State's Responsibility for International Crimes

Reflections upon the Rosenburg Exhibition

Edited by
Magdalena Bainczyk and Agnieszka Kubiak-Cyrul

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Table of Contents

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The Rosenburg Project – Federal Ministry of Justice of the Federal Republic of Germany in the Shadow of National Socialist Past in Poland

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Although more than 75 years have elapsed since the end of the Second World War, the magnitude of human rights violations between 1939 and 1945 and their long-term effects both on the macro scale (e.g. the division of Europe by the Iron Curtain for long 45 years or the enormous social, economic and cultural impoverishment of Central and Eastern Europe) and on the micro scale (loss by the citizens of the occupied countries of their loved ones, most often in very dramatic circumstances[1], and often all their belongings, either due to wartime destruction or ruthless ownership shifts, an aftermath of the Red Army activities) makes the subject of liability of the state in the context of the Second World War ever topical and valid. Despite an attempt made in 1945 to create an international community based on a ban on inter-state aggression, massive human rights violations have taken place and continue to take place, and many countries, including the EU Member State Croatia, are confronted with the need to restore justice after a period of lawlessness and chaos.

Historia magistra vitae est, and the process of learning from history should in this case cover not only the years 1933–1945, but also the entire post-war period, because after a time of injustice and lawlessness[2], justice was neither restored nor meted out. This refers to the macro level (e.g. in the form of concluding a peace

[1] D. Brewing, *W cieniu Auschwitz. Niemieckie masakry polskiej ludności cywilnej 1939–1945*, Poznań 2019, e.g. p. 113ff. p. 193, p. 193.

[2] German documents and legal act use the term *NS-Unrecht* (national socialist lawlessness) cf. 'Świadczenia Niemiec związane z bezprawiem narodowosocjalistycznym dla ofiar w państwach środkowo- i wschodnioeuropejskich, jak również dla ofiar reżimu SED. Dokumentacja z dnia 10 października 2017 r. przygotowana przez Służby Naukowe Bundestagu', in: M. Bainczyk, 'Raporty Służb Naukowych Bundestagu w sprawie reparacji wojennych dla Polski i odszkodowań dla polskich obywateli', *IZ Policy Papers*, 1918, no. 26, p. 79, https://www.iz.poznan.pl/plik,pobierz,2721,ea91761886de622fcde600b1b566318e/IZ%20Policy%20Papers%2026.pdf (accessed 15.01.2021).

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treaty and regulating reparations[3], or the return of stolen works of art[4]) and to the micro level (e.g. meting out justice to individuals responsible for the crimes committed during the Second World War, or the payment of compensation to the victims for the losses incurred at that time[5]). D. Brewing strongly claims that 'The history of the legal settlement of the massacres on Polish civilians is a history of defeat'.[6] In this context, the establishment of the International Military Tribunal in Nuremberg was of historic importance for the development of international criminal law, but given the process of administering justice to war criminals, it is of individual importance. The Court's activities have not, by any means, become a signpost for the German justice system with regard to crimes committed during the Second World War[7]. In this volume, the Court's activity is assessed by A. Eichmüller. In the text titled 'Die strafrechtliche Verfolgung von nationalsozialistischen Verbrechen in der Bundesrepublik Deutschland – Bilanz und Weichenstellungen' (Prosecution of Nationalist Socialist Crimes by the Criminal Law of the Federal Republic of Germany – balance and strategy), he presents striking results of his long-term studies in different bodies of the justice system concerning the number of proceedings and sentences passed as well as the types of sanctions adjudicated on. The results of studies are staggering – given the millions of victims of the Third Reich, only 6,700 convictions for National Socialist crimes were handed down by West German courts.

While unprecedented human rights violations led to the creation of international and national systems for their protection, paradoxically, these systems were almost exclusively future-oriented and did not include the victims of World War II, whose suffering was at the heart of the UN Charter: – "We the People of the United States determined to save succeeding generations from the scourge

[3] K.H. Roth, H. Rübner, *Wyparte. Odroczone. Odrzucone. Niemiecki dług reparacyjny wobec Polski i Europy*, Poznań 2020, p. 209ff. This volume also contains very interesting source documents: 26. Interview by Federal Chancellor Kohl with the President of the United States G. Bush in Camp David (excerpts). Consent as to the rejection of Polish reparation claims; 27. Presentation by Government Director Mertes and Legislative Counsellor Hinz to Federal Chancellor Kohl. Rejection by Poland of reparations as a compensation for the international legal recognition of the border on the Oder and the Neisse by a united Germany; 28. Counsellor rapporteur Ueberschaer to Ministerial Director Teltschik. Polish claims for damages; 29. letter from Federal Chancellor Kohl to Prime Minister Mazowiecki (excerpt). Recognition of the Oder-Neisse border by the united Germany and waiver of reparations and compensation by Poland.

[4] E.g. M. Tureczek, *Dzwony pożyczone. Studia historyczne i prawne nad problematyką strat dóbr kultur*, Poznań 2020.

[5] M. Bainczyk, 'Asymetria odszkodowań dla obywateli Polski za szkody poniesione w II wojnie światowej w stosunku do odszkodowań wypłaconych obywatelom innych państw', *Przegląd Zachodni*, 2019, no. 1, p. 83ff.

[6] D. Brewing, op. cit., p. 333.

[7] C. Safferling, 'Aufarbeitung von NS-Unrecht durch die deutsche Nachkriegsjustiz', in: A. Koch, H. Veh (eds.), *Vor 70 Jahren – Stunde Null für die Justiz*, Baden-Baden 2017, p. 35f.

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of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person"[8], the Statute of the Council of Europe – "the Governments (...) convinced that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation"[9], of the Basic Law of the Federal Republic of Germany (hereinafter BL FRG)[10] – the preamble which lays out that "Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law" and Art. 1 BL, enshrining the principle of respect for human dignity[11]. The concept of the responsibility of the German people, which opens up the text of the German constitution of 1949, is significant in the context of this topic. In the relevant literature, however, the historical context of this part of the preamble is now being relativised[12]. This is somewhat in line with the practice of the state authorities over the next few decades.

One of the reasons for the lack of administration of justice after the Second World War, both on a macro and a micro scale, was Germany's conscious policy of personal continuity after the Second World War. The year 1949 turned out to be only a symbolic beginning of a new state based on the principles of respect for human dignity, democracy and the rule of law, in relation to the political principles of the Third Reich[13]; the above principles are defined as immutable in light of Art. 79 section 3 BL[14]. The first decades of Germany were marked by personal and material continuations from the Third Reich period[15], especially as regards the functioning of state authorities, both at federal and national level; they

[8] United Nations Charter, Journal of Acts of 1947, no. 23, item 90.

[9] Statute of the Council of Europe adopted in London on 5 May 1949, Journal of Acts of 1994, no. 118, item 565.

[10] Basic Law for the Federal Republic of Germany (German Grundgesetz für die Bundesrepublik Deutschland of 23 May 1949 (Bundesgesetzblatt, Federal Journal of Acts, hereinafter referred to as BGBl., p. 1), recently amended by the Act of 29 September 2020 (BGBl. I p. 2048).

[11] M. Bainczyk, 'Wpływ europejskiej Konwencji Praw Człowieka na interpretację praw podstawowych w RFN', *Krakowskie Studia Międzynarodowe*, 2018, no. 4, p. 35ff and the relevant literature indicated there, https://repozytorium.ka.edu.pl/handle/11315/19685?locale-attribute=en (accessed 15.01.2021).

[12] H. Dreier, *Grundgesetz-Kommentar*, Bd. I: *Präambel*, Tübingen 2013, para. 42; P. Kunig, 'Präambel', para. 19, in: I. v. Münch, P. Kunig (eds.), *Grundgesetz. Kommentar*, Bd. I, München 2012.

[13] K.-P. Sommermann, 'Art. 20 GG', in: H. von Mangoldt, F. Klein, C. Starck (eds.), *Grundgesetz*, München 2018, para. 20ff.

[14] M. Sachs, 'Art. 79 GG Änderungen des Grundgesetzes', para. 27ff, in: M. Sachs (ed.), *Grundgesetz. Kommentar*, München 2018.

[15] Cf. N. Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, München 1996; N. Frei, *Hitlers Eliten nach 1945*, Frankfurt am Main 2001.

failed to restore a state of justice in both domestic[16] and international relations. The widely promised denazification[17] was very limited in scope.

According to the authors of the exhibition 'Rosenburg – Federal Ministry of Justice in the Shadow of Nationalist Socialist Past', to be discussed below, K. Adenauer's objective was reached. Only 1.4% of people subject to denazification procedure were considered to be "principally guilty" or "guilty", and as a result of the rationale adopted, also former Gestapo or SS members acquired the right of re-employment.[18]

The personal and material continuity in the bodies of state authority of the Federal Republic of Germany after 1949 were crucially analysed by research teams, which in the early 21st century gained access to the archival records of the above authorities. The first such analysis concerned the careers begun in the Third Reich and continued in the German Ministry of Foreign Affairs[19]. No less important for the functioning of the state was the examination of the recent past of the Federal Ministry of Justice and Consumer Protection, which acts as a kind of centre of federal legislation and has a significant impact on the functioning of the federal justice system due to the exceptionally broad competence of the Minister of Justice in administering the federal judiciary and prosecution service[20].

In 2012, the Federal Ministry of Justice and Consumer Protection (hereinafter as FMJ) appointed an independent commission of scholars led by historian M. Görtemaker and lawyer C. Safferling. The commission was tasked with analysing personal and material continuations from the period of the Third Reich within this Ministry in the three decades following the war. The report, which came out in 2016 and numbered over 500 pages, bears the title *Die Akte Rosenburg*[21] (*The Rosenburg Files*). The title refers to the FMJ headquarters in the years 1950–1973, i.e. the Rosenburg villa in a district of Bonn. The work and findings

[16] E.g. the film *The People vs. Fritz Bauer* [original title: *Der Staat gegen Fritz Bauer*] dir. Lars Kraume, Germany 2015. As for victims-citizens of the Federal Republic of Germany the monography by A. Pross, *Wiedergutmachung: Der Kleinkrieg gegen die Opfern*, Berlin 1988 under the telling title "Redress: a small war against victims", interesting data on the amounts of compensation paid out to former officials of the Third Reich and those paid out to their victims. By 2000, the former received EUR 306 billion and the victims EUR 52.51 billion, K.H. Roth, H. Rübner, op. cit., p. 285f.

[17] Critically H.A. Winkler, *Długa droga na Zachód*, vol. II: *Dzieje Niemiec 1933–1990*, Wrocław 2007, p. 123ff.

[18] *Rosenburg – Federalne Ministerstwo Sprawiedliwości Niemiec w cieniu narodowosocjalistycznej przeszłości. Publikacja towarzysząca wystawie*, transl. M. Bainczyk, https://www.iz.poznan.pl/plik,pobierz,3298,91f27b643892ae4937b2adafd6af61f2/BMJV%20Rosenburg%20Katalog%20wystawy.pdf (accessed 15.01.2021), p. 21f.

[19] E. Conze, N. Frei, P. Hayes, M. Zimmermann, *Das Amt und die Vergangenheit: Deutsche Diplomaten im Dritten Reich und in der Bundesrepublik*, München 2010.

[20] M. Bainczyk, 'Wybrane aspekty prawne niezawisłości władzy sądowniczej w RFN', *IZ Policy Papers*, 2019, no. 30, https://www.iz.poznan.pl/plik,pobierz,3026,1cf079cc57256ac2eeaa534c581c132a/IZ%20Policy%20Papers%203=0.pdf (accessed 15.01.2021).

[21] M. Görtemaker, Ch. Safferling, *Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit*, München 2016.

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of the commission are summarised in a text by one of its leaders, M. Görtermaker, entitled 'Das Bundesministerium der Justiz 1949–1973 und die NS-Zeit: Kontinuität und demokratischer Neuanfang – Ein historischer Rückblick' (Federal Ministry of Justice 1949–1973 and the Nazi period: continuity and a democratic new beginning – a historical retrospective). One of the most striking findings of the committee was the extent to which the FMJ management positions continued to be staffed by the same people.

The work of the commission headed by M. Görtemaker and C. Safferling was based on the concept of "public history", while both interim and overall results of the work have been repeatedly presented and debates at open meetings targeted at various social groups. A major part of the "public history" project was moreover the development of an exhibition that concisely and transparently presents the findings of an independent commission of scholars. The itinerant exhibition, excellent in terms of content and form, has since 2017 toured Germany and since been shown 2019 abroad, in an English version. Poland was the second country, after the United States of America, where the FMJ in cooperation with the Institute for Western Affairs in Poznań decided to show the exhibition. This logistically complicated undertaking could not have been made possible without the great commitment of the FMJ staff, especially Ms. I. Hanke.

One should emphasize at this point the superb graphics of the exhibition, in perfect harmony with the content presented. The exhibition panels depict the double face of the FMJ in the post-war years; the light front of the exhibition panel is contrasted with its dark back side. One side demonstrates the superior competence of many lawyers, whereas the other side shows their dark past and deep entanglement with the Third Reich. The slanting and crooked forms of the exhibition panels increase the feeling of ambiguity, while the oversized office lamps literally bring to light what has long remained hidden in the shadows and was the subject of scientific research of M. Görtemaker and C. Safferling's commission.

The exhibition toured three Polish cities: Wrocław, Krakow and Poznań, and was accompanied by scholarly and popular events and the publication of a comprehensive catalogue in the Polish language[22]. The scholarly events included the international conference *Liability for International Crimes. Conclusions and Perspectives/Verantwortung für Völkerverbrechen. Konklusionen und Perspektiven* on 5–6 November 2019 in Krakow and a seminar titled *Post Conflict Justice* on 21–22 January 2020 in Poznań. Importantly, both events gathered scholars and students from Poland and the Federal Republic of Germany. The texts reviewed and collected in this volume and in one published in Polish grew out of the context of the exhibition, the curatorial tour of the FMJ Ministerial Counsellor

[22] *Rosenburg – Federalne Ministerstwo*..., op. cit.

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A. Grapentin, speeches and debates of the above scholarly events.

Events popularising the subject of the personal continuation in the West German judiciary were reviews of films related to the subject of the exhibition, prepared by M. Wagińska-Marzec from the Institute for Western Affairs. The screenings, held in Wrocław, Krakow and Poznań, included three films: *Labyrinth of Lies* [original title: *Im Labyrinth des Schweigens*], dir. Giulio Ricciarelli, Germany 2014; *The People vs. Fritz Bauer* [original title: *Der Staat gegen Fritz Bauer*] dir. Lars Kraume, Germany 2015; *The Nuremberg Epilogue* dir. Jerzy Antczak, Poland, 1969.

Research on the settlement of the post-war history of the German state authorities and in particular of the justice system continues to this day. In early 2018, the General Prosecutor's Office set up a scientific committee for this purpose, headed by lawyer C. Safferling and historian F. Kießling. The findings of this committee are as appalling as those of other bodies: 50% of the Prosecutor General's Office staff were NSDAP members.[23]

In February 2020, the then President of the Federal Constitutional Court of the Federal Republic of Germany (hereinafter FCC) A. Vosskuhle announced during an annual meeting with communications media representatives that both the FCC Senates had passed a regulation on the study of personal continuations from the socialist nationalist period in the operation of the Court, set up in 1951.[24] Compared to other German authorities and offices, the continuation of careers from the Third Reich period was relatively limited in the FCC. Out of 24 judges appointed in 1951, 9 were persecuted during the Third Reich, which was rather an exception in Germany's post-war personnel policy. It was even believed that the composition of the FCC was a kind of compensation for those not connected with the Third Reich, who in other bodies and offices could not continue their careers interrupted between 1933 and 1945. This does not mean, however, that the FCC had no people with a controversial past. Among the cases examined so far, the following are mentioned: H. Höpker-Aschoff, President of the FCC between 1951 and 1954, member of the NSDAP, chief lawyer of the Central Trust Office East (German: *Haupttreuhandstelle Ost*, HTO). This particular office was responsible for the collection and administration of the property of Polish citizens in the area annexed by the Third Reich.[25] In addition, there was W. Geiger, an FCC justice between 1951 and 1977, a member of the NSDAP and SA, prosecutor at the Special Court in Bamberg in the years 1941–1943,

[23] K. Hempel, *Eine belastete Behörde*, https://www.tagesschau.de/inland/gba-ns-vergangenheit-101.html (accessed 15.01.2021).

[24] *BVerfG will NS-Erbe aufarbeiten lassen*, Redaktion beck-aktuell, 19 February 2020 (dpa), https://rsw.beck.de/aktuell/daily/meldung/detail/bverfg-will-ns-erbe-aufarbeiten-lassen (accessed 15.01.2021).

[25] B. Rudawski, *Grabież mienia w Kraju Warty 1939–1945. Działalność Urzędu Powierniczego w Poznaniu*, Poznań 2018.

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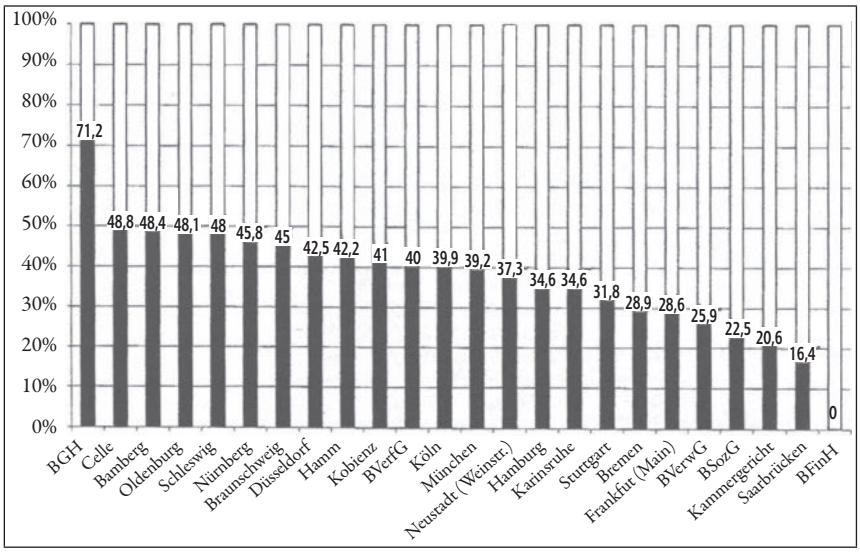
responsible for the delivery by that court of five death sentences, including two for Polish citizens. In addition, four more FCC judges continued their careers began in the Third Reich.[26]

At present, a commission of scholars is looking into the socialist nationalist past of the post-war judges of the Federal Supreme Court (German *Bundesgerichtshof*, BGH). The continuation of employment of persons previously involved in the Third Reich machinery was 71.2% in the BGH in 1964 and over 40% in nine Higher Land Courts (German *Oberlandsgericht*, OLG). It was the BGH which delivered a number of controversial rulings in cases concerning Third Reich war criminals, e.g. an acquittal of the judges who sentenced to death Admiral W. Canaris and the Reverend D. Bonhoeffer.[27] In the context of this ruling, J. Perels pointed to the discrimination of victims of national socialism by the legal system of the Federal Republic of Germany and further violations of their rights under Art. 1ff. BL FRG, which he called an "outrage of constitutional law".[28]



Continuations in Higher Land Courts and Highest Federal Courts in 1964.

Source: H. Rottleuthner, *Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945*, Berlin 2010, p. 69.

[26] M. Görtemaker, C. Safferling, op. cit.

[27] A. Koch, 'Der „Huppenkothen-Prozess". Die Ermordung der Widerstandskämpfer um Pastor Dietrich Bonhoeffer von der Schranken der Augsburger Justiz', in: A. Koch, H. Veh (eds.), *Vor 70 Jahren – Stunde Null für die Justiz*, Baden-Baden 2017, p. 131ff; J. Perels, *Das juristische Erbe des „Dritten Reiches". Beschädigungen der demokratischen Rechtsordnung*, Frankfurt am Main 1999, p. 181ff.

[28] J. Perels, 'Die Würde des Menschen ist unantastbar. Entstehung und Gefährdung einer Verfassungsnorm', in: J. Perels, *Recht und Autoritarismus*, Baden-Baden 2009, p. 18ff.

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The continued staffing of higher courts and supreme courts is very controversial. Between 1933 and 1945, the German justice system was deeply involved in the policy of the Third Reich. This is perfectly illustrated by W. Kulesza's text, shocking for contemporary lawyers, entitled 'Criminal bending of the law by German special courts in occupied Poland. A contribution to further research', in which the author analyses the crimes committed by judges of German special courts (German *Sondergerichte*) in their judicial decisions. The justices, adjudicating exorbitant penalties under a special regulation on criminal proceedings of Poles and Jews, delivered judgements *per analogia iuris*, thus violating the elementary principles of criminal law: *nullum crimen sine lege, nulla poena sine lege, nullum crimen sine lege certa, lex retro non agit, cogitationis poenam nemo patitur*.

The active participation of members of the Third Reich regime, including judges of all court instances, in the post-war state authorities at the federal and *Länder* level, undoubtedly had an impact on the prosecution, or rather the failure to prosecute war criminals in West Germany. German literature even uses the term *Krähenjustiz* (literally crows' justice), meaning that crows will not harm another crow.[29]

The negative balance is no doubt one of the main reasons why the responsibility of a state for international crimes should be considered more broadly and the restoration of justice after massive human rights violations should be analysed. We are taking here about a state that has transformed itself in political terms and as to its system, abiding by the values of democracy, respect for human rights and the rule of law, and has established numerous institutions to implement these values. In view of the fundamental structural problems outlined above, even the establishment of specialised institutions to assist in the prosecution of war criminals has not fundamentally affected the restoration of justice. Such institutions include the Central Unit of the National Administration of the Judiciary for the Investigation of National Socialist Crimes in Ludwigsburg (German *Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen*). Its task is to conduct preliminary investigations, on the basis of which prosecutors in the *Länder* can bring charges against perpetrators from the Third Reich. Since 1958, 7600 preliminary investigations have been carried out. The Central Office is still in operation today. The practical aspects of the activity of public prosecutors in such proceedings were discussed during the *Post Conflict Justice* seminar by Chief Prosecutor J. Lehman (General Prosecution Authority Celle).

Apart from internal settlements with national socialism and its legacy in Germany, issues concerning Germany's liability for the effects of the Third

[29] H. Rottleuthner, Karrieren und Kontinuitäten..., op. cit., p. 95.

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Reich's action in international relations and the reaction of national legal systems to crimes of international law remain extremely important. In particular, to date, the process of post-war settlements has not been completed and the damage suffered by citizens affected by warfare has not been redressed. This is pointed out by M. Bainczyk in the text entitled 'Constitutional courts vs. jurisprudence of international tribunals in a question of just compensation for the losses incurred as a result of international crimes', where the author presents the question of fair compensation and redress for the victims of the Third Reich in light of case of law of national constitutional courts: of the Italian Constitutional Court, Federal Constitutional Court of the Federal Republic of Germany and the Polish Constitutional Court, as well as the International Court of Justice. The fact that compensation was not dealt with in the post-war period has resulted in significant relevant decisions of national and international supreme courts over the last decade. They also provide interesting material for analysing the relationship between constitutional law and public international law.

The far-reaching consequences of the massive human rights violations during the Second World War in German-Polish relations of a legal nature are shown in three other texts in the volume. They refer to the so-called "Polish concentration camps" and various ways of eradicating this expression from public discourse. The above term is most painful for the Poles who remember the times of World War II and the horrors of German concentration camps located within the borders of present-day Poland. The attempts to introduce legal regulations in this area prove the urgency of this problem in Polish society, despite the passage of years. They moreover indicate how emotionally charged statements denying the crimes committed by Third Reich functionaries or attributing these crimes to Poles are. At the same time, they show how difficult it is to regulate these issues effectively by means of legal provisions. A. Strzelec in the text 'Polish death camps...', referring to the amendment of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation of 26 January 2018 presents the genesis of this untrue yet widespread concept and discusses the attempt to criminalise its use in the public domain. Particular attention should be paid to analyses to verify whether the new criminal law regulations have reduced the frequency of use of such defective memory codes. The research carried out shows, however, that the emergence of provisions in the Polish legal system ensuring criminal liability for the use of such terms has had the opposite effect to that intended, and has even led to these phrases being perpetuated in the public domain.

At the same time, a regulation of a civil law nature has appeared in Polish law, which is intended to prevent the falsification of Polish history and to protect the

good name of the Republic of Poland and the Polish Nation. This regulation is addressed by A. Kubiak Cyrul in the text 'Protection of the good name of the Republic of Poland and the Polish Nation in the Act on the Institute of National Remembrance'. The author presented an analysis of the new provisions of the Act on the Institute of National Remembrance (IPN) against the background of the civil law *acquis* to date with regard to general provisions on the protection of personal rights, and in particular the protection of the sense of national identity. The new provisions are a source of numerous doubts as to their subjective and material scope and the means available to the "wronged party". Their analysis leads to the conclusion that these provisions in their current form will not contribute to the elimination of statements which falsify Polish history, either at home or abroad. In Poland, on the other hand, they may constitute a restriction on public debate and on the freedom of scientific research.

The practical aspect of this question is addressed by P. Mostowik and E. Figura-Góralczyk in the text 'Polish Death Camps' as an 'Opinion' of which Expressing is Protected by German Law? Questionable *Bundesgerichtshof's* Judgement of 19.7.2018'. The authors present problems related to the enforcement of decisions of Polish courts in civil matters in the Member States of the European Union, issued in cases involving statements about "Polish concentration camps". They point to a specific example of the refusal to enforce a judgment issued by the Court of Appeal in Krakow in the case against the German television ZDF. In these proceedings, the Federal Supreme Court of Germany challenged the Polish court's assessment of the use of the term "Polish death camps" by the ZDF and invoked the public order clause. The authors demonstrated beyond doubt that this decision of the German court is a violation of EU law, private international law and public international law.

The passage of time is one of the important elements of the process of compensating for the wrongs associated with warfare, in relations between the participating countries. This issue is analysed in the next two texts in this volume relating to the statute of limitation. In the text entitled 'Evolution of the statute of limitations of crimes under international law in international law' by K. Banasik discusses the development of the statute of limitation of crimes of international law in instruments of international law. In turn, R. Pawlik in the text 'Scope of the exclusion of the statute of limitations on prosecution in Article 105 § 1 of the Polish Penal Code in the context of the State's responsibility for crimes under international law', presents considerations on the principle of non-applicability of the statute of limitation with regard to war crimes and crimes against humanity in the context of the Polish Penal Code. Both authors draw attention to problems concerning the definition of the scope of the concept of crimes of international law in national and international law, which

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results in doubts about the scope of non-applicability of the statute of limitation with regard to war crimes and crimes against humanity.

A unique problem of international responsibility for starving civilians and prisoners of war during wartime operations is highlighted by T. Srogosz in the text entitled 'Starvation as an international crime'. The author analyses the example of the so-called *Hungerplan* (*der Backe-Plan*), developed under the supervision of H. Göring as part of a broader economic plan to exploit and destroy the eastern territories; the plan was codenamed Oldenburg. When considering the issue of criminal liability in international law, he refers to the legacy of the Nuremberg Trial, which made the international community aware that starvation may be an instrument of state policy aimed at exterminating national or ethnic groups.

The compilation of the report published as *The Rosenburg Files*, the creation of exhibitions and their catalogues reaching German and international audiences, the participation of Polish and German academics and students in conferences and seminars, as well as the exemplary cooperation with FMJ representatives in these projects created an added value in Polish-German relations on an intellectual and personal level. The exhibition and related events provided space for a qualitatively new German-Polish dialogue involving not only scientists but also Polish and German school and university students as well as non-academic circles.

We would like to once again express our heartfelt gratitude to the project leaders, Prof. Manfred Görtemaker and Prof. Christoph Safferling, as well as to Ms. Isabel Hanke and Ms Senior Counsellor Alexander Grapentin from the Federal Ministry of Justice and Consumer Protection.

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Abstract

Does it make sense to talk about the consequences of the Second World War more than 70 years after its conclusion? Meetings of scholars, which are at the same time meetings of a personal nature in the context of the exhibition 'Rosenburg – German Federal Ministry of Justice in the Shadow of the National Socialist Past in Poland' justify an affirmative answer to the above question. It turned out that the subject of liability of the state for international crimes arouses many questions and reflections both in German-Polish relations and in relation to the contemporary international community. This volume, therefore, addresses the issue of the international responsibility of the state from the point of view of past and present, history and law. These meetings aim to contribute to the future of Poland and Germany in a united Europe.

The Rosenburg exhibition, which offered an opportunity to analyse the issue of liability of the state for international crimes in the light of international law, as well as national constitutional, criminal and civil law, is part of a comprehensive process of research into the activities of the state authorities of the Federal Republic of Germany in the postwar years, e.g. at the Ministry of Foreign Affairs and more recently at the Federal Constitutional Court of Germany. The subject matter of the exhibition stirred great interest in both Polish and German academic circles. The material and personal continuations from the time of national socialism in the Federal Republic of Germany were poorly known, yet they have to date had significant implications for German-Polish relations, a matter which is also addressed in this volume.

Keywords: international crimes, liability of the state, Second World War, human rights

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Crime of bending the law (*Rechtsbeugung*) by German special courts in occupied Poland. A contribution to research

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Introduction

The article will outline the activities of special courts in the Polish territories incorporated into the Third Reich as "Gdańsk – West Prussia" and "Wartheland", the first to be completely Germanised, within a short time at that.[1]

Wartheland Gauleiter Arthur Greiser openly announced from Poznań: "The Führer appointed me a trustee of the German cause in that country with an unequivocal injunction to re-Germanise it. It will therefore be my most noble task to do everything in my power to remove all signs of Polishness, irrespective of their kind, in the next few years".[2]

Albert Forster was said to admonish from Gdańsk: "Amidst enthusiastic applause, the Gauleiter urged judges and prosecutors to always remember that whatever serves the nation can be called the law, while what harms it is unlawfulness".[3]

The notion of law-bending, or perversion of justice, used in the title of this paper is the name of an offence known to the German penal law as the *Rechtsbeugung*, defined by the German Penal Code of 1871 as follows: "§ 336. An official, including a justice of the peace, who intentionally bends the law to the benefit or detriment of a party while presiding over or recognising a legal case shall be liable for a strict prison sentence of up to 5 years".

[1] Referring to this part of the Polish territory, K.M. Pospieszalski consistently uses the term "*eingegliederte Ostgebiete*" in inverted commas, calling them "annexed territories" (pursuant to a Hitler decree of 8.10.1939 "über Gliederung und Verwaltung der Ostgebiete", Reichsgesetzblatt I, p. 2044). This is also the way he refers to Nazi "law" as containing unlawful provisions (K.M. Pospieszalski, *Hitlerowskie „prawo" okupacyjne w Polsce. Wybór dokumentów. Część I. Ziemie „wcielone"*, Poznań 1952, p. 329).

[2] Quoted after C. Łuczak, *Arthur Greiser hitlerowski władca w Wolnym Mieście Gdańsku i w Kraju Warty*, Poznań 1997, p. 43.

[3] Quoted after D. Schenk, *Albert Forster gdański namiestnik Hitlera*, Gdańsk 2002, p. 269.

As of the change of article numbers introduced by the law of 18.8.1997 – § 339 (instead of § 336), the StGB stipulates as follows: "Bending the law. A justice, another official or a justice of the peace, who intentionally bends the law to the benefit or detriment of a party while presiding over or recognising a legal case shall be liable to the deprivation of liberty for a period between one year and five years".

If we look through the prism of the constituent elements of this crime at the activities of special courts in occupied Poland, it is not easy to find convictions whose contents would not meet the essence of punishable perversion of justice. In other words, "bending the law to the detriment" of harshly punished inhabitants of a country that was the first victim of war crimes, crimes against peace and humanity, which began with the assault on Poland on 1 September 1939, was the daily practice of German special courts as an instrument of mass terror.

The "execution of justice" by German special courts

1. A thorough examination of the activity of the *Sondergerich*t Łódź led J. Waszczyński to conclude that "only with respect to the criminal activities of the population may one, not always at that, accept the legal qualification applied to them by the Special Court in Łódź ".[4] This group included "the following kinds of offences: larceny and misappropriation, fraud, robbery and extortion, trade in stolen goods, brawls and bodily harm, homicide, rape and immoral acts with minors, pimping, perjury, forgery, and other acts".[5]

Special courts were generally involved in systemic persecution and extortion, atrocious penalisation and intimidation, and demanded total submissiveness and absolute obedience of a population deprived of fundamental means of existence. As J. Waszczyński writes, the special judiciary sanctioned "the criminal nature of the orders of the occupying authorities, regulating the trade in necessities in a way that clearly led to the biological extermination of Poles".[6] Therefore activities detrimental to the occupier's economic system, such as food trafficking, illegal swine slaughter, illegal trade in food or clothing coupons, treated as criminal offences, "were a manifestation of the population's most fierce and widespread fight against discrimination, a struggle for physical survival in a situation where compliance with the occupiers' orders led to the destruction of the nation's biological substance as a result of malnutrition

[4] J. Waszczyński, 'Z działalności hitlerowskiego Sądu Specjalnego w Łodzi (1939–1945)', *Biuletyn Głównej Komisji Badania Zbrodni Hitlerowskich w Polsce*, 1972, vol. XXIV, p. 78.

[5] Ibid., p. 79.

[6] Ibid., p. 85.

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and disease, above all tuberculosis"[7]. The convictions for these crimes were in fact "a merciless persecution of the self-defence of Polish society, which faced the threat of extermination by hunger if it had to limit themselves to rationed food".[8] Importantly, during the occupation Poles received meagre food rations, purchased against coupons, roughly 1/3 of what the Germans received in the final stage of the war, in 1945[9].

Actions which the special courts treated as "political" crimes, a form of self-defence of the population of the occupied country, included listening to foreign radio stations and forwarding to others information about the situation at the frontlines, offering hope that the Third Reich would not survive a millennium, as Hitler would have it, as well as allegedly malicious statements about the leaders of the Reich.

Judges of the special courts moreover executed revenge on Poles for their actions against the Germans taking place prior to the attack on Poland and claimed that stringent punishment met the expectations of justice of the victors.

2. The extermination objective of punishing Poles by the *Sondergerichte* in the territories incorporated into the Reich for all categories of crimes, i.e. criminal, economic and political, was particularly evident in the unrestricted use by German judges of the death penalty, made possible by the regulation "on criminal proceedings against Poles and Jews in the annexed Eastern territories" (*Polenstrafrechtsverordnung*) of 4.12.1941.[10] Provision of section I subsection 3 of the regulation stipulated as follows:

"They (Poles and Jews – author's note) will be subject to the death penalty and in less severe cases deprived of liberty, if their hateful or seditious activities display an attitude hostile towards Germans, in particular if they speak in hostile terms about Germans, tear down or damage public announcements

[7] Ibid., p. 78. The author shows that Poles were mercilessly punished not only for illegal slaughter of own pigs, but also for all the assistance offered, e.g. lending premises or heating up the water needed to wash the slaughtered meat, as well as for meat trade and purchasing even the smallest quantities of such meat. J. Waszczyński, 'Z działalności hitlerowskiego Sądu Specjalnego w Łodzi w latach 1939–1945', in: C. Pilichowski (ed.), *Zbrodnie i sprawcy. Ludobójstwo hitlerowskie przed sądem ludzkości i historii*, Warszawa 1980, p. 554.

[8] J. Waszczyński, 'Z działalności…', op. cit., Warszawa 1972, p. 97. The sentences issued by this court is discussed in detail by H. Schlüter, '„…für die Menschlichkeit im Strafmaß bekannt…". Das Sondergericht Litzmannstadt und sein Vorsitzender Richter', *Juristische Zeitgeschichte Nordrhein-Westfalen*, 2007, Band 14, p. 100 ff; see also: W. Kulesza, 'Sąd Specjalny (Sondergericht) w Łodzi', in: *Gmach i jego tajemnice. Sąd Okręgowy w Łodzi 1917–2017*, Łódź 2017, p. 60 ff.

[9] *Braunbuch. Kriegs- und Naziverbrechen in der Bundesrepublik. Staat. Wirtschaft. Verwaltung. Armee. Justiz. Wissenschaft*, Nationalrat der Nationalen Front des Demokratischen Deutschland. Dokumentationszentrum der Staatlichen Archivverwaltung der DDR (Hrsg.), Berlin 1965, p. 138.

[10] Reichsgesetzblatt 1941 I, p. 759.

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of German authorities or services, or if by their other actions they reduce or harm the honour or interest of the German Reich or the German nation".

A provision formulated in this way threatened the inhabitants of the occupied country with the death penalty for "manifestations of an attitude hostile to the Germans", who from the first days of the war committed war crimes against Poles and Jews and against humanity. This provision therefore become a handy extermination tool used by prosecutors and judges, and justified the draconian punishment of any behaviour that a judge would consider to be "detrimental to the interest of the German nation", even if it were not defined as a concrete punishable offence. The above provision was also cited as the basis for the imposition of the most severe penalties if the judge wanted to impose a penalty in excess of the penalty for the offence described in the less severe provision.

As K.M. Pospieszalski pointed out, the announcement of the *Polenstrafrechtsverordnung* opened up another chapter in the system of occupation unlawfulness and it was no coincidence that it took place in Poznań, the capital of the *Mustergau* ("a model state"), on 17.12.1941. The author recounts: "In mid-December 1941, general prosecutors of the 'annexed territories' led by General Prosecutor Sturm from Wrocław gathered in Poznań to discuss the prosecution of crimes and execution of penalties, first and foremost the special treatment of Poles and the relevant earlier experience". He then quotes an account provided in *Ostdeutscher Beobachter* of 20.12.1941 with a transcript of a speech delivered during the meeting of the prosecutors by a secretary of state in the Ministry of Justice R. Freisler, who stressed that the *Polenstrafrechtsverordnung*: "is a developed authoritative criminal law, which is based on the obligation of Poles and Jews to obey the Reich". The speaker pointed out that "The regulation applies only to Poles and Jews whose position in the Greater German Reich is completely unique and which Poles and Jews should only attribute to themselves and their conduct".[11]

The lawyers cooperating in the application of the *Polenstrafrechtsverordnung* accepted its contents and objectives: "The Regulation constitutes a special criminal law for Poles and Jews in the Eastern annexed territories, offering the possibility, in all appropriate cases, of applying the strictest penalties, in the fastest proceedings, with immediate enforceability of sentences. This regulation will create a state in which vigorous cooperation will make the objectives of the Führer in the Eastern annexed territories a reality".[12]

[11] K.M. Pospieszalski, op. cit., p. 329.

[12] Official document of 7.11.1941 quoted in the *ratio decidendi* of the judgement of 11.10.1981 issued by the Stadtgericht Berlin – Hauptstadt der DDR in the case of the Sondergericht Grudziądz prosecutor (*Neue Justiz*, 1982, no. 1, p. 39).

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The regulation of 7.01.1942 on the execution of penalties adjudicated with respect to Poles (*Polenvollzugsordnung*) had a discriminatory character;[13] under this regulation Poles sentenced to deprivation of liberty were sent to penal camps rather than to prisons. The specific provisions and their implementation were a token of "organised sadism, which in practice was to bring about the death of a prisoner who suffered hunger, was inhumanely treated and made to work beyond their strength".[14] The daily brutal abuse of prisoners by sadistic guards resulted in an average life expectancy of 6 months for a camp prisoner.[15]

J. Waszczyński sums up his studies with remarks about the *Sondergericht* employees: "The judges who hand down such sentences and the prosecutors who demanded them cannot be treated differently from the organisers and accomplices of these *de facto* legalised mass death sentences, which are then carried out in large part by callous camp guards".[16] Importantly, a prisoner who served more than 6 months was not released but transferred to a concentration camp until the end of the war, which in the majority of cases ended with the inmate's death.

A researcher of the *Sondergericht* files may find it astonishing to find sentences which testify to the conviction of German judges that, by terrorising Poles with the threat of the death penalty for evading service in the Wehrmacht, they will force them to join its ranks and defend the Reich against the impending defeat.

3. The separation between conviction and sentencing decisions by judges was based on their conviction that criminal law, serving the National Socialist ideology, exempts them from following elementary rules and thus gives them the opportunity to demonstrate their initiative in unlimited punishment *per analogiam iuris*. In fact, this was the aim of amending the content and normative sense of the provision of § 2 StGB of 1871. Originally, the provision read: "An action entails a penalty only when this penalty was set out in a law prior to the commitment of the act". Leipziger Kommentar explained in the 1925 edition that this provision actually means that: "there is no punishable offence and no penalty without a law, *nullum crimen sine lege, nulla poena sine lege*".[17] In the amended StGB of 28.06.1935, the provision is designated as "§ 2a" and preceded by article "2", which set out that punishment will be meted out on a person committing

[13] *Deutsche Justiz*, 1942, p. 35.

[14] J. Waszczyński, 'Z działalności...', op. cit., Warszawa 1972, p. 37.

[15] Ibid., pp. 75, 77.

[16] Ibid., pp. 97–98.

[17] A. Lobe, in: L. Ebermayer, A. Lobe, W. Rosenberg, *Reichs-Strafgesetzbuch* (Leipziger Kommentar), Berlin und Leipzig 1925, p. 109. The commentary to § 2 StGB began with the sentence: "The provision states at the outset that a penalty can be imposed solely pursuant to an express statutory provision".

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a punishable offence defined in a law or deserving punishment "in line with the foundation doctrine of a penal law" (*nach dem Grundgedanken eines Strafgesetzes*) and "in line with a healthy national sense" (*nach gesundem Volksempfinden*). The commentary clarifies that the new provision "in the interests of material justice" enables a departure from previously adopted rules and the punishment of an act which is not punishable by law, if this is supported by the basic idea of punishment and the judges ' wholesome national sense.[18] Thus it was stressed that "the acts and the law" (*Gesetz und Recht*) became sources of a penal law of the same status.[19] "The acts" included provisions established when it was in force, while "the law" was all that "served the German nation". The purpose of the judge's punishment, according to his sense of "the law," was to pass convicting sentences to eliminate unintentional "loopholes in the acts," and to make punishable those defendants' behaviour that, although not included as punishable offences in existing acts, were nevertheless "presumed by the legislator to be punishable because they thought of them when passing the acts". This was the interpretation of the second sentence of Section 2, which states that "if no provision of the law is directly applicable to a given act, then the behaviour will be punished according to the law whose guiding principle best applies to it". This conduct of the judge ensured that the behaviour was punishable because of the "material unlawfulness" contained therein, even if it was not formally declared an offence. The "material unlawfulness" of the conduct was recognized by the judges themselves, often completely ignoring the verbal wording of the act, citing the fact that the interest of the German people is above written law.

This created a kind of template for the judge's reasoning to justify the punishment not only of those defendants who had committed an offence under criminal law, but also of those who had not committed any crime, because their actions did not constitute any kind of criminal act, but were nevertheless believed by the judge to deserve punishment. If the actions they were charged with were not prohibited by a provision of a written law, the judge referred to the "guiding spirit" of another law, and generally chose as the basis for the criminal law qualification the provision that carried the most severe punishment. Applying these categories, the judges themselves added to the lawlessness of the Third *Reich*; "without their active participation, the National Socialist criminal law project would not have been implemented".[20]

[18] Ibid.

[19] A. Dalcke, K. Schäfer, in: A. Dalcke, E. Fuhrmann, K. Krug, K. Schäfer, *Strafrecht und Strafverfahren*, Berlin und München 1940, p. 8.

[20] K. Ambos, *Nationalsozialistisches Strafrecht*, Baden-Baden 2019, p. 99.

In many cases this line of reasoning of judges led to a juristically ridiculous subsuming of the behaviours attributed to the accused to the penal provisions invoked in the judgments, a practice that could have seemed absurd and grotesque had it not been for the risk of the most stringent penalties resulting from the legal nonsense contained in the judges' judgments.[21]

4. The German special courts served as a murder instrument, terrorizing the population during the entire period of the occupation. It must be noted, too, that from the first days of the war the invaders exterminated the upper echelons of Polish society as part of the prearranged *Intelligenzaktion* campaign. In the fall of 1939, at least 70,000 people were murdered without even the appearance of any legal proceedings. Their mass executions were carried out on the basis of previously drafted personal lists of those who might have been able to incite resistance against the occupier.[22] The ultimate goal was to reduce Poles to the role of powerless slaves, to Germanise the Eastern territories annexed to the Reich, i.e. Pomerania and so-called *Reichsgau Wartheland* and the annihilation of all Jews.[23] In relation to the Jews, the procedure of trials before special courts was repealed by the decree of April 1, 1943, and they were transferred to be punished by the police with an indication: "After the death of a Jew, their property is the property of the Reich".[24]

[21] The activity of a 21-year-old Pole who, encouraged by a German girl at the age of 14 years and 5 months, had physical relations with her, was not a punishable offence. This was because § 176 of the StGB stipulated that a punishment of up to 10 years would be imposed on those "who commit or incite to commit or tolerate immoral acts with persons under 14 years of age". The *Sondergericht* Łódź, headed by Dr H. Neubauer, sentenced this Pole to the death penalty, citing as the basis for the criminal law qualification the most vaguely worded provision of paragraph I.1. 3 of the *Polenstrafrechtsverordnung*, which refers to action "to the detriment of the German Nation", from which he derived the principle of punishment: "Any Pole who has relations with a German woman or immorally approaches her must know that they are bound to lose their life because of this". The second death penalty was imposed by Neubauer in the same sentence, on the same defendant for imposing himself on another German girl, embracing her from behind and saying *schönes Fräulein*. More on this W. Kulesza, 'Karanie za zbrodnię "zhańbienia rasy" (Rassenschande) i odpowiedzialność karna sędziów za zbrodnicze skazania', in: A. Adamski, J. Bojarski, P. Chrzczonowicz, M. Leciak (eds.), *Nauki penalne wobec szybkich przemian socjokulturowych. Księga jubileuszowa Profesora Mariana Filara*, vol. I, Toruń 2012, p. 349.

[22] D. Schenk, *Albert Forster...*, op. cit., p. 233. The fact that the commander of the police execution command placed crosses on the list of arrested Poles at their names was enough for their group execution. On the criminal trial of Lölgen, who handed over such lists to the executioners: W. Kulesza, 'Ustalenie prawdy jako cel postępowania sądowego – refleksje historyczne', in: H. Czakowska, M. Kuciński (eds.), *Dialog wielokulturowości i prawda*, Bydgoszcz 2018, p. 183.

[23] At a meeting held between 10 and 15 September 1939, Gauleiter A. Forster instructed the chief of police and the SS in Gdańsk to "eliminate" all dangerous Poles, all Jews and Polish clergy. The President of the Higher National Court, Wohler, stated that for the time being he would not delegate the judges to the operation site so as not to delay it and, if necessary, he would "instruct them accordingly". D. Schenk, *Albert Forster*..., op. cit., p. 213.

[24] 1943 I, p. 372.

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The first German court murder during the Second World War

1. In the opinion of D. Schenk, an eminent researcher of the historical and legal aspects of the defence of the Polish Post Office in Gdańsk on 1 September 1939 and the death penalty imposed on its 38 heroic defenders: "The verdict of the Gdańsk Court Martial of 8 September 1939 is considered to be the first verdict of a military court during the Second World War".[25] The sentence passed on the defenders of the Post Office was at the same time a blatant case of bending the law and violating its fundamental principles, and a researcher of files of special courts will easily observe the same thinking shown by the prosecutors and judges of the court martial.

The files of the trial involving the Polish defenders of the Post Office had the file numbers StL 41/39 and 42/39 and have never been discovered.[26] The course of events in the Post Office building in Hevelius Square and the trial of the post office staff had therefore to be recreated on the basis of detailed documentation gathered by the aforementioned author and his comprehensive analysis.

At midnight on August 31, 1939, there were 58 people in the Polish Post Office building, including officials who stayed after the day shift and arrived for night duty. The director, Dr. J. Michoń, convened a meeting at which he read the secret order to defend the Post Office against an expected German attack and introduced his subordinates to "Inspector Konrad (Guderski – author's note)", a person put in charge of the military command. "Konrad" had the guns, ammunition, grenades, and one light machine gun for each of the three floors of the building distributed, and then assigned defence positions. The estimates were that the post office workers would need to fight for six hours, until divisions of Pomorze Army would come to the rescue. Around 4:00 a.m. the defenders noticed that electricity as well as phone and telegraph connections had been cut off.

The attack was carried out by a police unit from Police Station no. 2, located in the side wing of the same building in which the Polish Post Office was based. The police were reinforced by police reserves, the SA and the SS-Heimwehr under the command of the head of the Gdańsk Police Col. W. Bethke.

In the first attack, which started at 4:45 am, i.e. in parallel with the shots fired from the battleship Schleswig-Holstein at Westerplatte (possibly earlier, at 4:30 am)[27], the Germans tried to force their entry into the building via the yard entrances and the east side entrance on the narrow wall of the building. The Post

[25] D. Schenk, *Polska Poczta w Gdańsku. Dzieje pewnego niemieckiego zabójstwa sądowego*, Gdańsk 1999, p. 278. At the same time, this is the only judgment that has been legally recognised as an offence of bending the law (§ 336 of the StGB), consisting in judicial murder, for which the victims' relatives were offered symbolic recompense.

[26] Ibid., p. 113.

[27] Ibid., p. 288.

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Office employees opened fire and managed to withstand the attack. The group who managed to penetrate the packages room on the first floor of the building was forced out by the defenders with grenades. One policeman and one SS officer were killed and seven attackers were wounded. None of the postmen were seriously wounded. All the windows in the Post Office building had already been blown out and an SS-Heimwehr armoured car shelled the building with a machine gun.

The commander of the attack ordered a ceasefire and called the defenders through a megaphone to surrender, threatening to blow up the building within two hours. All the defenders gathered on the first floor and no one objected when it was decided that they should not give up at this point.[28]

The second phase of the attack, conducted with a howitzer, two cannons and machine guns, focused on the façade of the Post Office building and the main entrance.[29] Shots were fired from the Post Office building. Hevelius Square was screened by a billow of dust and the noise was deafening. Postman A. Flisykowski ran to the uppermost floor of the Post Office as the machine gun there had ceased to operate and noticed that Inspector "Konrad" was dead. In this situation A. Flisykowski, despite his thigh wound, took over command of the defenders.

The third phase of the attack, according to an account in a German propaganda publication in 1940, was as follows: "The attack was scheduled for 5 p.m. It was to commence with the release of an explosive device placed by sappers under the building. The earth was shaken by a rapid explosion; then, for a few seconds, a paralyzing silence fell, interrupted by a sudden, intense fire of machine guns and the sound of cannon shots. (...) Bullets pound on the facade of the Polish bastion, tearing a hole in the wall the size of a barn gate. The fence made of brick pillars and iron bars collapsed. (...) Machine guns shell the windows. (...) The Poles respond with fire. A barrage of all weapons forces the Poles to descend from the upper floors. They retreat to the basement and continue fighting. They do not want to give up."[30] Unnoticed by the defenders, sappers from the Wehrmacht unit of the Eberhardt Group planted under the building an explosive device referred to at the beginning of the aforementioned account. They tried to enter the Post Office through the basement yet were unable to do so because the defenders pre-empted the assault and barricaded the basement entry with wooden logs.[31]

[28] Ibid., p. 65.

[29] A staff member, Dr. H.-W. Gieseke, a counsellor of the group's war court, took care of bringing a howitzer from the military Eberhardt Group to Hevelius Square in order to make the police attack on the Post Office more effective. After the war, he testified as a witness: "I personally ensured that this order was carried out. The cannon fired at the building from a close distance (approximately 300–500 m). Around noon on September 1, 1939, I was still on the square near the Polish Post Office for half an hour after the cannon was launched" (ibid., pp. 65–66).

[30] Ibid., p. 69.

[31] Ibid.

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The fourth phase was the execution of the order given by W. Bethke to the fire department: delivering a petrol tanker to the front of the building and pumping the fuel to the basement of the Post Office. Then the gasoline was set on fire with a hand grenade. The explosion had terrible consequences: five people were burned alive, six Poles died as a result of severe burns during the next few days in hospital, among them Erwina, a ward of the married couple who were the managers of the Post Office building.

The course of events could be watched by journalists from German newspapers, reporters from the Radio of Great Germany and cameramen of the *Wochenschau* newsreel, screened in cinemas a few days later. The information about the use of gasoline was removed from the news and coverage, an example of National Socialist propaganda.

When the Postmen surrendered, the first to leave the building was the wounded director J. Michoń, carrying a white towel. He was killed by a shot in the belly and a shout was heard: "These are the Polish dogs". The next was the head of the Post Office, J. Wąsik, who was shot – according to a version known in Poland – after a flamethrower was directed at him.[32] The next Postmen leaving the building, their hands crossed on the nape, were taken captive.

2. The trial of the twenty-eight defenders of the Polish Post Office took place a week after the German attack. The indictment was drafted by councillor of the military court H.-W. Gieseke, who decided that the trial of the gravely wounded and unable to stand trial was to take place later; it finally was held on 29 September 1939. Dr. K. Bode, the then vice-president of the Gdansk Higher Land Court, was appointed chairman of the three-person jury panel of the Eberhardt Group Military Court Martial. The jurors were police major Dr. H.-W. Schimmelpfennig and an undefined officer. All the defendants were assigned only one officer as a defence attorney. The sitting of the court took place in the hall of the Higher Land Court in Gdańsk. It began in the afternoon and lasted until early evening. The court was not presented with a written indictment, which was delivered orally by H.-W. Gieseke, who claimed that the accused postal workers had committed the "crime of guerrilla activity".[33]

[32] Ibid, pp. 70–71.

[33] The regulation on the wartime special penal law – *Kriegssonderstafrechtsverordnung* (KSSVO) of 17.08.1938 (*Reichsgesetzblatt* 1939 I, p. 1455). Provision § 3 (1) of the Regulation read as follows: "The death penalty for guerrilla warfare (*Freischärlerei*) shall be imposed on anyone who does not belong to the enemy armed forces and who, being unable to be recognised as belonging to them by virtue of the external markings carried and provided for by international law, uses or possesses firearms or other weaponry with the intention of using them to the detriment of the German Wehrmacht or its allied armed forces with the intention of murdering members of those forces, or take other actions which, after the outbreak of war, can only be taken by uniformed members of the armed forces".

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The charge was justified by the words of one of the defendants, whom H.-W. Gieseke interrogated earlier and who told him that the defenders would be considered as guerrillas. In response, he heard that "if he meant volunteers (*Franktireurs*), it was right".[34] After the hearing of one witness on the occasion of the fighting on September 1, 1939, the trial ended with the imposition of the death penalty on all defendants. The trial on September 29, 1939 against the other ten defendants of the Post Office concluded with the same sentence. Subsequently, the sentences were approved by the superior, and requests for clemency were denied. The sentenced defenders of the Polish Post Office were executed on 5 October 1939 by SS-Heimwehr commandoes in Gdańsk-Zaspa, on a military property.

3. The sentence of the decision of the Lübeck Land Court of 25 May 1998, concluding the resumed proceedings concerning the sentencing of defenders of the Polish Post Office reads that the court "repeals the judgements of the Eberhardt Group Military Court Martial in Gdańsk issued on 8 September 1939 and 29 September 1939 with respect to the defendants (file nos. StL 41/39 and 42/39) and acquits the defendants".[35] At the beginning of the *ratio decidendi* it was observed that the repealed judgements had not been presented to the court and a search for them had proved futile for a number of decades. The reader of the *ratio decidendi* is made aware that both the account of the course of events on 1 September 1939 and the legal analysis of the trial and sentence of the Postmen fully corroborated D. Schenk's findings. D. Schenk's 1995 publication under the telling title *Die Post von Danzig. Geschichte eines deutschen Justizmords* was impactful for the judicial procedure of resuming the proceedings concerning this judicial murder.

In the justification of the decision of the Lübeck Land Court, there is a key sentence stating that Judge Dr. K. Bode: "while examining the case committed a punishable breach of official duties, namely bending the law (§ 336 of the Penal Code). This was due to his participation in a conviction for guerrilla activity, which he later confessed on several occasions in the investigations concerning him".[36]

In view of the procedural chronology of the claim that the conviction of the Post Office workers was a case of bending the law within the meaning

[34] D. Schenk, *Die Post von Danzig. Geschichte eines deutschen Justizmords*, Reinbek bei Hamburg 1995, p. 98.

[35] Decision of the Third Grand Penal Chamber of the Lübeck Land Court, Se. 3 AR 1/98 in a resumed proceeding in the case of the Eberhardt Group led by the Wartime Military Court in Gdańsk. The text of the decision was appended to the Polish edition of D. Schenk, op. cit., p. 283 ff.

[36] Ibid., p. 292.

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of Section 336 of the StGB, it is necessary to refer first of all to prosecutor H.-W. Gieseke as the one who qualified the criminal act and pressed it before the court. The focus should therefore be on the provision cited by the prosecution, on the basis of which he demanded the death penalty for the defendants. This provision entailed the death penalty for anyone "using or possessing firearms or other weaponry with the intention of using them to the detriment of the German Wehrmacht".[37] Being an eyewitness to the events, H.-W. Gieseke knew that the accused Postmen shot back, defending themselves against the attack of Gdańsk policemen, members of the *SA* and the *SS-Heimwehr*. The attackers were therefore not soldiers and even the broadest interpretation could not possibly equalise the term "the German *Wehrmacht*" with those of "Gdańsk police, the *SA* and the *SS-Heimwehr*". The rejection by the prosecution of the natural right of Polish Postmen to necessary defence against unlawful assault did not in a legal sense turn the attacking policemen into members of the *Wehrmacht*.[38]

Prosecutor H.-W. Gieseke implemented in the room of the Gdańsk Land Court his intention to kill all who on 1 September 1939 happened to be in the building of the Polish Post Office and dared to resist uniformed Germans, no matter what the uniforms were. Although, as he admitted, he brought a howitzer which shelled the Post Office building, he failed to achieve his goal at that time, but a week later he managed to use a court martial as a legal deadly tool.

4. A question arises what a defence attorney countering the claim of the prosecution should have said had he really performed his role. This question was answered in detail by D. Schenk in his seminal text. The defence of the accused Postmen should have referred the court to the fact that the Regulations concerning the laws and customs of war on land, an annex to the Hague Convention of 1907, excluded in its Article 1 the possibility of treating the accused defenders of the Polish Post Office as guerrillas.[39] Then the defence should have raised that this Convention provision was reiterated in § 3 (2) of the *Kriegssonderstrafrechtsverordnung*, stipulating that guerrillas are not "members of militia and volunteer units, provided that they meet the following conditions: 1) they are headed

[37] Vide footnote 33.

[38] "The attackers were police officers and auxiliary police officers, who were not soldiers. According to the laws in force at the time, both the German one and those of the Free City of Gdańsk, they had no legal basis for the assault. Thus, also from a legal point of view, the defenders of the Post Office were entitled to act in necessary defence". D. Schenk, op. cit., p. 106.

[39] Regulations concerning the laws and customs of war on land. Section I. On warring parties. Chapter I. Definition of a warring party. Art. 1. Acts, rights and duties of war apply not only to the army, but also to the common mobilization and volunteer troops, provided that they meet the following conditions: 1) they are headed by a person responsible for their subordinates; 2) they wear a permanent and distinguishable distinction badge; 3) they openly carry weapons; 4) they observe the laws and customs of war in their actions.

by a person responsible for their subordinates; 2) they wear a permanent and distinguishable distinction badge; 3) they openly carry weapons; 4) they observe the laws and customs of war in their actions". D. Schenk aptly indicates that the content of the provision stipulated that "As a result one could not deny the defenders of the Post Office veteran status, and thus they should not have been sentenced for guerrilla activity."[40] Vicariously transferring D. Schenk's argument to the courtroom where the Postmen were put on trial, his interpretation of the defendants self-definition as *Franktireurs* is fully convincing: "The Postmen were simply Polish patriots who did not know the term >*Freischärler*< (>*guerrilla*<) and linked the term >*Franktireurs*< (>*volunteer*<) with the general notion of honour".[41] Their calling themselves "volunteers" protected them under the Hague Convention as members of a "volunteer unit" who met all the criteria of being called "warriors" i.e. veterans and as such should not have been sentenced for unlawful "guerrilla warfare" (*Freischärlerei*) as precisely § 3 section 2 KSSVO had excluded this. They had their commanders (Inspector K. Guderski, A. Flisykowski), most of them wore recognizable postmen's uniforms, fought openly, and respected the laws and customs of war. In justification of the acquittal of the defendants, the Land Court in Lübeck emphasized that during the criminal trial: "The question of what the defendants understood by this term (*Franktireurs*) was left unanswered by the court".[42]

5. However, the determination of the importance of the Postmen's statement was not a prerequisite for their acquittal in light of the charge that they had committed the crime of "guerrilla warfare", because according to the findings of the Land Court in Lübeck, made earlier by D. Schenk, "the application of provisions of a 'special wartime penal code' was inadmissible".[43] The KSSVO Regulation entered into force in Gdańsk only as of 16 November 1939, and under "the Law on a reunification of the Free City of Gdańsk with the German Reich..." of 1 September 1939, the city became part of the Reich, while the authority of the Wehrmacht judiciary embraced its operation zone outside the Reich's borders. Therefore the Land Court in Lübeck observed that "§ 3 of the special wartime penal code (guerrilla – *Ferischärlerei*) was inapplicable" to the Defenders of

[40] D. Schenk calls "blatant insinuation" the statement by prosecutor Giesecke, who claimed that the defenders admitted before him to the crime of *Freischärlerei*. Admittedly, Alfons Flisykowski and others during the preliminary hearings, when accused of shooting being *Franktireurs*, answered: "Franktireurs, ja, das sind wir gewesen", i.e. "volunteers, right, we were them". D. Schenk, *Die Post von Danzig*..., op. cit., p. 98; eadem, *Polska Poczta*..., op. cit., p. 105. The term (*Franktireurs*) most probably referred to the name of the corps of French volunteers during the war with the Prussians from 1870/71.

[41] D. Schenk, *Polska Poczta*..., op. cit., p. 104.

[42] Ibid., p. 294.

[43] Ibid.

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the Polish Pots Office in Gdańsk as a crime "committed within the country".[44] Furthermore, the court raised that "under Article IV of the Basic Law of the Free City of Gdańsk on the reunification with the German Reich, until the Führer made the final decision on the introduction of German law, all laws (apart from the constitution) remained in force".[45]

6. The criminal bending of the law, which was carried out by the judges of the war court in the judgments of 8 and 29 September 1939 in cooperation with the military prosecutor, consisted in the sentencing to death on the basis of a non-existent law, under which the provision on "guerrilla crime" to the detriment of the Wehrmacht was made against the facts, a subsumption of the behaviour of the Postmen who defended the Polish Post Office against an illegal police attack.

German special courts in Polish territories annexed to the Reich

1. That special courts will be set up in conquered Poland was decided still prior to the attack on the country, as evidenced by the order of the commander-in-chief W. von Brauchitsch of 26.08.1939, redated to 1.09.1939, authorising army commanders to create such courts in the acquired territories. The activities of the special courts in the occupied country were based on the ordinance of 21 March 1933 establishing special courts in Germany.

On 30 September 1939 in Frankfurt (Oder), 170 judges, prosecutors and officials appointed by the Reich Ministry of Justice to carry out tasks "in the East" were addressed by Secretary of State R. Freisler, who pointed out that "every appointee should feel that they are part of the front command (...) as representatives of German culture, the German will for order, and the German sense of law (*Rechtsempfinden*)"[46]. According to the deputy minister for justice, they were the "pioneers of law" with a "political mission", and each of them as a "national socialist and warrior of German law (...) fights in a national war in the East, shoulder to shoulder with others for the sake of the victory of Germanness (*Deutschtum*)".[47]

2. In view of the title of the panel in which the main findings of this paper were presented at the conference, i.e. "Responsibility for International Crimes under National Law", below the reader will find a discussion of judgments, the contents of which were examined by the author of this paper. Handed down by judges of special courts, they are examples of perversion of German national law and violations of Article 43 in Division III of the Regulations on the Laws and Customs

[44] Ibid., p. 293.
[45] Ibid.
[46] H. Schlüter, "„...für die Menschlichkeit im Strafmaß bekannt...", op. cit., p. 50.
[47] Ibid., p. 44.

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of War on Enemy State Territory, annexed to the 1907 Hague Convention. This provision stipulated that "except in the event of absolute impediments," the occupier was to observe the laws of the occupied country. The discussion will therefore focus on the doubly lawless conduct of the judges: due to their bending the criminal law of the Third *Reich* and their violation of international law. Although the judges of special courts were aware of the importance of the standards relating to them, prohibiting violations of the law and protecting the population of the occupied Polish territory, they completely ignored them in their rulings. The justifications for their judgments bear no trace of reflection on the notion of bending German law as a prohibited behaviour of the adjudicating judge, nor of thinking in terms of international law that protected the rights of civilians in the occupied territory.

Analysis of the judgements seems to indicate that the normative devaluation of apparently inviolable principles of *nullum crimen sine lege, nulla poena sine lege* and *lex retro non agit*, originally adopted as the cornerstone of the 1871 StGB, paralleled the conviction that the notion of *Rechtsbeugung* (§ 336 StGB) does not at all apply to judicial decisions. The following are judgments that will help to understand this normative notion, which seems in order also because some purely theoretical publications and comments on the particular elements of the crime of "bending the law" are often removed from the specific decisions of the judges of the *Sondergerichts*, which were in fact crimes of judicial lawlessness.

Retroactive punishment

1. A judgement of the Special Court in Gdańsk of 08.05.1942 is an example of the violation of the prohibition of retroactivity (*Rückwirkungsverbot*)[48]. The ruling stipulates that the commander-in-chief of the Wehrmacht introduced the entry into force of German penal law in Polish territories as early as 5 September 1939 and indicates that formally this law applied to "annexed Eastern territories" on 6 June 1940.[49] However, these ordinances were cited by the judges of the *Sondergericht* as "merely confirming" their own conviction of the correctness of the generally accepted practice of punishing Poles pursuant to German regulations for acts committed in Poland, even years before the outbreak of the war, if they were directed against Germans who "today, after their victory, expect justice".

Such an "act of justice" was performed by the *Sondergericht* in Gdańsk when it punished two Poles, members of the Union of Polish Reservists, who along

[48] Fil no. 6 Sg K Ls 55/42 Federal Archives Berlin, DAHL – RMJ IV g 22 Nr des Aktenbandes 1384.

[49] Verordnung über die Einführung des deutschen Strafrechts in den eingegliederten Ostgebieten vom 6.6.1940 Reichsgesetzblatt 1940 I, p. 844 ff. – Ordinance on the introduction of German criminal law in the incorporated Eastern territories.

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with others on 14 June 1935 joined a gathering of the Party of German Youth in a location near Gdynia and obstructed the proceedings by "making vile statements and singing incendiary Polish songs". As the Polish policeman did not take action, the moderator of the meeting moved for its conclusion and the German participants leaving the venue were "beaten by Polish reservists, who turned into a thuggish horde". The first defendant, who did not take part in the brawl, was sentenced to two years' imprisonment for participating in a riot under the ordinary type – § 125 para. 1 StGB.[50] The other was sentenced to 3.5 years in prison, justified by the fact that he "used weaponry, throwing a light chair and hitting in the back a German speaker passing by, a member of the Gdańsk Senate".[51] It is not clear from the verdict how far back in time the judges' power to punish Poles was to satisfy the German "expectation of justice". Thus, an unrestricted principle was adopted with regard to German criminal law on occupied Polish territory, namely *lex retro agit*.

2. It is not easy, *sine ira et studio*, to recreate the convoluted interpretation of the judges of the *Sondergericht* Grudziądz, (Dr Schönfeld – presiding judge, justices Dr Bull, Grossmann), who in a judgement of 12.12.1941[52] sentenced to death a Polish officer, a prisoner of war, for an act committed 7 days prior to the attack of the Reich on Poland. The defendant, Lieutenant W. Bekierski brought by the *Sondergericht* from an *Oflag*, or a camp for POWs – officers, arrested on 24.8.1939 "the *Volksdeutsche* Husarek and Teschendorf for their having assisted other *Volksdeutsche*, who had recently received draft letters to the Polish army, to escape across the Reich's border". It was pointed out that such escapes from Poland were called for by the German radio, and the brother of the *Volksdeutsch* Hussarek captured by the Polish army, called to serve in the Polish army, had already managed to escape to the German side of the border. In this way, it was claimed, the *Volskdeutsche*, who were Polish citizens, "evaded military service in the Polish army"; it was rightly pointed out that "it was a crime under Polish law".[53]

[50] § 125 para. 1 StGB: If a crowd gathered in a public place perform acts of violence against persons or property, anyone who takes part in such a gathering will be punished for violating public order (*Landfriedensbruch*) with a prison sentence of no less than 3 months.

[51] § 125 para. 2 StGB: The leader, as well as anyone who violates a person or plunders things, destroys or damages them, will be punished with imprisonment in a strict prison for up to 10 years.

[52] File no. KLs 61/64 Federal Archives Berlin, DAHL – RMJ III g 22 Nr des Aktenbandes 1007/42.

[53] The Polish Military Penal Code of 1932 set out: Article 45 § 1: Anyone who, while being obliged to perform military service, fails to comply with an appointment or public call for such service within a specified period of time, shall be subject to the penalty of deprivation of liberty in a prison or fortress for up to two years or to the penalty of military arrest. The more severe penalty of imprisonment (up to 10 years) was due for action aiming at a permanent evasion of the military duty – Article 46.

The defendant, commanding a small unit of Polish border guards at the railroad station, reported the arrest of two Germans escorting *Volksdeutsche* across the border. His commanding officer, a colonel inspecting the border post, ordered that "25 strokes be dealt to each of them". This order was carried out with the use of military leather belts, "which was the usual practice for a long time in relation to both Germans and Poles trying to cross the border illegally, and then they were let go".

According to the findings of the investigation, in the conditions of the mobilization ordered in Poland,[54] the arrested Germans could have been handed over to a military court and executed under an *ad hoc* conviction by such a court, for providing assistance to fugitives to illegally cross the border and evade military service. However, the *Volksdeutsche* Husarek and Teschendorf were released after the subordinates of the lieutenant who commanded the unit obeyed his order, as directed by the colonel. In a detailed justification of the verdict, it was stated that "the defendant did not have to carry out such an unlawful order." Nevertheless, as the *Sondergericht* concluded, he "aggravated" the execution of this order by the soldiers under his command by ordering the detainees to take off their pants, lie down one by one on a bench in the station's waiting room, after which the soldiers dealt calculated "strikes with leather belts on the bare behinds" of each of them (*Schläge mit den Lederkoppeln auf das entblösste Gesäß*). As the judges noted, in this way "the defendant humiliated both Germans and manifested his fanatical hatred of Germanness (*Deutschtum*), defaming their honour (*die Ehre*)".

When, in accordance with procedure, the death sentence was handed down to the Minister of Justice in Berlin, who could, by virtue of the authority vested in him by the Reich Führer, pardon the convict, the judges of the *Sondergericht* vociferously opposed this option. They justified their position on the grounds that the convict had shown particular contempt for the honour of the two Germans, praised by the *Sondergericht* for their behaviour as they "had only acted in accordance with their duty to the German nation (*die nur ihre Pflicht gegenüber ihrem Volkstum taten*)". Furthermore, the prosecutor general in Gdańsk in his opinions justified the necessity to carry out the execution in that "the convict's conduct was a mockery devoid of any legal sense and points to a general attitude, which must have impacted his subordinates and other Polish circles, being an element of the persecution of Germans taking place still before the outbreak of the war, making the situation unbearable". It was therefore concluded that "the Volksdeutsche, helpless at that time and maltreated, can today expect that (the perpetrators – author's note) would be appropriately punished".

The files of this case show the typical reasoning of judges who first decided on the death penalty, required "for the sake of the German people," and then

[54] Alert mobilisation in Poland started on August 24 at 6:00 am.

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invoked, even beyond *analogia iuris*, any criminal provision, even if not in force at the time of the act, to justify the conviction.

In the aforementioned case of a Polish officer, his conviction was based on a provision of the ordinance of 5.12.1939 "against violent criminals" (*Verordnung gegen Gewaltverbrecher* – Gew-VVO), whose underlying idea could in no way be seen as even tangentially related to the conduct alleged to the defendant. The provision invoked in the sentence read as follows:

"Violent acts committed with the use of weapons. § 1 (1) Whoever, in the course of rape, street assault, bank robbery, or any other grave act of violence uses a firearm, a cutting or stabbing weapon, or any other equally dangerous instrument, or endangers the life or health of another, shall be punished by death".

Ignoring in their justification of the criminal qualification that this provision could not be applied to the defendant at all, even by the most far-reaching analogy, the judges found that the defendant's conduct constituted an "objectively severe act of violence committed with the use of dangerous tools, which were military belts and his fist" (he allegedly hit witness Teschendorf in the face with his fist after the latter had called Polish soldiers who had beaten him with military belts a "gang".

A desk officer at the Berlin Ministry of Justice, while preparing a submission for the Minister of Justice on the execution of the sentence, confirmed and elaborated on the claim that "objective assumptions of the provision of § 1 Gew-VVO" applied to the case at hand since maltreatment with the use of leather belts, even without the use of their metal buckles[55] meets the criteria of a "equally dangerous instrument in the meaning of this provision" and moreover included punching Teschendorf. However, the consensus of opinion as to the legal classification of the defendant's act did not lead to acceptance of the punishment meted out to the accused Polish officer. A ministerial official pointed out that the prosecutor at the *Sondergericht* had concluded that there were grounds for commuting the death penalty to "a sufficient sentence of 10 years in a stringent penal camp". At the same time, it was pointed out that the Polish officer did not correspond to the "type of criminal" referred to in § 1 of the Gew-VVO (committing rape, street assault or bank robbery) and that the consequences of his act were not severe for the *Volksdeutsche* victims within the meaning of this provision, so a qualification on the basis of the relevant provisions of the criminal code was proposed[56].

[55] Both the *Volksdeutsche* admitted that they had been beaten "only with the leather parts of military belts, without the use of (metal) buckles".

[56] The *Sondergericht* prosecutor already at the trial moved for a change of the legal qualification, indicating a possible invocation of § 223 StGB ("Whoever intentionally abuses another person's body or causes damage to their health will be punished for bodily harm in prison for up to three years or a fine") and § 223a StGB ("If the injury was inflicted with a weapon, in particular a knife or any other dangerous tool, either by deceitful assault, or jointly with many persons

The decision to commute the death sentence to 10 years of strict penal camp for the Polish officer as a "criminal making use of violence" was signed by Minister of Justice F. Schlegerberger on 19.3.1942.

Criminal bending of the law taking place in this judgement violated the 1907 Hague Rules, whose Article 4 ordered the humane treatment of prisoners of war. Depriving the sentenced person of the status of a prisoner of war and his incarceration in a penal camp in the conditions calculated to physically annihilate the prisoners meant subjecting him to inhumane and cruel treatment and left him with no chance of survival. The conviction was predicated on a criminal law that was not in force at the time of the events and violated the basic rule of subsumption.

Punishing Poles for evading military service in the Wehrmacht

1. In the judgment presented above the judges of the *Sondergericht* stated that the *Volksdeutche* who were Polish citizens fleeing to the *Reich* after being called up to the Polish army, "acted in accordance with their duty towards their nation". A different view was taken by the German judges in relation to Poles in the occupied country, who were considered to be evading the service in the Wehrmacht.

In the Polish territories incorporated into the Third *Reich* (*Gdańsk-West, Prussia, Wartheland*), a system was created that degraded Poles in all legal and social aspects and consequently, contrary to the Hague Regulations of 1907, enforced the "oath of allegiance to the enemy state" through applications for registration on the German nationality list (*Volksliste*). Such an entry protected against deportation which meant a loss of the entire possessions and offered food inaccessible for other inhabitants of the annexed territories. In many cases it was the one and only chance for survival.

After the Eastern front was halted near Moscow, special courts in 1942 most clearly concluded that they need to terrorise Poles to enrol in the *Wehrmacht* and as a result made a military pledge and defended their new "*Fatherland*".

To this end was "bent" a provision of the *Kriegssonderstrafrechtsverordnung* (KSSVO) of 17.08.1938[57]. It read as follows: "The weakening of the defence power will be punished by death (...) of anyone who for the purpose of wholly, partially, or temporarily evading his own or another person's obligation to perform military service, commits self-mutilation or uses a means calculated to defraud or another manner".

or in a life-threatening manner, the punishment will be at least two months' imprisonment". This provision offered no grounds for a death sentence; in his final speech at the trial, the prosecutor requested a 10-year prison sentence.

[57] Reichsgesetzblatt 1939 I, p. 1455.

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2. As for punishment for the crime of weakening the defensive power, the most far-reaching reasoning bending the law, with reference to the judge's "healthy national sense", found expression in a judgment handed down on 6.2.1942 by the *Sondergericht* Grudziądz, sentencing to death B. Kruczinski .[58] Although the defendant himself did not apply to be entered on the *Volksliste*, he did apply for permission to marry a *Volksdeutsch* woman, and when asked by a police official about his military service he said: "I serve if I must" (*Ich diene, wenn ich muß*). Uttering these words was considered by the judges of the Gruziadz *Sondergericht* to be criminal evasion of military service, weakening the defensive power of the *Reich* and cited as the basis for conviction § 5 (1) Ziff. 3 KSSVO. Although the final part of the provision referred to the evasion of conscription by "any other means" than self-inflicted injury or fraud, the court did not explain why it considered Kruczinski's incriminating words to be tantamount to the commission of a crime.

When the case came before the Reich Minister of Justice, in a clemency proceeding, the ministerial clerks relied on the opinions of the Oberkommando der Wehrmacht (24.03.1942) and the minister of the interior (08.06.1942). Both jointly questioned the punishment of B. Kruczinski who, as they noticed, had no German citizenship and was therefore unfit for committing the crime of evading the military service obligation in the Wehrmacht. As can be inferred, it was concluded that sending Poles with no German citizenship to the ranks of the German army by the judges of the *Sondergericht* under the threat of the death penalty would not strengthen the defensive power of the Reich but could have the opposite effect. It was written in the opinion of the Wehrmacht command that the convict's statement to the official "was not fit to implement evasion of military service".[59] It was found that the meaning of the words he spoke expressed a willingness to serve – "I serve if I must" – and not an intention to avoid it. The death sentence therefore appeared to be a punishment for the Pole's lack of enthusiasm about the prospect of serving in the *Wehrmacht*, which conduct was neither defined as a crime under § 5 (1) Ziff. 3 KSSVO, nor could be justified *per analogiam iuris*, especially that not being a *Reich* citizen he could not serve in the *Wehrmacht*.

[58] Strafsache gegen B. Kruczinski, IV g 22/1248/42, Federal Archives Berlin, DAHL – NJ –2964. The matter elaborated on in: W. Kulesza, 'Polacy wpisani na Volkslistę a obowiązek służby w Wehrmachcie w świetle wyroków Sądu Specjalnego w Toruniu', *Studia Iuridica Toruniensia*, 2018, vol. XXIII, p. 113, footnote 23.

[59] It may be assumed that the *Wehrmacht* command reasoned that faced with a possible the death penalty, Poles would comply with the order to obediently serve in the army in order to avert an immediate danger to their lives, and then would desert the army at an opportune moment. W. Kulesza, 'Polacy wpisani na Volkslistę…', op. cit., p. 109.

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3. The death sentence was passed on W. Zydel for evading military service by the *Sondergericht* Toruń by a judgement of 19.05.1942;[60] the judges justified it in a manner typical of penalisation by analogy with the principle indicated in § 2 StGB. In an argument relating to the criminal qualification of the conduct attributed to the accused, they stated: "If one does not directly apply to such an offender § 5 (1) Ziff. 3 KSSVO, it is necessary to look upon his act as reprehensible at least according to the underlying idea of this provision and a sound national sense." The defendant in the case was enrolled on the *Volksliste* without his consent, and when he received a summons to appear at the military draft board to enrol for military service, he did not do so, but sent back his *Volksdeutsch* identity card, writing to the office: "Having been summoned for conscription, I inform you that I am not aware that I remain in a duty relationship with the German *Wehrmacht*. Previously, I had Polish citizenship, and at the moment I have no other citizenship."

W. Zydel's conviction was justified on the grounds that "those entered on the German *Volksliste* in Chapter III, as applicants for citizenship, could, contrary to the law, commit acts to evade the military service expected of them." The argument concludes as follows: "A German, also a *Volksdeutsch* in the position of the defendant, who is not ready to defend the country at the moment of grave danger to the Nation and the *Reich* cannot count on pardon". Speaking out against their pardon of the convict in an opinion submitted to the *Reich* Ministry of Justice, the judges (Breier, Deike, Dr von Grosschopff) raised: "Zydel, who was undoubtedly a self-declared Pole and did not try to be considered a *Volksdeutsch*, sent back the *Ausweis* only to avoid becoming a soldier, which is highly reprehensible".

4. In the cases of B. Kruczyński and W. Zydel, both sentenced to death, an effective exceptional appeal for the nullification of the verdicts was lodged on the grounds that they did not have German citizenship. In the case of W. Zydel, it was pointed out that his inclusion in Part III of the Volksliste did not in itself mean that he had been granted the citizenship of the *Reich*.

The *Reichsgericht* recognised a nullification complaint on 28.09.1942,[61] repealing the judgement of the *Sondergericht* Toruń, stating that the "very fact of a former Polish citizen being entered into the Third Division of the German *Volksliste* did not justify the military service obligation". The conclusion noted that "former Polish citizens will not be obliged to defend the Reich until they have acquired German citizenship, which makes it impossible to apply to them § 5 (1) of the KSSVO to justify their obligation as Polish nationals and to force

[60] 4 Sg. K.Ls. 45/42 Federal Archives Berlin, DAHL – NJ – 2964. More on the course of the case in W. Kulesza, 'Polacy wpisani na Volkslistę...', op. cit., p. 111.

[61] 5 C 33/42, Federal Archives Berlin, DAHL – NJ – 2964, IV g 22 1500/42.

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them into military service." Therefore, "the annulled conviction of the defendant, who had no German citizenship, as being based on erroneous legal considerations is unjust (*ungerecht*)".

It continues with a passage whose juristic hypocrisy is unbeatable and in which the *Reichsgericht* indicated the bending of the law it expected from the judges of the *Sondergericht*, writing that: "This, however, is not sufficient for an immediate acquittal of the accused by the special court. It cannot be established with the requisite certainty that the accused is not guilty of attempting to evade military service." With this recommendation, the case was referred for reconsideration, which meant that the special court could convict any Pole who was not a *Reich* citizen for attempted evasion of military service and impose a heavy prison sentence of 3 to 15 years (§ 44, § 14 StGB).[62] With this ruling, the *Reichsgericht* created a legal state in which lack of *Reich* citizenship was no obstacle to the draconian punishment of a Pole for evading the defence of Germany.

It would be hard to assume that the *Reichsgericht* justices (Klingsporn – presiding judge, Dr. Schäfer, Dr. Rohde, Dr. Iber, Dr. Everling) would not have been aware that W. Zydel's rejection of German citizenship could not in any way be juristically seen as an attempt, i.e. "the onset of a crime" of a *Reich* citizen evading military service in the Wehrmacht. According to the then commonly accepted commentary to the Criminal Code, attempt, as the punishable beginning of the execution of a crime, occurs when "the very behaviour of the perpetrator creates an immediate danger to the legally protected interest."[63] In a situation where there was no legal obligation to serve in the army because the man did not have German citizenship, he could not be punished for attempted evasion of military service understood as creating an imminent danger of weakening the defensive power of the Reich. The position of the *Reichsgericht* meant in fact that persons without citizenship, which entailed an obligation of enrolment in the army, can also be made to serve in the military by the threat of punishment for attempted dodging of the obligation which did not apply to them.

5. The Regulation of 31.01.1942 (RGBl. I, p.51) on the German national list amended the earlier regulation, which did not link the entry in Division III of the *Volksliste* with the granting of citizenship, and thus did not entail an obligation of enrolment in the army. The new regulation stipulated that this regulation imposed an obligation of military service in the Wehrmacht, invoked by the *Sondergericht* Toruń (Breier as the presiding judge, Deike, Dr. von Grosschopff),

[62] Attempt was "penalised less stringently than the act", yet if "a crime is punishable by the death penalty (...) then the penalty of a strict prison will be no less than three years (§ 44 StGB). A strict prison sentence entailed "a permanent exclusion from service in the German army" (§ 31 StGB).

[63] A. Dalcke, K. Schäfer, in: A. Dalcke, E. Fuhrmann, K. Krug, K. Schäfer, *Strafrecht und Strafverfahren*..., op. cit., p. 41.

which issued a death sentence on 15.10.1942, under § 5 (1) Ziff. 3 KSSVO, on W. Miszalowski, a Pole who married a *Volksdeutsche*, was entered on a *Volksliste* and was notified orally to "expect an immediate call to arms". Not wanting to leave his wife alone, after their several-month-old child died, on 11.07.1942 he "cut off four fingers of his left hand with an axe on a stump". The ministerial official referred approvingly to the *Sondergericht*'s judgement and made a note in a document dated 08.12.1942, as he did before (28.09.1942), and the *Reichsgericht* noted that "The defendant would have attempted to breach his military service obligations even if he had not been a German citizen".[64]

Punishing a Polish girl for thinking about the victory of Polish soldiers

Under a judgement of 24.04.1942[65], the *Sondergericht* Poznań (presiding judge Bömmels, justices Dr. Hucklenbroisch, Dr. Görner) sentenced 16-year-old B. Pięta for "showing an attitude hostile to the Germans by her hateful activity", an offence under section I subsection 3 of the *Polenstrafrechtsverordnung*.

The defendant's criminal behaviour consisted in the possession of a piece of paper with a Polish text, hidden in her *Ausweis*. The judges emphasized that the defendant attached considerable importance to the content of the note, which had been translated into German, and stored it in a special way. The note with the aforementioned words was revealed by chance, when the defendant offered her *Ausweis* in a cover to the official to receive a sickness certificate (*Krankenschein*).

Since the published verdict contains only the German text, its translation must be offered here:

"Hitler: My soldiers are like green grass all over the world.

Mussolini: My soldiers are like the most beautiful roses.

Sikorski: My soldiers are like bulls that eat grass, shit on roses and will win.

Take off the furs and sheepskins with which the German army can warm their cold asses.

For Easter, people will bake cakes pale like Hitler, thick like Göring and crisp like the Germans will be.

The carpenters were searched and the last rescue beams were taken away".[66]

It was emphasized in the justification of the sentence that the accused explained her behaviour to the police and before the court in a different way as to how long she had been in possession of the note, lying that she had not read the sentences written on the note and had forgotten about it. According to the judges, she preserved the note "with care" in order to further disseminate

[64] This sentence was underlined in the original document. File no. Sg.K.Ls. 208/42, Federal Archives Berlin, DAHL – RJM IV g 22, Nr des Aktenbandes 2099/42.

[65] 140/42, III P 74, published by K.M. Pospieszalski, op. cit., pp. 370–371.

[66] Ibid., p. 371.

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its content at an opportune moment, aware of the punishable nature of her conduct. When sentencing the accused, the court did not examine the content of any of the written sentences, limiting itself to stating that, as quoted, it required "no further arguments".

Recognising that the accused, because of her age, had no knowledge of the "full significance of her behaviour", the court punished her with "a lenient 3-month sentence in a penal camp".

The provision of section I, subsection 3 of the *Polenstrafrechtsverordnung* used as the basis for the conviction described the punishable act as the behaviour of Poles who "by their hateful or seditious activities display an attitude hostile towards Germans, in particular speak in hostile terms about Germans". Contrary to the basic rules of understanding the nature of any criminal provision, the judges assumed that the mere "possession" of a note was tantamount to committing a crime.

Sentence for writing a letter to a brother

Another sentence by the same the *Sondergericht* in Poznań of a year later, 05.03.1943,[67] (presiding judge Rex, justices Dr. Müller, Rüdiger) analysed in detail the contents of the sentences in a letter written by F. Walinski to his brother Anton, who "was a Polish soldier and as such was incarcerated in a camp in Hungary". Understandably, aware of the then situation on the frontline and the imminent defeat of the Third *Reich*, the judges wished to contribute to the "ultimate victory" in the total warfare announced after the Battle of Stalingrad. The letter bore the date "24 January 1943" and in a veiled form, with the use of codewords, described the progress made by the Allies in the war and shared a prediction of its further course: "I suspect that the current period will conclude in June at the latest" and furthermore: "When one looks at all this, they may really take heart and think: One more year to go...".

The court decoded the semantics behind the sentences of the letter:

"The Bollard lays all of them on the table and mercilessly tans their skin"; "The Bollard works perfectly well";

"The English lad along with his foster brother make great headway in the learning of a strategy".

The *ratio decidendi* mentioned that the defendant, the author of the letter, wrote about the Soviet Union (Bollard), England (English lad) and the United States (English lad's foster brother) and admitted to it. In the letter he also wrote about two popular actors before the war, broadcasting satirical dialogues

[67] File no. Sd 4a Ls 33/43, I W 1043, published by K.M. Pospieszalski, op. cit., pp. 394–397.

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on a Lviv radio station (most likely Szczepko and Tońko)[68], who said that after the war one of them would "wash and the other one hang". In the following sentence the defendant wrote: "Our old man is preparing for this task...".

An in-depth exegesis of the entire text and the pride of the judges in their ability to carry out deductive reasoning (probably supported by the Gestapo interrogation technique, helping to determine the content of the coded meanings of the words), as seen in the justification for the conviction, led the court to formulate the following statement : "The accused expressed in a letter that the German resistance (*deutsche Widerstand*) would break down in June 1943 and this would end the war, followed by the hanging of the Germans by Poles, in which even his 70-year-old father would like to participate." In this way, "the accused showed joy with and consent to the acts of revenge he desired," which, according to the court, expressed his hostile attitude towards the Germans and constituted an offence under section I subsection 3 of the *Polenstrafrechtsverordnung*.

The *Sondergericht* began reflection on the punishment from the statement that the defendant "knew and wanted" the letter with news about the military situation reach "former Polish soldiers" in an internment camp and this would strengthen their will to resist (*Widerstandswille*). It was stressed in the conviction of the court that the accused would have instigated and participated in actual assaults on the Germans himself and "would not have refrained from such brutality and atrocities against German women and children as had already taken place in Poland in September 1939 " was also justified.

The summary of the argument states that the accused poses a real threat to the German people (*Deutschtum*) because he would have participated in actions against the Germans if there had ever been an attempted uprising of Poles, and therefore "only the death penalty is a just punishment for the accused's action". In fact, the accused was sentenced not for the "deed," but for his thoughts, which he wanted to share with his brother, a soldier of September 1939. Judges in the service of barbaric criminal law therefore ruled as if they had not understood the basic principle of justice, namely *cogitationis poenam nemo patitur*, during their studies in the Law School. The death sentence in this case clearly shows that, according to National Socialist law and the lawyers serving it, all Poles were to be subject to judicial extermination for their thoughts arising from "hostile attitudes towards Germans". Special Courts were in fact "judicial execution squads" and members of the jury should not be seen as "judges" but rather as murderers ordering an execution.

[68] See a discussion of this judgement in: W. Lemiesz, *Paragraf i zbrodnia*, Warszawa 1963, p. 52.

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Conclusion

The judgments presented above may serve as a casuistry illustrating the concept of criminal bending of the law within the meaning of § 336 of the StGB, in stark violation of elementary principles of justice. Under German law, the criminal bending of the law in a death sentence should, on the basis of a single, actual confluence of crimes, also entail liability for murder, and the bending of the law concluding with a prison sentence should entail liability for the unlawful imprisonment of the convicted person. In cases where a conviction would not be carried out, its delivery should be qualified as an attempt to commit an effective crime by bending the law. This model of responsibility was not, however, confirmed in the Federal Republic by convictions of the *Sondergerichte* judges who passed criminal judgments.[69]

The reason cited to justify the exemption of National Socialist judges from criminal liability for bending the law was that they were unable to prove to them the direct intention with which they were attributing the characteristics of an act prohibited by Section 336 of the StGB. It was considered that a possible intention was not sufficient for the existence of this judicial offence.[70] The presentation of this issue, taking into account the most recent literature, has exceeded the scope of this paper and has been therefore singled out for a separate publication.

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[69] W. Kulesza, *Crimen laesae iustitiae. Odpowiedzialność karna sędziów i prokuratorów za zbrodnie sądowe według prawa norymberskiego, niemieckiego, austriackiego i polskiego*, Łódź 2013, p. 77.

[70] W. Kulesza, 'Sędziowskie naginanie prawa w świetle niemieckiego prawa karnego', in: J. Kasiński, A. Małolepszy, P. Misztal, R. Olszewski., K. Rydz-Sybilak, D. Świecki (eds.), *Artes serviunt vitae sapientia imperat. Proces karny sensu largo. Rzeczywistość i wyzwania. Księga jubileuszowa Profesora Tomasza Grzegorczyka z okazji 70. urodzin*, Warszawa–Łódź 2019, p. 641 ff.

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Abstract

German criminal law provides for the criminal liability of a judge for the crime of violating the law. Since the beginning of World War II, this crime was committed in the occupied Polish territory by the judges of German special courts (*Sondergerichte*), sentencing Poles and Jews to draconian punishments under a special regulation on criminal proceedings against these nations. The death penalty was common, including for acts not prohibited by law. German judges "created" crimes themselves, guided by a "healthy

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national sense". The punishment was based on legal analogy, violating the elementary principles of criminal law: *nullum crimen sine lege, nulla poena sine lege, nullum crimen sine lege certa, lex retro non agit,* and *cogitationis poenam nemo patitur*. The paper provides examples of such judgments aimed at terrorizing inhabitants of occupied Poland and its systemic extermination, carried out under the guise of applying laws. The first controversial verdict sentenced to death 38 heroes of the Polish Post Office in Gdańsk before the invasion of the German police on the day the war broke out, i.e. 1 September 1939. In the last referenced sentence, a Pole who was sentenced to death wrote a letter to his brother, a soldier who participated in the struggle in September 1939; the letter, from the beginning of 1943, expressed hope for the imminent victory of the Allies over the Third *Reich*. Judges who issued such judgments were murderers who perverted justice, which raises the question of their responsibility for the crimes committed.

Keywords: World War II, German special courts (*Sondergerichte*) in occupied Poland, crime of bending the law (*Rechtsbeugung*), Nazi criminal law for Poles and Jews (*Polenstrafrechtsverordnung*), German judges as murderers

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Andreas Eichmüller

Die strafrechtliche Verfolgung von nationalsozialistischen Verbrechen in der Bundesrepublik Deutschland – Bilanz und Weichenstellungen

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Die alliierte Ahndung von NS-Kriegsverbrechen nach dem Zweiten Weltkrieg

In der Zeit unmittelbar nach Ende des Zweiten Weltkriegs bestimmten die alliierten Besatzungsmächte die strafrechtliche Ahndung von NS-Verbrechen in Deutschland. Sie hatten schon während des Krieges deutsche Völkerrechtsverletzungen angeprangert und in der „Moskauer Deklaration" vom 30.10.1943 deren justizielle Verfolgung angekündigt. Grundsätzlich sollten die Täter an diejenigen Staaten ausgeliefert werden, in denen sie ihre Verbrechen begangen hatten und dort abgeurteilt werden. Außerdem einigte man sich in der Folge darauf, eine kleine Gruppe von Hauptverantwortlichen in einem symbolischen Akt – und bis dahin völkerrechtlich einzigartigen Vorgehen – vor ein internationales Gericht zu stellen und damit auch die Öffentlichkeit über die Verbrechen der Nationalsozialisten aufzuklären. Zu diesem Zweck wurden ein Internationaler Militärgerichtshof geschaffen und in einem eigens für ihn entworfenen und an die Prinzipien des Völkerrechts anknüpfenden Statut die Rechtsgrundlagen für eine Bestrafung festgelegt. Von November 1945 an verhandelte der Gerichtshof in Nürnberg fast elf Monate lang gegen 22 Angehörige der Führungsriege des NS-Staates, gegen Parteikanzleichef Martin Bormann allerdings in Abwesenheit. 19 der Angeklagten wurden schließlich verurteilt, darunter zwölf (einschließlich Bormann) zum Tod.[1]

Daran anschließend fanden in Nürnberg zwölf sogenannte Nachfolgeprozesse statt, die aufgrund der zunehmenden Uneinigkeit der Alliierten von den

[1] Einen Überblick über die alliierten Prozesse bieten: N. Frei (Hg.), *Transnationale Vergangenheitspolitik. Der Umgang mit deutschen Kriegsverbrechen in Europa nach dem Zweiten Weltkrieg*, Göttingen 2006, zu den hier und nachfolgend genannten Zahlen, S. 31; K.C. Priemel, A. Stiller (Hrsg.), *NMT. Die Nürnberger Militärtribunale zwischen Geschichte, Gerechtigkeit und Rechtsschöpfung*, Hamburg 2013; A. Weinke, *Die Nürnberger Prozesse*, München 2006.

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Amerikanern allein geführt wurden. Sie richteten sich gegen führende Vertreter der Exekutive des NS-Staates aus den Bereichen Medizin, Justiz, Ministerien, SS und Polizei, Militär sowie der Industrie. Gesetzliche Grundlage für diese Prozesse war das Gesetz Nr. 10 des Alliierten Kontrollrats vom 20. Dezember 1945, das sich an das Statut des Internationalen Militärgerichtshofs anlehnte. Schon 1945 begannen außerdem in allen vier Besatzungszonen Militärgerichtsprozesse der jeweiligen Mächte, die sich unter anderem gegen das Personal von Konzentrationslagern richteten.

Von wenigen Ausnahmen abgesehen hatten all diese Prozesse Verbrechen zum Gegenstand, die in der Zeit des Weltkriegs zumeist an nichtdeutschen Staatsangehörigen begangen worden waren. Insgesamt wurden von den Alliierten in den westlichen Besatzungszonen in der Zeit von 1945 bis 1951 über 4000 Personen wegen NS-Verbrechen verurteilt.[2]

Die Grundlagen und Ergebnisse der westdeutschen Strafverfolgung

Auch die deutsche Justiz ahndete seit dem Herbst 1945 NS-Verbrechen. Die deutschen Gerichte waren zwar von den alliierten Besatzungsmächten zunächst geschlossen worden. Ab Juni 1945 konnten sie jedoch sukzessive ihre Arbeit wieder aufnehmen, allerdings mit gesäubertem Personal und unter alliierter Oberaufsicht. Außerdem blieb ihre Zuständigkeit in den ersten Jahren beschränkt auf Verbrechen begangen von Deutschen an Deutschen und Staatenlosen.[3] Rechtsgrundlagen dieser Ahndung waren das von wesentlichen NS-Bestimmungen gesäuberte deutsche Strafgesetzbuch sowie das alliierte Kontrollratsgesetz Nr. 10, aus dem fast ausschließlich die Strafbestimmung wegen Verbrechen gegen die Menschlichkeit zur Anwendung kam. Allerdings konnte dieses Gesetz, das anders als das Strafgesetzbuch auch eine rückwirkende Bestrafung ermöglichte, nach entsprechender Ermächtigung der Besatzungsmächte nur in der britischen und der französischen (wie auch der sowjetischen) Besatzungszone zur Anwendung gebracht werden, nicht jedoch – mit Ausnahme von Berlin – in der amerikanischen. Soweit möglich wendeten die Gerichte das Kontrollratsgesetz und das deutsche Strafgesetzbuch in Idealkonkurrenz an.

Seit 1948 wurden die alliierten Beschränkungen in der Gerichtsbarkeit langsam gelockert und zu Beginn des Jahres 1950 weitestgehend ganz aufgehoben. In Summe waren bis dahin (1945–1949) von deutschen Gerichten auf dem

[2] Die in der sowjetischen Besatzungszone bzw. der späteren DDR von der Besatzungsmacht und der ostdeutschen Justiz durchgeführten Prozesse bleiben in diesem Aufsatz mangels Vergleichbarkeit der Zahlen außerhalb der Betrachtung. Zu groß sind die Unterschiede bei den rechtlichen Grundlagen und den bestraften Tatbeständen. Außerdem wurden in Ostdeutschland in nicht wenigen Prozessen grundsätzliche rechtsstaatliche Garantien nicht beachtet.

[3] Vgl. dazu grundlegend E. Raim, *Justiz zwischen Demokratie und Diktatur. Wiederaufbau und Ahndung von NS-Verbrechen in Westdeutschland 1945–1949*, München 2013.

Gebiet der nunmehrigen Bundesrepublik (inklusive West-Berlin und dem bis 1955 autonomen Saarland) immerhin 4685 rechtskräftige Verurteilungen wegen NS-Verbrechen ergangen.[4]

Auch nach Gründung der Bundesrepublik Deutschland im Mai 1949 blieb die ordentliche Strafgerichtsbarkeit dem föderalistischen Staatsaufbau folgend Sache der in ihrer Mehrzahl schon 1945/46 gebildeten Bundesländer. Mit dem Bund betrat jedoch ein neuer justizpolitischer Akteur das Feld, der auf ein Ende der Entnazifizierungsmaßnahmen, eine Aufhebung von alliierten Gesetzen und eine Wiederherstellung der Rechtseinheit im Staatsgebiet drängte. Der Ende 1950 errichtete Bundesgerichtshof sollte als zentrales Obergericht für Revisionen in Strafsachen die Einheitlichkeit der Rechtsprechung garantieren.

Wesentliche Folgen sollte es haben, dass die Bundesregierung auch hinsichtlich der Ahndung von NS-Verbrechen ein striktes Rückwirkungsverbot von Gesetzen vertrat. Dieses Rückwirkungsverbot, das sich auf den weithin akzeptierten Rechtsgrundsatz „nullum crimen, nulla poena sine lege" stützte, war im 1949 verabschiedeten Grundgesetz der Bundesrepublik Deutschland (Artikel 103) verankert und setzte sich vom NS-Recht ab, wo dieser Grundsatz vielfach missachtet worden war. Auch die 1950 in Kraft gesetzte Europäische Menschenrechtskonvention bekennt sich zu ihm, lässt aber in Ausnahmefällen in einem gerade im Hinblick auf die Verbrechen des NS-Regimes eingefügten Zusatz eine Durchbrechung zu. Die Konvention wurde 1952 auch in das bundesdeutsche Recht übernommen, allerdings ausdrücklich ohne den eine rückwirkende Bestrafung ermöglichenden Passus. Ein Fortwirken des alliierten Kontrollratsgesetzes 10 zur Bestrafung von nationalsozialistischen Verbrechen oder dessen Übernahme in deutsches Recht lehnte der Bund in Konsequenz ebenfalls ab. 1951 erreichte er von den Briten und Franzosen für deren westdeutsche Besatzungszonen eine Rücknahme der Ermächtigung deutscher Gerichte zur Anwendung dieses Gesetzes; eine entsprechende Rücknahme für das Gebiet von West-Berlin folgte 1952. Von da an galt im Bundesgebiet einheitlich allein das deutsche Strafrecht als Rechtsgrundlage für die Ahndung von NS-Verbrechen.[5]

Das für die Bestrafung der alltäglichen Kriminalität geschaffene und auf individuelle Täterschaft zugeschnittene deutsche Strafgesetzbuch war jedoch wenig geeignet, dem kollektiven Charakter der organisierten Massenverbrechen des

[4] Die hier und im Folgenden genannten Zahlen beruhen auf einer Auswertung von im Archiv des Instituts für Zeitgeschichte in München zugänglichen Daten: Die Verfolgung von NS-Verbrechen durch deutsche Justizbehörden seit 1945. Datenbank aller Strafverfahren und Inventar der Verfahrensakten, bearbeitet im Auftrag des Instituts für Zeitgeschichte München-Berlin von Andreas Eichmüller und Edith Raim, München 2013. Für den vorliegenden Aufsatz wurden die Zahlen vom Autor bis ins Jahr 2019 aktualisiert.

[5] Zur Entwicklung in den 1950er Jahren vgl. A. Eichmüller, *Keine Generalamnestie. Die Strafverfolgung von NS-Verbrechen in der frühen Bundesrepublik*, München 2012.

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NS-Staates Rechnung zu tragen. Seine Täterzentrierung behinderte außerdem eine angemessene Berücksichtigung der Leiden der Opfer und der Bedürfnisse der Überlebenden. Zentrale rechtliche Fragen drehten sich um die Grenzziehung zwischen Mord und Totschlag oder Täterschaft und Beihilfe, um die Berücksichtigung des Unrechtsbewusstseins, von Befehls- oder anderen Notstandssituationen. Das Verbot einer rückwirkenden Bestrafung versuchte man in einigen Fällen mit besonders ausgeprägtem Unrechtsgehalt durch eine Berufung auf das Naturrecht oder ein „übergesetzliches Recht" (Gustav Radbruch) zu begegnen. Jedoch blieben das Einzelfälle. Allgemein setze sich eine weitgehend legalistische Rechtsauslegung durch, die eine Gültigkeit der ordentlich verkündeten NS-Gesetze akzeptierte, Befehle als schuldmindernd oder schuldausschließend berücksichtigte und stark auf die subjektive Seite des Täters rekurrierte.

Insgesamt wurden von westdeutschen und bundesrepublikanischen Staatsanwaltschaften in den Jahren 1945 bis einschließlich 2019 rund 37.000 strafrechtliche Ermittlungsverfahren wegen NS-Verbrechen gegen 175.000 namentlich benannte Beschuldigte geführt. In 5694 oder 16 Prozent aller eingeleiteten Verfahren wurde Anklage gegen 16.789 Beschuldigte erhoben. Ein rechtskräftiges Urteil erging gegen rund 14.000 Angeklagte. Von diesen wurden 6676, also etwas weniger als die Hälfte, verurteilt und 5190 freigesprochen. Gegen die übrigen 2120 Angeklagten verfügten die Gerichte eine Einstellung. Die Freisprüche erfolgten in den allermeisten Fällen, weil nach Ansicht der Richter die vorliegenden Beweise für eine Verurteilung nicht ausreichten. Die Einstellungen begründeten sich mit Amnestien oder einer Verjährung der Straftaten.

Sehen wir uns die Verurteilungen etwas genauer an, so ist festzustellen, dass sie größtenteils nur geringe Bestrafungen zur Folge hatten (siehe Schaubild 1). In 60% der Fälle betrug das Strafmaß weniger als ein Jahr, in 90% weniger als fünf Jahre Haft. Auf lebenslange Haft (und in den ersten Nachkriegsjahren vereinzelt auf Todesstrafe) lautete das Urteil nur in 3% der Fälle. Dies hatte vor allem damit zu tun, dass die Verurteilungen in überwiegendem Maß minderschwere Verbrechen betrafen (siehe Schaubild 2), wie Ausschreitungen gegen Juden beim Pogrom 1938, Misshandlungen von NS-Gegnern nach der Machtübernahme 1933 oder Denunziationen (zusammen 70% der Verurteilungen). Lediglich 15% aller Anklagen und 17% der Verurteilungen erfolgten wegen Tötungsdelikten. 70% der Verurteilungen datieren in die Jahre der Besatzung 1945 bis 1949.

Weichenstellungen in den 1950er Jahren

In der ersten Hälfte der 1950er Jahre gingen sowohl die Zahl der neu eingeleiteten Ermittlungsverfahren wegen NS-Verbrechen (siehe Schaubild 3) wie die der einschlägigen Anklagen und Verurteilungen trotz des Wegfalls der alliierten

Beschränkungen stark zurück.[6] Die Ursachen dieses Rückgangs waren vielschichtig. Zum Teil lagen sie in der Natur der Sache: Viele der minderschweren Straftaten, die die Ahndung in den späten 1940er Jahren dominiert hatten, waren weitgehend ausermittelt oder verjährt. Zum Teil manifestierte sich darin aber auch eine sich sowohl in Politik als auch Gesellschaft und Teilen der Justiz ausbreitende Schlussstrichmentalität.

Die Politik der ersten Bundesregierungen unter Bundeskanzler Konrad Adenauer grenzte sich zwar strikt vom Nationalsozialismus und politischen Extremen von rechts wie links ab. Sie bekannte sich auch zu einer Entschädigung von Opfern politischer, „rassischer" und religiöser Verfolgung sowie zu einer Bestrafung von NS-Verbrechen. Ausgangspunkt dabei war allerdings, dass die Zahl der „wirklichen Verbrecher" gering gewesen sei, die Masse der Bevölkerung sich eine Distanz zum Nationalsozialismus bewahrt habe oder von der relativ kleinen Führungsriege der Nationalsozialisten verführt worden sei.

Allgemein war die Politik darauf ausgerichtet, die durch Kriegsniederlage, Besatzungsherrschaft, Entnazifizierung und Flüchtlingszustrom aus den Fugen geratene westdeutsche Gesellschaft zu stabilisieren und gesellschaftliches Konfliktpotential abzubauen oder zu beruhigen. Sie setzte auf ein rasches Ende der Entnazifizierung und eine Reintegration der Masse der Funktionäre und Parteigenossen des NS-Staates. Das führte nicht zuletzt in den für die Strafverfolgung zentralen Bereichen Justiz und Polizei zu weitreichenden personellen Kontinuitäten zur NS-Zeit. Die meisten der von den Alliierten wegen NS-Belastung entlassenen Richter und Staatsanwälte konnten, befördert durch den allgemeinen Personalmangel in den Justizverwaltungen und die milde Beurteilung ihrer Tätigkeit in den Jahren 1933 bis 1945, bald wieder in den Justizdienst zurückkehren.[7]

Das Denken weiter Kreise der bundesdeutschen Bevölkerung war bestimmt von einer Mischung aus Schuldabwehr, und Leidensaufrechnung, Hinwendung des Blicks auf Existenzsicherung und Wiederaufbau sowie einem Wunsch nach Normalisierung, Sicherheit und Ruhe. Dieses gesellschaftliche Klima begünstige eine nationalistische Gnadenkampagne für die von den Alliierten verurteilten NS- und Kriegsverbrecher, die bald nur noch als „Kriegsverurteilte" bezeichnet wurden. Der Unterschied zwischen Kriegs- und NS-Verbrechen wurde dabei nahezu ganz verwischt. Der Kampagne mangelte es nicht an Unterstützung aus den Reihen der Kirchen und der großen politischen Parteien.

[6] Zur Entwicklung der jährlichen Zahlen vgl. A. Eichmüller, *Die Strafverfolgung von NS-Verbrechen durch westdeutsche Justizbehörden seit 1945. Eine Zahlenbilanz*, in: *Vierteljahrshefte für Zeitgeschichte*, 56 (2008), S. 621–640.

[7] Zu den personellen Kontinuitäten im Justizbereich vgl. H. Rottleuthner, *Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945*, Berlin 2010.

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Sie mündete in einer Begnadigungswelle der West-Alliierten, die die Deutschen als Bündnispartner im Kalten Krieg brauchten, und das führte dazu, dass im Laufe der 50er Jahre auch schwerster Verbrechen schuldige Einsatzkommandoführer aus alliierter Haft frei kamen. Parallel zur Aufstellung neuer Streitkräfte wurde der deutschen Wehrmacht jegliche Schuld an den Verbrechen des NS-Regimes abgesprochen.

Die Bundespolitik zeigte sich unter Federführung des Bundesjustizministeriums hinsichtlich der Ahndung von nationalsozialistischen Verbrechen sehr nachsichtig. Ende 1949 und 1954 erließ der Bund zwei Amnestien, die sich auch auf NS-Verbrechen erstreckten. Die erste stellte neben Vergehen aus der Besatzungszeit auch NS-Verbrechen bis zu einer Strafhöhe von sechs Monaten Haft und damit mehrere tausend minderschwere Taten straffrei. Die zweite begünstigte zwar auch Täter von Tötungsverbrechen, aber aufgrund ihrer Beschränkung auf in der Kriegsendphase ab September 1944 begangene Straftaten bis zu einer Höhe von drei Jahren Haft, nur recht wenige. Vorhandene Pläne für eine umfassendere Strafbefreiung ließen sich politisch nicht durchsetzen. Die Hoffnung der Amnestielobby, die auf eine Art Generalamnestie spekuliert hatte, wurde damit aber enttäuscht und klargestellt, dass NS-Verbrechen auch weiterhin strafrechtlich verfolgt werden sollten.

1955 begannen dann die Zahl der neu eingeleiteten Ermittlungsverfahren und auch der Anklagen wegen NS-Verbrechen wieder leicht zu steigen. Bei der gängigen Einleitungspraxis für Strafverfahren blieb jedoch insbesondere bei im Ausland begangenen Straftaten wie den Massenmorden an Juden in Osteuropa nach wie vor Vieles dem Zufall überlassen. Reagierten die Behörden doch nur entweder auf Anzeigen von Bürgern oder wurden von Amts wegen tätig, wenn sich eine Tat in ihrem Amtsbezirk ereignet hatte oder der Täter eines ihnen bekannten Verbrechens im Amtsbezirk wohnhaft war.

Dabei war der Holocaust in Osteuropa keineswegs eine völlige Blindstelle der Strafverfolgung der 1950er Jahre. So gab es Prozesse etwa zu den Vernichtungslagern Auschwitz, Sobibor und Treblinka oder zu mehren Gettos und Zwangsarbeitslagern in Polen und sogar zur Erschießung von Juden durch eine Wehrmachtseinheit. Jedoch standen dabei meist einzelne oder eine kleine Gruppe von Tätern vor Gericht. Eine systematische Aufklärung der jeweiligen Verbrechenskomplexe war meist gescheitert oder ganz unterblieben, vor allem weil es den einzelnen Staatsanwaltschaften an personellen Ressourcen, an Erfahrungen mit derartigen Ermittlungen und an historischem Wissen fehlte.

Die Justiz entwickelte erst relativ spät im Zusammenhang mit den Ermittlungen zum sogenannten Ulmer Einsatzgruppenprozess ein Gespür für diese Defizite. Mitte 1958 ergriff schließlich der Stuttgarter Generalstaatsanwalt Erich Nellmann die Initiative für eine Systematisierung und Zentralisierung

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der Ermittlungen. Er erhielt tatkräftige Unterstützung seitens der Medienöffentlichkeit. Eine Reihe von Journalisten und Intellektuellen setzte sich seit Mitte des Jahrzehnts zunehmend kritischer mit der bisherigen Strafverfolgungspraxis und dem bundesdeutschen Umgang mit der NS-Vergangenheit überhaupt auseinander. Nicht zuletzt das beförderte eine Einigung von Bund und Ländern für die Schaffung einer „Zentralen Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen" zum 1. Dezember 1958. Diese übernahm fürderhin systematische Vorermittlungen und Koordinierungsaufgaben; selbst Anklage erheben durfte sie jedoch nicht, sondern musste zu diesem Zweck die Verfahren an die zuständigen Staatsanwaltschaften der Länder abgeben. Trotz ihrer komplizierten Konstruktion als Kooperationsbehörde der Bundesländer sowie ihrer beschränkten Kompetenzen und Zuständigkeiten erlangte sie in den nachfolgenden Jahren als Ausgangspunkt für zahlreiche neue Ermittlungen rasch eine herausragende Rolle bei der Strafverfolgung von NS-Verbrechen.[8] Im ersten Jahr ihres Bestehens leitete die Stelle über 400 Vorermittlungsverfahren ein. Im Zentrum ihrer Arbeit stand dabei die Ermordung der Juden im von deutschen Truppen besetzten Osteuropa in Vernichtungslagern, durch Einsatzkommandos oder örtliche Sicherheitspolizeidienststellen.

Dass es 13 Jahre nach dem Ende der NS-Herrschaft zu dieser Wende in der Strafverfolgungspraxis und damit zu einer Intensivierung der Ahndung von NS-Verbrechen kam, war auf der einen Seite durchaus bemerkenswert. Politisch konnte dies auf der anderen Seite aber nur durchgesetzt werden, weil man davon ausging, die bislang noch nicht geahndeten schweren Verbrechen innerhalb einer relativ kurzen Zeit erledigen zu können. Entsprechend gering fiel die personelle Ausstattung der Zentralen Stelle zunächst aus. Und man hatte sich stillschweigend darauf geeinigt, nur die Täter mit Befehlsverantwortung oder Befehlsüberschreitung zu verfolgen. Die sogenannten kleinen Täter am Ende einer Befehlskette, also etwa die Schützen bei Massenerschießungen, sollten mit Berufung auf einen Notstand straffrei bleiben.

Die Entwicklung nach Gründung der Zentralen Stelle

In der ersten Hälfte der 1960er Jahre stiegen nicht zuletzt infolge der Arbeit der Zentralen Stelle die Zahl der neuen Ermittlungsverfahren wie auch der Anklagen und Verurteilungen wegen NS-Verbrechen vorübergehend wieder etwas an (siehe Schaubilder 3 und 4). Gegenstand der Prozesse waren nun meist schwerste Delikte wie Tötungsverbrechen und Massenmorde in Konzentrations- und

[8] Vgl. A. Weinke, *Eine Gesellschaft ermittelt gegen sich selbst. Die Geschichte der Zentralen Stelle Ludwigsburg 1958–2008*, Darmstadt 2008.

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Vernichtungslagern oder Massenerschießungen von Juden durch SS- und Polizei-Einheiten.[9]

Hervorzuheben ist hier vor allem der Frankfurter Auschwitz-Prozess, der hinsichtlich Dauer, Anlage, Umfang und Publizität einen für die damalige Zeit außergewöhnlichen Charakter trug.[10] Nach rund fünf Jahren Ermittlungen verhandelte das Gericht ab Dezember 1963 20 Monate lang bis August 1965 gegen 22 Angeklagte. 360 Zeuginnen und Zeugen wurden im Prozessverlauf vernommen, darunter 221 Überlebende des Lagers. Diese kamen nahezu aus der ganzen Welt nach Frankfurt. Eine Besonderheit war außerdem, dass sich das Gericht im Dezember 1964 zu einem Lokaltermin nach Auschwitz in Polen und damit in ein kommunistisch regiertes Land begab, mit dem keine diplomatischen Beziehungen bestanden. Die öffentliche Resonanz auf den Prozess war enorm. Insgesamt besuchten etwa 20.000 Menschen die Verhandlungen, darunter Schüler- und Studentengruppen. Zeitungen und Rundfunk berichteten nahezu von jedem Sitzungstag; viele hatten Sonderkorrespondenten vor Ort. Der Prozess hatte damit eine wichtige aufklärende Wirkung hinsichtlich der Verbrechen des NS-Regimes.

Die Anlage des Prozesses und sein aufklärerischer Impetus waren vor allem dem Frankfurter Generalstaatsanwalt Fritz Bauer geschuldet. Er hatte das ursprünglich in Stuttgart anhängige Auschwitz-Verfahren in seinen Zuständigkeitsbereich geholt, weil er die Chance sah, die komplizierten historischen Zusammenhänge und grauenhaften Vorgänge in diesem Konzentrations- und Vernichtungslager, in dem mehr als eine Million Menschen umgebracht worden waren, in einem Großverfahren darzustellen und damit auch das Menschheitsverbrechen der Ermordung der europäischen Juden in der bundesdeutschen Erinnerung zu verankern. Für den Prozess setzte Bauer in bis dahin ungewöhnlichem Maß auf die Unterstützung durch Historiker. Er ließ vom Institut für Zeitgeschichte in München mehrere Fachgutachten erstellen mit dem Ziel, das Gesamtgeschehen und den historisch-politischen Kontext der Verbrechen in den Prozess einzuführen. Das war seiner Ansicht nach in den bisherigen NS-Prozessen nur sehr unzureichend geschehen. Die Folge war gewesen, dass es den Verteidigern der Angeklagten gelungen war, die Taten vom

[9] Vgl. zu den 1960er Jahren M. von Miquel, *Ahnden oder amnestieren? Westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren*, Göttingen 2004; M. Greve, *Der justitielle Umgang mit den NS-Gewaltverbrechen in den sechziger Jahren*, Frankfurt/Main u. a. 2001.

[10] Vgl. Fritz Bauer Institut, *Tonband-Mitschnitt des 1. Frankfurter Auschwitz-Prozesses*, http://www.auschwitz-prozess.de, abgerufen 5.1.2020; W. Renz, *Auschwitz vor Gericht. Fritz Bauers Vermächtnis und seine Missachtung*, Hamburg 2018; I. Wojak, *Fritz Bauer 1903–1968. Eine Biographie*, München 2009; D.O. Pendas, *The Frankfurt Auschwitz Trial, 1963–1965. Genocide, History, and the Limits of the Law*, Cambridge 2006.

Gesamtgeschehen zu isolieren und die Gerichte diese nur als Einzelfälle und nicht als Teil eines Ausrottungsplans gewürdigt hatten.

Mit dem Ausgang des Prozesses konnte Fritz Bauer allerdings nur zum Teil zufrieden sein. Das Gericht verurteilte lediglich sechs Angeklagte wegen Mordes (zu lebenslanger Haft), die meisten hingegen nur wegen Beihilfe zum Mord zu zeitlich befristeten Haftstrafen (zwischen dreieinhalb und 14 Jahren), drei Angeklagte wurden freigesprochen. Anders als von Bauer beabsichtigt hatten die Richter nicht alle Angeklagten als Mittäter eines groß angelegten Massenmordes eingestuft. Ausschließlich diejenigen Angeklagten, die eigenhändig und eigenverantwortlich getötet hatten, waren wegen Mordes zur Höchststrafe verurteilt worden. Die übrigen, auch der mit weitreichenden Befehlsvollmachten ausgestattete Adjutant des Lagerkommandanten, nur als Gehilfen von Hitler, Himmler und einigen anderen Hauptverantwortlichen. Die Rechtsprechung der westdeutschen Justiz in NS-Prozessen, die für die Zuerkennung einer Täterschaft, den Beweis dafür verlangte, dass der Täter, selbst wenn er eigenhändig getötet hatte, die Tat auch als eigene gewollt hatte, war schon seit Beginn der 1960er Jahre häufig angeprangert worden. Sie hatte in manchen Fällen dazu geführt, dass bei tausendfachen Morden Strafen unter fünf Jahren Haft ausgesprochen worden waren.[11] Diese Rechtsprechung war 1966 auch Gegenstand einer sie kritisierenden sogenannten Königsteiner Entschließung des Deutschen Juristentags, die jedoch nur wenig an der Urteilspraxis änderte.

Nicht zuletzt solche rechtlichen Figuren und Auslegungen führten dazu, dass die kleine Welle an Prozessen in den 1960er Jahren die Gesamtbilanz der Strafverfolgung von NS-Verbrechen nur noch in begrenztem Maß verbessern konnte.[12] Hinzu kamen die Verjährung aller vor 1945 begangenen Straftaten außer Mord im Mai 1960 und der wachsende zeitliche Abstand zu den Taten, der eine Ahndung erschwerte. Zeugen und Täter wurden immer älter, waren gesundheitlich nicht mehr in der Lage, Prozesse durchzustehen, oder verstarben.

Außerdem ließ die Ermittlungsintensität in den 1970er Jahren wieder nach. Und die Ablehnung derartiger Prozesse in der bundesdeutschen Bevölkerung wuchs sogar noch an. Hatten sich nach Meinungsumfragen 1965 gut die Hälfte (52%) der Befragten gegen eine Fortsetzung der strafrechtlichen Verfolgung von NS-Verbrechen ausgesprochen, so waren es 1978 fast zwei Drittel (65%).[13]

[11] Vgl. zur Beihilferechtsprechung und anderen entschuldenden Rechtskonstruktionen K. Freudiger, *Die juristische Aufarbeitung von NS-Verbrechen*, Tübingen 2002.

[12] Seit 1960 erfolgten noch 554 rechtskräftige Verteilungen. Diese entsprachen dann allerdings fast der Hälfte aller Verurteilungen wegen Tötungsverbrechen seit 1945. Die Höchststrafe, also lebenslange Haft, erhielten von den 554 Verurteilten jedoch nur 114, was aber wiederum fast zwei Drittel aller Höchststrafen waren, die westdeutsche Richter wegen NS-Verbrechen überhaupt verhängten.

[13] Vgl. E. Noelle, E.P. Neumann (Hrsg.), *Jahrbuch der öffentlichen Meinung 1965–1967*, Allensbach–Bonn 1967, S. 165; Emnid-Informationen Nr. 11/12, 1978, S. 10.

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Zahlreiche SS-Männer, die in Konzentrations- und Vernichtungslagern Dienst getan hatten, kamen immer noch genauso ungeschoren davon, wie Mitglieder von Erschießungskommandos oder führende Gestapobeamte. Ein besonders unschönes Kapitel stellt die faktische Strafbefreiung der eigenen Profession durch die bundesdeutschen Strafverfolger dar. Kein Richter und kein Staatsanwalt wurde wegen seiner Tätigkeit in der ordentlichen Justiz des nationalsozialistischen Staates rechtskräftig verurteilt, auch nicht die Richter der von den Nationalsozialisten geschaffenen Sondergerichte und des Volksgerichtshofs.[14]

Die bundesdeutsche Politik war Mitte der 1960er Jahre in der Frage der Fortsetzung der strafrechtlichen Verfolgung von NS-Tätern gespalten. 1965 drohte aufgrund der geltenden Verjährungsfrist für Mord von 20 Jahren ein Ende der juristischen Aufarbeitung. Wie schon sein Amtskollege 1960, als man Totschlag hatte verjähren lassen, sprach sich Bundesjustizminister Ewald Bucher in dieser Situation gegen ein Eingreifen des Gesetzgebers aus. Nach heftiger Kritik aus dem Ausland und intensiven und kontroversen Debatten rang sich der Deutsche Bundestag jedoch dazu durch, den Beginn der Verjährungsfristen auf das Datum der Aufhebung aller alliierten Vorbehalte zum 1. Januar 1950 festzusetzen und die Verjährung damit um vier Jahre hinauszuschieben.

Eine gewichtige Rolle in den Debatten spielten die in den Archiven osteuropäischer Staaten zahlreich vorhandenen Akten aus der NS-Zeit. Diese hatten von den bundesdeutschen Ermittlern bis dahin noch kaum ausgewertet werden können. In ihnen wurden jedoch Hinweise auf viele bislang noch nicht bekannte NS-Verbrechen vermutet. Aufgrund des Kalten Krieges und der deutschen Teilung gestalteten sich die Rechtsbeziehungen nach Osteuropa sehr schwierig. Einerseits lehnte die Bundesregierung offizielle Kontakte insbesondere nach Ost-Berlin ab. Anderseits verweigerten die Ostblockstaaten – abgesehen von Einzelfällen – lange Zeit eine Unterstützung der westdeutschen Justiz oder nutzten wie die DDR die dort vorhandenen Akten vor allem zu Versuchen, mit der Offenlegung von NS-Belastungen bundesdeutsches Führungspersonal und damit den westdeutschen Staat insgesamt zu delegitimieren. Nachdem die Bundesregierung 1964 zwecks rechtzeitiger Unterbrechung der Fristen vor Eintritt der Verjährung entsprechende Ansuchen ausgesendet hatte, kündigten die CSSR, die DDR und Polen an, sie würden Dokumentenmaterial über NS-Verbrechen zur Verfügung stellen oder Einsicht in ihre Akten gewähren. Am günstigsten entwickelte sich dabei trotz mancher Irritationen die Zusammenarbeit mit Polen.

[14] Verurteilt wurden lediglich drei Richter bzw. Staatsanwälte wegen ihrer Mitwirkung an Standgerichtsurteilen zu Kriegsende. Zum Umgang mit NS-Justizverbrechen vgl. allgemein A. Hoeppel, *NS-Justiz und Rechtsbeugung. Die strafrechtliche Ahndung deutscher Justizverbrechen nach 1945*, Tübingen 2019; zum Volksgerichtshof A. Eichmüller, *Ausgebliebene Ahndung. Die Juristen des Volksgerichtshofs nach 1945*, in: Stiftung Topographie des Terrors (Hg.), *Der Volksgerichtshof 1934–1945. Terror durch „Recht"*, Berlin 2018, S. 287–294.

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Schon im Februar 1965 fuhr eine Delegation der Zentralen Stelle zwecks Sichtung von Akten zur Polnischen Hauptkommission nach Warschau.[15]

In der Folge wurde klar, dass die Fülle des Aktenmaterials und die sich daraus ergebenden Hinweise auf NS-Verbrechen auch nicht bis zum Eintritt der verschobenen Verjährung im Jahr 1969 in befriedigendem Maß ausgewertet werden konnten. Mit inspiriert von der UNO-Resolution über die Unverjährbarkeit von Kriegsverbrechen und Verbrechen gegen die Menschlichkeit aus dem Jahr 1968, brachte die SPD-geführte Bundesregierung 1969 in den Bundestag einen Gesetzentwurf zur völligen Aufhebung der Verjährung für Mord ein. Dieser ließ sich jedoch politisch nicht durchsetzen. Beschlossen wurde allerdings eine Verlängerung der Verjährungsfrist um zehn auf nunmehr 30 Jahre. 1979, als die Verjährung erneut anstand, hob der Bundestag die Frist dann mit relativ knapper Mehrheit ganz auf. Mord verjährt seitdem in der Bundesrepublik nicht.

Ende der 1970er Jahre hatte sich das gesellschaftliche und politische Klima auch hinsichtlich des Umgangs mit der NS-Vergangenheit stark verändert. Dafür verantwortlich war nicht zuletzt die Ausstrahlung der vierteiligen US-amerikanischen Serie „Holocaust" im bundesdeutschen Fernsehen im Jahr 1978. Sie hatte vor allem in der jungen Generation die Empathie für die Opfer der NS-Verbrechen erheblich anwachsen lassen. Und so sprach sich nun in einer Meinungsumfrage auch eine Mehrheit der Bundesbürger für eine Fortsetzung der strafrechtlichen Ahnung von NS-Verbrechen aus.[16]

Konterkariert wurde die Verlängerung und dann Aufhebung der Verjährungsfristen durch eine Strafbefreiung für viele Beihilfetaten sozusagen durch die Hintertür. Schon länger hatte eine Gruppe von Politikern und Interessenvertretern eine Amnestierung von Gehilfen bei NS-Verbrechen gefordert. 1968 sollte sie auf einem ungewöhnlichen Weg zu einem partiellen Erfolg kommen. Der Bundestag beschloss ohne Debatte und mit großer Mehrheit das „Einführungsgesetz zum Gesetz über Ordnungswidrigkeiten", das an sich mit der Ahndung von NS-Verbrechen nichts zu tun hatte. Das Gesetz bestimmte allerdings, dass Gehilfen zwingend milder bestraft werden mussten als die Täter, wenn ihnen eigene niedere Beweggründe nicht nachgewiesen werden konnten. Nach einer dann vom Bundesgerichtshof bestätigten Auslegung verringerte sich damit auch die an die Höhe der Strafandrohung gekoppelte Verjährungsfrist für Gehilfen,

[15] Vgl. A. Rückerl, *NS-Verbrechen vor Gericht. Versuch einer Vergangenheitsbewältigung, Heidelberg* 1982, S. 168 ff.; P. Gulińska-Jurgiel, *Gemeinsame oder getrennte Wege? Kontakte zwischen Polen und Westdeutschland zur justiziellen Aufarbeitung von NS-Verbrechen bis zum Beginn der 1970er-Jahre*, in: *Zeithistorische Forschungen/Studies in Contemporary History* 2019, 16, S. 300–320.

[16] Vgl. Emnid-Informationen Nr. 2, 1979, S. 10 ff.; F. Bösch, *Zeitenwende 1979. Als die Welt von heute begann*, München 2019, S. 363 ff.

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und das bedeutete, dass alle derartigen Taten, die in der NS-Zeit begangen worden waren, bereits 1960 verjährt waren.[17]

Bei der vorherrschenden Rechtsprechung, den größten Teil der NS-Täter nur als Gehilfen zu verurteilen, beeinträchtigte dies die weitere Ahnung von NS-Verbrechen ganz erheblich. Von dieser Regelung profitierten nicht nur „kleine" Gehilfen, sondern auch sogenannte Schreibtischtäter wie etwa die Bediensteten des Reichssicherheitshauptamts. Die Auswirkungen dieses Gesetzes sollten allerdings auch nicht überschätzt werden, da sich an der allgemein milden Beurteilung von NS-Verbrechen in der Bundesrepublik bis in die 1990er Jahre wenig änderte und Richter und Staatsanwälte in vielen Fällen auch andere Gründe gefunden hätten, die Täter nicht zu bestrafen.

Fazit

Aus heutiger Sicht stellt sich die Strafverfolgung von NS-Verbrechen in der Bundesrepublik trotz der lang andauernden Bemühungen als im Gesamten wenig gelungen und in manchen Punkten ganz gescheitert dar. Insbesondere gegenüber den Opfern der NS-Herrschaft bleibt ein dauerhaftes eklatantes Gerechtigkeitsdefizit, das sich in einen zumindest in den ersten Jahrzehnten wenig emphatischen Umgang mit den Leiden der vom NS-Regime verfolgten und malträtierten Überlebenden einbettet.

Nach moralischen Maßstäben gemessen fällt das Urteil deshalb ziemlich eindeutig aus. Aus historischer Perspektive jedoch muss man differenzieren und nach Erklärungen suchen. Auch weil das Beispiel der Bundesrepublik Deutschland nur so zur Erhellung der auch heute aktuellen Frage beitragen kann, mit welchen Problemen sich postdiktatorische Gesellschaften bei der strafrechtlichen Aufarbeitung ihrer Vergangenheit konfrontiert sehen.[18]

Die Gründe für das insgesamt magere Ergebnis der strafrechtlichen Ahndung waren vielfältig. Grundsätzlich ist festzuhalten, dass eine allen Gerechtigkeitserwägungen entsprechende und alle Untaten erfassende juristische Ahndung der millionenfachen Morde und anderen Verbrechen des NS-Regimes von vorneherein kaum möglich war. Außerdem war eine rechtsstaatlich operierende Strafjustiz mit all ihren gesetzlichen Garantien für Beschuldigte und Angeklagte nicht in der Lage, eine gesellschaftliche und moralische Auseinandersetzung mit dem vergangenen NS-Unrecht zu ersetzen. Eine besondere

[17] Die Frage, ob diese Rechtsfolge von interessierten Kreisen im Bundesjustizministerium bewusst herbeigeführt oder zumindest sehenden Auges nicht verhindert wurde, hat schon mehrere Historiker und Juristen beschäftigt; vgl. zuletzt M. Görtemaker, C. Safferling, *Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit*, München 2016, 400 ff.

[18] Vgl. zum Beispiel S. Buckley-Zistel, T. Kater (Hrsg.), *Nach Krieg, Gewalt und Repression. Vom schwierigen Umgang mit der Vergangenheit*, Baden-Baden 2011; J. Elster, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge 2004.

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Schwierigkeit lag darin, ein von einer Massenbewegung zur Macht gebrachtes und sich breiter gesellschaftlicher Unterstützung erfreuendes diktatorisches Unrechtsregime in ein demokratisches, freiheitliches und rechtsstaatliches politisches System umzuformen. Wollte man die junge Demokratie stabilisieren, gab es kaum eine Alternative dazu, die meisten der zahlreichen ehemaligen Anhänger und Unterstützer des Nationalsozialismus in den neuen Staat zu integrieren und nur bei einem kleineren Teil Konsequenzen für deren Handeln in der Vergangenheit zu fordern. Wo man allerdings die Grenze bei dieser Integrationspolitik ziehen wollte, war entscheidend. Und hier setzte sich in der frühen Bundesrepublik ein sehr großzügiger Kurs durch. Die Rahmenbedingungen für eine juristische Ahndung von NS-Verbrechen waren deshalb fast von Beginn an wenig günstig. Weder die Politik noch die Bevölkerung waren mehrheitlich bis Ende der 1970er Jahre an einer breiteren Aufarbeitung der NS-Vergangenheit interessiert. Damit einhergehend behinderten personelle Kontinuitäten gerade auch in Justiz und Polizei die Ahndung und führten zu entschuldigenden Rechtskonstruktionen und milden Bestrafungen.

Hinzu kamen Probleme in der Rechtsprechung und der juristischen Praxis. Das seit 1950 für die Ahndung allein maßgebliche bundesdeutsche Strafrecht ist für eine adäquate Be- und Aburteilung der staatlich organisierten Massenverbrechen des NS-Staates nur bedingt geeignet. Zudem gestalteten sich die Ermittlungen in vielen Fällen langwierig und beschwerlich, die Beweisführung schwierig, und es mangelte Richtern und Staatsanwälten zumindest in den ersten Jahren am notwendigen ermittlungstechnischen und historischen Wissen. Solches Wissen stellte gerade auch die Geschichtswissenschaft lange Zeit nur sehr unzureichend bereit. Im Gegenteil wurde die Justiz zum Vorreiter oder Initiator (Auschwitz-Prozess) bei der Produktion und Verbreitung von historischem Wissen über NS-Verbrechen. Trotz aller Unzulänglichkeiten brachten die NS-Prozesse, die ein weites Spektrum der nationalsozialistischen Untaten abgedeckten, die Straftaten immer wieder ins Licht der Öffentlichkeit und trugen damit wesentlich dazu bei, die gesellschaftlichen Debatten über den richtigen Umgang mit der NS-Vergangenheit lebendig zu erhalten.

Letztlich fehlte es der bundesdeutschen Justiz wie auch der Politik aber an Erfahrungen und Vorbildern, wie man adäquat mit einem derart blutigen Erbe umgehen konnte. Erst in einem langsamen Lernprozess, der sich weit in die Gegenwart hinein ziehen sollte, setzte sich unterstützt vom Generationenwechsel die Einsicht durch, dass alte Verarbeitungsmuster wie Vergessen und Verschweigen angesichts des Ausmaßes der von Deutschen während der NS-Zeit begangenen Verbrechen nicht angemessen und darüber hinaus auch nicht geeignet waren, das deutsche Ansehen in der Welt wiederherzustellen, sondern dass im Gegenteil die Würde der Opfer und die Notwendigkeit, Lehren aus der NS-Herrschaft zu

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ziehen, einen offensiven Umgang mit der Vergangenheit und ein Erinnern an die Verbrechen verlangten.

„Vieles hatte man sich vorgenommen. Vieles wurde nicht geschafft. Aber es wurden Zeichen gesetzt. Ein Versuch nur – immerhin ein Versuch". So bilanzierte der langjährige Leiter der Zentralen Stelle Adalbert Rückerl im Jahr 1984 die Arbeit seiner Behörde und die Bemühungen der bundesdeutschen Justiz um eine strafrechtliche Ahndung der nationalsozialistischen Verbrechen.[19]

Anhang

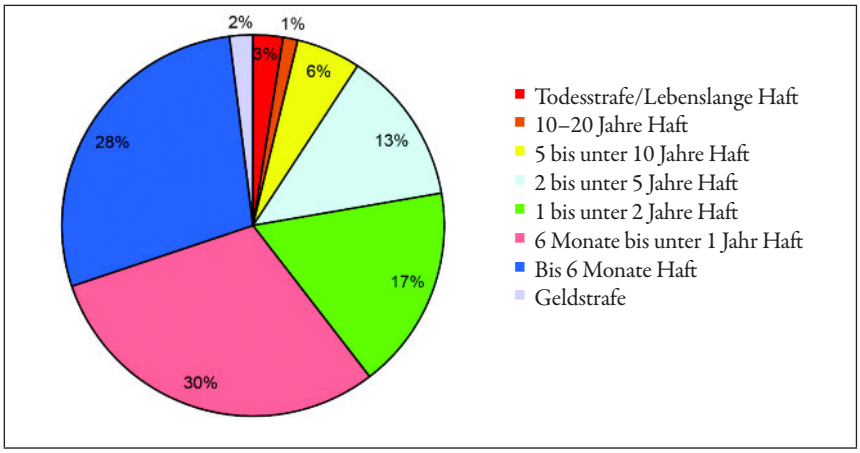

Schaubild 1: Rechtskräftige Verurteilungen wegen NS-Verbrechen in den Westzonen und der Bundesrepublik Deutschland 1945–2019 nach Strafmaß

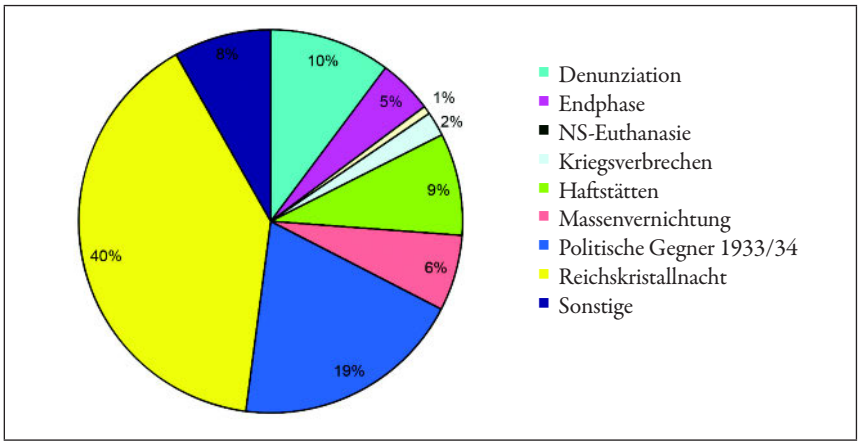

Schaubild 2: Rechtskräftige Verurteilungen nach Verbrechenskomplexen

[19] A. Rückerl, *NS-Verbrechen* (wie Anm. 15), S. 325.

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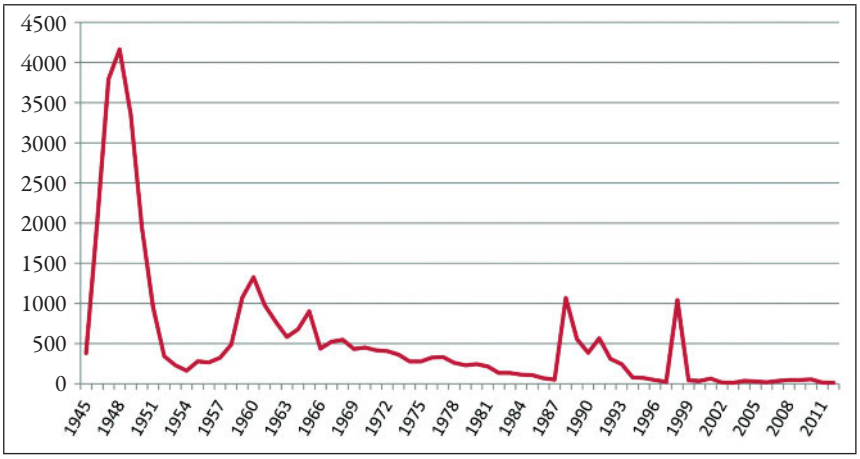

Schaubild 3: Jährlich neu eingeleitete Ermittlungsverfahren wegen NS-Verbrechen

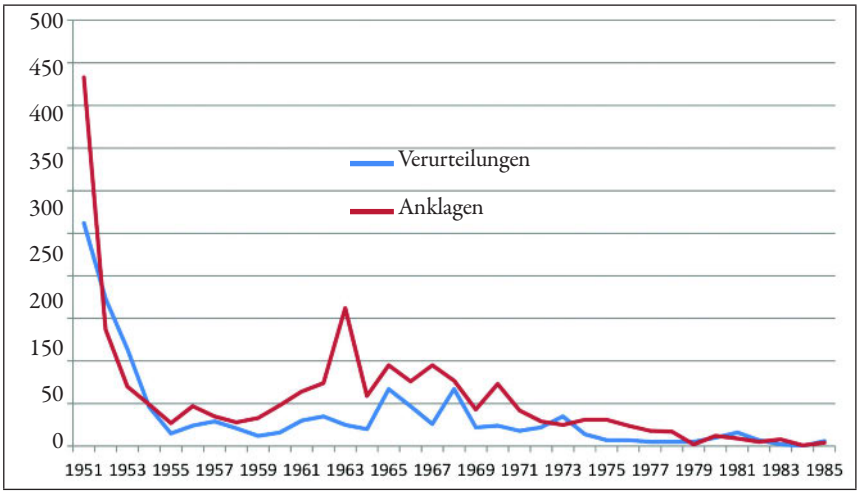

Schaubild 4: Anklagen und rechtskräftige Verurteilungen wegen NS-Verbrechen pro Jahr 1951–1985

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Prosecution of Nationalist Socialist Crimes by the Criminal Law of the Federal Republic of Germany – balance and strategy

Abstract

The results of the West German punishment of National Socialist crimes are ambiguous. Long efforts with 37,000 investigations against 175,000 accused face a meager result of almost 6700 convictions, including only 1154 for homicides. In view of the millions of murders committed by the Nazi regime and the hundreds of thousands of perpetrators, this outcome cannot satisfy, much less if the focus is on the aspect of justice towards the victims and their relatives. There were many reasons for this disproportion. Last but not least, they refer to the fundamental problems of post-dictatorial societies in the transition to stable democratic and constitutional conditions.

Keywords: Nazi Crimes, War Crimes Trials, German Post-War Justice, Transitional Justice

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Manfred Görtemaker

Das Bundesministerium der Justiz 1949–1973 und die NS-Zeit: Kontinuität und demokratischer Neuanfang – Ein historischer Rückblick

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Die Bundesrepublik Deutschland wird zumeist als eine Erfolgsgeschichte beschrieben: politisch stabil, wirtschaftlich prosperierend und mit einer freiheitlich-demokratischen Grundordnung versehen, die ihresgleichen sucht. Und dies alles seit nunmehr über siebzig Jahren – trotz der moralischen Zerrüttung nach den Verbrechen des NS-Regimes, vor allem dem Holocaust, den materiellen Zerstörungen als Folge des verheerenden Krieges, der Notwendigkeit, Millionen Flüchtlinge und Vertriebene aus den ehemaligen deutschen Ostgebieten zu integrieren und schließlich nach 1989/90 die Umbrüche der Wiedervereinigung zu meistern.[1]

Zweifellos ist der Neuaufbau nach dem Zivilisationsbruch, den das „Dritte Reich" bedeutete, alles in allem gelungen. Die demokratischen Institutionen haben funktioniert, während die Hinterlassenschaften des NS-Regimes immer mehr in den Hintergrund rückten. Aber diese vordergründige Erfolgsgeschichte hatte auch eine dunkle Kehrseite. Dies gilt für alle Bereiche der Gesellschaft: in der Wirtschaft ebenso wie in der Politik, in Wissenschaft und Kultur ebenso wie in der staatlichen Verwaltung und in den Medien – und natürlich auch in der Justiz. Überall war der Neubeginn nach 1945 mit einem hohen Maß an Kontinuität verbunden, vor allem in personeller Hinsicht. Denn die alliierte Politik der „Entnazifizierung" erwies sich als schwierige bürokratische Prozedur, die schon bald an ihren eigenen Ansprüchen scheiterte. Da sie nicht nur die Elite, sondern die gesamte Bevölkerung auf ihre nationalsozialistische Belastung hin zu durchleuchten suchte, war die Aufgabe schlicht gigantisch: Etwa 8,5 Millionen Deutsche, rund 10 Prozent der Bevölkerung, waren Mitglieder der NSDAP gewesen. Sehr viel mehr noch – insgesamt über 45 Millionen – hatten Organisationen angehört, die von der NSDAP kontrolliert wurden.[2] Und selbst jene,

[1] Siehe zum Beispiel E. Wolfrum, *Die geglückte Demokratie. Geschichte der Bundesrepublik Deutschland von ihren Anfängen bis zur Gegenwart*, Stuttgart 2006.

[2] Zahlenangaben nach: K.-D. Henke, *Die amerikanische Besetzung Deutschlands* (Quellen und Darstellungen zur Zeitgeschichte, Bd. 27), 2. Aufl., München 1996, S. 579.

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die keine direkten Verbindungen zu NS-Organisationen aufwiesen, waren von ihrem „Mittun" und damit ihrer Mittäterschaft und Mitverantwortung für die nationalsozialistischen Verbrechen nicht freizusprechen. Widerstand hatte es nur im Ausnahmefall gegeben. Zudem zeigten die meisten Deutschen kaum Einsicht, geschweige denn Reue, wie der amerikanische Diplomat Robert Murphy seinem Außenminister Cordell Hull im Mai 1945 berichtete: Die Deutschen seien „äußerst reuelos und von unbegreiflicher Ignoranz gegenüber den Taten ihrer Führer". Nur wenige gäben zu, von den Konzentrationslagern und den SS-Gräueltaten gewusst zu haben, und lehnten jede eigene Verantwortung dafür ab. Das einzige Verbrechen, das Deutschland in ihren Augen begangen habe, so Murphy, bestehe darin, den Krieg verloren zu haben.[3]

Vor diesem Hintergrund konnte die Entnazifizierung kaum gelingen. Bereits im Frühjahr 1946 sah die amerikanische Militärregierung deshalb keinen anderen Ausweg, als ihre Durchführung – einschließlich der Verwaltung der Internierungslager – auf deutsche Stellen zu übertragen.[4] Das war die Geburtsstunde der sogenannten „Spruchkammern", in denen die Deutschen nun selbst über ihre Verstrickung in das NS-Regime befinden sollten. Aber konnte das gutgehen? Die Bilanz spricht für sich. Denn zonenübergreifend wurden nach Abschluss der Spruchkammerverfahren, die keine Strafurteile fällten, sondern nur der politischen Säuberung dienen sollten, lediglich 1,4 Prozent der Betroffenen als „Hauptschuldige" und „Belastete" eingestuft. Der Rest – 98,6 Prozent – galt als „entnazifiziert". Die Hälfte davon waren angeblich nur „Mitläufer" gewesen, in 35 Prozent der Fälle wurden die Verfahren ganz eingestellt, und nur 0,6 Prozent wurden als NS-Gegner anerkannt. Spätestens im Frühjahr 1951 war das Kapitel „Entnazifizierung" in Westdeutschland endgültig abgeschlossen. An seine Stelle trat eine „Schlussstrich-Mentalität", die sich wiederum auf alle Bereiche der Gesellschaft erstreckte.[5]

Freispruch für die Nazi-Justiz?

Aber galt dies auch für die Justiz – insbesondere für das Bundesministerium der Justiz, das als „Verfassungsministerium" zum Schutz der Verfassung gegründet worden war und damit doch eine ganz besondere Verantwortung trug? Dies war die Kernfrage, mit der sich das „Rosenburg-Projekt" befasste, in dem von 2012

[3] Robert Murphy an Secretary of State, 1. Mai 1945, in: *Foreign Relations of the United States: Diplomatic Papers, 1945, European Advisory Commission, Austria, Germany*, vol. III, Washington, DC 1968, S. 937.

[4] Siehe hierzu Gesetz Nr. 104 zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946, in: *Regierungsblatt für Württemberg-Baden* 1946, S. 71 ff. Vgl. ebenfalls F. Ostler, *Das Gesetz zur Befreiung von Nationalsozialismus und Militarismus vom 5. März 1946 und sein Vollzug. Persönliche Erfahrungen und Erinnerungen*, in: *Neue Juristische Wochenschrift* 1996, S. 821–825.

[5] Zahlenangaben nach: H.-J. Ruhl (Hrsg.), *Neubeginn und Restauration. Dokumente zur Vorgeschichte der Bundesrepublik Deutschland 1945–1949*, München 1982, S. 279 f.

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bis 2016 die Entwicklung des BMJ mit Blick auf die NS-Zeit untersucht wurde.[6] Im Mittelpunkt der Arbeit stand also nicht die Justiz im „Dritten Reich", die bereits gut erforscht ist, da sowohl über die Ära von Reichsjustizminister Franz Gürtner als auch über die Zeit seines Nachfolgers Otto Georg Thierack umfangreiche Untersuchungen vorliegen.[7] Vielmehr ging es bei der Rosenburg-Kommission darum, wie man im Bundesministerium der Justiz nach 1949 mit der NS-Vergangenheit umging: Welche personellen und institutionellen Kontinuitäten gab es? Wie tief war der Bruch 1945/49 wirklich? Und wie sah es mit den inhaltlichen Aspekten der Politik aus? Wurden auch diese, wenn man unterstellt, dass viele der handelnden Personen im BMJ schon vor 1945 aktiv gewesen waren, vom Gedankengut des Nationalsozialismus beeinflusst? Und wenn ja, auf welche Weise?

Bei der Beantwortung dieser Fragen konnte die Kommission an einige Untersuchungen anknüpfen, die bereits die allgemeine Entwicklung der Justiz im Übergang vom „Dritten Reich" zur Bundesrepublik beleuchtet hatten. Das BMJ selbst hatte sich an der Aufarbeitung des schwierigen Erbes der NS-Justiz schon 1989 mit der Ausstellung „Im Namen des Deutschen Volkes – Justiz und Nationalsozialismus" beteiligt. Die Ausstellung war seinerzeit in der Staatsbibliothek Berlin an der Potsdamer Straße eröffnet worden, war dann für zwei Jahrzehnte auf Wanderschaft durch alle Bundesländer gegangen und in 43 Städten zu sehen gewesen, meist in Gerichten und Justizgebäuden, bevor sie im Juni 2008 einen dauerhaften Platz im Oberverwaltungsgericht Berlin-Brandenburg in der Berliner Hardenbergstraße 31 am Bahnhof Zoo fand. Sie umfasst drei Abschnitte: die Justiz im Nationalsozialismus, ihre Vorgeschichte in der Weimarer Republik und den Umgang mit dieser Vergangenheit durch die westdeutsche Justiz nach 1945/49. Rund 2 000 Dokumente und Bilder sowie Begleittexte zu den einzelnen Themenkreisen machen wichtige Aspekte der historischen und ideologischen Grundlagen der Justiz, der Einflussnahme der Partei auf die Justiz und der Zusammenarbeit zwischen Justiz, NSDAP und SS deutlich. Die Ausstellung zeigt, wie verhängnisvoll die Rolle der Justiz nicht nur im „Dritten Reich" gewesen war, sondern welche Verbindungen es auch zur Justiz der Nachkriegszeit gab.[8]

[6] Vgl. M. Görtemaker, C. Safferling, *Die Akte Rosenburg. Das Bundesministerium der Justiz und die NS-Zeit*, München 2016.

[7] Zur Ära Gürtner siehe vor allem L. Gruchmann, *Justiz im Dritten Reich 1933–1940. Anpassung und Unterwerfung in der Ära Gürtner*, 3. Aufl., München 2001. Vgl. auch E. Reitter, *Franz Gürtner. Politische Biographie eines deutschen Juristen*, Berlin 1976. Zur Ära Thierack siehe bes. S. Schädler, *„Justizkrise" und „Justizreform" im Nationalsozialismus. Das Reichsjustizministerium unter Reichsjustizminister Thierack (1942–1945)*, Tübingen 2009.

[8] Eine ähnliche Ausstellung folgte nach der Wiedervereinigung Deutschlands, wiederum im Auftrag des BMJ, zum Thema „Im Namen des Volkes? Über die Justiz im Staat der SED". Sie ging auf eine Anregung von Richtern, Staatsanwälten und Bürgerrechtlern in den neuen Bundesländern zurück und zeigte mit über 200 reproduzierten Schriftstücken, Graphiken und Fotos auf 75 Tafeln

Ingo Müller hatte darauf bereits 1987 in seiner rechtshistorischen Dissertation *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz* hingewiesen.[9] Allerdings war sein Buch in juristischen Kreisen nur widerwillig zur Kenntnis genommen worden und hatte die akademische Karriere Müllers nachhaltig beschädigt, der deutlich machte, wie tief Juristen in die Verbrechen und den Massenmord des NS-Regimes verstrickt gewesen waren und welche personellen und sachlichen Kontinuitäten über die Zäsur von 1945/49 hinweg bestanden hatten. Inzwischen sind die Kernaussagen Müllers unstrittig und wurden durch zahlreiche Studien bestätigt. Hervorzuheben ist besonders der 1996 erstmals erschienene, vieldiskutierte Band *Vergangenheitspolitik* von Norbert Frei, der sich, ausgehend von grundlegenden Weichenstellungen in Parlament und Regierung, mit der mangelnden „Vergangenheitsbewältigung" in der Bundesrepublik in den frühen 1950er Jahren beschäftigt und dabei auch dem Justizbereich umfangreiche Passagen widmet.[10] Marc von Miquel setzte diese Überlegungen 2004 für die 1960er Jahre fort und kam zu ähnlichen Ergebnissen.[11]

Zu erwähnen ist in diesem Zusammenhang ferner der Publizist Jörg Friedrich, der in seinen Büchern *Freispruch für die Nazi-Justiz* und *Die kalte Amnestie – NS-Täter in der Bundesrepublik* schon zwanzig Jahre zuvor trotz eines noch sehr begrenzten Materialzugangs auf skandalöses Verhalten von Richtern und Staatsanwälten, fragwürdige Urteile und eine kalkulierte Schlussstrich-Mentalität der Politik hingewiesen hatte. Bei aller materialbedingten Vorläufigkeit seiner Erkenntnisse ließen die publizistisch zugespitzten Ausführungen Friedrichs erahnen, welcher historische Klärungsbedarf hier noch bestand.[12] Der Berliner Rechtssoziologe Hubert Rottleuthner schließlich, der 2010 anhand der Daten von über 34 000 Personen, die zwischen 1933 und 1964 im höheren Justizdienst tätig gewesen waren, die „Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945" untersuchte, vermochte dann auch flächendeckend zu beweisen, was inzwischen kaum noch ein Geheimnis war: dass Brüche in den

den Missbrauch der Justiz ohne unabhängige Richter in der SED-Diktatur. Die Ausstellung wurde 1994 in Berlin eröffnet und danach bis 1999 in zahlreichen Städten, vornehmlich in Ostdeutschland, aber auch in Braunschweig und Karlsruhe, gezeigt. Seither ist sie dauerhaft in der Gedenkstätte Moritzplatz in Magdeburg zu sehen. Siehe hierzu Bundesministerium der Justiz (Hrsg.), *Im Namen des Volkes? Über die Justiz im Staat der SED. Zwei Bände: Dokumentenband und Katalog*, Leipzig 1996.

[9] I. Müller, *Furchtbare Juristen. Die unbewältigte Vergangenheit unserer Justiz*, München 1987 (7., überarb. Neuaufl., Berlin 2014).

[10] N. Frei, *Vergangenheitspolitik. Die Anfänge der Bundesrepublik und die NS-Vergangenheit*, München 1996.

[11] M. von Miquel, *Ahnden oder amnestieren? Westdeutsche Justiz und Vergangenheitspolitik in den sechziger Jahren*, Göttingen 2004.

[12] J. Friedrich, *Freispruch für die Nazi-Justiz. Die Urteile gegen NS-Richter seit 1948. Eine Dokumentation*, Reinbek 1983 (überarb. u. erg. Ausg. Berlin 1998). Ders., *Die kalte Amnestie. NS-Täter in der Bundesrepublik*, Frankfurt am Main 1984 (erw. Neuausg. Berlin 2007).

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Karrieren deutscher Juristen nach dem Ende des Nationalsozialismus eine Ausnahme darstellten und dass die meisten Juristen, auch wenn sie politisch belastet waren, ihre Laufbahn nach Gründung der Bundesrepublik mehr oder weniger nahtlos fortsetzen konnten.[13]

Tatsächlich hat sich die deutsche Justiz in der Nachkriegszeit – mit Ausnahme des Nürnberger Juristenprozesses, der unter amerikanischer Federführung stattfand – der eigenen Strafverfolgung nahezu völlig entzogen.[14] Dabei hatten Tausende von Richtern und Staatsanwälten an ordentlichen Gerichten, Sondergerichten, Standgerichten oder am berüchtigten Volksgerichtshof bei der Durchsetzung der nationalsozialistischen Ideologie geholfen und sich damit, direkt oder indirekt, an den Verbrechen des NS-Regimes beteiligt. Das methodische Handwerkszeug dafür war ihnen von zahlreichen Hochschullehrern und der am 26. Juni 1933 in München gegründeten „Akademie für Deutsches Recht" unter ihren Präsidenten Hans Frank (bis 1942) und Otto Thierack (bis 1944) geliefert worden. Die Akademie hatte als wissenschaftliche Zentralstelle für die Umgestaltung des deutschen Rechts im Sinne der nationalsozialistischen Weltanschauung gewirkt und damit als Instrument der rechtswissenschaftlichen Gleichschaltung gedient.[15] Das Reichsjustizministerium hatte dann die entsprechenden Gesetze und Verordnungen vorbereitet und akribisch über die Einhaltung der neuen Ideologie durch die Justiz gewacht. Eine ganze Generation von Juristen war nach Beendigung der Ausbildung und ihrem Eintritt in das Berufsleben in den 1930er Jahren in diesen Rahmen gezwängt worden und hatte sich teils aus Überzeugung, teils aus opportunistischem Karrierestreben der Partei und dem „Führer" verschrieben.

Dennoch gab es kaum Richter und Staatsanwälte, die in der Bundesrepublik nach 1949 wegen Unrechtsurteilen im „Dritten Reich" zur Rechenschaft gezogen wurden. Während man in der SBZ/DDR immerhin versuchte, belastete Staatsanwälte auszutauschen und ehemalige Richter durch kurzfristig ausgebildete sogenannte „Volksrichter" zu ersetzen – allerdings um den hohen Preis der juristischen Expertise und des Verlustes der politischen Unabhängigkeit –, kehrten in der Bundesrepublik zahllose Juristen, die das NS-Regime mitgetragen hatten, weitgehend unbehelligt an ihre Schreibtische und in die Gerichte zurück und reihten sich stillschweigend in die neue rechtsstaatliche Ordnung ein, getragen oftmals von dem Willen, einen Schleier des Schweigens über das Vergangene zu legen und das unbegreifliche Ausmaß der Verbrechen vergessen zu machen.

[13] H. Rottleuthner, *Karrieren und Kontinuitäten deutscher Justizjuristen vor und nach 1945*, Berlin 2010.

[14] Zum Nürnberger Juristenprozess vgl. L.M. Peschel-Gutzeit (Hrsg.), *Das Nürnberger Juristen-Urteil von 1947. Historischer Zusammenhang und aktuelle Bezüge*, Baden-Baden 1996.

[15] Vgl. hierzu H.-R. Pichinot, *Die Akademie für Deutsches Recht. Aufbau und Entwicklung einer öffentlich-rechtlichen Körperschaft des Dritten Reichs*, Univ.-Diss., Kiel 1981.

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Selbst wenn dadurch die Demokratie der Bundesrepublik nicht ernsthaft gefährdet wurde, übten NS-belastete Juristen auf diese Weise in wichtigen staatlichen und gesellschaftlichen Positionen weiterhin Einfluss aus und schützten sich immer wieder gegenseitig vor dem Zugriff der rechtsstaatlichen Justiz.[16]

Die Ergebnisse der Rosenburg-Kommission

Zu welchen Ergebnissen ist die Rosenburg-Kommission nun im Hinblick auf die Situation im Bundesministerium der Justiz gekommen? Dazu zunächst einige Zahlen: Mit 67 planmäßigen Beamtenstellen war das BMJ bei seiner Errichtung 1949 das kleinste Bundesministerium, wobei allerdings nur 35 Personen als Abteilungsleiter, Unterabteilungsleiter oder Referatsleiter zum unmittelbaren Leitungspersonal zählten. Am Ende des Untersuchungszeitraums 1973 gab es zwar schon 250 Stellen, aber damit war das BMJ immer noch ein sehr kleines Haus.[17] Insgesamt konzentrierte sich die Kommission auf 258 Personalakten, die das Leitungspersonal betreffen, das heißt die Abteilungsleiter, Unterabteilungsleiter und Referatsleiter. Bei der detaillierten Auswertung lag der Schwerpunkt auf den vor 1927 geborenen Mitarbeitern, insgesamt rund 170, die bei Kriegsende 1945 mindestens 18 Jahre alt waren, ihre Schulzeit im NS-Staat absolviert hatten und in der Regel beim Arbeitsdienst und bei der Wehrmacht gewesen waren. Innerhalb dieser Gruppe galt das Hauptinteresse aber denjenigen Personen, die bereits im ersten Jahrzehnt des 20. Jahrhunderts geboren waren. Sie hatten ihre juristische Ausbildung vor dem Krieg abgeschlossen und waren schon im Nationalsozialismus als Juristen tätig gewesen, bevor sie nach 1945 in die Landesjustizverwaltungen oder die alliierten Zonenverwaltungen und schließlich in das Bundesministerium der Justiz gelangten.[18]

Bei der Betrachtung dieser Personen konnten sämtliche Personalakten eingesehen werden. Von Anfang an wurde den Kommissionsmitgliedern der ungehinderte Zugang zu diesen Akten zugesichert, die in der Tat sehr aussagekräftig sind, weil die Akten nicht nur die Entwicklung in der Bundesrepublik abbilden, sondern im Regelfall bereits in der Weimarer Republik oder spätestens im „Dritten Reich" angelegt wurden. Nach 1945 wurden diese Akten häufig von den Zonenverwaltungen übernommen und gelangten von dort in das Bundesministerium der Justiz, wenn die Mitarbeiter hier eingestellt wurden. Sie sind deshalb besonders aussagekräftig und wertvoll, weil es sich um authentische Dokumente

[16] C. Lange, *Die justizielle NS-Aufarbeitung – Täter, Opfer, Justiz*, in: *Die Rosenburg. 4. Symposium. Vorträge gehalten am 21. Oktober 2014 im Foyer der Bibliothek des Bundesgerichtshofs in Karlsruhe*, Berlin 2015, S. 22 f.

[17] Vgl. J. Schröder, *Das Bundesministerium der Justiz und die Justizgesetzgebung 1949–1989*, in: Bundesministerium der Justiz (Hrsg.), *40 Jahre Rechtspolitik im freiheitlichen Rechtsstaat*, Bonn 1989, S. 12, 26 f., 40.

[18] Görtemaker/Safferling, *Die Akte Rosenburg*, S. 260 ff.

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handelt und alle notwendigen Angaben enthalten, die für eine Untersuchung zur NS-Belastung und zur Kontinuität von Karriereverläufen unverzichtbar sind.

Auf das Ausmaß der NS-Belastung in der Frühzeit des BMJ lässt bereits ein Dokument schließen, das im Mai 1950 auf Anforderung des Bundeskanzleramtes erstellt wurde. Ausgangspunkt war ein Schreiben des Ministerialdirektors und späteren Staatssekretärs im Kanzleramt, Hans Globke, mit dem er alle Bundesminister bat, festzustellen, wie viele Angehörige der jeweiligen Ministerien früher Mitglied der NSDAP gewesen waren.[19] Die Antwort des BMJ datiert vom 20. Mai 1950 und macht deutlich, wie hoch der an der Parteimitgliedschaft gemessene Belastungsgrad in der Phase des personellen Aufbaus im Bundesjustizministerium war.[20] So befanden sich unter den 48 Angehörigen des höheren Dienstes 19 ehemalige Parteigenossen. Im gehobenen Dienst standen 17 ehemalige Parteigenossen 21 Nicht-Mitgliedern gegenüber. Der Anteil früherer NSDAP-Mitglieder betrug somit im höheren Dienst rund 40 Prozent, im gehobenen Dienst fast 45 Prozent.[21]

Im Vergleich mit den übrigen Bundesministerien waren dies durchschnittliche Werte. Legt man die Gesamtwerte für alle Bundesministerien einschließlich des Bundeskanzleramtes zugrunde, war der Anteil der früheren Parteimitglieder im höheren Dienst des BMJ sogar niedriger als im Durchschnitt (40:47 Prozent), im gehobenen Dienst dagegen nahezu gleich (45:44 Prozent).[22] Es wäre daher verfehlt anzunehmen, das BMJ stünde hinsichtlich der Durchsetzung mit ehemaligen Parteigenossen an der Spitze der Ministerien. Dennoch bleibt es eine Tatsache, dass knapp die Hälfte der Beamten und Angestellten des im Aufbau befindlichen Justizministeriums der NSDAP angehört hatte. Die Erklärung dafür ist einfach: Als Bundesjustizminister Thomas Dehler (FDP) und Staatssekretär Walter Strauß (CDU) das neue Bundesjustizministerium 1949 errichteten, taten sie dies in Anlehnung an Strukturen des früheren Reichsjustizministeriums. Zugleich übernahmen sie zahlreiche Mitarbeiter, die teilweise schon vor 1933 im Justizdienst tätig gewesen waren, vielfach aber erst im „Dritten Reich" Karriere gemacht hatten. Zahlenmäßig findet sich die höchste NS-Belastung in der zweiten Hälfte der 1950er Jahre. Während am Anfang noch versucht wurde, in der Führung der Abteilungen und Referate ein ungefähres Gleichgewicht zwischen Belasteten und Nicht-Belasteten zu halten, ging diese Balance aufgrund von Beförderungen und Neueinstellung von Belasteten zunehmend verloren.

[19] Der Staatssekretär des Innern im Bundeskanzleramt an sämtliche Bundesminister (gez. Dr. Globke), 8. Mai 1950, in: BArch B 136/5116.

[20] Der BMdJ an den Staatssekretär des Innern im Bundeskanzleramt, 20. Mai 1950, mit einer Übersicht zum Rundschreiben des Staatssekretärs des Innern im Bundeskanzleramt vom 8. Mai 1950 – BK 1741/50 mit Stand vom 15.5.1950, in: BArch B 136/5116.

[21] Ebd. Im mittleren Dienst waren hingegen kaum ehemalige Parteimitglieder zu finden, unter den Mitarbeitern im einfachen Dienst gab es kein einziges ehemaliges NSDAP-Mitglied.

[22] Zusammenstellung [des Bundeskanzleramts] der Mitglieder der früheren NSDAP für alle Ministerien, in: BArch B 136/5116.

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Dabei ist schwer nachzuvollziehen, dass es 1949 nicht 35 unbelastete Juristen in Deutschland gegeben haben soll, um die leitenden Positionen in diesem besonders sensiblen Ministerium zu besetzen, in dem es um den Schutz von Recht und Verfassung ging. Offenbar hat man danach aber gar nicht gesucht – auch nicht unter den Emigranten. Bemerkenswert ist ferner, dass die Belastung in einigen Bereichen besonders hoch war. Dies gilt etwa für die Abteilung II (Strafrecht), aber auch für die Abteilung III (Wirtschafts- und Gesellschaftsrecht). So wiesen 1957 in der Abteilung II alle Referatsleiter eine mehr oder weniger braune Vergangenheit auf – auch der Abteilungsleiter Josef Schafheutle, der zwar kein Mitglied der NSDAP war, aber mehrfach seine Aufnahme beantragt hatte, unter anderem in einem persönlichen Schreiben an den damaligen Staatssekretär im Reichsjustizministerium, Roland Freisler. Seine Nicht-Mitgliedschaft ist daher zu relativieren: Schafheutle war kein Mitglied, aber nicht, weil er nicht wollte, sondern weil die Partei ihn nicht wollte – wegen seines katholischen Hintergrundes, den er selbst in seinen Gesuchen um Aufnahme in die Partei allerdings stets bestritt. Anders ausgedrückt: In der Abteilung II waren 1957 sämtliche Personen auf der Leitungsebene auf die eine oder andere Weise in das NS-Regime verstrickt gewesen – ausnahmslos.[23] Für die anderen Abteilungen gilt Ähnliches, auch wenn nicht alle Abteilungen in gleichem Maße belastet waren. Erst seit den 1960er Jahren wurde die Belastung altersbedingt geringer. Wirklich frei von ehemaligen NSDAP-Angehörigen war das Ministerium aber erst mit der Pensionierung der Unterabteilungsleiter Gerhard Marquordt und Rudolf Franta 1978 und von Abteilungsleiter Dr. Günther Schmidt-Räntsch 1986.[24]

Individuelle Schuld und Verantwortung

Für die Rosenburg-Kommission stellte dieser Befund allerdings nicht mehr als ein Zwischenergebnis dar. Denn die Mitgliedschaft in NSDAP oder SA war zwar ein Hinweis auf Regimenähe, aber keineswegs ein Beweis für Denken oder gar Handeln im Sinne der NS-Ideologie. Hierzu musste auch das aktive Verhalten der jeweiligen Personen im Einzelfall untersucht werden. Untersuchungsgegenstände der Rosenburg-Kommission waren deshalb ebenfalls die Kriterien und Maßstäbe, die unter Berücksichtigung des individuellen Handelns *vor* 1945 bei der Einstellung sowie bei Beförderungen *nach* 1949 galten. Ausgangspunkt hierbei war der im Nürnberger Juristenprozess 1947 entwickelte Maßstab für das Verhalten von Ministerialbeamten, Richtern und Staatsanwälten. Dies betraf nicht nur die Übernahme von Juristen in den Dienst des BMJ, die als belastet gelten mussten, sondern auch die inhaltliche Auseinandersetzung mit dem Unrecht

[23] Ebd., S. 316 ff. Zur Problematik Schafheutle siehe vor allem S. 327 ff.
[24] Vgl. hierzu ausführlich ebd., S. 262 ff.

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der NS-Justiz, die Bereinigung der Gesetze von nationalsozialistischer Ideologie und die Strafverfolgung von NS-Tätern durch die deutsche Justiz.[25]

Weitere Themen der Untersuchung waren die Amnestierung von NS-Tätern und ihre vorzeitige Haftentlassung, durch die bis 1958 nahezu alle Verurteilten freikamen, sowie die Rolle, die das BMJ bei der Erarbeitung des Einführungsgesetzes zum Ordnungswidrigkeitengesetz vom 24. Mai 1968 spielte. Denn dadurch wurde die Beihilfestrafbarkeit in bestimmten Fallkonstellationen herabgesetzt, was im Zusammenspiel mit der sogenannten Gehilfenrechtsprechung zur rückwirkenden Verjährung zahlloser nationalsozialistischer Gewaltverbrechen am 8. Mai 1960 führte. Ferner wurde der Frage nachgegangen, inwieweit das BMJ bei der verschleppten Rehabilitierung der Opfer der NS-Justiz mitwirkte – etwa bei strafgerichtlichen Entscheidungen, bei Erbgesundheitsurteilen oder in der Militärjustiz –, so dass die Urteile des Volksgerichtshofs und der Standgerichte erst am 28. Mai 1998 bzw. 17. Mai 2002 durch Bundesgesetz pauschal aufgehoben wurden, Kriegsverratsfälle sogar erst im September 2009. Untersucht wurden auch die Haltung des BMJ zum Alliierten Kontrollrat, etwa zum Kontrollratsgesetz Nr. 1 vom 20. September 1945 über die Aufhebung von insgesamt 24 Gesetzen, Verordnungen und Erlassen aus der Zeit des „Dritten Reiches", sowie zu den Nürnberger Prozessen und ihren Urteilen, die in der Bundesrepublik bekanntlich weithin umstritten waren. Und schließlich widmete sich die Kommission ebenfalls der Haltung des Ministeriums zur Zentralen Rechtsschutzstelle, die bis 1953 im Geschäftsbereich des BMJ angesiedelt war, ehe sie in den Verantwortungsbereich des Auswärtigen Amtes wechselte, wo sie bis zu ihrer Auflösung 1968 deutsche Kriegsverbrecher vor Strafverfolgung im Ausland warnte und die Arbeit der Ludwigsburger Zentralstelle zur Aufklärung von NS-Verbrechen erschwerte.[26]

Im Ergebnis ist festzustellen, dass viele führende Mitarbeiter des BMJ in den Ministerien des NS-Staates direkt an der Umsetzung des Führerwillens beteiligt gewesen waren. Andere hatten durch ihre Tätigkeit an Gerichten, etwa an den Sondergerichten des „Dritten Reiches", an den Gerichten in den besetzten Gebieten oder in der Militärgerichtsbarkeit, die verbrecherischen Gesetze, die im Reichsjustizministerium vorbereitet und auf den Weg gebracht worden waren, angewandt und damit ebenfalls schwere persönliche Schuld auf sich geladen. In keinem einzigen Fall gab es deswegen nach 1949 Disziplinarverfahren oder gar Entlassungen, obwohl schon seit Mitte der 1950er Jahre immer wieder Informationen über die NS-Belastung einzelner Mitarbeiter des Bundesjustizministeriums an die Öffentlichkeit gelangten. In allen Fällen, in denen es solche Hinweise

[25] BGBl I 2007 Seite 2614 Art. 4 Gesetz zur Bereinigung des Besatzungsrechts § 1 (2).

[26] Vgl. hierzu O. Schröm, A. Röpke, *Stille Hilfe für braune Kameraden. Das geheime Netzwerk der Alt- und Neonazis*, 2. Aufl., Berlin 2002.

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gab, wurden von der Ministeriumsspitze – dem Minister oder Staatssekretär Walter Strauß – Untersuchungen veranlasst. Sie endeten stets mit einem Gutachten von Josef Schafheutle, in dem dieser erklärte, dass ein Fehlverhalten nicht vorliege und Konsequenzen daher nicht gezogen werden müssten.

Was personelle Kontinuität bedeutet, wird jedoch erst am Einzelfall wirklich erkennbar. Nehmen wir etwa das Beispiel *Franz Maßfeller*. Vor 1945 war er im Reichsjustizministerium für Familien- und Rasserecht zuständig. Er nahm an den Folgebesprechungen zur Wannsee-Konferenz teil und war ein bekannter Kommentator des Blutschutz- und Ehegesundheitsgesetzes von 1935. Dies führte jedoch nicht dazu, dass ihm die Einstellung im BMJ versagt blieb. Vielmehr stieg er hier zum Ministerialrat auf und leitete bis 1960 ausgerechnet das Referat für Familienrecht. Ein anderer Fall ist *Eduard Dreher*, vor 1945 Erster Staatsanwalt am Sondergericht Innsbruck, wo er zahlreiche Todesurteile wegen Nichtigkeiten erwirkte. Im BMJ wurde er nach 1949 ein hochrangiger Mitarbeiter in der für das Strafrecht zuständigen Abteilung II und leitete viele Jahre lang die Kommission zur Großen Strafrechtsreform. Der schon genannte *Josef Schafheutle* war vor 1945 im Reichsministerium der Justiz tätig, wo er an der Ausarbeitung des politischen Sonderstrafrechts beteiligt war, unter anderem bei der Verordnung über die Bildung von Sondergerichten und beim Gesetz über die Verhängung und den Vollzug der Todesstrafe sowie beim Gesetz zur Abwehr politischer Gewalttaten. Nach 1949 leitete er als Ministerialdirektor die Abteilung II Strafrecht im BMJ. Ein viertes Beispiel ist *Walter Roemer*. Vor 1945 war er Erster Staatsanwalt am Sondergericht München und dort unter anderem als Vollstreckungsstaatsanwalt an der Hinrichtung von belgischen und französischen Widerstandskämpfern und Mitgliedern der „Weißen Rose" beteiligt. Nach 1949 wurde er Ministerialdirektor und Abteilungsleiter für Öffentliches Recht und Verfassungsrecht im BMJ. *Max Merten* war von 1942 bis 1944 Kriegsverwaltungsrat beim Befehlshaber der Wehrmacht in Thessaloniki, wo er als Leiter der Abteilung „Verwaltung und Wirtschaft" einer der Organisatoren der Ausplünderung und Deportation von mehr als 50 000 griechischen Juden war – also einer der größten deutschen Kriegsverbrecher. 1952 wurde er im BMJ Leiter des Referats „Zwangsvollstreckung". *Hans Gawlik* war vor 1945 Staatsanwalt am Sondergericht Breslau, nach 1945 zunächst Verteidiger des SD und einiger Einsatzgruppenführer in den Nürnberger Prozessen und wurde 1949 Leiter der Zentralen Rechtsschutzstelle im BMJ. *Ernst Kanter* schließlich, der vor 1945 als „Generalrichter" im besetzten Dänemark eingesetzt war, wo er an 103 Todesurteilen mitwirkte, arbeitete seit 1951 als Ministerialrat und ab 1954 als Ministerialreferent und Strafrechtsreferent im Bundesjustizministerium, bevor er 1958 zum Bundesgerichtshof versetzt wurde, wo er als Senatspräsident dem 3. Strafsenat vorstand. Die Aufzählung ließe sich fortsetzen.

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Thomas Dehler und Walter Strauß

Die Frage, weshalb insbesondere die beiden Gründerväter des Ministeriums, Bundesjustizminister Thomas Dehler und sein Staatssekretär Walter Strauß, derart problematische Personen für das Ministerium auswählten und darauf verzichteten, gezielt Remigranten anzuwerben oder von vornherein nach unbelasteten Mitarbeitern zu suchen, ist nicht überzeugend zu beantworten. Sowohl Dehler als auch Strauß waren persönlich gänzlich unbelastet. Dehler war mit einer Jüdin verheiratet, Strauß entstammte einem jüdischen Elternhaus. Beide waren im „Dritten Reich" Diskriminierungen ausgesetzt gewesen. Strauß hatte die NS-Zeit nur mit Mühe in Berlin-Wannsee überlebt. Seine Eltern waren in das KZ Theresienstadt deportiert worden und dort an den Folgen der Haft gestorben.

Dennoch scheuten sich Dehler und Strauß nicht, hochgradig NS-belastete Mitarbeiter einzustellen. Sie handelten dabei nicht in Unkenntnis der Vergangenheit, sondern in vollem Wissen. Im Fall Dehlers ist dies besonders auffällig, wie das Beispiel Willi Geiger zeigt, dem Dehler im „Dritten Reich" als Verteidiger am Sondergericht Bamberg gegenübergestanden hatte, wo Geiger als Staatsanwalt fungierte. Dennoch machte Dehler ihn nach 1945 zunächst zu seinem persönlichen Referenten und betraute ihn danach sogar mit der Aufgabe, das Bundesverfassungsgerichtsgesetz zu entwerfen. Anschließend sorgte Dehler auch noch dafür, dass Geiger Richter sowohl am Bundesgerichtshof als auch am Bundesverfassungsgericht wurde. Geiger war damit der Einzige, der in der Bundesrepublik beide Positionen gleichzeitig bekleidete.

Bei Strauß verhält es sich ähnlich. Auch er stellte in vollem Wissen um die Vergangenheit belastete Personen ein, wenn diese seinen Maßstäben genügten. Die wichtigsten Kriterien für Dehler wie für Strauß waren fachliche Kompetenz und ministerielle Erfahrung. Hinzu kamen persönliche Bekanntschaften und in geringerem Maße politische Empfehlungen. Politische Belastungen wurden zwar, wie der Briefwechsel zwischen Dehler und Strauß zeigt, häufig intern erörtert. Soweit sich erkennen lässt, führten sie aber nur selten dazu, einem gewünschten Mitarbeiter die Einstellung zu versagen. Dehler wie Strauß ging es also in erster Linie um die Arbeitsfähigkeit des Ministeriums, die ihrer Meinung nach nur zu gewährleisten war, wenn seine Angehörigen über die nötige fachliche Eignung und über Erfahrung verfügten. In seiner Ansprache anlässlich der Amtsübergabe von Bundesjustizminister Hans-Joachim von Merkatz an seinen Nachfolger Fritz Schäffer im Oktober 1957 sprach Strauß sogar ausdrücklich von einem „Schatz an Erfahrungen", den man „aus den vergangenen Jahrzehnten, ungeachtet des dutzendjährigen Reiches", in die Arbeit des Bundesministeriums der Justiz mitgebracht habe.[27] Wörtlich erklärte er: „Ein nicht unerheblicher

[27] Staatssekretär Dr. Strauß, Ansprache anlässlich der Amtsübergabe am 30. Oktober 1957, in: *Ansprachen aus Anlaß von Amtsübergaben (Minister, Staatssekretäre) im Bundesministerium der Justiz Bonn 1953–1971*, Bonn o.J., Maschinenschriftl. Manuskript, S. 3 f.

Teil von uns ist früher schon in der reichsministeriellen Arbeit tätig gewesen, und ich glaube, wenn wir nicht diese Kollegen und ihre Erfahrungen gehabt hätten, wären wir nicht in der Lage gewesen, die Arbeit der vergangenen acht Jahre zu erfüllen."[28]

Bei anderen Gelegenheiten führte Strauß zudem häufig das Bild des unpolitischen Beamten an, den es doch gerade im „Dritten Reich" nicht gegeben hatte und den es auch danach nicht gab, weil Politiknähe und Politikberatung zum Wesen und zu den Kernaufgaben der Ministerialverwaltung gehören. Was Strauß meinte, war indessen etwas anderes: Er bezog sich auf die Tatsache, dass die handwerklichen Fähigkeiten der Juristen rasch an die jeweiligen politischen Gegebenheiten und Wünsche angepasst werden können und die juristische Tätigkeit damit im Grunde vom jeweiligen Regime unabhängig ist. Zwar gilt diese Feststellung für viele Berufe. Doch Juristen erfüllen im staatlichen Gefüge eine zentrale Funktion, indem sie an der Formulierung von Gesetzen mitwirken und als Staatsanwälte oder Richter an deren Durchsetzung maßgeblich beteiligt sind. Sie sind damit Techniker der Macht und tragen zur Herrschaftssicherung und Stabilisierung politischer Regime bei. Im „Dritten Reich" war diese Instrumentalisierung der Juristen nahezu vollständig gelungen – ob aus innerer Überzeugung, pragmatischem Karrierewillen oder unter Anpassungsdruck, wurde nach 1949 oft nicht mehr hinterfragt.

Es überrascht demnach nicht, dass Dehler und Strauß und auch die ihnen nachfolgenden Minister und Staatssekretäre bei der Auswahl der Mitarbeiter nach ministerieller Vorerfahrung suchten. Denn die juristischen Fertigkeiten, die im Bundesjustizministerium von den Beamten verlangt wurden, unterschieden sich in der Form kaum von denjenigen, die im Reichsjustizministerium für vorrangig gehalten worden waren. Zynisch könnte man sagen, dass es für den juristischen „Handwerker" gleichgültig ist, ob er ein Gesetz zum Verbot von Mischehen formuliert oder ein Gesetz zur Gleichstellung des nichtehelichen Kindes mit den ehelichen Kindern im Erbrecht. Tatsächlich haben manche Mitarbeiter auf der Rosenburg genau dies getan: Sie formulierten im „Dritten Reich" das „Gewohnheitsverbrechergesetz" und bestimmten nun die Diskussion um die Strafrechtsreform. Sie wirkten an der Reform des Jugendstrafrechts 1943 mit und waren jetzt federführend bei der Reform des Jugendgerichtsgesetzes von 1953. Sie waren als Kriegsrichter in der Wehrmacht oder in der Kriegsgerichtsbarkeit des „Dritten Reiches" tätig und planten nun ein neues Wehrstrafrecht für die Bundeswehr. Ähnliches galt im Bereich des Familienrechts, des Zwangsvollstreckungsrechts oder dem Gesellschaftsrecht der Unternehmen.

Ministerielle Erfahrung war demnach ein Schlüsselkriterium bei der Rekrutierung des Personals für das BMJ nach 1949 und lässt sich auch statistisch

[28] Ebd., S. 4.

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nachweisen. So waren schon 1949 27 Mitarbeiter des Bundesministeriums der Justiz ehemalige Mitarbeiter des Reichsjustizministeriums. Davon wurden etliche sofort in den Bundesdienst übernommen, andere kamen 1950 dazu, die übrigen bis 1955. Alle hatten selbstverständlich dem nationalsozialistischen Rechtswahrerbund angehört und waren – mit Ausnahme von Josef Schafheutle, von dem bereits mehrfach die Rede war – auch Mitglieder der NSDAP gewesen.[29] Wenn zudem von Seiten des Ministeriums stets behauptet wurde, die fachliche Qualifikation sei für die Aufnahme in den ministeriellen Dienst das ausschlaggebende Kriterium gewesen, so wird dies ebenfalls durch die Akten belegt. Von den 170 näher untersuchten Personen waren 155 Volljuristen, von denen 94 eine Examensnote von „vollbefriedigend" bis „sehr gut" im Staatsexamen nachweisen konnten. Wenn man bedenkt, dass in der Regel nur etwa 15 Prozent der Examenskandidaten diese Noten erreichen, bedeutete dies, allein auf die Examensnote bezogen, eine bemerkenswerte Ansammlung von Spitzenjuristen. Nimmt man die Promotion als Gradmesser für Expertise hinzu, wird dieses Bild weiter bestätigt. So fanden sich unter den 155 Volljuristen insgesamt 90 promovierte Mitarbeiter sowie zwei weitere, denen ein Doktortitel „honoris causa" verliehen wurde.[30]

Wenig überraschend ist auch die Tatsache, dass die meisten Ministerialbeamten im BMJ eine konservative Einstellung aufwiesen, die häufig auf Traditionen der alten Beamtenschaft vor 1933 Bezug nahm und die NS-Diktatur als Phase eines „irregeleiteten" Rechtsverständnisses begriff. So ließ sich in der Formulierung der neuen Gesetze „braunes" Gedankengut auch kaum ausmachen. Dies wurde im Übrigen schon allein dadurch verhindert, dass die politischen Rahmenbedingungen, unter denen die Bundesrepublik, zumal mit Beginn der europäischen Integration seit Anfang der 1950er Jahre und später in der NATO, Mitglied der westlichen Wertegemeinschaft geworden war, eine Neuorientierung erzwangen. Wenn sich einzelne Anknüpfungspunkte an frühere Vorstellungen – etwa im Jugendstrafrecht – fanden, beruhten sie nicht nur auf der persönlichen NS-Erfahrung derjenigen, die nun an der Formulierung der entsprechenden Gesetze in der Bundesrepublik mitwirkten, sondern entsprachen auch dem „Zeitgeist" der 1950er Jahre. Denn dieser hatte sich hinsichtlich der Werteordnung der deutschen Gesellschaft seit den 1930er Jahren kaum geändert und wich erst Mitte der 1960er Jahre neuen Gedanken, die sich dann auch in der Gesetzgebung bemerkbar machten. Dennoch sind in den 1950er Jahren Tendenzen erkennbar, etwa im Familienrecht oder im Jugendstrafrecht, die in die Zeit vor 1945 zurückweisen.

[29] Görtemaker, Safferling, *Die Akte Rosenburg*, S. 264 f.
[30] Ebd., S. 261 f.

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Weit mehr noch lässt sich dies über die Verfolgung von NS-Tätern sagen, die von der deutschen Justiz geradezu verhindert wurde – begleitet und gefördert auch vom Bundesjustizministerium, das auf Drängen der Bundesregierung und unter dem Druck der Öffentlichkeit die Straffreiheitsgesetze von 1949 und 1954 vorbereitete, nach denen bis 1958 praktisch alle NS-Straftäter freikamen bzw. von weiterer Strafverfolgung verschont blieben. Der Ulmer Einsatzgruppen-Prozess 1958 und die Auschwitz-Prozesse in den 1960er Jahren sowie die jahrzehntelangen Verzögerungen bei der Aufhebung der NS-Unrechtsurteile sind Beispiele für die Schwierigkeiten im strafrechtlichen Umgang mit der NS-Vergangenheit. Zudem wurde die in mehreren Phasen diskutierte Frage der Verjährung durch die sogenannte „kalte Verjährung" konterkariert, die mit dem schon erwähnten Einführungsgesetz zum Ordnungswidrigkeitengesetz vom 10. Mai 1968 einherging, so dass auch Schwerstäter, gegen die bereits Strafverfahren eingeleitet waren oder gegen die Verfahren hätten eingeleitet werden müssen, straffrei ausgingen. Bei all diesen Entwicklungen war das Bundesjustizministerium – neben dem Bundesgerichtshof – maßgeblich beteiligt. Die Erklärung dafür liegt nicht nur in dem allgemeinen Bestreben der Bundesregierung, die alten Eliten wieder zu verwenden, um den Übergang vom „Dritten Reich" zur Bundesrepublik technisch so reibungslos wie möglich verlaufen zu lassen, sondern auch an der personellen Zusammensetzung des BMJ.

„Kommunikatives Beschweigen" der Vergangenheit

Vor diesem Hintergrund erscheint es erstaunlich, dass der Rechtsstaat in der Bundesrepublik trotzdem gut funktioniert hat. Dass dies so war, lässt sich nicht bestreiten. Daher ist zu fragen, ob die Wiederverwendung ehemaliger Funktionseliten, so belastet sie im Einzelfall waren, nicht nur im BMJ, sondern in allen Bundesministerien und Behörden und darüber hinaus in weiten Teilen der Gesellschaft nicht unter Umständen sogar sinnvoll war, weil von ihnen nicht nur das Funktionieren des neuen Staates abhing, sondern weil damit auch eine Integrationsleistung erbracht wurde, die anders als in der Weimarer Republik wesentlich zur inneren Stabilität der Bundesrepublik beitrug.

Bereits im Parlamentarischen Rat war dafür mit Artikel 131, der die Wiedereinstellung der ehemaligen Angehörigen des Öffentlichen Dienstes vorsah, die Basis geschaffen worden. Das heißt: Die Wiederverwendung der alten Funktionseliten war ein Grundprinzip der politisch-administrativen Gestaltung der Bundesrepublik. Diejenigen, die nach 1949 in der Rosenburg am Neuaufbau der deutschen Justiz mitwirkten, konnten sich dadurch der Illusion hingeben, in einer Welt zu leben, die nicht durch die Erinnerung an eine dunkle Vergangenheit beschwert war.[31] Tatsächlich wurde auf der Rosenburg über

[31] Zur Problematik des Artikels 231 siehe ebd., S. 154 ff.

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die Vergangenheit offenbar wenig oder gar nicht gesprochen, wie den schriftlichen Quellen zu entnehmen ist und wie auch Zeitzeugen bestätigen. Jeder wusste vom anderen, aber man behielt das Wissen für sich. Der Philosoph Hermann Lübbe hat deshalb von einem „kommunikativen Beschweigen" der Vergangenheit gesprochen.[32] Diesen Vorgang gab es auch auf der Rosenburg. Dass dies so war, geschah nicht zufällig. Denn das „Beschweigen" der Vergangenheit war ein Grundanliegen der deutschen Bevölkerung, die sich 1949 nicht als Täter, sondern als Opfer sah – als Opfer der alliierten Besatzungspolitik im Allgemeinen und der Politik der Entnazifizierung im Besonderen. Daher sollte so schnell wie möglich ein Schlussstrich unter die Vergangenheit gezogen und diese dem Vergessen anheim gegeben werden.

Doch dieser Weg hatte seinen Preis. So kamen nahezu alle Parteigänger des NS-Regimes, sogar diejenigen, die schlimmste Verbrechen begangen hatten, ohne oder mit nur geringen Strafen davon. An diesem Skandal wirkte, wenn man etwa das Einführungsgesetz von 1968 betrachtet, das Bundesjustizministerium in Gestalt von Referatsleiter Eduard Dreher in der Abteilung II mit. Die von Hubert Rottleuthner 2001 gestellte Frage „Hat Dreher ‚gedreht'?" kann heute positiv beantwortet werden. Und auch in der Gesetzgebung zeigte sich vielfach altes Denken: im Staatsschutzrecht, bei der Reform des Jugendstrafrechts, bei der Frage der Aufhebung der Erbgesundheitsurteile oder den verbotenen Plänen alter Wehrmachtrichter zur Einführung einer neuen Wehrstrafgerichtsbarkeit und nicht zuletzt beim sogenannten V-Buch, mit dem unter Umgehung des Parlaments und unter Bruch der Verfassung eine Notstandsregelung angestrebt wurde.

Dabei gab es bereits früh erste Hinweise auf die Problematik, die sich damit verband. Das Nachrichtenmagazin *Der Spiegel* und die sogenannten „Braunbücher" der DDR veröffentlichten die Namen vieler Täter und benannten präzise deren Taten.[33] Gänzlich unbeachtet lassen, wie Staatssekretär Walter Strauß lange Zeit meinte, konnte man die Vergangenheit damit nicht mehr. Auf einer Konferenz der Justizminister des Bundes und der Länder im niedersächsischen Bad Harzburg wurde daher Anfang Oktober 1958 die Zentrale Stelle der Landesjustizverwaltungen in Ludwigsburg gegründet, um vor allem im Ausland neuem Misstrauen in den demokratischen Aufbau der Bundesrepublik entgegenzuwirken. Strauß verfasste allerdings noch am 5. Dezember 1958 vorsorglich einen

[32] H. Lübbe, *Vom Parteigenossen zum Bundesbürger. Über beschwiegene und historisierte Vergangenheiten*, München 2007, S. 32.

[33] Siehe hierzu ausführlich A. Weinke, *Die Verfolgung von NS-Tätern im geteilten Deutschland. Vergangenheitsbewältigungen 1949–1969 oder Eine deutsch-deutsche Beziehungsgeschichte im Kalten Krieg*, Paderborn u.a. 2002, S. 76–100. Vgl. auch Miquel, *Ahnden oder amnestieren?*, S. 23–81; sowie M. Lemke, *Kampagnen gegen Bonn. Die Systemkrise der DDR und die West-Propaganda der SED 1960–1963*, in: *Vierteljahrshefte für Zeitgeschichte*, 41. Jg. (1993), H. 2, S. 153–174.

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Vermerk über die Wiederverwendung von Richtern und Staatsanwälten der nationalsozialistischen Zeit, in dem er erklärte, die Bundesjustizverwaltung habe „die Vorwürfe gegen die in ihrem Geschäftsbereich wiederverwendeten früheren Richter und Staatsanwälte geprüft". Es bestehe „kein Anlass zu irgendwelchen Maßnahmen".[34]

Diese Grundhaltung galt auch für den Umgang mit den Enthüllungen in der westdeutschen Presse und aus der DDR und die Behandlung gezielter Strafanzeigen gegen Mitarbeiter des Ministeriums. Diese lösten zwar interne Ermittlungen seitens der Abteilung Z, insbesondere durch das Personalreferat, aus, doch die Vorwürfe wurden durchweg verworfen. Eine wirkliche Prüfung fand gar nicht statt. Die betroffene Person wurde lediglich um eine Stellungnahme gebeten, die von einem anderen Ministeriumsmitarbeiter zusammengefasst und ausgewertet wurde, der in der Regel selbst belastet war. Negative Konsequenzen ergaben sich aus diesen Vorwürfen kaum. Nur in einem Fall (Heinrich Ebersberg) wurde die betreffende Person nicht befördert. Eine weitere Person (Max Merten) wurde gebeten, das Ministerium zu verlassen. Im Falle Eduard Drehers mag die NS-Vergangenheit ein Hindernis bei seiner Nicht-Beförderung zum Abteilungsleiter gewesen sein; aktenkundig ist diese aber nicht.

Die „zweite Schuld der Deutschen"

Eine Veränderung trat erst allmählich ein. Dazu trugen unterschiedliche Entwicklungen bei, etwa die Uraufführung des Kinofilms „Rosen für den Staatsanwalt" von Wolfgang Staudte mit Martin Held und Walter Giller in den Hauptrollen, in dem 1959 die Problematik der personellen Kontinuität im Bereich der Justiz aufgezeigt wurde.[35] Fast zeitgleich wurde die vom Sozialistischen Deutschen Studentenbund organisierte Wanderausstellung „Ungesühnte Nazijustiz" eröffnet.[36] Und im juristischen Raum zeigten – ebenfalls fast

[34] W. Strauß, *Vorsorglicher Vermerk zur Wiederverwendung von Richtern und Staatsanwälten der nationalsozialistischen Zeit, 5. Dezember 1958*, in: BArch Koblenz B 141/50451 Angriffe gegen Angehörige der Bundesjustiz wegen ihrer früheren Amtstätigkeit (1933–1945), Materialband 2 (Betr. Große Anfrage der Fraktion der SPD betr. Fragen der Justizpolitik), Bl. 29.

[35] Der Film wurde 1960 gegen den Willen des Bundesinnenministers mit dem Bundesfilmpreis ausgezeichnet. Vgl. Miquel, *Ahnden oder amnestieren?*, S. 50 f.

[36] Siehe hierzu den hektographierten Ausstellungskatalog von W. Koppel, *Ungesühnte Nazijustiz. Hundert Urteile klagen ihre Richter an*, Karlsruhe 1960. Vgl. ebenfalls G. Oy, C. Schneider, *Die Schärfe der Konkretion. Reinhard Strecker, 1968 und der Nationalsozialismus in der bundesdeutschen Historiografie*, 2., korr. Aufl., Münster 2014; S.A. Glienke, *Die Ausstellung „Ungesühnte Nazijustiz" (1959–1962). Zur Geschichte der Aufarbeitung nationalsozialistischer Justizverbrechen*, Baden-Baden 2008; Weinke, *Die Verfolgung von NS-Tätern*, S. 101–108; sowie M. Kohlstruck, *Reinhard Strecker – „Darf man seinen Kindern wieder ein Leben in Deutschland zumuten?"*, in: C. Fröhlich, M. Kohlstruck (Hrsg.), *Engagierte Demokraten. Vergangenheitspolitik in kritischer Absicht*, Münster 1999, S. 185–212. – Anlässlich seines 85. Geburtstags wurde Reinhard Strecker für seine Arbeit im Oktober 2015 mit dem Bundesverdienstkreuz ausgezeichnet. „Besser spät als nie", bemerkte dazu der Journalist Christoph David Piorkowski im Berliner „Tagesspiegel".

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zeitgleich – der Ulmer Einsatzgruppen-Prozess und danach der Eichmann-Prozess in Jerusalem sowie die Auschwitz-Prozesse in Frankfurt am Main, wie groß das Problem tatsächlich war, dem man sich nun auch im Bundesjustizministerium nicht länger verschließen konnte. 1965 geschah dann endlich, was schon 1949 möglich gewesen wäre: die Einführung der Regelanfrage beim Berlin Document Center über die Mitgliedschaft in der NSDAP. Bis 1965 hatte es eine solche Regelanfrage nicht gegeben. Erst jetzt, am 15. Februar 1965, sah sich Staatssekretär Dr. Arthur Bülow genötigt, dieses Instrument auch für das BMJ zu nutzen – allerdings nur bei Neueinstellungen und Beförderungen, nicht zur Überprüfung des gesamten Personals.

Mit dem Regierungswechsel zur Großen Koalition 1966 und der Ernennung Gustav Heinemanns zum Bundesjustizminister setzte sich dieser Wandel in der Beurteilung der NS-Belastung fort. Einen wichtigen Beitrag dazu leistete der hessische Generalstaatsanwalt Fritz Bauer, der 1960 mit eigenen Hinweisen die Ergreifung Adolf Eichmanns in Argentinien vorantrieb und mit den von ihm vorbereiteten drei Auschwitz-Prozessen von 1963 bis 1968 für große öffentliche Aufmerksamkeit weit über die Grenzen der Bundesrepublik hinaus sorgte.[37] Dass er seine Erkenntnisse über den Aufenthaltsort von Eichmann nicht den deutschen Behörden, sondern dem Leiter der Israel-Mission in Köln, Felix Elieser Shinnar, übermittelte, spricht für sich, da die Versäumnisse der bundesrepublikanischen Justiz im Umgang mit NS-Tätern allzu offenkundig waren.

Der deutsch-jüdische Publizist Ralph Giordano hat deshalb 1987 von einer „zweiten Schuld der Deutschen" gesprochen.[38] Diese Schuld wog umso schwerer, als sie vor allem die Berufsgruppe der Juristen selbst betraf, die ihrer besonderen Verantwortung, von der eingangs die Rede war, nicht gerecht geworden war. Dabei hatte der ehemalige Reichsjustizminister der Weimarer Republik und Rechtsphilosoph Gustav Radbruch, der nach der Machtübernahme der NSDAP am 30. Januar 1933 als erster deutscher Professor aus dem Staatsdienst entlassen worden war, bereits 1946 einen Weg gewiesen, der hätte beschritten werden können – wenn man nur gewollt hätte. Die „Radbruchsche Formel" besagte, dass im Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit eine Situation eintreten könne, in der „der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, dass das Gesetz als ‚unrichtiges Recht' der Gerechtigkeit zu weichen hat".[39] In Situationen aber, in denen

Siehe „NS-Justiz-Aufklärer Reinhard Strecker. Wider die Politik des Vergessens", in: *Tagespiegel online*, 14. Oktober 2015.

[37] Vgl. hierzu vor allem R. Steinke, *Fritz Bauer oder Auschwitz vor Gericht. Mit einem Vorwort von Andreas Voßkuhle*, München 2013, sowie I. Wojak, *Fritz Bauer 1903–1968. Eine Biographie*, München 2009.

[38] R. Giordano, *Die zweite Schuld oder Von der Last Deutscher zu sein*, Hamburg 1987.

[39] G. Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht*, in: *Süddeutsche Juristenzeitung (SJZ)* 1946, S. 105–108.

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„Gerechtigkeit nicht einmal erstrebt" werde, wie es offenbar im Nationalsozialismus der Fall gewesen war, wenn also „die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewusst verleugnet" werde, sei „das Gesetz nicht etwa nur ‚unrichtiges Recht'". Denn dann, so Radbruch, entbehre es „überhaupt der Rechtsnatur".[40] Diese Überlegung, wonach legalistisches Unrecht nicht nur keine Anwendung finden darf, sondern – etwa als Verbrechen gegen die Menschlichkeit – sogar strafbewehrt sein kann, bildete nach 1945 die Grundlage der Nürnberger Prozesse. In der Bundesrepublik nach 1949 wurde dieser Gedanke aber rasch wieder verdrängt. Stattdessen zog man sich auf eine Gesetzesauslegung zurück, die es ermöglichte, dass Straftäter, selbst wenn sie schwerste Verbrechen begangen hatten, straffrei davonkamen, weil ihr Unrecht legalistisch gedeckt gewesen war.

Der Blick in die Geschichte macht also deutlich, wie wichtig es ist, sich an diese Vorgänge zu erinnern und die jüngere deutsche Rechtsgeschichte mehr als bisher zu einem Thema der juristischen Ausbildung zu machen. Gerade weil die jüngeren Generationen keine persönliche Erinnerung an die Diktatur mehr haben – weder an die nationalsozialistische noch an die kommunistische –, muss man sie damit konfrontieren. Dieser Auffassung waren auch die Mitglieder im Rechtsausschuss des Deutschen Bundestages, der sich im November 2016 mit den Erkenntnissen der „Akte Rosenburg" befasste. Alle Fraktionen waren sich dort einig, dass angehende Juristen dazu angehalten werden müssten, nicht nur Rechtsanwendung zu lernen, sondern mehr als bisher auch über die rechtsethischen Grundlagen ihres zukünftigen Berufs nachzudenken. Über die Frage, ob es dazu einer Ergänzung des Deutschen Richtergesetzes bedarf, mag man streiten. Aber klar ist, dass Juristinnen und Juristen nicht nur Wissen benötigen, um ihren verantwortungsvollen Beruf auszuüben, sondern dass sie dabei auch ein Gewissen haben sollten. Sie sollten also nicht nur über handwerkliches Können verfügen, sondern auch eine ethische Grundhaltung besitzen, die für das Funktionieren eines Rechtsstaates – gerade in schwierigen Zeiten – unverzichtbar ist.

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The Federal Ministry of Justice between 1949 and 1973 and the period of national socialism: continuation and a new democratic beginning - a historical retrospection

Abstract

There is no such thing in history as "hour zero". This was also the case in Germany after 1945. The legacy of the Nazi past had long-term ramifications, not only in the field of justice. A great deal of personal continuity existed in the courts of law, in the administration of justice in the Länder and in the Federal Ministry of Justice. This affected not only legislation and jurisprudence, but also the prosecution of Nazi crimes. The perpetrators of the most serious crimes often went unpunished. While admittedly this did not compromise the rule of law, it did hamper and delay the reckoning with the Nazi past, which has actually continued to date.

Keywords: free democratic system, war crimes, Nazi crimes, Nazi past, Nuremberg trial of lawyers, personal continuity, "thick line" mentality, insurmountable past

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Jens Rommel

The Central Office between Politics and Criminal Law

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Approaches by the Allies and in the Federal Republic

The international dimension of the crimes committed during the dictatorship in Germany since 1933 and during the Second World War from 1939 to 1945 has led to many different answers: by the Allies in the International Military Tribunal at Nuremberg, by numerous foreign states that have punished the crimes committed on their territory, by the four occupying powers in Germany, and finally by the Federal Republic of Germany and the (former) German Democratic Republic. The international approach may be characterized by three attributes: After the end of the war, special penal provisions are laid down retroactively, specifically tailored to state mass crimes, especially crimes against humanity. Only for these procedures, a special tribunal is set up, whose staff comes from the victorious powers. The process is based on a specially created procedural code partially restricting the rights of the defense.

There are considerable reservations about this approach in Germany. Rather political is the argument of "victors' justice" – meaning an unfair procedure by the winners against the losers. A substancial legal objection is that the Allied laws apply with retroactive effect to crimes committed before the rules were passed. In Germany, therefore, the accusation is raised loudly that the Allied procedure violates itself an elementary legal principle: *"nulla poena sine lege"*.

As a reaction to "Nuremberg" but also to the experiences with the abuse of criminal law during the dictatorship, the (West-) German constitution upholds a strict prohibition of retroactive penal law. There was also a political motto: "No special law for Nazi perpetrators". This led to a solution that deviated in all three points from the Allies:

(1) the applicable law,
(2) the competence of the general law enforcement authorities, and
(3) the general procedure and rules of evidence.

II. The Central Office between Politics and Criminal Law

1. Applicable law

No special legal basis has been established retroactively for dealing with NS crimes: neither crimes against humanity nor genocide. Consequently, German courts can only pass judgements in accordance with the provisions of the German criminal code – applicable already during the "Third Reich". We have to deal with the definitions in the code, established for individual acts with individual motives: distinguishing for example between murder, homicide in particularly aggravated circumstances and manslaughter. Up to now, we apply an individual criminal law – the "mass murders by state authority [were] an unprecedented novelty in history [...] to which the penal code was not tailored" (Federal Criminal Court, Bundesgerichtshof).

Recourse to the general criminal law led to the application of the usual statutory limitations. After the period of limitation, a crime may no longer be punished. For legal reasons, only NS crimes defined as murder can be prosecuted already since May 1960: a killing for pleasure or out of otherwise base motives, by stealth or cruelly. The imprescriptibility for murder is the result of a broad discussion in German Parliament in 1965, 1969, and 1979 that also reflected the international development: the non-prescription of genocide and crimes against humanity. Here again, the German solution is not limited to Nazi crimes but applicable to any murder case.

There is no room in criminal legislation for the concept that mere membership of an agency or unit participating in a crime provides prima facie evidence of culpable conduct. That is why members of the national socialist party (NSDAP), the paramilitary organisations Schutzstaffel and Sturmabteilung (SS and SA), the Secret State Police (GeStaPo) or the armed forces cannot be punished only on the basis of that fact. The most difficult legal question is: Where does personal responsibility begin when the state organizes crimes?

For a long time, the jurisdiction was prevalent: Not everyone who was *somehow* integrated into Auschwitz concentration camp is responsible for *everything* that happened in the context of the extermination program. Rather, it must be determined how the individual's behaviour *concretely* supported the murders.

Not until 2016, the Federal Criminal Court (*Bundesgerichtshof*) has clarified where to draw the line for criminal responsibility in cases of mass crimes, organized or tolerated by the state with thousands being involved in the bureaucracy: Today, it is sufficient for someone to have kept the murder machine running by performing his general duties in a certain function (for example, as a guard). This is why we could turn our attention to tracking down those who might have contributed to the killings even in low-level positions.

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2. Institutions

The judicial power is exercised mainly by the courts of the *Länder* – meaning a decentralized system. Unlike acts of terrorism, there is no competence for federal institutions when it comes to Nazi crimes. The local public prosecutor's offices and criminal courts are primarily responsible only for crimes conducted in their district or for perpetrators resided in the respective area. However, most of the crimes had been committed outside Western Germany. Often, the victims did not know the names of the suspects or their whereabouts. Thus, in the beginning, no institution seemed competent to deal e.g. with Auschwitz.

Just as the number of procedures had decreased sharply in the mid-fifties, the approach in the Federal Republic changed. By chance, there was the so called "task force trial" (*Einsatzgruppen-Prozess*) in Ulm. For the public and for politicians two things became clear: Not all crimes had been investigated. And we can no longer leave it to chance to determine whether a crime is prosecuted. An authority was and still is needed filling the considerable gap within the areas of judicial competence, an authority that would do some preparatory work in advance, push and bundle investigations of the public prosecutor's offices and provide support for them.

That is why the Ministers of Justice have founded the Central Office for the Investigation of National Socialist Crimes in Ludwigsburg. The task of the Central Office is to collect, to scrutinise and to evaluate the whole accessible material on NS crimes worldwide. Our main aim is searching for acts limited in space, time and committed by a certain group of culprits and to determine which persons involved into these atrocities can be still prosecuted. As soon as the Central Office has found the group of the perpetrators who are to be prosecuted, the preliminary investigations are closed and the files are transferred to the prosecutor's office in charge. Furthermore, the Central Office renders investigative assistance.

Unfortunately, the Central Office can neither obtain court decisions nor impose coercive measures – like a house search. Instead, we rely on the voluntary participation of witnesses, on publicly available sources and on the support of the police or from abroad by means of legal assistance.

Since 1959 we have seen investigations against about 120.000 defendants in Germany. Even if some of these proceedings have not been opened by the Central Office yet, they are in most cases indirectly connected with it.

3. Investigations and Procedures

Since our task is to prepare criminal proceedings, we try to find the means of evidence allowed in German courts. A great deal of surprise has been voiced about the strict requirements laid down by West German courts in Nazi trials

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as the regards the furnishing of proof. Yet these are the same standards as those stipulated in any other criminal trial conducted along constitutional lines in order to produce enough evidence to convict someone.

In some of the early Nazi trials, the courts were able to base their verdicts on the most convincing proof possible in a criminal case, i.e. a confession by the accused. Since the 60ies, this has played no role at all until the recent trials of our days.

Another form of evidence usually lacking in Nazi trials – unlike other legal proceedings against crimes of violence – is the local taking of evidence by a judge visiting the scene of the crime. In the overwhelming bulk of cases, a local inspection was not possible during the Cold war – a fact that is even more important when we take into account that most crimes have been committed on the territory of Poland or the former Soviet Union. Nowadays, most scenes of the crimes are accessible – but they can no longer help to ascertain the true facts because of changes in property and vegetation. We try to integrate modern techniques: The conditions in a camp can be illustrated with a modern 3D-virtual reality-model of Auschwitz; thus, it can also be clarified, what a defendant could see from his position.

Compared with other criminal trials, the obstacles encountered in Nazi cases are much greater because of the almost complete absence of "neutral" witnesses. Most of the series of murders were carried out under conditions of great secrecy and with the virtual exclusion of third parties. The armchair culprit, making his decisions on life or death for hundreds or thousands of people far away from the actual scene of the crime, remained unknown by name and appearance to the victims. By contrast, the "physically involved culprits", who were hardly ever individually named on documents relating to the crime because of their mostly subordinate duties and low rank, can as a rule only be convicted on the strength of witnesses' testimony. The number of witnesses available for the Nazi trials has been decreasing since WW II. To the losses from death and illness must be added the reluctance and exhaustion of witnesses from among the victims – especially those who have emigrated to North America or Israel. Experts have largely taken their place. Historians or military historians, in particular, are teaching us about the state of research, general events, chains of command, or constraints in the dictatorship.

In addition to the experts, documents have been the most important evidence, especially in the past for "armchair culprits". Today, they also have gained significance for the immediate helpers/aider/abettors on the crime scene, because each piece of the puzzle can give an indication to the general service of, for example, a guard in a concentration camp. Many documents have been deliberately destroyed by the SS; others have got lost by the effects of the

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war or have been inaccessible for decades in foreign archives. Staff members of the Central Office who until 1964 were forbidden by the federal government making trips to Eastern Europe, received permits in this period of the Cold War in the second half of the 60s and spent over several weeks in Polish and Czechoslovak archives as well in the Soviet Central Archives in Moscow. After the changes in the former Eastern bloc, the Central Office has gained access to large parts of the archive material. Soon after German reunification, the Central Office looked through the NS-Archive in the "Ministry of State Security", access to which had been refused for so many years by the authorities of the German Democratic Republic. Since many years, the Central Office has been cooperating with similar authorities from abroad, which also deal with NS crimes, especially with the Commission for the Prosecution of the Crimes against the Polish nation.

Our main difficulty is the passage of time since the deeds. In more than two generations, the evidence has deteriorated in every way. The accused have also aged or died in the meantime. Nowadays, the defendants are between 92 and 99 years of age. Our task is not to collect historical knowledge but to further criminal investigation: Therefore, we can conduct proceedings only if the accused is still alive and as long as he is fit to stand trial.

Importance

Despite all difficulties, we will continue our efforts to investigate murder crimes of the Nazi-regime for some more years. Preliminary proceedings of public prosecutor's offices and single trials as the current Stutthof-case in Hamburg demonstrate the importance of these efforts.

For survivors or members of family it is often very important and it remains a remembrance that such acts will be prosecuted until the end. This gives both sides the opportunity to tell their stories: both, the defendant and the victims (or their relatives) are heard by the current German state. We have to accept the fact, that the mass crimes of the former German state were only possible with the participation of thousands in the Nazi death machine and that they should therefore share responsibility.

"Too late, too lenient, too few" – that's how we might sum up the reaction to national socialist crimes by means of criminal law. It is an arduous learning process within the judiciary and in the post-war society in Germany. The investigations and trials on national socialist crimes are only an attempt. Despite all difficulties, I think it is worth trying.

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Abstract

The key note deals with the laborious learning process in German post-war justice and society. Unlike the Allies, the Federal Republic of Germany had not issued any special criminal regulations for dealing with National Socialist crimes. This gave rise to considerable difficulties in the application of the national criminal law, which is tailored for the assessment of individual guilt but reaches its limits with the assessment of state-organized mass crimes. The general rules on the jurisdiction of investigative authorities and courts have been found unsuitable for the mass crimes committed outside Germany. Since 1958, the Central Office of the state judicial administrations for the Investigation of National Socialist Crimes has helped to remedy the situation. Significant difficulties remained in proving facts, not only due to the behaviour of the perpetrators and the events of the war, but also due to constraints during the Cold War. The main difficulty today is the time since the deeds and the age of those involved.

Keywords: National Socialist crimes, German post-war justice, the Central Office for the Investigation of National Socialist Crimes

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"Polish Death Camps" as an "Opinion" of which Expressing is Protected by German Law? Questionable *Bundesgerichtshof's* Judgement of 19.7.2018

Introductory remarks

1. The issue discussed below in detail is focused on the recent German judgment of Federal Court of Justice (*Bundesgerichtshof*) further: "BGH" of 19th July 2018 (IX ZB 10/18)[1] and the preceding Polish judgment of the Court of Appeal (*Sąd Apelacyjny, SA*) in Cracow of 22nd December 2016.[2] Both rulings are results of court civil proceedings against the German television station Zweites Deutsches Fernsehen (ZDF) initiated by a civil lawsuit of a Polish inhabitant, a former prisoner of the Konzentration Lager Auschwitz (ie. the German Nazi concentration

[1] BGH 19 Juli 2018, IX ZB 10/18, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2018-8&nr=86838&linked=bes&Blank=1&file=dokument.pdf (accessed 20.01.2021), further: the judgment of German Court of 2018. The remedy (*Anhörungsrüge*) was examined by *BGH 11 Oktober 2018* http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=edd5d2bd1470278f2e359680eff737f7&nr=88961&pos=0&anz=3 (accessed 20.01.2021). See the first comments: P. Mostowik, E. Figura-Góralczyk, 'Odmowa wykonania polskiego orzeczenia z powodu obcego ordre public. Glosa do Wyroku Niemieckiego Federalnego Sądu Najwyższego (Bundesgerichtshof) z 19 lipca 2018 r. (IX ZB 10/18)', *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2019, vol. XVII, pp. 294–307, https://europeistyka.uj.edu.pl/documents/3458728/143239918/P.Mostowik%26E.Figura_PWPM+2019.pdf (accessed 20.01.2021).

[2] Sąd Apelacyjny w Krakowie 22 grudnia 2016 [Court of Appeal in Cracow 22 December 2016], I ACa 1080/16, http://orzeczenia.krakow.sa.gov.pl/content/$N/152000000000503_I_ACa_001080_2016_Uz_2016-12-22_001 (accessed 20.01.2021), further: the judgment of Polish Court of 2016. The first instance of the case was ruled by Sąd Okręgowy w Krakowie 25 kwietnia 2016 [District Court in Cracow 25 April 2016], I C 151/14, http://orzeczenia.krakow.so.gov.pl/content/$N/152010000000503_I_C_000151_2014_Uz_2016-04-25_001 (accessed 20.01.2021).

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camp located near the Polish town of Oświęcim during the World War II). The recognition of this judgment was not blocked by the state immunity, which sometimes happens to proceedings concerning this period.[3]

The demand concerned the prohibition to publish and spread in any way the following notion published in Internet by ZDF: "Polish concentration or extermination camp (and its translations into several languages) which had been used in the text published on the Internet website in order to describe German concentration camps and German camps located during World War II in the occupied Poland", as well as the demand of order to publish the statement with the specific content of apology in various media.[4]

In the sentence of the judgment of Polish Court of 2016, the defendant was ordered to apologize the plaintiff by publication on the Internet website (and maintain it for a period of one month), on the main page, in German, in the frame, in the bold font at its own expense of the following statement: "Zweites Deutsches Fernsehen, the publisher of the Internet portal, regrets the appearance on 15 July 2013 on the www.zdf.de portal in the article (...) the expression which is the untrue and falsifying history of the Polish nation, suggesting that the death camps of Majdanek and Auschwitz were built and run by Poles, and it apologizes Karol Tendera, who was imprisoned in a German concentration camp, for violating his personality rights, in particular his national identity (sense of belonging to the Polish nation) and his national dignity".

Whereas the judgment of German Federal Court of Justice of 2018 – that *de facto* neutralized the obligation to express regret and officially apologize for the historical falsehood – was pronounced in the course of the proceedings for the recognition and declaration of enforcement in Germany of the judgment of another EU Member State, i.e. the judgment of the Polish court. Such a declaration of enforcement is usually granted almost automatically under the Brussels I Regulation[5] according to the principle stipulated in articles 33 para

[3] See: S. Vrellis, 'The World War II Distomo Massacre of Greek Civilians by German Armed Forces and the Right to Effective Judicial Protection', in: Permanent Bureau of the HCCH (ed.), *A Commitment to Private International Law: Essays in honour of Hans van Loon*, Hague 2013, pp. 637–640.

[4] See first section of the grounds of the *Sąd Okręgowy w Krakowie 25 kwietnia 2016*, http://orzeczenia.krakow.so.gov.pl/content/$N/152010000000503_I_C_000151_2014_Uz_2016-04-25_001 (accessed 20.01.2021).

[5] Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, data.europa.eu/eli/reg/2001/44/2013-07-09, further: "Brussels I Regulation". Instead of Brussels I Regulation to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015 shall apply the Regulation 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, data.europa.eu/eli/reg/2012/1215/oj, further: "Brussels I bis Regulation".

1, 38 para 1 and 45 of this Regulation.[6] One of the "only grounds" provides for in Article 34 Brussels I Regulation is so called public policy (*orde public*) clause which has the following wording: "A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought".[7]

In the presented case the *exequatur* (declaration of enforceability of the judgment obliging to abandon spreading the falsehood) was not granted in Germany. According to the sentence of the judgment of *Bundesgerichtshof* of 19th July 2018 (IX ZB 10/18): "The applicant's claim to issue an enforcement clause to the judgment of the Court of Appeal in Cracow of 22nd December 2016 is dismissed. The costs of the proceedings are borne by the applicant. The amount of costs is set at € 4,000".[8]

2. The subject matter of further remarks is several important legal issues regarding this specific case of the protection of personality rights that arise in connection with the abovementioned circumstances. Further analysis includes also general assessment of the court rulings from the perspective of "judicial cooperation in civil and commercial matters" within the European Union and of the international law standards. Particularly important to the authors of the text is the issue of international private law and international civil procedure in cross-border cases concerning infringement of personality rights.[9]

[6] Article 33.1. "A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required." Article 38.1. "A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there." Article 45 1. "The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay. 2. Under no circumstances may the foreign judgment be reviewed as to its substance."

[7] See more on the recognition provided for in Article 33 as the rule – P. Wautelet, in: U. Magnus, P. Mankowski (eds.), *Brussels I Regulation*, Sellier 2007, pp. 547–554. On the public order clause and refusal to recognize the foreign judgment under article 34 – see S. Franco, in: U. Magnus, P. Mankowski (eds.), *Brussels*, pp. 565–579.

[8] "Der Antrag des Antragstellers, das Urteil des Appellationsgerichts Krakau, Polen, vom 22. Dezember 2016 – IACa 1080/16 – mit der Vollstreckungsklausel zu versehen, wird abgewiesen. Der Antragsteller trägt die Kosten des Verfahrens. Der Wert des Verfahrens wird auf 4.000 € festgesetzt."

[9] The subject matter of the case (the apology for violation of personality rights) is excluded from the scope of Regulation 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), data.europa.eu/eli/reg/2007/864/oj, further: "Rome II Regulation" – see A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations Updating Supplement*, Oxford Private International Law Series, Oxford 2008, pp. 238–240 – this causes only that the court ruling on the case applies the conflict law rules of the forum (of the national origin), and not the rules unified internationally. See also C.I. Nagy, 'The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in the EU Law – Missed and New Opportunities', *Journal of Private International Law*, 2012, 8, no. 2, pp. 251–296.

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The court cases should in particular be seen from the perspective of the conflict of law rules of private international law as well as norms on jurisdiction and, above all, the unified in EU rules on the recognition and enforcement of foreign judgments (international civil procedure). These rules have recently been subject to the unification process in the Member States.[10] The uniform regional rules on national jurisdiction and mutual recognition of judgments in civil and commercial matters were the result of the entry into force of the 1968 Brussels Convention[11] and in the last years they emerged in provisions of secondary law of EU (called Brussels Regulations). The EU legal instruments, as well as the existing solutions of national law and international agreements, including those established under the auspices of the Hague Conference on Private International Law, allow – rather exceptionally – not to accept on own territory the effects of a judgment issued in another Member State.[12]

3. The more general context, i.e. the issues of falsifying the history of II World War and the Holocaust, as well as current political issues – although important from a broader perspective – do not in principle fall within the framework of these remarks. However it is worth mentioning that the territory of Poland during the II World War was occupied by Soviet Union and Nazi Germany. The last one at that time organized in this territory an extermination system of "concentration camps" (*Konzentrationslager*) and "annihilation camps" (*Vernichtungslager*).[13] The second ones were in fact not camps but the areas of continual executions of transported victims. A huge number of the human victims of the camps, particularly in "death camps", were persons of Jewish origin. They were both citizens of pre-war Poland and persons transported there from other European countries occupied by Nazi Germany and their allies.[14]

[10] See: *Judicial cooperation in civil matters exists between EU countries in order to improve interoperability between their judicial system*s, https://e-justice.europa.eu/content_cooperation_in_civil_matters-75-en.do (accessed 20.01.2021).

[11] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27.9.1968 (consolidated version), eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41968A0927%2801%29 (accessed 20.01.2021).

[12] The effects of considering the foreign laws as *statuta odiosa* are presented by I. Thoma, *Die Europäisierung und die Vergemeinschaftung des nationalen ordre public*, Tübingen 2007, p. 4–16.

[13] In fact the second term adopted in German (*Vernichtungslager*) and copied in other languages is not precise, because there were *in fact* no camps but places of constant executions (the people were not accommodated but murdered immediately after arrival). The few becamped there persons were mainly voluntary or coerced executors.

[14] The official Polish government report on war damages prepared in 1947 estimated Poland's casualties of war at circa 5 million, including over 3 million Polish citizens of Jew nationality and 2 million ethnic Poles. Additionally, millions of foreign Jews were also murdered at the Polish territory occupied by German Nazis, in particular in death camps like Treblinka or Birkenau. See also data presented in materials of United States Holocaust Memorial Museum, Washington, titled "Polish Resistance and Conclusions", https://www.ushmm.org/learn/

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Additionally the German occupiers attempted but failed to organize a collaborative Polish government which would cooperate with the Nazis, which was a phenomenon and an exception on a European scale. It's also worth mentioning that during the World War II only on the territory of occupied Poland there was a ban on help of the persecuted Jewish persons under the death penalty.[15] It seems that these are important reasons why a great deal of sensitivity can be observed in contemporary Poland in recent decades aimed at counteracting the falsification of history by using the word 'Polish' in context and connection to events related to crimes planned and organized by the invaders during the war on the territory of occupied Poland called "Generalgouvernement for the occupied Polish territory" (*Generalgouvernement für die besetzten polnischen Gebiete*).[16] Despite this the untrue expression "Polish death camps" was presented several times in mass media in the last decade[17]. Thanks to the sending of educational historical explanations to the authors of such unfortunate statements, they were usually officially corrected (e.g. by American NBC reporter).[18]

students/learning-materials-and-resources/poles-victims-of-the-nazi-era/polish-resistance-and-conclusions (accessed 20.01.2021). See more: R.C. Lukas, *Forgotten Holocaust: Poles Under German Occupation, 1939–44*, Hippocrene Books, 2001, p. 31 et seq.; M. Gniazdowski, 'Losses Inflicted on Poland by Germany during World War II. Assessments and Estimates—an Outline', *The Polish Quarterly of International Affairs*, 2007, no. 1, pp. 94–126, available in Central and Eastern European Online Library www.ceeol.com. See also catalogue of victims and losses at: http://www.aan.gov.pl/delegaturaRP/ (accessed 20.01.2021).

[15] See for example the context of execution of the whole Polish Ulma family hiding the Jewish Family: https://muzeumulmow.pl/en/museum/history-of-the-ulma-family/ (accessed 20.01.2021).

[16] For example, an information campaign launched inter alia via Twitter: #GermanDeathCamps. An example of support from the World Jewish Congress may be the following message: https://www.worldjewishcongress.org/en/news/wjc-president-ronald-s-lauder-demands-msnbc-retract-false-characterization-of-warsaw-ghetto-uprising-2-4-2019 (accessed 20.01.2021).

[17] As far as the need and grounds – see: I. Lewandowska-Malec, 'Względy aksjologiczne i teleologiczne polityki historycznej w świetle problemu „polskich obozów śmierci"', in: *Prawda historyczna a odpowiedzialność prawna za jej negowanie lub zniekształcanie*, eds. A. Radwan, M. Berent, Warszawa 2019, s. 69.

[18] For example correction were made by the following media (FOX TV, Netflix): https://twitter.com/foxandfriends/status/1031953153984540672?lang=en (accessed 20.01.2021), https://www.dailymail.co.uk/news/article-2152166/Obama-makes-Holocaust-gaffe-referring-Polish-death-camps-blaming-Nazis.html (accessed 20.01.2021), https://twitter.com/mitchellreports/status/1096131096574681088?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1096131096574681088&ref_url=http%3A%2F%2Fwww.thenews.pl%2F1%2F10%2FArtykul%2F406610%2CUS-reporter-apologises-for-error-on-Polish-WWII-history (accessed 20.01.2021). See also BBC news: Netflix to amend Devil Next Door series after Poland complaint, https://www.bbc.com/news/world-europe-50431823 (accessed 20.01.2021). See also: S. Topa, L. Obara, 'Dobra osobiste a wypowiedzi o „polskich obozach". Dlaczego nieprawdziwe wypowiedzi o obozach zagłady wywołują poczucie krzywdy?', in: *Prawda historyczna a odpowiedzialność…*, op. cit., p. 399.

The judgment of Polish Court ordering to apologize for the publication of the expression "Polish concentration camps" which falsifies a history

The discussed judgments have their origin in the publication on 15th July 2013 on the website of ZDF announcement of the documentary film "Verschollene Filmschätze 1945. Die Befreiung der Konzentrationslager"[19] in which the expression "Polish extermination camps of Majdanek and Auschwitz" (*polnische Vernichtungslager Majdanek und Auschwitz*) was misused. The Polish Embassy in Germany intervened in this matter on 19th July 2013, which caused that on the same day ZDF corrected this wording in the following way: "German extermination camps of Majdanek and Auschwitz on the Polish territory" (*deutsche Vernichtungslager auf dem polnischem Gebiet Majdanek und Auschwitz*).

Also on 19th July 2013 the plenipotentiary of Karol Tendera, a former prisoner of Auschwitz concentration camp during the World War II, sent a message to ZDF in which he requested that the term "Polish extermination camps" should be removed from the website www.zdf.de and demanded to publish an apology in German and Polish language on the abovementioned portal and in the press, as well as to pay for the social organization the amount of 50,000 PLN.

In the message of 31st July 2013 ZDF apologized individually Karol Tendera for the expression "Polish extermination camps" and expressed regrets. Then next messages were sent in August 2013 and the publisher indicated who bears the editorial responsibility for this mistake and the TV-station ARTE (which provided the wrong expression to ZDF) apologized for this situation.

The prisoner of German Nazi was not satisfied by this partial reaction and filed a lawsuit against ZDF in 2014 to the District Court in Cracow. Karol Tendera indicated violation of his personality rights. On the day before the first hearing at the District Court in Cracow, i.e. on 11th April 2016, ZDF posted on its Internet portal information that in July 2013 on their website, in the announcement of the program, the false expression "Polish extermination camps" was mistakenly used, despite it concerned of course "German extermination camps in occupied Poland". This information also included apology for mistake, but – what was important for the plaintiff – it was not addressed directly to Karol Tendera.[20]

[19] Translation into English language: "Lost Movie Treasures of 1945. Liberation of concentration camp".

[20] The apologies had general character and the following wording: "As we have already stated, we regret this inattentive, untrue and incorrect wording and we apologize all those who feel hurt by it in their feelings." ("*Wie bereits seinerzeit zum Ausdruck gebracht, bedauern wir diese unachtsame, falsche und irrtümliche Formulierung und bitten alle Menschen, die sich dadurch in ihren Gefühlen verletzt sehen, um Entschuldigung.*")

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The court of the first instance dismissed the lawsuit, not because of the merits but because of the specificity of Polish extra-contractual obligations law.[21] However the court of second instance changed this ruling. Court of Appeal in Cracow in the abovementioned judgment of 22nd December 2016 partially supported the plaintiff's lawsuit. When the case was in front of Court of Appeal in Cracow, *Rzecznik Praw Obywatelskich* [Polish Ombudsman] joined the case and effectively supported the plaintiff.[22]

Finally the Polish Court in judgment of 2016 ordered the defendant to apologize individually the plaintiff in the following way defined in detail: by posting in German language, on the website www.zdf.de on the main page, in a frame, with the bold font, size of 14 points and on their own cost (and maintaining it for a period of one month) the following statement: "Zweites Deutsches Fernsehen, the publisher of the Internet portal, regrets the appearance on 15 July 2013 on the www.zdf.de portal in the article 'Verschollene Filmschtäze. 1945. Die Befreiung der Konzentrationslager' the expression which is the untrue and falsifying history of the Polish Nation, suggesting that the death camps of Majdanek and Auschwitz were built and run by Poles, and it apologizes Karol Tendera, who was imprisoned in a German concentration camp, for violating his personality rights, in particular his national identity (sense of belonging to the Polish Nation) and his national dignity". The court stated that in this case there was an infringement of the personality rights[23] of plaintiff and the hitherto apology do not fulfil the adequacy requirement in relation to the infringement. From the point of view of the court in order to fulfil the adequacy requirement the apology should fulfil among others two criteria: be personal and take place on the internet portal where the violation occurred.[24]

[21] The Court accepted that the actions necessary to remove the effects of infringement of the plaintiff's personality rights were fulfilled by the defendant. See justification of the Sąd Okręgowy w Krakowie 25 kwietnia 2016, orzeczenia.krakow.so.gov.pl/content/$N/152010000000503_I_C_000151_2014_Uz_2016-04-25_001 (accessed 20.01.2021).

[22] The Arguments of *Rzecznik Praw Obywatelskich* [the Polish Ombudsman] in the file entitled: *Naruszenie dóbr osobistych przez stosowanie określenia „polskie obozy śmierci" – argumenty prawne RPO*, rpo.gov.pl.

[23] The legitimacy of including the truth in the catalog of personality goods is indicated by J. Mazurkiewicz, 'Do diabła z prawdą! Kłamstwo medialne jako naruszenie dobra osobistego prawdy', in: M. Łaszewska-Hellriegel, M. Skibińska (eds.), *Dobra osobiste w prawie cywilnym, prasowym i karnym*, Acta Iuridica Lebusana, vol. 8, Zielona Góra 2018, p. 13.

[24] ZDF filed cassation complaint to Polish Supreme Court against the judgment of Court of Appeal in Cracow of 2016 and the defendant's cassation complaint which has been accepted for examination (III CSK 156/17, 30.01.19, www.sn.pl.). The hearing was scheduled for 25th September 2019. However, just before this date ZDF withdrew its cassation complaint. In fact the judgment of Polish Supreme Court would not affect the discussed issue of the enforcement in Germany of – already legally valid and enforceable on 22nd December 2016– judgment of the Polish Court of second instance.

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German *orde public* as the ground for refusing by *Bundesgerichtshof* (German Federal Court of Justice) to enforce the judgment of Polish Court

The judgment of Polish Court of 2016 was on the 22nd December 2016 enforceable and subject to enforcement in accordance with the Brussels I Regulation. Therefore, ZDF published a statement on its website and maintained it for a period from 23rd December 2016 to 23rd January 2017. However, according to the plaintiff, it was not in accordance with the details of the judgment of the Polish Court. Therefore, the *actor* filed a motion for declaration of enforcement of this judgment in Germany, i.e. the country of residence (seat) of the defendant (ZDF).

The next stages of procedure took place in Germany after filing the motion of the declaration of enforcement of the judgment of Polish Court of 2016 (for granting the enforcement clause). The Regional Court in Mainz (*Landesgericht Mainz*) granted such a clause on 27th January 2017 but ZDF appealed against this judgment. The Higher Regional Court in Koblenz (*Oberlandesgericht Koblenz*) also confirmed the enforcement of the Polish judgment in Germany on 11th January 2018. This court stated that: "The defendant, what he does not deny himself, confirmed that he was using the phrase 'Polish extermination camps' which is an untrue fact. An incorrect statement of fact is not subject to the protection of the fundamental right under Art. 5 sec. 1 sentence 1 GG".[25] It is worth additional noting here that German substantive penal law forbids both the negation of the Holocaust and the approval, negation and underestimation of all acts committed in the period of the national-socialist regime in the sense of § 6 sec. 1 of German International Criminal Code (*Völkerstrafgesetzbuch*)[26] according to § 130 sec. 3 German Criminal Code (*Strafgesetzbuch*).[27] The Higher Regional Court in Koblenz ruled that the enforcement of a Polish judgment in Germany would not imply a violation of the freedom of speech

[25] „Die Antragsgegnerin habe, was sie selbst nicht in Abrede stelle, mit der Formulierung 'polnische Vernichtungslager' eine unrichtige Tatsache behauptet. Eine unrichtige Tatsachenbehauptung unterfälle nicht dem Schutz des Grundrechts aus Art. 5 Abs. 1 Satz 1 GG" (BGH 19 Juli 2018, footnote 1, p. 7). *Bundesverfassungsgericht* states that the denial of the Holocaust is not protected by freedom of thought and expression, guaranteed in Art. 5 sec. 1 of the German Constitution. See: BVerfG 13 April 1994, 1 BvR 23/94, openjur.de/u/183443.html (accessed 20.01.2021).

[26] Völkerstrafgesetzbuch, www.gesetze-im-internet.de/vstgb/BJNR225410002.html (accessed 20.01.2021).

[27] Strafgesetzbuch, www.gesetze-im-internet.de/stgb/. Moreover according to German substantive law one of the conditions of applying § 130 para. 4 StGB is a violation of the dignity of people who were victims of the national socialist regime. See more, opinion written by P. Kapusta, *Odpowiedzialność karna za negowanie zbrodni przeciwko ludzkości oraz naruszenie godności narodu w systemach prawnych wybranych państw – Niemcy, Austria oraz Liechtenstein*, Instytut Wymiaru Sprawiedliwości, Warszawa 2018, pp. 4, 11–12, https://iws.gov.pl/wp-content/uploads/2018/08/IWS_Kapusta-P._Odpowiedzialno%C5%9B%C4%87-karna-za-negowanie-zbrodni-p.-ludzko%C5%9Bci-Niemcy-Austria-Liechtenstein.pdf (accessed 20.01.2021).

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as ZDF argued, because the term "Polish extermination camps" is a statement of a false fact which is excluded from the protection provided by art. 5 sec. 1 sentence. 1 of the German Constitution. Therefore the ascertainment of the infringement of the plaintiff's personality rights in the judgment of Court of Appeal in Cracow does not violate the German Constitution.

The German defendant (ZDF) was unsatisfied with these judgments of German courts and submitted the remedy in this case to Federal Court of Justice (*Bundesgerichtshof*) and applied for revocation of the abovementioned judgments of the internal courts and refusal to declare the enforcement of the judgment Polish Court. According to the abovementioned judgment of 19 July 2018 *Bundesgerichtshof* dismissed the motion for the declaration of enforceability of the judgment of Polish Court of 22nd December 2016, referring to an obvious violation of German public order and "freedom of opinion" (*Meinungsfreiheit*) which is the "constitutional right" (*Grundrecht*).

Bundesgerichtshof stated in a generally formulated thesis in particular that: "The enforcement of a judgment by which the convicted television broadcaster is obliged to apologize for falsification of history contained in a statement [Majdanek and Auschwitz Polish Extermination Camps] existing in the opinion of the court of the sentencing State and for infringement of personality rights existing in this case in the opinion of the court of the sentencing State, clearly infringes the fundamental right to negative freedom of expression and German public policy".[28]

German Federal Court of Justice not only revoked the judgment of the Higher Regional Court in Koblenz (*OLG Koblenz*) of 11th January 2018 and the judgment of the Regional Court in Mainz (*LG Mainz*) of 27th January 2017. Moreover, the court charged the applicant with the costs of proceedings in the amount of 4,000 Euro.[29] BGH indicated as the legal basis for the ruling Art. 34 point 1 Brussels I and art. 5 sec. 1 of the German Constitution which are to be discussed in the following part.

The questionable grounds of judgment of *Bundesgerichtshof*

1. The detailed commentary on the grounds of the abovementioned judgments should begin from the issues of international private law and international civil

[28] "Die Vollstreckung eines Urteils, welches der verurteilten Fernsehanstalt aufgibt, eine nach Ansicht des Gerichts des Urteilsstaats in einer Äußerung [polnische Vernichtungslager Majdanek und Auschwitz – EFG PM] enthaltene Geschichtsverfälschung zu bedauern und sich für eine nach Ansicht des Gerichts des Urteilsstaats hierin zu sehende Persönlichkeitsrechtsverletzung zu entschuldigen, verstößt offenkundig gegen das Grundrecht auf negative Meinungsfreiheit und gegen den deutschen ordre public."

[29] The amount of 4 thousand. € is a large sum from the Polish perspective, as it is 8 times more than the average pension and 16 times more than the amount of the most frequently paid pension.

proceedings. The provisions of international civil proceedings have been unified in Germany and Poland (in the EU). It resulted on the basis of Lugano Convention of 1988[30] and next the Brussels I Regulation that applied in this case as the lawsuit was filed to the court on 2014 and what was confirmed by the judgment of BGH.

Private law cases concerning the infringement of personality rights fall within the scope of the Brussels I Regulation which has been applied in relation to the issue of recognition and declaration of enforcement of the discussed judgment of the Polish Court of 2016 in Germany. Brussels I Regulation provides as a rule – based on mutual trust between EU Member States – the principle of recognition and declaration of enforceability of judgments among these countries.[31] On the basis of this normative act, as well as the Brussels I bis Regulation which replaced it, the "blocking" role may be exercised by the public order (*orde public*) clause. More specifically – by the possibility of non-enforcement of a foreign judgment if its effects would be incompatible with the fundamental principles of the legal order of the state in which the motion for the enforcement of a judgment from another country is filed.[32] Additionally, in this case BGH applied the German provisions of the Act on the recognition and enforcement[33] and the provisions of the German Code of Civil Procedure (*Zivilprozessordnung*[34]).

However in relation to the conflict-of-law rules concerning infringement of personality rights the unification of the legal status in the region has not taken place. As to the applicable law, the legal status has not been harmonized in the European Union under the "Rome II" Regulation. It is true that in the draft of this Regulation the appropriate provisions have been found.[35] But they were removed

[30] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Official Journal of the European Union of 21.12.2007, data.europa.eu/eli/convention/2007/712/oj (accessed 20.01.2021).

[31] Compare e.g. relations between China and Japan on the basis of the case of Nanjing Massacre. See the judgment of Court in Tokio of 20th March 2015, Westlaw Japan (Ref. no. 2015 WLJPCA 03208001). See also Q. He, Y. Wang, 'Resolving the Dilemma of Judgment Reciprocity. From a Sino-Japanese Model to a Sino-Singaporean Model', *Yearbook of Private International Law*, 2017–2018, vol. 19, p. 90, footnote 39.

[32] See M. Frigo, 'Recognition and Enforcement of Judgments on Matters Relating to Personality Rights and the Recast Proposal of the Brussels I Regulation', in: F. Pocar, I. Viarengo, F.C. Villata, *Recasting Brussels I*, Padova CEDAM, 2012, pp. 341–350.

[33] Anerkennungs- und Vollstreckungsausführungsgesetz, http://www.gesetze-im-internet.de/avag_2001/ (accessed 20.01.2021).

[34] Zivilprozessordnung, www.gesetze-im-internet.de/zpo/ (accessed 20.01.2021).

[35] See: A. Dickinson, *The Rome II*, pp. 23–61; P. Mankowski in: U. Magnus, P. Mankowski (eds.), *Rome II Regulation*, Verlag Dr Otto Schmidt, 2019, pp. 11–25. See also additional content at www.romeii.eu. See more D. Wallis, *Rome II – A Parliamentary Tale*, pp. 1–7; see more A. Scott, *The Scope Of 'Non-Contractual Obligations'*, in: W. Binchy, J. Ahern, *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations. A New International Litigation Regime*, Martinus Nijhoff Publishers, 2009, pp. 57–83.

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at a later stage of legislative procedure.[36] Thus the defamation and violation of personality rights have been excluded (exclusion but de facto – non-inclusion) from the scope of application of "Rome II" Regulation.[37] This means that the courts of each EU Member State apply national conflict-of-law rules concerning the personality rights.

2. From the point of view of BGH, the refusal of recognition and enforcement of the foreign judgment in Germany is justified by the exception provided for in Article 45 sec. 1 sentence 1 in conj. with art. 34 point 1 of the Brussels I Regulation due to the fact that the implementation of the judgment of Polish Court of 2016 would obviously violate the *orde public* of the Federal Republic of Germany. BGH referred to the judgment of the German lower court instance (the Higher Regional Court in Koblenz) and questioned its thesis that the term "Polish extermination camps" is a statement of a false fact that is excluded from the protection of freedom of speech and opinion, as stipulated in art. 5 section 1 sentence 1 of the German Constitution, and thus that the ascertainment in the judgment of Polish court of 2016 that there have been the violations of personality rights does not violate the German Constitution. BGH did not agree with this justification, stating that the subject of the examination in the case of a declaration of enforcement is not the question of examination of the falseness of the expression "Polish extermination camps" but of the statement which the defendant was obliged to pronounce according to the judgment of the Polish Court of 2016.

Bundesgerichtshof expressed this last thought in the following way: "On the contrary, the subject of the legal examination in the procedure of the declaration of enforcement is rather solely the declaration for which the court of the sentencing state has sentenced the defendant. The defendant is sentenced to adopt and publish as its own the opinion that the Polish court has got from defendat's statement. This clearly infringes the fundamental right of the defendant under Article 5 sec. 1 GG".[38] From the BGH's point of view, the defendant was obliged

[36] A. Dickinson observed that "During the consultation process, representatives of the broadcast print media proved a powerful lobby group, with many openly advocating application of the so called 'country of origin' principle. There was overt hostility from media representatives to the rules on defamation and privacy postulated by the Commission (...)." See: A. Dickinson, *The Rome II*, p. 234. Similarly P. Mankowski in: *Rome II*, pp. 115–116, stresses "It [Art. 6 of Commission's Proposal COM 2003/427] almost immediately met fierce opposition and received a decidedly negative reception from broadcasters and newspapers throughout Europe. (...) The political instances were unable to agree on anything positively. Hence, they agreed to disagree and resorted to excluding the matter from the scope of Rome II Regulation."

[37] See A. Dickinson, *The Rome II*, pp. 234–224; P. Mankowski in: *Rome II*, pp. 11–25. On substantive scope of application – see also A. Halfmeier in: G.-P. Calliess (ed.), *Rome Regulations: Commentary*, Wolters Kluwer, 2nd ed., 2015, pp. 857–863.

[38] "Gegenstand der rechtlichen Prüfung im Rahmen der Vollstreckbarkeitserklärung ist vielmehr ausschließlich die Erklärung, zur deren Abgabe das Gericht des Urteilsstaates die

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to accept and submit in public as his own the statement that is an assessment (*Bewertung*) made by the Polish court what obviously violates the fundamental right resulting from art. 5 sec. 1 of the German Constitution.

3. It is partly necessary to agree with the formal arguments of this justification. *Bundesgerichtshof* precisely states that in accordance with art. 45 sec. 1 sentence 1 in conj. from art. 34 point 1 Brussels I, it is possible to refuse to recognize or enforce the judgment because of the national public order. In order to apply the public order clause, it is necessary that the effect of the application of foreign law in a specific case violates the basic principles of the law of the state of execution and the sense of justice (*Gerechtigkeitsvorstellung*) that takes effect in that state, to such a great extent that this violation precludes the statement of enforcement.[39] Moreover, *Bundesgerichtshof* rightly emphasized that in the light of the Brussels I Regulation, the violation of these basic principles must be manifest.[40]

It is worth adding that the possibility of referring to this clause and the refusal to recognize or enforce a judgment due to its negative potential effects concerns essentially the substantive law issues. In the analysed case, the *Bundesgerichtshof* did not invoke any procedural issues against the quality of proceedings in Poland, but BHG referred to the merits of the court's judgment and its consequences. Such a possibility is also provided for in the Brussels I Regulation, because the clause has also a substantive law side.[41] But it must be seen as an exception to the principle that when declaring the enforcement of a foreign judgment, the court of the executing state does not carry out substantive law control.[42]

4. On the other hand, it is hard to agree with the arguments that do not refer to the merits (i.e. the expressing of "Polish death camps" and the question of correction of the statement and apology), but create a specific "redirect" argumentation not on the claimant's relationship with the defendant but directed de facto against the sentence of the Polish court judgment, and indirectly – as

Antragsgegnerin verurteilt hat. Die Antragsgegnerin ist dazu verurteilt worden, die Bewertung, die ihre Erklärung durch das polnische Gericht erfahren hat, als eigene Meinung zu übernehmen und zu veröffentlichen. Dies verstößt offenkundig gegen das Grundrecht der Antragsgegnerin aus Art. 5 Abs. 1 GG." (BGH 19 Juli 2018, footnote 1, p. 10).

[39] BGH 19 Juli 2018, footnote 1, pp. 8–9.

[40] BGH 19 Juli 2018, footnote 1, p. 9.

[41] S. Francq, in: *Brussels*, p. 579 rightly indicates that it is not only procedural public policy (in particular, the infringement of the rights of the defense) but pp. 568–573 "substantive public policy", that is de facto the substantive assessment, and more specifically its effects from the perspective of the fundamental principles of substantive law of the forum.

[42] Additional arguments are presented by A. Nowicka, 'Wykonywanie orzeczeń sądów polskich w sprawach cywilnych w państwach członkowskich Unii Europejskiej, z uwzględnieniem ewentualności powołania się przez sądy zagraniczne na klauzulę porządku publicznego', in: *Prawda historyczna a odpowiedzialność*..., op. cit., p. 329.

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it seems – against his tenure. This happened by redirecting discourse from personality rights to the sentence of the Polish court judgment and applying a highly complicated and "sublime" interpretation of the principle of freedom of opinion, raised to the rank of "German public order", as a result of which BGH refused to recognize and declare the Polish judgment enforceable in the territory of Germany as "obviously contradictory" to this order with reference to art. 34 point 1 Brussels I.

From the point of view presented *obiter dicta* by *Bundesgerichtshof*, it is the judgment of the Polish Court of 2016 that violates the negative freedom of expressing opinion (*negative Meinungsfreiheit*), i.e. the right not to have one's own opinion, not pronouncing one's opinion, to silence, and not being able to compel another person to express someone else's opinion as one's own. BGH states that the impossibility of examining whether a given statement (in this case the sentence of a judgment) expresses truth or falsehood (the impossibility of falsifying a given statement) makes it an opinion (*Meinungsäußerung, Werturteil*).[43]

The main objections are raised by this step of the *Bundesgerichtshof*'s argumentation, which causes that correcting the statement of a false historical fact is changed into the category of "opinion" (*Meinung*), with which category of the freedom of speech and opinion is later bound, and then the protection of this principle in the German Constitution and its blocking effect on the execution of the Polish judgment. From the point of view of BGH the statement which content of was formulated by Court of Appeal in Cracow is the expressing of the opinion (*Meinungsäußerung*).[44] In the grounds of the judgment BGH states that: "The description of a – also not coherently reproduced – program announcement as a falsification of history and as a violation of the personality rights of a former concentration camp prisoner is the result of a judgmental consideration, but not a fact whose truth could be verified".[45] *Bundesgerichtshof* emphasizes also that the defendant would have to join the abovementioned opinion and make it public as its own , as it is excluded in this case to indicate that the statement results from the judgment of the Polish court.[46]

Thus, the negative freedom of expressing the defendant's opinion would be violated if Polish judgment is enforced. At the same time, *Bundesgerichtshof* omits in this part of explanations that freedom of expression has its limits, resulting e.g.

[43] BGH 19 Juli 2018, footnote 1, pp. 10–11.

[44] BGH 19 Juli 2018, footnote 1, p. 11.

[45] "Die Umschreibung einer – zudem nicht zusammenhängend wiedergegebenen – Programmankündigung als Geschichtsverfälschung und als Verletzung des Persönlichkeitsrechts eines ehemaligen KZ-Häftlings ist das Ergebnis einer wertenden Betrachtung, nicht jedoch eine Tatsache, deren Wahrheitsgehalt überprüft werden könnte." (BGH 19 Juli 2018, footnote 1, p. 12).

[46] BGH 19 Juli 2018, footnote 1, p. 12.

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from the protection of the individual's personality rights.[47] However it refers to the case law of the German Constitutional Court according to which the change of opinion can not be demanded.[48] In this case, the defendant would be forced to regret and apologize as part of joining the "opinion" (*Meinung*) of the Polish Court of 2016 regarding "Polish extermination camps". It's also worth mentioning that by comparing the judgment of Polish Court to the "opinion" in fact its sentence was evaluated by BGH.

However it's hard not to object to the fact that the adjective "Polish" is a denial of facts, and not just expressing an "opinion". But in the summary of this part *Bundesgerichtshof* draws the conclusion that this case "(...) concerns the question of whether the defendant can be obliged to take over a foreign opinion. If the obligation to express one's own opinion violates the negative freedom of expression under Article 5 (1) of German Constitution, that is certainly the case with the obligation to publish a described assessment as one's own opinion".[49]

5. In the following part BGH *de facto* assesses the relationship of the fault to the obligations imposed by the Polish court. *Bundesgerichtshof* claims that the erroneous expression "Polish" camps did not trigger sensation in 2013 and the defendant has not used once again such term any more, and that the wording was detached from the entire text of the announcement and the program itself. In the opinion of BGH, it is difficult to suspect the defendant that using the abovementioned term he believed that the concentration camps of Majdanek and Auschwitz, located on the territory of the current Poland, were the work of Poles. Such a conclusion is only a valuation, subjective opinion of the Court of Appeal in Cracow which the defendant does not have to share and make public as his own opinion, because it would violate the right to freedom of speech (freedom of expression and media freedom) guaranteed by Article 5 sec. 1 of the German Constitution.

[47] However, BGH at the beginning of the discussion on art. 5 of the German Constitution among the limits of freedom of expression in accordance with Art. 5 sec. 2 of the German Constitution lists the right to the protection of honor (*Recht der persönlichen Ehre*). (BGH 19 Juli 2018, footnote 1, p. 10). Regarding the protection of dignity in the German Constitution, see F. Rakiewicz, *Poczucie tożsamości narodowej jako dobro osobiste. Studium cywilnoprawne*, not published doctoral theses wrote under auspicies of Adam Mickiewicz University in Poznań, 2017, p. 69, note 263 and the literature given there.

[48] E.g.: Bundesverfassungsgericht 02 Mai 2018, 1 BvR 666/17, ECLI:DE:BVerfG:2018:rk20180502.1bvr066617.

[49] "Es geht um die Frage, ob die Antragsgegnerin zur Übernahme einer fremden Meinung verpflichtet werden kann. Wenn schon die Pflicht zur Abgabe einer eigenen Stellungnahme gegen die negative Meinungsfreiheit aus Art. 5 Abs. 1 GG verstößt, gilt dies erst recht für die Pflicht, eine vorgegebene Bewertung als eigene Meinung veröffentlichen zu müssen." (BGH 19 Juli 2018, footnote 1, p. 13).

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In addition to the abovementioned argumentation, *Bundesgerichtshof* argues that the declaration of enforcement of the judgment of Court of Appeal in Cracow violates the constitutional principle of proportionality (*Verhältnismäßigkeitsgrundsatz*). BGH presents appropriate and adequate measures to restore the lawful state. It states that the obligation of the press or television to make the correction public is an infringement of their rights under Article 5 sec 1 of the German Constitution and Article 10 of the European Convention on Human Rights,[50] according to which the media decide how and what they inform.

It seems that at this point *Bundesgerichtshof* again *de facto* paid little attention to the important issue of the scope and "borders", which were given by the international legislator to the notion of "freedom of speech", "freedom of opinion" and "freedom of expression".[51] It is stressed that freedom of expression is of considerable importance but remains a conditional freedom. In particular, freedom of the press is of cardinal importance in a democratic society, but is not unlimited. Publishing some expressions or statements may render the person concerned civilly liable or even criminally punished in the case of defamation or insulting language.[52]

In the subsequent fragments *Bundesgerichtshof* continues the substantive evaluation of the judgment of Polish Court of 2016 in the scope of the principle of proportionality. BGH states that the term "Polish concentration camps" (while erroneously referring to "concentration" camps, although the expression contained the word "extermination" or "death" camps, which is not a synonym) could be seen only for four days on the website and

[50] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950, www.echr.coe.int/pages/home.aspx?p=basictexts, further as 'ECHR'. See about violation of personality rights such as national identity in judgments of Polish courts and European Court of Human Rights in: M. Brzozowska-Pasieka, 'Legitymacja czynna osób fizycznych i prawnych w sprawach o naruszenie prawa do tożsamości narodowej. Przegląd orzecznictwa polskiego z uwzględnieniem orzecznictwa Europejskiego Trybunału Praw Człowieka', *Monitor Prawniczy*, 2019, no. 22, p. 1239 et.

[51] It is worth to remind the wording of the Article 10 ECHR, which concerns the freedom of expression: "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[52] ECtHR, 29 March 2001, Thoma v. Luxembourg, Reports 2001-III. See: *Introduction to the European Convention on Human Rights The rights guaranteed and the protection mechanism*, Council of Europe, 2005, pp. 22–27, https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-01(2005).pdf (accessed 20.01.2021).

immediately after the intervention of the Polish Embassy has been corrected. BGH mentions also that it resulted from inaccurate translation and the defendant made public on its website a statement to which he had been obliged by the judgment of Polish Court of 2016, in a way that only the plaintiff considered to be incorrect. Additionally, *Bundesgerichtshof* indicates that the declaration of enforcement of this judgment would violate Article 5 sec. 1 of the German Constitution, because the ordered way of announcing the statement (too long period of making the statement public, the size of the font, its thickness and the frame) is neither necessary nor rational to repair the infringement of the plaintiff's personality rights.

The latter arguments for the reasoning of *Bundesgerichtshof* judgment is in fact – generally excluded by Brussels I Regulation – the substantive review of the judgment of Polish Court of 2016. The evaluation regarding merits although – as BGH stated in the grounds of its judgment – the court of the executing State does not in principle have such powers in accordance with EU law. According to Article 45 para 2 Brussels I Regulation: "under no circumstances may the foreign judgment be reviewed as to its substance".[53] Additionally under Article 36 Brussels I Regulation: "Under no circumstances may a foreign judgment be reviewed as to its substance".[54] Of course, the application of the public order clause, which the Brussels I Regulation introduces, creates a certain opportunity to assess the judgment from the substantive law's perspective of the state of enforcement. Article 34 (1) Brussels I Regulation states that "foreign judgment shall not be recognised if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought." Such formal reasoning – regardless of whether it raises doubts – could be undoubtedly presented by *Bundesgerichtshof* regarding the broad approach to freedom of expression and the "assessment" for which the wording of the sentence of the Polish judgment was treated. Although the substantive perspective of such ruling may be evaluated as questionable.

6. The application of the *orde public* clause means in fact that the local court takes into account substantive rules of *legis fori* that express the fundamental principles of a certain state. They can be interpreted not only from national constitutions and prescriptions, but also from international conventions and EU law (ie. from all legal sources in a given system of law). The local court compares with them the substantive effect of a foreign judgment. Since there are no EU principles of substantive private law (and we should rather not aim at them in the face of current extreme differences of Member States e.g. concerning property law and family

[53] See: K. Kerameus, in: *Brussels I*, pp. 667–669.
[54] See: P. Mankowski, in: *Brussels I*, pp. 625–628.

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law). There is no EU substantive law standard on personality rights that could be a pattern to the application of the clause and which misuse could be raised as part of EU legislative measures.[55] A different approach could cause that also in other cases concerning the refusal of recognition or enforcement of a foreign judgment based on a clause (eg. refusal of recognition in Poland of a foreign judgment on the civil status and filiation of a child from persons of the same sex, possible in some Member States), EU institutions and the Court of Justice of the European Union would feel competent to assess whether the national understanding of basic principles of legal order (*orde public*) is in line with EU law, despite of the fact that there is neither EU substantive private law nor it can be adopted due to the lack of European Union's competence. At the same time, however, one can get the impression that the essence of the matter is not only substantive private law and that the issue of freedom of speech, freedom of expression and falsification of reporting of history can also be seen in an area other than "judicial cooperation in civil and commercial matters" (that means "technical" conflict-of-law rules and international civil procedure) and than in the area of uniform EU substantive legal standards. After all, restrictions on media freedom are the domain of public law, and this in turn is (should be) the core of the European Union's activity. According to Art. 2 Treaty on European Union, a preamble to the Charter of Fundamental Rights of the European Union and its Article 1 European Union law is based, among others, on the value of protecting the human dignity.[56]

One might wonder whether the discussed German judgment should not be accused of an infringement of the Brussels I Regulation but of other more general principles of international public law, including United Nations and Council of Europe standards.[57] A part of doctrine expressed even the view that at least in the area of non-violation of human dignity Art. 1 of the Charter of Fundamental

[55] S. Francq, in: *Brussels I*, p. 579. The reference about the role of ECJ in shaping the "Community (union) orde public". However, this observation can not be overestimated and referred to this case because there is no EU competence in the scope of substantive law, and therefore the ECJ will not have the opportunity and competence to create such standards when interpreting EU provisions. It is worth mentioning that in the case of Krombach concerned other problem, namely not controlling of jurisdiction by way of extending the clause provision. See however European Parliament resolution on remembrance of the Holocaust, anti-semitism and racism from 27th January 2005, P6_TA(2005)0018, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0018+0+DOC+XML+V0//EN (accessed 20.01.2021).

[56] See more F. Rakiewicz, *Poczucie tożsamości* (PhD thesis available in library of Law Faculty of University of Poznań), p. 69; F. Rakiewicz, 'Poczucie tożsamości narodowej jako dobro osobiste w świetle polskiego prawa cywilnego. Część druga', *Studia Prawa Prywatnego*, 2011, 3–4, p. 89. See also A. Radwan, 'Między negacjonizmem a dyfamacją. Ustawodawca jako moderator dyskusji o przeszłości', in: *Prawda historyczna a odpowiedzialność*..., op. cit., p. 111.

[57] See legal instruments of public international law relevant to the protection of personality rights in: F. Rakiewicz, *Poczucie tożsamości* (not published PhD thesis), p. 23, note 26 and the literature given there. See about private enforcement in personality rights protection in A. Radwan, 'Między negacjonizmem..., op. cit., p. 117, 127, 129.

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Rights of the European Union will cause horizontal effects, i.e. it will affect the sphere of civil law relations.[58] The European Parliament has recognized the historical truth about the Holocaust as deserving of protection.[59] A similar need was noticed at the UN forum.[60] The UN forum would also be an appropriate place to express the position that the extermination camps organized by Germany is a fact (such as the Holocaust), and speaking differently (e.g. Polish extermination camps) is not expressing opinions (and exercising freedom of expression and freedom of speech)), but indirectly negating history. Also the legislation of the Council of Europe seems to be appropriate forum to question the abovementioned understanding of German public order. Mr. Karol Tendera not only did not get him due (more broadly – Polish Nation) satisfaction, but he was also "punished" with legal costs in the amount of EUR 4,000. Additionally, the future practical effect of the BGH's judgment in Germany may be that the broadcasters there will feel more free to express similar "opinions" about "Polish death camps".

One can even express the view that the law of Council of Europe precludes such understanding of freedom of expression and freedom of speech, and that grounds presented by *Bundesgerichtshof* in 2018 are contrary to the ECHR, in particular the limits of Art. 10 ECHR. The Convention certainly introduces restrictions on the exercise of the freedom provided for in Article 10 sec 1. by imposing obligations in sec. 2, consisting of the duty to practice reliable journalism[61]. The principle which results form those provisions is that the media should not use the opportunity to declare the false statements as legal. In fact to such effects leads lack of enforcement of the judgment of Polish Court of 2016 on German territory.

Final remarks

1. The commented *Bundesgerichtshof*'s judgement of 2018 presents a completely different interpretation of German law than the rulings of lower instances (ie. *Landesgericht Mainz* and *Oberlandesgericht Koblenz*). It concerns primarily the

[58] See L. Bosek, 'Ochrona godności człowieka w prawie Unii Europejskiej a konstytucyjne granice przekazywania kompetencji państwa', *Przegląd Sejmowy*, 2008, no. 2, pp. 66 et seq.

[59] European Parliament resolution on remembrance of the Holocaust, anti-semitism and racism from 27th January 2005, P6_TA(2005)0018, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2005-0018+0+DOC+XML+V0//EN (accessed 20.01.2021).

[60] Resolution of General Assembly of 26 October 2005, Holocaust remembrance, Sixtieth session, Agenda item 72, A/60/L.12, www.un.org/en/ga/search/view_doc.asp?symbol=A/60/L.12 (accessed 20.01.2021).

[61] See more, L. Garlicki, in: L. Garlicki (ed.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, vol. 1, Warszawa 2010, pp. 599 et seq; L. Garlicki, 'Wolność wypowiedzi dziennikarza – przywileje i odpowiedzialność', *Europejski Przegląd Sądowy*, 2010, no. 1, p. 12 et seq.

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enforcement of foreign judgments in the mode of EU law (rules on "judicial co-operation in civil and commercial matters"). In the Brussels I Regulation, as in most of legal instruments in the field of international law private law and international civil procedure, *orde public* clause is stipulated. This exceptional legal institution allows not to recognize or enforce (although the general principle of the normative act is different) a foreign judgment, if it could give effect that is manifestly contradictory to local, fundamental principles of the given legal system. Bearing this in mind, there is the formal possibility of applying public order clause in Germany, because it is expressly provided for in the provisions of EU law. As discussed above, the doctrine emphasizes the need for strict interpretation of the provisions on the clause.[62] It is postulated *de lege ferenda* that even the remaining requirements necessary for the mutual recognition and enforcement of judgments between Member States should be restricted.[63] However, there can be no doubt that under current rules of "judicial co-operation in civil and commercial matters" every Member State has the possibility to refuse to recognize or enforce a foreign judgment because of the contradiction of its effects with the fundamental principles of local legal order, including procedural or substantive ones. The jurisprudence and doctrine accurately notes that such a possibility is necessary, and the legal system in which such an institution would not be provided for would be like "a vehicle without brakes".[64]

The need for the existence of such an exceptional clause, even for use in relations between Member States of one international organization, is justified by progressive differences in legal systems (e.g. in family matters – growing in recent years), and the necessity to safeguard the legal order of a given state against the adverse consequences of a foreign judgment that may be in future issued on the basis of foreign law in a form that cannot be predicted (and thus acceptable in advance through the lack of such a mechanism).The clause is expressly provided for in the Brussels I Regulation in Article 34 (1). The clause may be applied

[62] See more S. Francq, in: *Brussels I*, p. 568 narrow interpretation, the infringement should be manifest.

[63] For even easier "flow" of the effects of judgments between EU countries than it is in the Brussels I Regulation, and thus the narrow scope of application of the clause and such direction of EU legislative works – see A. Frąckowiak-Adamska, 'Time for a European "full faith and credit clause"', *Common Market Law Review*, 2015, 52, Issue 1, pp. 191–218. The discussed judgment is however the proof of a reverse tendency, i.e. that the Member States generally need the "safety valve" or "defensive shield". A separate issue is whether the conditions for the application of the clause occurred in the discussed case what was questioned above.

[64] See: K. Siehr, '*Kollisionen des Kollisionsrechts*', in: D. Baetge, J. v. Hein, M. v. Hinden (eds.), *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag*, *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag*, Tübingen 2008, p. 223; see also H.J. Sonnenberger, 'Wandlungen und Perspektiven des familienrechtlichen ordre public', in: R. Freitag, S. Leible, H. Sippel, U. Wanitzek (eds.), *Internationales Familienrecht für das 21. Jahrhundert*, München 2006, pp. 29–53.

and – additionally – substantive civil law is outside the scope of EU and CJEU competences. In particular, the civil liability for defamation and infringement of personality rights is differently regulated in EU Member States. Formally, therefore, it is difficult to accuse the BGH's judgment of directly affecting EU law. It can be assumed that the decision of BGH cannot be accused of violating EU "judicial cooperation in civil and commercial matters" which includes the technical issues of applicable law and the recognition and enforcement of foreign judgments, and also contains a provision expressly allowing not to recognize or enforce a judgment from another Member State.

2. Incidentally, it should be noted that proceedings in the case resolved by the discussed judgments cannot be concerned by – appearing in the international forum in 2018 – allegations against judicial reforms in Poland, because the judgment of the Polish Court comes from 2016. The questioned changes came into force in the middle of the year 2018, and the judgment of the Polish Court comes from the proceedings which finished in December 2016.

3. However, objections to *Bundesgerichtshof* judgment of 2018 may arise above all from the reasoning that led to the application of the public order clause and the refusal to enforce the judgment of Polish Court of 2016 on the infringement of personality rights. There is also some controversies on basis of merit (substantive law) over the abovementioned national understanding of freedom of expression and, consequently, the implied recognition of historical falsification (of "Polish death camps") as an opinion. Certainly, it is not easy to agree with the arguments of BGH, which recognizes the content of the judgment of the Polish Court of 2016 for "opinion" (*Meinungsäußerung, Werturteil*). The notion of opinion adopted by BGH means that any correction ordered by a foreign court could not be put into the press or television, because such information is by nature not falsifiable, and consequently each of them would violate the freedom of speech.

4. It could be added that, if for example the massacre committed in 1937 in Nanjing by Japanese invaders were now called "Chinese crimes", with remark that this regards current geographical location, the demand for correction and apology would not give rise to doubts similar to those presented in the justification of the commented judgment.[65]

Additional doubts may also arise from the fact that the plaintiff, whom the court of another EU Member State considered to be right, was charged with costs

[65] See the judgment of Court in Tokio of 20th March 2015, Westlaw Japan (Ref. no. 2015 WLJPCA 03208001).

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of €4,000 for an application of declaration of enforcement in another Member State. Probably a possibility to reduce or waive such costs (which – taking into account the enforceable judgement from another EU state and the claimant's person – are disproportionate) could be interpreted from the international standards and the German procedural rules.

5. Summarizing, taking into consideration the international law, the *Bundesgerichtshof* judgment of 2018 can be evaluated as correct only for some some formal legal reasons. It provokes to critical comments, at least as far as its fairness, substantive aspects, including the EU cooperation in civil matters, and the principles of Council of Europe are concerned. The commented judgment definitely raises doubts from the perspective of international law, including the achievements of the United Nations and Council of Europe system (including the limits of freedoms), and may raise doubts from perspective of European Union (including the costs on the access to justice). The issues of the content of publications in the media and falsifying history and restrictions on freedom of speech are not of "pure" private law character, that are in principle beyond competences of EU institutions. It seems that they are partly (at least – indirectly) concerned by EU provisions of public law character. The important role of international agreements in the field of human rights protection concluded by EU Member States, also before the accession and with third states, should be taken into consideration.[66] It is also possible to present the thesis that the discussed approach makes inefficient access to justice in European Union and generates unnecessary costs. Additionally *Bundesgerichtshof* presented a questionable (even from the perspective German courts of 1st and 2nd instance) understanding of freedom of expression and speech, without taking into consideration its limits provided in Art. 10 para 2 ECHR.

Postscriptum to "Polish Death Camps" as an "Opinion" of which Expressing is Protected by German Law? Questionable *Bundesgerichtshof's* Judgment of 19.7.2018

The case law from 2016-2018 discussed in the text is related to two events that took place at the beginning of 2021. They require more detailed presentation, but at this point it is worth to inform about them.

Firstly. another proceeding, also concerning the expression of 'Polish camps', before Appeal Court in Warsaw has been recently suspended because of the

[66] On the international treaties with third parties versus EU legal system – see: T. Hartley, *The Foundations of European Union Law*, 8th edition, Oxford 2014, pp. 193–200. Declaration that Article 65 of Treaty on European Union does not limit the application of the constitutional rules of a Member State to press freedom.

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preliminary question to CJEU[67]. This question concerns the grounds of jurisdiction of Polish courts in cases concerning violation of personality rights by means of an online publication. In opinion of ECJ Advocate General Bobek delivered on 23 February 2021 the jurisdiction of Polish courts was confirmed in such cases[68].

Secondly, in recent judgment of Court of Appeal in Cracow of 2021, the same defendant – ZDF and additionally UFA Fiction (both the producers of the TV series) have been obliged to apology World Union of Home Army Soldiers for infringement of personal rights by identifying the Polish partisan unit in the above-mentioned series as a part of the Home Army (*Armia Krajowa*)[69]. The apology should be broadcasted in Polish public tv channel and in three German tv channels, where the series was shown, and presented on the internet websites of defendants. This judgment of 2021, in general similar to abovementioned judgment of 2016, was based on the infringement of personality rights and includes the duty to officially apologize for this infringement.

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[67] Request for a preliminary ruling from the Sąd Apelacyjny w Warszawie (Poland) lodged on 30 October 2019 — SM v Mittelbayerischer Verlag KG, OJ C 27, 27.1.2020, p. 22–22.

[68] Opinion of Advocate General Bobek delivered on 23 February 2021. ECLI identifier: ECLI:EU:C:2021:124, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A62019CC0800 (accessed 1.06.2021).

[69] The court stated that 'obliges each of the defendants to submit an apology within seven days of the judgment becoming final, between 8.00 p.m. and 8.30 p.m., in white text on a black background that is at least the same size that the opening credits of the series (...) with a visible-bold title (...) and the following content: 'Producers of the film 'Our Mothers Our Fathers' i.e. Tv ZDF and the company UFA Fiction, as a result of losing a court trial, apologize World Union of Home Army Soldiers with the seat in Warsaw, for violating his personal rights by identifying the Polish partisan unit in the above-mentioned film as having detachment with (...) which gives rise to an unauthorized suggestion that this Polish military organization was anti-Semitic in nature'. See more: https://krakow.tvp.pl/52926643/sad-ponownie-nakazal-tworcom-niemieckiego-serialu-przeprosiny; https://www.krakow.sa.gov.pl/komunikat-w-sprawie-i-aca-80819-dot-filmu-nasze-matki-nasi-ojcowie,new,mg,1,279.html,637; https://www.dw.com/en/polish-courtdemands-apology-from-german-zdf-broadcaster-over-wwii-miniseries/a-57015648 (accessed 1.06.2021).

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Abstract

The article covers the analysis of the judgment of German Supreme Court (*Bundesgerichtshof*), further: BGH of 19 July 2018 (IX ZB 10/18). BGH dismissed the motion for the declaration of enforcement of the judgment of Polish Court of Appeal in Cracow of 22nd December 2016 by invoking German public order clause. The case concerned infringement of personality rights of the former prisoner of the Auschwitz concentration camp during World War II by the publication on 15th July 2013 on the website of Zweites Deutches Fernsehen the announcement of the documentary film "Verschollene Filmschätze 1945. Die Befreiung der Konzentrationslager" in which the expression

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"Polish extermination camps of Majdanek and Auschwitz" was incorrectly used instead of the expression "Nazi (or German) extermination camps of Majdanek and Auschwitz". The basis for the analysed judgment of BGH was the obvious violation of German public order under Article 34 (1) and Article 45 (1) Brussels I EU Regulation and "freedom of opinion" which is the constitutional right regulated in Article 5 Sec. 1 Sentence 1 of the German Constitution. The analysis concerns the evaluation of the judgment of BGH from the perspective of private international law and additionally from the point of view of public international law.

Keywords: limits of freedom of expression, infringement of personality rights, *ordre public* clause, recognition and enforcement of foreign judgments in EU, falsifying history

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"Polish camps..." in the context of amendment of the Law on the Institute of National Remembrance – Commission of Prosecution of Crimes Against the Polish Nation of 26 January 2018

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The "Polish camps..." issue

The Second World War was a disgraceful period of world history. Poland played a unique role in this conflict as it was the first country to be attacked by Nazi Germany and then for almost six years occupied by the Third German *Reich*. Poland suffered the greatest material and population losses per the number of people inhabiting countries fighting against Hitler's Germany and its coalition members.[1] As historians point out, around 6 million Polish citizens of various nationalities died as a result of the Second World War, of whom only around 644,000 were war casualties; the remainder were victims of extermination operations.[2] Over one million Polish nationals are estimated to have been exterminated in concentration camps. 9 concentration camps were in operation in the occupied Poland: Auschwitz-Birkenau, Bełżec, Groß-Rosen, Kulmhof, Majdanek, Sobibor, Stutthof, Treblinka, and Warszawa. Besides, over 60 concentration camps operated in territories occupied by the Nazi Germans in 20 countries. Located in *Reich*-occupied Poland, the above death camps are among the most readily recognisable death camps in operation during The Second World War. Their uniqueness lies in the fact that they claimed the highest death toll in history. The creators of this death machine, which claimed millions of victims of different nationalities, were functionaries of the Third German *Reich*. It is worth emphasising at this point that the only element connecting these camps with Poland was their location on the territory of occupied Poland.

[1] J. Fajkowski, J. Religa, *Zbrodnie hitlerowskie na wsi polskiej 1939–1945*, Warszawa 1981, p. 5.

[2] See e.g. W. Grabowski, 'Raport. Straty ludzkie poniesione przez Polskę w latach 1939–1945', in: T. Szarota, W. Materski, *Polska 1939–1945. Straty osobowe i ofiary represji pod dwiema okupacjami*, Warszawa 2009, pp. 13–38; C. Łuczak, *Polska i Polacy w drugiej wojnie światowej*, Poznań 1993, p. 683.

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Numerous foreign media publications, as well as statements by leading foreign politicians, repeatedly used so-called defective codes of memory[3] such as e.g.: "Polish death camps", "Polish concentration camps", "Polish Holocaust", "*polnische Vernichtungslager*", "*polnische Häuser des Todes*", "*lager polacco*", "*campo di sterminio polacco*", etc.[4] The phrases were published by reputable world media outlets, such as e.g. *The New York Times*,[5] *The Guardian*,[6] ABC News and CBS News,[7] *Corriere della Sera*[8] and *Der Spiegel*.[9] The term "Polish death camp" was on 29 May 2012 used by US President B. Obama during the ceremony of a posthumous decoration of J. Karski with the Presidential Medal of Freedom.[10]

Trying to establish when the above defective codes of memory were used for the first time, one should take a step back and return to the Second World War. In October 1944, the US *Collier's* weekly published an article titled "Polish death camp".[11] The phrase appeared in the text written by the emissary of the Government of the Polish Underground State, J. R. Kozielewski, also known as J. Karski. Originally, the article was to be titled "In the Belzec Death Camp", yet ultimately the title was changed by the editors of the weekly.

[3] A. Nowak-Far, 'Wstęp: Wadliwe kody pamięci we współczesnym świecie', in: A. Nowak-Far, Ł. Zamęcki (eds.), *Wadliwe kody pamięci. Zniekształcenie pamięci o zbrodniach międzynarodowych w dyskursie publicznym*, Warszawa 2015, pp. 9–15.

[4] See e.g.: 'Amerykańscy dziennikarze o „polskich obozach"', Nasz Dziennik, 18–19.04.2009, no. 91 (3412), http://stary.naszdziennik.pl/index.php?typ=sw&dat=20090418&id=sw23.txt (accessed 18.10.2019); 'Włoska agencja prasowa napisała o Auschwitz "polski obóz"', Polskie Radio, 20.10.2013, https://www.polskieradio.pl/5/3/Artykul/960053,Wloska-agencja-prasowa-napisala-o-Auschwitz-polski-oboz (accessed 27.10.2019); 'Niemcy przepraszają. Za „polski obóz zagłady"', Polskie Radio, 19.02.2013, https://www.polskieradio.pl/5/3/Artykul/785009,Niemcy-przepraszaja-Za-polski-oboz-zaglady (accessed 27.10.2019).

[5] N. Siegal, 'Beyond Anne Frank: The Dutch Tell Their Full Holocaust Story', *The New York Times*, 17.07.2016, https://www.nytimes.com/2016/07/18/world/europe/beyond-anne-frank-the-dutch-tell-their-full-holocaust-story.html?_r=0 (accessed 28.10.2019).

[6] 'Three suspected former Auschwitz guards arrested in Germany', *The Guardian*, 20.02.2014, https://www.theguardian.com/world/2014/feb/20/germany-auschwitz-guards-arrests-raids (accessed 28.10.2019).

[7] '„Polskie obozy śmierci" w amerykańskich telewizjach', TVN 24, 17.04.2009, https://tvn24.pl/wiadomosci-ze-swiata,2/polskie-obozy-smierci-w-amerykanskich-telewizjach,92719.html?h=1f3a (accessed 2.11.2019).

[8] P. Di Stefano, 'A Sobibór il ciondolo di Karoline la nuova Anna Frank', *Corriere della Sera*, 19.01.2017, https://www.corriere.it/esteri/17_gennaio_20/a-sobibor-ciondolo-karoline-nuova-anna-frank-51dd1630-de82-11e6-93cd-d08bed2f6059.shtml (accessed 2.11.2019).

[9] G. Bönisch, A. Frohn, '"Schweinhunde" willkomen', *Der Spiegel*, 13/2006, 27.03.2006, https://www.spiegel.de/spiegel/print/d-46421511.html (accessed 2.11.2019).

[10] 'Obama o Karskim i „polskim obozie śmierci"', TVN24, 30.05.2012, https://tvn24.pl/wiadomosci-ze-swiata,2/obama-o-karskim-i-polskim-obozie-smierci,254518.html?h=1b40 (accessed 2.11.2019).

[11] J. Karski, 'Polish Death Camps. In the Nazi slaughter pens, a patriot witnessed mass torture and slow death', *Collier's Weekly*, 14.10.1944, pp. 18–19, http://www.unz.com/print/Colliers-1944oct14-00018 (accessed 20.10.2019).

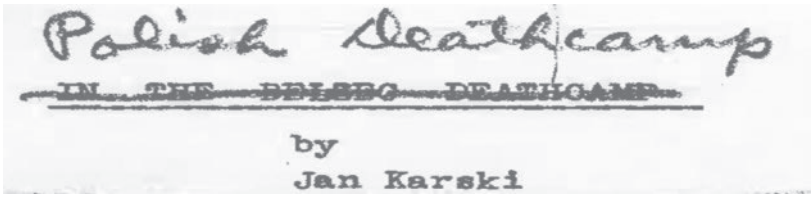

Photo no. 1. Hand-written change of the title on the typescript of J. Karski's article. Crowell-Collier Publishing Company. Manuscripts and Archives Division. The New York Public Library. Astor, Lenox and Tilden Foundations.[12]

The article was one of the chapters of J. Karski's books *Courier from Poland: The Story of a Secret State*, scheduled to be published in November 1944. Today we can only conjecture that the reason the title of the article was changed was that the editors of *Collier's* weekly were afraid that the title originally used by J. Karski, "In the Belzec Death Camp", would not rivet the attention of American readers, most of whom were unfamiliar with the location of the town of Bełżec. It is difficult to say whether attracting the readers' attention was to show the world the tragedy of the Nazi death camps operating in occupied Poland, or whether it was to boost the promotion of the book, to be published less than a month after the article. It can be assumed that the editor's use of the phrase "Polish death camp" in the title of the J. Karski article was only intended to indicate the geographical aspect and it is difficult to see it as attributing responsibility for its creation or operation to Poles. This is confirmed by the content of the aforementioned article, in which J. Karski describes the functioning of the Nazi death camp in Bełżec, which was merely located on the territory of Poland occupied by the Third *Reich*. This seemingly harmless editorial procedure at the time triggered a snowball effect. Apart from the positive aspect, which was to reveal the fact that the Nazi death camps were operating on Polish soil, there was also a negative aspect, namely media outlets all over the world have since 1944 repeatedly used the phrases "Polish death camps, Polish extermination camps" or other similar terms.

In the majority of cases whenever defective codes of memory emerged in public space, the Polish diplomatic service intervened immediately. Since 2008, the Polish Ministry of Foreign Affairs (hereafter: MFA) has intervened about 1,400 times in such cases. For example, in 2017 the largest number of interventions took place in the United Kingdom (43), the United States (42)

[12] J. Gancarson, N. Zaytseva, *The real source of misnomer "Polish Death Camps"*, http://justiceforpolishvictims.org/polish-experience/the-real-source-of-misnomer-polish-death-camps-jacek-gancarson-ms-natalia-zaytseva-phd (accessed 20.10.2019).

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and Germany (32). Individual incidents were also reported in the media in New Zealand, the Republic of Korea, Qatar, Colombia, and Algeria.[13] Between 2009 and 2014, there were around 100 interventions annually. As of 2015, however, a marked increase of MFA interventions has occurred, reaching around 250 annually. So far, the actions of the Ministry of Foreign Affairs and of the diplomatic service have mostly proved successful. Polish diplomatic missions demanded corrections and the use of the correct expression "German (Nazi) concentration camps or death camps". In addition, the Ministry of Foreign Affairs is conducting on going monitoring of reports from foreign mass media and the list of incorrect phrases monitored includes over 20 records.[14]

Legislative action

In recent years, there have been several attempts in Poland to penalise the use of the phrase "Polish camp...".

In 2006, the Law of 18 October 2006 on the Disclosure of Information on Documents of State Security Agencies from 1944–1990 and their Contents (so-called Lustration, or Vetting Law)[15] introduces into the Criminal Code (hereinafter CC)[16] two new provisions, which entered into force on 15 March 2007.

Art. 132a CC Anyone who publicly accuses the Polish nation of participating in, organising or being responsible for communist or Nazi crimes shall be subject to a penalty of imprisonment of up to 3 years.

Art. 112 subsection 1a CC Regardless of the regulations in force at the place where the offence was committed, the Polish Criminal Law shall apply to a Polish citizen and a foreigner in the event of an offence of slander of the Polish Nation.

This amendment aroused much controversy among many representatives of the doctrine of criminal law. Still at the stage of drafting the law, the Legislative Department of the Senate Office recommended deleting Article 132a CC (then Article 55a of the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, hereinafter referred to as the IPN Law), stating in its opinion of 31 July 2006 that "This provision seems to be in contradiction with the principle that the criminal law provision should be precise and clear, and should unambiguously

[13] T. Żółciak, 'Czas odkłamać polską historię. Tak MSZ interweniuje na słowa „polscy naziści" czy „polskie Gestapo"', Gazetaprawna.pl, 24.01.2018, https://www.gazetaprawna.pl/artykuly/1099657,inrwencje-msz-w-sprawie-wadliwych-kodow-pamieci.html (accessed 23.10.2019).

[14] As for the interventions of the Ministry of Foreign Affairs, see: https://www.msz.gov.pl/pl/polityka_zagraniczna/niemieckie_obozy_koncentracyjne/interwencje_msz (accessed 24.10.2019).

[15] Journal of Laws, no. 218, item 1592.

[16] Las of 6 June 1997. Criminal Code (Journal of Laws, no. 88, item 553).

identify the characteristics of an offence. The phrase 'the Polish nation' is vague in nature and applying it in criminal law as a constituent of an offence will require a law enforcement authority to investigate the intentions of the perpetrator of the act, and it may not be possible in practice to decide whether slander concerns the entire nation or only certain Polish nationals".[17]

L. Gardocki observed that Art. 132a CC may raise doubts as to whether due to its ambiguity it does not violate the *nullum crimen sine lege* principle, i.e. is at variance with Art. 42 section 1 of the Constitution of the Republic of Poland.[18] He is moreover of the opinion that such an accusation can only be avoided by a very strict interpretation of the provision, i.e. referring to a situation where slander concerns the Polish Nation as a whole, i.e. not individual persons of Polish nationality or groups of such persons.[19] Importantly, the above comments are still valid in light of the 2018 amendment of the Institute of National Remembrance Law.

The Ombudsman questioned the compatibility of Article 132a CC and Article 112(1a) CC with the Polish Constitution. The Constitutional Court, having recognised the Ombudsman's motion, in its judgment of 19 September 2008 found Article 112(1a) CC and Article 132a CC to be inconsistent with Article 7 and Article 121(2) in conjunction with Article 118(1) of the Constitution of the Republic of Poland. The substantive basis for the Court's annulment of the contested provisions was the defectiveness of the legislative process.[20] In the opinion of the Ombudsman, Art. 132a CC unjustifiably constrained the constitutional freedoms of expressing views and of conducting research. Furthermore, its impact might have limited the debate on Poland's history.[21] In the opinion of the then Ombudsman J. Kochanowski, "according to the general and widely accepted knowledge of the facts of the past, representatives of the Polish nation did take part in communist crimes and Nazi crimes (...). Facts from Poland's most recent history should be subject to scholarly evaluation by historians rather than to the evaluation of prosecutors".[22]

[17] J. Wyrembak, *Opinia Biura Analiz Sejmowych do ustawy o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944–1990 oraz treści tych dokumentów*, Warszawa, 31.07.2006, p. 9, http://orka.sejm.gov.pl (accessed 26.10.2019).

[18] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 16 July 1997, no. 78, item 483).

[19] L. Gardocki, *Prawo karne*, 13th ed., Warszawa 2007, p. 224.

[20] Judgment of the Polish Constitutional Court of 19 September 2008 (K 5/07, Journal of Laws, no. 173, item 1080), OTK-A 2008/7/124.

[21] 'Prawnicy o sposobie reakcji na zwroty typu „polski obóz"', 8.05.2015, *Gazeta. Dziennik Polonii w Kanadzie*, https://gazetagazeta.com/2015/05/prawnicy-o-sposobie-reakcji-na-zwroty-typu-polski-oboz/#prettyPhoto (accessed 23.10.2019).

[22] A. Stankiewicz, *Nieudane polowanie na oszczerców narodu*, Onet wiadomości, 6.02.2018, https://wiadomosci.onet.pl/tylko-w-onecie/nieudane-polowanie-na-oszczercow-narodu/ccycch9 (accessed 28.10.2019).

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On 30 September 2008, roughly one and a half years upon their entry into force, Art. 132a CC and Art. 112(1a) CC ceased to apply.

Another attempt took place in 2013. A law drafted by deputies on the amendment of the IPN law and of the Criminal Code was submitted to the *Sejm*.[23] Already at first sight, the contents of the draft legislation raised serious doubts as to the offences to be punishable. The draft Art. 55b of the Institute of National Remembrance Law had the following wording: "Whoever publicly uses the words 'Polish death camps', 'Polish extermination camps', 'Polish concentration camps' or others that apply the adjective 'Polish' with respect to Nazi German concentration camps and extermination centres shall be subject to a fine, restriction of liberty or imprisonment of up to 5 years. The sentence shall be made public". Taking into account the content of the provision, it can be stated that the use of the phrase "Poland created concentration camps" or "death camps created by Poles", did not meet the requirements of the provision, as these phrases did not use the phrases "Polish death camps", "Polish extermination camps", "Polish concentration camps" or any other phrases containing the adjective "Polish" with respect to Nazi German concentration camps and extermination centres. The draft was not adopted.

The last attempt was made in 2016. Due to the increase in the number of incidents involving the use of defective codes of memory in the public space, the Polish Government started work on the introduction of new types of punishable offences, providing for criminal sanctions for the use of the phrase "Polish death camps" or similar ones. The law of 26 January 2018 on the amendment of the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Law on War Graves and Cemeteries, the Law on Museums and the Law on Responsibility of Collective Entities for Criminal Offences entered into force on 1 March 2018.[24] The new legislation introduced two criminal provisions:

Art. 55a. 1. Who publicly and in contravention of the facts attributes to the Polish Nation or the Polish State responsibility for or complicity in the Nazi crimes committed by the Third German Reich as defined in Article 6 of the Charter of the International Military Tribunal annexed to the International Agreement on the Prosecution and Punishment of the Principal War Criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws of 1947, item 367), or for other offences constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishing the responsibility of

[23] Draft law on the amendment of the Law on the National Remembrance Institute – Commission for the Prosecution of Crimes Against the Polish Nation and on the amendment of the Criminal Code, Sejm of the Republic of Poland of the 7th term, 15 October 2013, Sejm doc. no. 1958, http://orka.sejm.gov.pl (accessed 26.10.2019).

[24] Journal of Laws 2018, item 369.

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the real perpetrators of those crimes, shall be liable to a fine or to imprisonment for up to 3 years. The sentence shall be made public.

2. If the perpetrator of the offence referred to in paragraph 1 acts unintentionally, he shall be liable to a fine or to the penalty of restriction of liberty.

3. The perpetrator of the punishable act referred to in paragraphs 1 and 2 above has not committed an offence if the punishable act was committed in the course of his artistic activity or research.

Art. 55b. Irrespective of the provisions in force at the place where the prohibited act was committed, this Law shall apply to a Polish citizen and a foreigner who have committed the offences referred to in Art. 55 and Art. 55a.

The authors of the regulations did not avoid the mistakes present in Article 132a CC, adopted in 2006. Furthermore, in both cases (similarly to the 2013 draft) the authors of these regulations represented the same political option. The amendment of the Institute of National Remembrance Law was signed by the President of the Republic of Poland on 6 February 2018, and on 14 February 2018 the President of the Republic of Poland submitted a motion to the Constitutional Court to examine the constitutionality of that law by way of follow-up audit. However, the Constitutional Court did not manage to issue a decision on the motion. Due to reactions evoked in the world by the provisions of Article 55a and Article 55b added to the Institute of National Remembrance Law, they were repealed as of 17 July 2018 as a result of the adoption of the government draft amendment of the Institute of National Remembrance Law.[25] However, in view of experience to date, it is very likely that similar criminal law regulations will continue to be debated in Parliament in the future. Due to the deletion of Art. 55a and Art. 55b of the Institute of National Remembrance Law, a detailed analysis of the structure of these provisions seems unnecessary at present.[26] Only some major issues raising doubts as to the regulation adopted in Art. 55a of the Institute of National Remembrance Law are indicated.

Art. 55a of the Institute of National Remembrance Law sets out a common offence of an inconsequential nature. The formal nature of the offence presupposes that there need not be an effect in order to meet the constituent elements of this type of punishable act in the form of a general feeling that the

[25] Law of 27 June 2018 on the on the amendment of the Law on the National Remembrance Institute – Commission for the Prosecution of Crimes Against the Polish Nation and on the amendment of the law on the liability of collective entities for punishable offences (Journal of Laws 2018, item 1277).

[26] A detailed analysis of the characteristics of a punishable offence as set out under Art. 55a section 1 and 2 of the Law on the Institute of National Remembrance was carried out by e.g.: C. Kłak, 'Odpowiedzialność karna z art. 55a ust. 1 i 2 ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu', *Przegląd Więziennictwa Polskiego*, 2017, no. 98, pp. 169–212.

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Polish Nation or the Polish State is responsible or complicit in the crimes under Art. 55a of the Institute of National Remembrance Law.[27]

Some doubts may arise when trying to identify a legal interest protected by this provision. It does not pose any major difficulties to indicate that the object of protection of the offence of attributing responsibility for the crimes referred to in Article 55a of the Institute of National Remembrance Law to the Polish Nation or the Polish State is the good name (as well as honour, dignity and respect) of the Polish Nation and the Polish State. This is furthermore confirmed by the material scope of this Law as defined in Article 1(2a) of the Institute of National Remembrance Law. Assuming that the object of protection under Article 55a of the Institute of National Remembrance Law and Article 133 CC are identical,[28] we may follow W. Kulesza's observation that in both cases the object of protection is "Polish national dignity".[29] As the doctrine points out, the behaviours directed against the "Polish State" influence the shaping of the position of the "Polish State" as an organization of the "Polish Nation", while the protection of the good name of the "Polish Nation" serves to protect the position of the "Polish State" among other Nations.[30]

It may be problematic to indicate the object of protection if the perpetrator "in another way (than by attributing liability – AS) drastically reduces the liability of the actual perpetrators of these crimes". The object of protection here is not the good name of the "Polish Nation" or the "Polish State". As C. Kłak indicates, Art. 55a(1) of the Institute of National Remembrance Law was in this way wrongly edited, not linking this offence type with the protection of the good name of the "Polish Nation" or the "Polish State", which transcends the material scope set out under Art. 1 of the Institute of National Remembrance Law.[31] As a result, the IPN Law included a provision which goes beyond the material scope of this law.

The use of the statement "the Germans did not set up concentration camps on Polish soil" may be regarded as blatantly diminishing the liability of the actual perpetrators of the crimes, although the sentence does not unambiguously

[27] Ibid., p. 174.

[28] Although Article 133 of the Criminal Code uses the term "Republic of Poland" and Article 55a of the Institute of National Remembrance Law uses the term "the Polish State", their interpretation leads to the conclusion that the Republic of Poland – in accordance with Article 1 of the Constitution of the Republic of Poland – is the name of the Polish State, which is a common good of all citizens – see: ibid., p. 182; P. Kardas, 'Komentarz do art. 133 k.k.', in: W. Wróbel, A. Zoll (eds.), *Kodeks karny. Cześć szczególna*, t. II, cz. I: *Komentarz do art. 117-211a*, 5th ed., LEX 2017.

[29] W. Kulesza, 'Polska godność narodowa w świetle prawa karnego', *Czasopismo Prawno-Historyczne*, 2018, vol. LXX, Issue 1, p. 154–157.

[30] T. Bojarski, 'Komentarz do art. 132a k.k.', in: T. Bojarski (ed.), *Kodeks karny. Komentarz*, 7th ed., LEX 2016.

[31] C. Kłak, *Odpowiedzialność karna*..., op. cit., p. 180.

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imply that the author of these words intended to attribute liability for their creation to the "Polish Nation" or the "Polish State". Omission in the commented section of the provision of Art. 55a of the Institute of National Remembrance Law of the object of protection as the "Polish Nation" or the "Polish State" along with the option of extending the application of this provision under Art. 55b of the Institute of National Remembrance Law to offences committed outside of Poland (exclusion of the requirement of double jeopardy[32]) results in too broad a scope of responsibility. Is an inhabitant of a foreign country supposed to be aware that saying the words "the Germans did not set up concentration camps on Polish territory" they are liable for committing an offence under the Polish IPN Law? In such a case, it can be assumed that there is a circumstance excluding the guilt referred to in Article 30 CC (so-called error of law). According to this provision, "Who commits a prohibited act in the justified unawareness of its unlawfulness does not commit an offence; if the offender's error is unjustified, the court may apply extraordinary mitigating measures". A person who acts in error of law shall not be liable for the offence. The highly discretionary phrase "blatantly diminishing" is also controversial.

Another doubt concerns the interpretation of the term "Polish Nation" used in the provision under scrutiny. This phrase appears in the preamble to the Constitution of the Republic of Poland of 2 April 1997, referring to "all citizens of the Republic of Poland"; in the preamble of the Institute of National Remembrance Law "With a view to preserving the memory of the enormity of the victims, losses and damage suffered by the Polish Nation during and after the Second World War [...]" and in Art. 1(1a) of the Institute of National Remembrance Law "committed against persons of Polish nationality or Polish citizens of other nationalities". The doctrine rightly points out (pointing to Art. 133 CC) that the term "Polish Nation" from the perspective of the Constitution of the Republic of Poland should be first of all linked to citizenship. In line with the Constitution of the Republic of Poland, the nation is made up of all citizens of the Republic of Poland, irrespective of religion, race, nationality, etc. The term 'the nation' used in the Constitution of the Republic of Poland departs from the ethnic or sociological aspect and is clearly linked to the legal criterion of citizenship of the Republic of Poland".[33] A. Marek observes

[32] In order to hold a perpetrator who has committed an act prohibited by the Polish Criminal Law outside the territory of Poland criminally liable, such an act must, as a rule, also be deemed as prohibited by the law in force at the place where it was committed (see Art. 111 § 1 of the Criminal Code). However, criminal law provides for exceptions to this rule (e.g. Article 111 § 3 of the Criminal Code). One such exception was also contained in Article 55b of the Institute of National Remembrance Law. According to this provision, Art. 55a of the above law applied irrespective of whether the offence committed by the perpetrator abroad was prohibited by law at the location of its commission.

[33] P. Kardas, 'Komentarz do art. 133 k.k. ...', op. cit., LEX 2017.

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that the term "nation" will cover not only the citizens of the Republic of Poland living within its borders but also the citizens of the Republic of Poland living abroad. It assumes that "preservation of citizenship is proof of a sense of belonging not only to a nation in an ethnic sense, but also to its collective organisation, i.e. the Republic of Poland".[34]

In the doctrine, one can also find a divergent position, according to which the concept of the "Polish Nation" is understood as all persons of Polish nationality as well as all citizens of the Republic of Poland. As N. Kłączyńska indicates, it seems justified from an axiological point of view to use the term "Polish Nation" to include all persons, including those living in exile, who feel belonging to the "Polish Nation" even if they do not have Polish citizenship (Polish Diaspora).[35]

By analogy to Art. 133 CC, we should assume that the perpetrator of a punishable offence set out under Art. 55a of the Institute of National Remembrance Law must refer to the "Polish Nation" or the "Polish State" as a whole rather than to individuals or their groups.[36] The action of perpetrating an offence under Art. 55a of the Institute of National Remembrance Law with respect to a particular person or a particular group of people (other than meeting the criterion of the Polish Nation or the Polish State as a whole) does not meet the criteria of this type of an offence.

The criterion of "attribution" defining the action of perpetrating an offence indicates that the meeting of the criteria for an offence may take place by action (or action combined with negligence).[37] The attribution will therefore take place when it appears from any form of the perpetrator's communication that the "Polish Nation" or the "Polish State" participated in the commission of a given crime, in a situation where historical findings do not justify the formulation of such a claim.[38] The attribution may take place both when objectively untrue factual circumstances are presented and when only assessment is made which has no backing by historical facts.[39] From the point of view of meeting the criteria of the offence under discussion, it will not be sufficient to merely raise doubts about the conduct of the "Polish Nation" or the "Polish State" with respect to the crime under Art. 55a of the Institute of National Remembrance Law.

Is the mere use of the word "Polish" to refer to a death camp, an extermination camp or a concentration camp sufficient to indicate the offence type

[34] A. Marek, *Kodeks karny. Komentarz*, 4th ed., Warszawa 2007, p. 296.

[35] N. Kłączyńska, 'Komentarz do art. 133 k.k.', in: J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, LEX 2014.

[36] Ibid.; see also: judgement of a Regional Court in Elbląg of 22.07.2015, II K 67/15, LEX no. 2125732.

[37] C. Kłak, *Odpowiedzialność karna*..., op. cit., p. 189.

[38] Ibid., p. 191.

[39] Ibid., p. 193.

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referred to in Article 55a of the Institute of National Remembrance Law? It seems that the use of the adjective does not *a proiori* have to equal the attribution of liability for the crime to the "Polish Nation" or the "Polish State". Given most of the cases of use in the public domain of the term "Polish camp...", one may conclude that the author intended not so much to attribute liability for their operation to the Polish Nation or the Polish State, but that they were rather a sign of a lack of competence or a slip of the tongue. Oftentimes, the use of the adjective "Polish" with respect to a camp was only meant to indicate its geographical location. Following the intervention of the Polish diplomatic services, the authors corrected texts containing defective codes of memory and, in most cases, expressed regret for having used them. In order to meet the criteria of this type of offence, the perpetrator must therefore use this phrase in such a way that he can be unequivocally attributed to the act of attributing to the "Polish Nation" or the "Polish State" of a crime set out under Article 55a of the IPN Law, e.g. "it was Poles who organised and ran death camps on Polish territory". In this case, it can be assumed that the intention of the author of the words was to attribute, contrary to historical findings, responsibility for the organisation and administration of death camps operating on Polish territory to the Polish State or Nation. Slander will be public when the circumstances presented by the perpetrator may reach the awareness of an unspecified number of people (e.g. street, media, books, assembly).[40]

C. Kłak indicates that the feature "in contravention of the facts" denotes objectively untrue formulation of allegations of liability or complicity of the "Polish Nation" or the "Polish State" for the crimes indicated under Art. 55a of the Institute of National Remembrance Law.[41] In a situation when with respect to the act alleged to the "Polish Nation" or the "Polish State" there is no complete knowledge about the event being the object of the allegation, the criteria of the type of offence under Art. 55a of the Institute of National Remembrance Law have not been met (e.g. lack of historical research or unambiguous result of such research). Thus, a public statement e.g. in the press that the Polish State created or operated "death camps" is contrary to historical facts which are known and have not been credibly challenged. Therefore, it must be assumed that slander occurred in contravention of the facts.[42]

Importantly, apart from the deliberate type of the offence under Art. 55a(1) of the Institute of National Remembrance Law, section 2 envisages also its non-deliberate type. An unintentional offence occurs when the offender, without having had any intention of committing it, commits it nevertheless

[40] P. Kardas, 'Komentarz do art. 133 k.k. ...', op. cit., LEX 2017.
[41] C. Kłak, *Odpowiedzialność karna*..., op. cit., p. 195.
[42] Ibid., p. 197.

as a result of failure to observe the precaution required under the circumstances, even though the possibility of committing the criminal act was foreseen or could have been foreseen. The solution adopted in Article 55a(2) of the Institute of National Remembrance Law should be critically assessed. It may be problematic to establish the precautionary rules required of the offender under the circumstances (e.g. when the offender refers to information published by a reputable journal, which information turns out to be counterfactual).

Art. 55a(3) of the Institute of National Remembrance Law contains a countertype, according to which the perpetrator of a punishable act under Art. 55a(1) and (2) of the Institute of National Remembrance Law does not commit an offence if they have performed the act as part of their artistic activity or research. An analogous provision is contained in Art. 256 § 3 CC. As the legislator did not determine any statutory criteria of the "artistic activity or research", doubts may arise as to what can be understood by them. Z. Ćwiąkalski indicates that this countertype can only be invoked by those who are actually involved in it, and thus does not apply to those who, under pretext of artistic activity or research, wish to present a warped image of history.[43] W. Kulesza casts in doubt the validity of the countertype under Art. 256 § 3 CC and observes that the person who really describes certain historical events for artistic or scholarly purposes does not commit a punishable offence at all as such activity is void of criminal intent.[44]

Legal impact assessment and final conclusions

Any action aimed at ending the falsification of history by using the terms "Polish concentration camp", "Polish death camp" or other similarly defective code of memory in public space deserves praise. So far, attempts to use criminal law to combat these terms have proved ineffective. The originators of these changes were each time representatives of a single political option, which, it seems, on the basis of the directions of changes to date, sees the highest effectiveness of legal regulations in criminal law.

Regrettably, the effect of the 2018 amendment of the Institute of National Remembrance Law was exactly opposite to that intended. The adoption of the provisions triggered an international debate. The penal provisions added to the Institute of National Remembrance Law stirred much controversy e.g.

[43] Z. Ćwiąkalski, 'Komentarz do art. 256 k.k.', in: W. Wróbel, A. Zoll (eds.), *Kodeks karny. Cześć szczególna*..., op. cit.

[44] W. Kulesza, 'Pochwalanie faszyzmu i komunizmu w świetle prawa karnego (uwagi de lege praevia, lata et ferenda)', in: A. Michalska-Warias, I. Nowikowski, J. Piórkowska-Flieger (eds.), *Teoretyczne i praktyczne problemy współczesnego prawa karnego. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Bojarskiemu*, Lublin 2011, pp. 430–432.

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in the USA and Israel.[45] Poland was accused of wanting to deny or diminish the participation of Poland or Poles in the Holocaust by introducing these regulations. These allegations were groundless, because the intention of the legislator was not to deny the participation of Poland and Poles in the Holocaust or other crimes referred to in Article 55a of the Institute of National Remembrance Law. As a result, the new regulations caused a diplomatic crisis, particularly between Poland and Israel.

As a result of discussions on the amendment of the Institute of National Remembrance Law, the frequency of use of the phrase "Polish death camps" and other similar terms increased. Currently, the phrase "Polish camps…" has been so strongly rooted in international discourse that it is to be expected to continue, and it may take many years of effort to rectify this state of affairs. Although the penal provisions of the Institute of National Remembrance Law themselves have been repealed, they have left behind a negative effect in the form of popularising phrases such as "Polish death camps" or "Polish concentration camps" and weakening Poland's position in international relations.

Using the commonly available online tool Google Trends,[46] statistics have been compiled on the number of worldwide Google searches of phrases such as: "polish death camp", "polish death camps", "polish concentration camp" and "polish concentration camps" between 2004 and 2019.[47]

The above graph shows that the greatest interest in searching for these phrases took place in 2005, 2012 and 2018. The evident deviations coincide with events in public space. January 2005 marked the sixtieth anniversary of the liberation of the Auschwitz concentration camp, so texts containing the terms "Polish concentration camps" and other similar terms appeared in international press. The increase visible in 2012 was the result of the use by US President B. Obama of the phrase "Polish death camp" in his speech in May 2012 in honour of J. Karski at the White House during the ceremony of posthumously decorating the Polish hero with the highest civilian US distinction – the Presidential Medal of Freedom.[48] The spike observed in 2018 stems directly from the introduction into the Institute of National Remembrance Law of Art. 55a and 55b. The above flawed codes of memory appear most frequently in the United Kingdom, the United

[45] J. Sochacka, *Miały być kary za kłamstwa. Był kryzys dyplomatyczny*, TVN24, https://tvn24.pl/magazyn-tvn24/mialy-byc-kary-za-klamstwa-byl-kryzys-dyplomatyczny,192,3301 (accessed 3.11.2019).

[46] https://trends.google.com

[47] https://trends.google.pl/trends/explore?date=all&q=polish%20death%20camps,polish%20death%20camp,polish%20concentration%20camp,polish%20concentration%20camps (accessed 29.10.2019).

[48] 'Prezydent USA Barak Obama: „Polski obóz śmierci"', Polskie Radio, 16.08.2017, https://www.polskieradio.pl/320/6228/Artykul/1820657,Prezydent-USA-Barak-Obama-Polski-oboz-smierci (accessed 21.10.2019).

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States, Germany, Canada, and Australia. Between 2009 and 2014, the Ministry of Foreign Affairs intervened around 100 times a year. Since 2015, there has been a significant increase in the interventions of the Ministry of Foreign Affairs, the annual number of which is around 250.[49]

Graph no. 1. Comparison of phrases "polish death camp" (colour blue), "polish death camps" (colour red), "polish concentration camp" (yellow) and "polish concentration camps" (green) searched through the Google web browser between 2004 and 2019 worldwide. The numbers represent the individual interests during online searches for the highest point in the chart. The value 100 means the highest popularity of the phrase. The value 50 means that the popularity of the phrase was twice smaller. The value 0 indicated that there is not enough data for a given phrase.[50] Own elaboration.

The negative aspect of the 2018 amendment the Institute of National Remembrance Law is furthermore indicated by the number of faulty codes of memory which appeared in domestic and foreign publications. The data of the SentiOne report published by Gazeta.pl[51] indicates that between 1 January 2016 and 19 February 2018, the phrase "Polish death camps" appeared in various online articles ca. 7,000 times (it was used in 982 various international publications), over 4,600 times of which between 1 January and 19 February 2018, while the phrase "Polish concentration camps" was used times almost 1,900 times between 1 January and 19 February 2018, including 272 times in international media.[52]

[49] 'Niemieckie obozy koncentracyjne', Ministry of Foreign Affairs of the Republic of Poland, https://www.msz.gov.pl/pl/polityka_zagraniczna/niemieckie_obozy_koncentracyjne/ (accessed 2.11.2019).

[50] https://trends.google.pl/trends/explore?date=all&q=polish%20death%20camps,polish%20death%20camp,polish%20concentration%20camp,polish%20concentration%20camps (accessed 29.10.2019).

[51] A company monitoring the Internet.

[52] K. Świsłowski, *Ustawa o IPN więcej szkodzi, niż pomaga? Od dawna nie pisano tak dużo o "polskich obozach"*, Gazetapl. Wiadomości, 21.02.2018, http://wiadomosci.gazeta.pl/wiadom

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The above amendments of the laws from 2006, 2018 and the draft law of 2013 exemplify populist activities. The law is created not to actually safeguard a given legal interest, but to gain the support of the voters. It must be borne in mind that the severity of penalties does not deter the majority of perpetrators from committing crimes and does not significantly reduce the number of crimes. The narrative of the authors of the legislation under scrutiny, who hold that the only effective way of responding to faulty codes of memory is to penalise their use, is sheer penal populism.[53]

Given the criminal law principle of *ultima ratio*, we should assume that the instruments of criminal law should not be used when observance of legal provisions may be enforced by means other than sanctions of social policy.[54] As to the reactions of the Polish State to the flawed codes of memory emerging in the public domain to date, it must be said that these actions are sufficient and there is no justification for resorting to criminal law instruments. Diplomatic action which is taken as soon as the defective memory codes are detected is effective and leads to the revision of the defective texts. Furthermore, in most cases, those publishing texts falsifying history regret that they have used a phrase that is harmful to the Polish Nation or the Polish State.

In addition to diplomatic efforts, persons claiming the infringement of their legal rights as a result of the use of defective codes of memory may seek redress before a civil court. In a final judgment of 22 December 2016, the Appellate Court in Krakow found that the term "Polish death camps" violated the personal interest of former Auschwitz prisoner Karol T. and that this violation was unlawful.[55]

The use of the adjective "Polish" in relation to death camps, concentration camps, etc. seems to result, in most cases, from the users' ignorance rather than from the desire to hold Poland to account for these camps' operation (although such situations certainly do occur). The use of the term "Polish camp..." does not have to assume a connection with the Polish State or Nation in organisational or functional terms. In many cases, it is an unfortunate mental shortcut aimed only at indicating the geographical location of a given camp.[56]

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osci/7,114883,23045656,ustawa-o-ipn-dala-paliwo-polskim-obozom-setki-publikacji.html (accessed 2.11.2019).

[53] J. Widacki, 'Zamiast wstępu. Czym jest i do czego służy populizm penalny', in: J. Widacki (ed.), *Populizm penalny*, Kraków 2017, pp. 7–14.

[54] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, 2nd ed., Kraków 2012, p. 83.

[55] Judgement of the Appellate Court in Krakow of 22 December 2016 (file no. I ACa 1080/16), LEX no. 2202552.

[56] A. Wójcik, *Ustawa o IPN porażką. Za „polskie obozy śmierci" nadal nie będzie można karać – dr Małecki rozwiewa mit*, Okopres.pl, 30.01.2018, https://oko.press/ustawa-o-ipn-porazka-polskie-obozy-smierci-nadal-bedzie-mozna-karac-dr-malecki-rozwiewa-mit/ (accessed 30.10.2019).

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A similar view was expressed in 2013 by the Warsaw Public Prosecutor's Office, which refused to initiate criminal proceedings in connection with the publication of the phrase "Polish extermination camps" in the German newspaper *Rheinische Post* in August 2013. It was established that, on the same day, the newspaper apologised for this phrase, considering it a mistake and deeming it "unacceptable". The public prosecutor's office did not see that the intention of the authors was to insult the Polish nation (Article 133 CC), as stated in the notice. The phrase "Polish extermination camps", although very unfortunate, was not intended to indicate that such camps were established by Poles, but only that they were located on Polish soil; the above was part of the justification for refusing to investigate. In the justification, the public prosecutor's office also stressed that in similar cases the relevant institutions, such as the Ministry of Foreign Affairs, must react by requesting corrections.[57]

During the slightly more than 4 months of Art. 55a of the Institute of National Remembrance Law being in force, over 80 notifications were filed with the prosecution authority on the offence under the above provision, yet not a single proceeding was instituted.[58]

The problem of "Polish camps..." has been and will continue to exist in the public domain. Its extent is currently influenced by the development of technology, which contributes to the speed of information transfer. In the past, the dissemination of the printed word was limited by many factors. Today, we deal with "electronic", "virtual" words which spread at a rapid pace via the Internet and are available from almost anywhere in the world. In the age of globalisation and digitisation, online tools can be effective in combating defective codes of memory. One may indicate moreover the Truth About Camps website run by the Institute of National Remembrance. This educational website in Polish, English, German, Italian, French, Bulgarian, Slovak, and Ukrainian contains basic information on the death and concentration camps set up by the Third German *Reich* in occupied Poland during the Second World War.[59]

A free application called Remember, in operation since February 2016, cooperates with the most popular text editors. Its role is to detect and highlight as incorrect the phrase "Polish death camps" in edited texts, at the same time proposing the correct term.[60]

[57] 'Prokuratura: określenie "polskie obozy zagłady" nie znieważa narodu polskiego', TVN24, 13.12.2013, https://tvn24.pl/wiadomosci-z-kraju,3/prokuratura-okreslenie-polskie-obozy-zaglady-nie-zniewaza-narodu-polskiego,379407.html?h=2894 (accessed 29.10.2019).

[58] 'Prokuratorzy nie ścigają za "polskie obozy" na podstawie ustawy o IPN', Rzeczpospolita, 21.01.2018, https://www.rp.pl/Prawo-karne/306229974-Prokuratorzy-nie-scigaja-za-polskie-obozy-na-podstawie-ustawy-o-IPN.html (accessed 29.10.2019).

[59] https://truthaboutcamps.eu

[60] https://correctmistakes.auschwitz.org

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Experience to date indicates that the only effective tool in the fight against the falsification of history is global education, i.e. showing the historical truth about Poland's role in the Second World War and the Holocaust, as well as the activities of the concentration and extermination camps set up and administered by Nazi Germans in occupied Poland. Attempts to educate by means of criminal sanctions cannot produce the intended results. Before another idea is put forward to introduce criminal liability for falsifying the history of the Second World War, it is worthwhile for the potential authors of these regulations to notice that the history of Poland has recently been rewritten. This rewriting is not being done by foreign media or politicians, but by certain Polish political options which, by falsifying history, are trying to diminish the merits of their opponents in the fight for political position in the country.

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https://correctmistakes.auschwitz.org

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Abstract

Art. 55a and 55b of the amendment to the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation of 2018, were the Polish government's response to the terms "Polish camps", "Polish death camps", "Polish concentration camps" or other similar phrases. The article attempts to determine the genesis of the appearance of the phrase "Polish camps ..." in public space, showing the history of the latest Polish legal regulations providing for criminal liability for the use of such terms, and also analyses whether these regulations affected a decrease in the frequency of using defective memory codes in public space. Due to the loss of Art. 55a of the Law on the Institute of National Remembrance, no detailed analysis of all its features have

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been carried out, but the most important problems that could be raised by this interpretation were signalled. The dogmatic, historical and legal methods were conducted in the study. The considerations made lead to the conclusion that the relevant provision raises numerous doubts as to its interpretation and its appearance in the Polish legal system triggered an effect contrary to the intended one. Moreover, it led to the consolidation of these phrases in the public domain and adversely affected the image of Poland on the international arena. In the summary, it was stressed that education is the most effective method of fighting against defective codes of memory.

Keywords: Polish death camps, Polish concentration camps, criminal liability, amendment to the Law on the Institute of National Remembrance, faulty code of memory

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Protection of the Reputation of the Republic of Poland and the Polish Nation in the Law on the Institute of National Remembrance

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Introduction

The law of 26 January 2018[1] introduced into Polish law special civil law protection of the good name of the Republic of Poland and the Polish Nation. The amendment added Chapter 6c to the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (hereinafter: IPN Law)[2]: "Protection of the good name of the Republic of Poland and the Polish Nation", set out in Art. 53o–53q. At the same time, Article 1 (2a) of the IPN Law extended the subject matter of this Law to include the protection of the good name of the Republic of Poland and the Polish Nation. The above regulation deserves a more detailed analysis, as it is an unusual case of applying civil law institutions to protect public interests. At the same time, as will be shown below, the manner in which this protection is regulated raises numerous concerns as to its subjective and objective scope and the civil protection measures of the "wronged party".

First of all, the new provisions do not regulate on their own the prerequisites for protecting the good name of the Republic of Poland and the Polish Nation, but only mandate the application of the relevant provisions of the Civil Code (hereinafter CC)[3] concerning the protection of personal interests. However, they do indicate in a detailed manner who has active mandate in cases concerning the protection of the good name of the Republic of Poland and the Polish Nation. In the legislative process, the legislator stressed the intention to modify the protection of the good name of the Republic of Poland and the Polish Nation with a view to a more intense use of civil law instruments and meant to limit the use of

[1] Law of 26 January 2018 amending the Law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, the Law on War Graves and Cemeteries, the Law on Museums and the Law on Responsibility of Collective Entities for Criminal Offences (Journal of Laws of 2018, item 369).

[2] Law of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (Journal of Laws of 2019, item 1882).

[3] Law of 23 April 1964 – Civil Code (Journal of Laws of 2019, item 1145, as amended).

criminal law instruments (a result of the latter being deemed at variance with the Constitution of the Republic of Poland[4]). The new provisions aim at "creating effective legal instruments allowing the Polish authorities to pursue a persistent and consistent historical policy, counteracting the falsification of Polish history and protecting the good name of the Republic of Poland and the Polish Nation".[5] This chapter does not consider the adequacy of the tools chosen by the legislator to achieve the above objective. However, an attempt will be made to analyse the scope of application of the introduced provisions in light of the earlier doctrine and case law on the protection of personal rights in civil law.

In particular, the above regulation, due to its referential character, requires the definition of the material and subjective scope of the protection provided for therein, as well as the relation to the provisions on personal rights under the Civil Code. The determination of whose good name is to be protected under this procedure raises the biggest concerns, as both the Republic of Poland and the Polish Nation do not have the status of a civil law entity. Moreover, the place and manner of regulating this issue also indicate that the intention of the legislator was to protect public interest rather than the individual interests of specific civil law entities. A question thus arises whether the instruments introduced into the IPN Law are fit for the intended purpose. Noteworthy in this context is the legislator's use, on the grounds of civil law regulations, of formulations typical of public law, i.e. the Polish Nation and the Republic of Poland. Until then, good name, dignity and respect for the Polish Nation and the Republic of Poland had been protected under criminal law in Art. 133 CC[6] and under the misdemeanours law in Art. 49 (1) CM.[7] The penalised offences indicated in these provisions violate public order and the welfare of society as a whole. At the same time, criminal law doctrine stresses that the penalisation of said acts cannot eliminate the liberties protected under Art. 9 and Art. 10 Convention for the Protection of Human Rights and Fundamental Freedoms.[8] Everyone has the right to both publicly

[4] Document no. 2663, p. 2, http://orka.sejm.gov.pl/Druki8ka.nsf/0/4788B9F601808D0FC12582B9002257F3/%24File/2663.pdf (accessed: 19.01.2021).

[5] Document no. 806, p. 2, http://orka.sejm.gov.pl/Druki8ka.nsf/0/EA4AD50371FF6D17C12580250039936A/%24File/806.pdf (accessed: 19.01.2021).

[6] Law of 6 June 1997 – Criminal Code (Journal of Laws of 2019, item 1950, as amended). Art. 133 CC. Whoever publicly insults the Polish Nation or the Republic of Poland shall be subject to the penalty of deprivation of liberty for up to 3 years.

[7] Law of 20 May 1971 – Code of Misdemeanours (Journal of Laws of 2019, item 821, as amended). Art. 49 CM. 1. Anyone who, in a public place, demonstrates disrespect for the Polish Nation, the Republic of Poland or its constitutional authorities, shall be subject to the penalty of arrest or fine. 2. the same penalty shall be imposed on anyone who violates the provisions on the emblem, colours and anthem of the Republic of Poland.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol Nno. 2 (Journal of Laws of 1993 no. 61, item 284, as amended).

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express their views on a country's policies, history and to publicly express criticism in this regard.[9] Balancing out these colliding values must be made in relation to a particular factual state.[10] Furthermore, civil law protects legal entities in this respect. Both the civil law doctrine and case law concerning matters of protecting personal interests regards a sense of national identity to be a personal right[11] and grants it protection under civil law. Regrettably, this matter was completely omitted in the justification of the draft law.

The objective of introducing Chapter 6c into the IPN Law

The introduction of the Chapter 6c into the IPN Law was a direct reaction to the use of phrases such as "Polish death camps", "Polish extermination camps" or "Polish concentration camps" by Polish and foreign media. The justification of the draft law emphasised that diplomatic interventions in such cases did not produce completely satisfactory results. References to the provisions on the protection of personal rights, compensation of property damage under general principles as well as the publication of corrigenda under press law were considered ineffective, either.[12]

Attention should be paid to the extensive arguments presented in the explanatory memorandum of the draft law against the possibility of effective use of the concept of personal rights in cases of this type. Doubts were stressed as to the existence of personal rights of the State Treasury and discrepancies were pointed out as to the catalogue of personal rights of legal persons and the scope of claims for infringement of their personal rights. Despite this critical assessment, the model of protection of personal rights under the Civil Code was used by the legislator to construct the responsibility specified in Chapter 6c of the IPN Law. According to the legislator, the solution to the problems related to the application of regulations on personal rights to entities using the term "Polish concentration camps" in the communications media is to recognise that the Republic of Poland

[9] P. Hofmański, A. Sakowicz, 'Komentarz do art. 133', in: M. Filar (ed.), *Kodeks karny. Komentarz* [online], Warszawa 2016. System Informacji Prawnej LEX (accessed: 19.01.2020).

[10] The same constraints must apply likewise to the protection of the reputation of the Republic of Poland and the Polish Nation, as set out under the IPN Law.

[11] See F. Rakiewicz, *Poczucie tożsamości narodowej jako dobro osobiste w świetle polskiego prawa cywilnego* [online]. Part One. STPP 2011, no. 2, p. 91f. Part Two. STPP 2011, no. 3, p. 67f. Part Three. STPP 2012, no. 1, p. 57f. LEGALIS (accessed: 19.01.2020). J. Skrzypczak, 'Protection of the reputation of the Polish Nation and the Republic of Poland' [online], *Środkowoeuropejskie Studia Polityczne* 2019, no. 3, pp. 61–78 (accessed: 19.01.2020). M. Brzozowska-Pasieka, 'Legitymacja czynna osób fizycznych i prawnych w sprawach o naruszenie prawa do tożsamości narodowej. Przegląd orzecznictwa polskiego z uwzględnieniem orzecznictwa Europejskiego Trybunału Praw Człowieka' [online], *MOP* 2019, no. 22, pp. 1239–1243. LEGALIS (accessed: 19.01.2020).

[12] Document no. 806, p. 9, http://orka.sejm.gov.pl/Druki8ka.nsf/0/EA4AD50371FF6D17C12580250039936A/%24File/806.pdf (accessed: 19.01.2021).

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and the Polish Nation have personal rights analogous to those of legal persons. In this context, the justification makes it clear that "the Republic of Poland" is the name of the Polish State which according to Art. 1 of the Constitution of the Republic of Poland[13] is the good of all citizens, while the "Polish Nation" under the preamble to the Constitution of the Republic of Poland are "all citizens of the Republic of Poland". This matter is of major importance from the perspective of pursuing claims, since the Republic of Poland and the Polish Nation have no legal personality[14]. For this reason, provision was made, allowing bringing an action for the protection of the good name of the Republic of Poland or the Polish Nation by non-governmental organisations within the scope of their statutory tasks and by the Institute of National Remembrance.

The justification also indicated the conflicting legal problems associated with the pursuit of claims arising from violations of the good name of the Republic of Poland and the Polish Nation by foreign media. In particular, it was considered advisable to introduce an obligation to apply the principles of protection of the good name of the Republic of Poland and the Polish Nation as defined in Chapter 6c of the IPN Law, regardless of the applicable law (so-called mandatory provisions). According to the legislator, this regulation is to ensure that the Polish provisions concerning the protection of the good name of the Republic of Poland and the Polish Nation will apply in each and every case, regardless of what law is applicable under Private International Law.[15]

In addition to the issue of applicable law, the question of national jurisdiction was also raised. In the case of foreign publications and statements, it is necessary to determine which court has jurisdiction to resolve the dispute. The explanatory memorandum of the draft law stressed that the jurisdiction of courts in such cases for entities residing or established in the EU is determined according to the principles set out in EU law.[16] However, if an entity infringing the good name of the Republic of Poland or the Polish Nation has no residence or registered office in any of the EU Member States, the issue of jurisdiction is regulated by the Code of Civil Procedure (hereinafter CCP).[17] As a result, Polish courts "will

[13] Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws no. 78, item 483 as amended).

[14] Łętowska E., Nowelizacja ustawy o IPN: pozostają przepisy o odpowiedzialności cywilnej (in:) Archiwum Osiatyńskiego, https://archiwumosiatynskiego.pl/wpis-w-debacie/nowelizacja-ustawy-o-ipn-pozostaja-przepisy-o-odpowiedzialnosci-cywilnej (accessed: 19.01.2020).

[15] Law of 4 February 2011 – International private law (Journal of Laws of 2015, item 1792).

[16] Regulation (EU) no. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJEU L of 2012 no. 351, p. 1, as amended).

[17] Law of 17 November 1964 – Code of Civil Procedure (Journal of Laws of 2019, item 1460, as amended). See Art. 1103 CCP: "Cases brought before the courts shall lie within national jurisdiction if the defendant is domiciled or habitually resident or has a corporate office in the Republic of Poland".

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have jurisdiction over such cases or, when according to the general idea of the regulation (Art. 4 (1) of Regulation no. 1215/2012) – the defendant (the infringer) will have their place of residence/registered office in the Republic of Poland, or if – pursuant to the provisions of the Regulation on special jurisdiction in matters of torts (Article 7(2) of Regulation no. 1215/2012) – an 'event causing damage' will take place in the Republic of Poland (i.e. e.g. in the case of press-related offences, when information detrimental to the good name of the Republic of Poland or the Polish Nation is disseminated also in the Republic of Poland and will have negative consequences here)".[18] When Art. 1103 CCP applies, decisive for domestic jurisdiction will be the place of residence, domicile or the registered office of the defendant in the Republic of Poland.

Despite the rationale for the introduction of the regulation in question set out in the explanatory memorandum, the interpretation of the already existing provisions of Chapter 6c of the IPN Law raises numerous doubts. They concern issues of fundamental importance for the application of these provisions, in particular: Who is the wronged party, i.e. whose personal rights are protected? How to determine whether there has been an illegal violation of personal rights? Who has active legitimacy? What is the status of non-governmental organisations and the IPN? Whether all claims specified in Article 24 of the Civil Code can be the subject of legal action? and finally How to effectively sue foreign entities in this respect?

Construction of civil law protection of the good name of the Republic of Poland and the Polish Nation in the IPN Law – analysis of Art. 53o–53q of the IPN Law

Pursuant to Article 53o of the IPN Law, the provisions of the Civil Code on the protection of personal rights apply to the protection of the good name of the Republic of Poland and the Polish Nation.[19] However, the practical application of this simple reference structure requires an answer to the fundamental question: whose good name is to be protected in this way. The reference to the Republic of Poland and the Polish Nation should be regarded as flawed since they are

[18] Document no. 806, p. 11, http://orka.sejm.gov.pl/Druki8ka.nsf/0/EA4AD50371FF6D17C12580250039936A/%24File/806.pdf (accessed: 19.01.2021).

[19] Supreme Court jurisprudence recognises that "proper application means, first, that the law recognises the existence of the personal interests of a legal person and, second, that the automatic application of the rules on the protection of those interests is excluded on account of the differences resulting from the structural and functional distinctiveness of natural persons and legal persons and, third, that the rule is comprehensive in nature and does not prejudge which interests of the legal person are protected" (Supreme Court judgement of 5 April 2013 III CSK 198/12, OSNC 2013, no. 12, item 141; see also Supreme Court judgement of 26 October 2006, I CSK 169/06, Legalis).

not civil law entities. Claims for violating the good name are closely related to the wronged party and therefore the application of Article 24 of the Civil Code requires an objective individualisation of the violation of personal rights. This means that an average recipient of sound mind of an incriminating statement should be able to attribute the allegation contained therein to a specific entity.

In the case in question, in order to determine who the intended addressee of this regulation was, one can only refer to the Polish Constitution. According to the contents of the preamble, the concept of the Polish nation encompasses all citizens.[20] It can be considered that the identification of members of the Polish nation takes place using the legal criterion, which is the possession of citizenship of the Republic of Poland. Similarly, in accordance with Article 1 of the Polish Constitution, "The Republic of Poland shall be the common good of all its citizens". As a result, the Polish state, which is the political emanation of the Polish nation, is a legal interest under Article 53o of the IPN Law. On this basis, however, we cannot consider that we are dealing with an organisational unit whose legal interests can be identified and protected under civil law. Rather, it should be recognised that the addressee of this regulation is a different type of community of a large size, whose participants are united by the fact of having Polish citizenship. However, it is a vague set which, in the opinion of the addressee, does not indicate a particular participant. In the general perception, a statement such as "Poles are thieves" does not justify the automatic recognition that it concerns a specific, individually defined natural person or every single Pole, even though the statement undoubtedly exceeds the limits of admissible criticism.[21] A question thus arises whether a statement with defamatory accusations against such a generally defined community (the Republic of Poland and the Polish Nation) violate someone's good name, and when should the violation be considered to have occurred? Is it sufficient to subjectively convince an individual who feels affected by such a statement, or must the violation of a personal interest be objective in nature?

The relevant case law has established the view that it is possible to infringe personal rights by making a statement concerning a particular community or group of persons. However, in such a case, a member of the group may demand protection of their personal rights if the circumstances in which the action took place allow the addressees to identify that person as belonging to that group.[22]

[20] See: "[...] the Polish Nation – all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good – Poland [...]".

[21] More on this topic: J. Barta, R. Markiewicz, 'Dobre imię zbiorowości', in: J. Barta, R. Markiewicz (eds.), *Media a dobra osobiste*, Warszawa 2009, p. 55f.

[22] Supreme Court judgement – Civil Chamber, of 26 October 2001 V CKN 195/01. Legalis.

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If the content of the publication refers to a group whose composition is unknown, the "wronged party" entitled to make the claims provided for in Article 24 of the Civil Code cannot be identified. It is further assumed that the assessment of whether a breach of good repute has occurred cannot be made according to the criterion of the individual sensitivity of the person concerned. It is necessary to apply objective criteria for assessing whether an incriminating statement actually applied to a particular person.[23]

However, both the doctrine and case law allow a departure from the principle of individualisation of the infringement of the good name if a statement is especially negative and touches on questions especially socially sensitive.[24] In such a case, defaming a group or community may also infringe the good name of its members and those identifying with it, even if the statement itself is not addressed at a specific individual. This is precisely the emotional charge of statements denying crimes against humanity or those attributing Nazi crimes to Poles. This was clearly highlighted by the Appellate Court in Warsaw, whose ruling pointed out that "Defaming a community who significantly impacted the development of a person's personality is a form of denigrating their dignity. (...) Therefore, any allegations to the effect that Poles are responsible or co-responsible for the Holocaust, that they killed the Jews during the Second World War and confiscated their property then, in the opinion of the appellate court touch upon the area of national heritage and as a consequence, as grossly untrue and detrimental, may result in an unlawful violation of (pose a risk to) legally protected personal rights of Polish nationals. They may significantly impact one's sense of national dignity, destroying the legitimate, fact-based conviction that Poland was a victim of the warfare initiated and conducted by the Germans and Polish citizens, also of Jewish extraction, and bore the far-reaching, often atrocious and irreversible consequences of these actions".[25] At the same time, the Appellate Court recalled that even in such drastic cases recognition of infringement of personal rights calls for objective assessment criteria that involve "typical feelings of an average individual, an opinion of sound-thinking and disinterested individuals. Such assessment must take into account a wider social context and only with this in view establish whether a given action had the nature of infringement of a personal right in common opinion".[26]

[23] See Supreme Court judgement – Civil Chamber, of 11 March 1997 III CKN 33/97. Legalis. Supreme Court judgement – Civil Chamber, of 29 September 2010 V CSK 19/10. Legalis.

[24] See M. Jabczuga-Kurek, 'Legitymacja czynna członka zbiorowości w nietypowych sprawach o ochronę czci i dobrego imienia', [in:] *Usus magister est Optimus. Rozprawy prawnicze ofiarowane Profesorowi Andrzejowi Kubasowi*, Warszawa 2016, pp. 67–77.

[25] Warsaw Appellate Court judgement – 5th Civil Division, of 20 January 2020 V ACa 569/19. Legalis.

[26] Ibid.

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Importantly, an objective test should moreover take into consideration the values related to free public debate and freedom of research.

However, there is no need, in order to achieve this objective, to introduce a specific legal basis for the protection of the good name of the Republic of Poland and the Polish Nation. Firstly, it is generally recognised in doctrine and case law that in civil law relations it is the State Treasury that epitomises the Polish State, so it is surprising to create equivalent structures for very specific purposes.[27] The State Treasury has legal personality pursuant to Article 33 of the Civil Code, thanks to which the Polish State may participate in civil law relation, also with regard to the protection of personal rights.[28] In light of the justification of the draft law, the omission of the construction of the State Treasury can be seen as deliberate. For the purposes of this regulation, an attempt was made in the justification to attribute to the Republic of Poland and the Polish Nation personal rights analogous to those of legal persons. In this way, the Republic of Poland and the Polish Nation were recognised as a kind of civil law entities with respect to the protection of their good name. There is no doubt that, given the normative concept of legal persons under Polish law, subjectivity in civil law cannot be the result of a presumption. Therefore, the solution adopted in Article 53o of the IPN Law should be seen as negative[29]. It complicates the identification of individual interests of the subject of the protected right in light of the provisions on the protection of personal rights; it is actually in conflict with the developed concept of assessing statements concerning a given community from the perspective of these provisions.

The possibility of recognising the good name of the Republic of Poland and the Polish Nation as a personal right within the meaning of Article 23 of the Civil Code raises similar doubts. It should be stressed that the construction of civil law protection of personal rights of legal persons is already an institution with well-established premises of application, which are commonly accepted in doctrine and case law.[30] The personal rights held by each legal person are

[27] See A. Kubiak Cyrul, 'Komentarz do art. 34 KC', in: M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 83f.

[28] However, its organisational structure is not similar to that of other legal entities. It corresponds to the tasks of the state carried out by state agendas.

[29] See also: B. Lackoroński, 'Komentarz do art. 53o', in: K. Osajda (ed.), *Ustawa o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu. Komentarz* [online], Warszawa 2020, LEGALIS (accessed: 19.01.2020); R. Guzik, *Komentarz do ustawy o Instytucie Pamięci Narodowej – w zakresie zmian wprowadzonych ustawami z dnia 26 stycznia 2018 r. oraz z dnia 27 czerwca 2018 r.* [online], System Informacji Prawnej LEX, Warszawa 2019 (accessed: 19.01.2020).

[30] See M. Pazdan, 'Komentarz do art. 43 KC', in: K. Pietrzykowski (ed.), *Komentarz KC*, vol. 1, Warszawa 2018, art. 43, Nt: 1; P. Sobolewski, 'Komentarz do art. 43 KC', in: K. Osajda (ed.), *Komentarz KC*, Warszawa 2018, Nt: 1; G. Gorczyński, 'Komentarz do art. 43 KC', in: M. Fras, M. Habdas (eds.), *Komentarz KC*, vol. 1, Warszawa 2018, NB: 1.

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non-economic rights of an absolute nature and their protection is based on the principle of presumption of illegality and the objective nature of the infringement. Their identification should take into account the specific design, objectives pursued and functioning of the entity in question. In the case of legal persons, it is agreed that personal rights are non-economic rights by which a legal person can function in accordance with their scope of activities.[31] In light of the provision under Chapter 6c of the IPN Law, it is difficult to recognise that this type of subjective right is held by the Polish Nation or the Republic of Poland. How can one determine the sphere of personal interests subject to protection and to indicate the scope of the attendant standard prohibiting third parties from interference and creation of threats? When assessing whether there has been a violation of personal interests, one should be guided by objective assessments accepted in society, which is also difficult in the case of a violation of the good name of the Polish Nation or the Republic of Poland, because it requires the application of an external assessment criterion. Importantly, regulations on personal rights are intended to protect the individual interests of civil law entities rather than the public interest.

A good name, or reputation, is one of the most frequently infringed personal rights of legal persons. The good name of a legal person may be violated if such person is accused of improper conduct, in circumstances which may result in the loss of the trust necessary to achieve the objectives pursued by it in the course of its business.[32] This is most often the result of publication of false information, unjustified negative assessments or manipulation of true information in order to create a false and negative perception of the subject in the recipients of such information. In this context, recognition that the good name of the "individual", of which all citizens of the Republic of Poland are the personal substrate, has been violated requires the use of too many generalizations. It is up to the wronged party to prove that there has been a threat or violation of a particular personal right. It is difficult to apply this mechanism when the victim is identified in the way specified in Article 53o of the IPN Law. Empowering an independent institution, an organisational unit which is part of the state structure, i.e. the Institute of National Remembrance (IPN), to decide whether, for example, an infringement of a good name has occurred, is a solution which is foreign to the private law system. How is a court expected to verify whether a threat or violation of the good name of the Polish Nation has actually occurred? In particular, how to demonstrate that as a result of this

[31] See Supreme Court judgement of 14.11.1986, II CR 295/86, OSNCP 1988, no. 2–3, item 40; Supreme Court judgement of 11.8.2016, I CSK 419/15, Legalis and M. Pazdan, 'Komentarz do art. 43 KC'..., op. cit., art. 43, Nt: 4; G. Gorczyński, 'Komentarz do art. 43 KC'..., op. cit., NB: 5.

[32] See Supreme Court judgement of 27.3.2013, I CSK 518/12, OSNC-ZD 2014, no. A, item 13.

event, the Polish Nation has suffered legally significant damage, which could be remedied under the provisions on the protection of personal rights?

It should also be emphasised that Article 53o of the Institute of National Remembrance (IPN) Law may be the basis of an action not only in the case of publication of statements concerning "Polish death camps", but also in any case in which the IPN or an authorised non-governmental organisation deems a given statement to be detrimental to the good name of the Polish Nation or the Republic of Poland, regardless of whether it concerns past or current events. The above gives rise to serious concerns. The construction of the protection of personal rights in civil law is based on the presumption of unlawfulness. It is for the defendant to demonstrate that his action was not unlawful. This mechanism may "freeze" public debate, as its participants will refrain from actively participating and exercising their freedom of expression for fear of lawsuits. The opening up of the possibility of transferring a discussion on Polish history or current policy to a courtroom, when a court will have to decide whether, for example, the scientific findings of historians showing the wickedness of members of the Polish Nation are true and whether their dissemination violates the good name of the Polish Nation, should also be a matter of concern. Undoubtedly, the construction of the protection of the good name of the Polish Nation set out in Article 53o of the Law on the Institute of National Remembrance in this respect may interfere with the exercise of freedoms protected by, among others, Articles 9 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as Articles 54 and 73 of the Polish Constitution.

The scope of claims which can be made on the basis of Article 53o of the IPN Law raises further doubts. In principle, in the case of violation of the good name of a legal person, the scope of claims is defined in Article 24 CC in conjunction with Article 43 CC.[33] The protection measures to which the wronged party is entitled include claims of a non-pecuniary nature: a demand for the cessation of acts jeopardising or infringing personal rights, a demand for the removal of the effects of the infringement, and claims of a pecuniary nature: a demand for monetary compensation or the payment of a sum of money by the offender for a specified social purpose. Moreover, on the basis of Article 189 of the CCP, it is generally accepted to file a claim for determination. Importantly, Art. 24 § 2 of the Code of Civil Procedure applies, which states that if a violation of personal rights results in property damage, the wronged party may demand that it be repaired on general principles.

The most controversial issue is the admissibility of a legal person claiming financial compensation for infringement of their personal rights. The assessment

[33] See A. Kubiak Cyrul, 'Komentarz do art. 43 KC', in: M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 99f.

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of the legitimacy of a claim for monetary compensation and the payment of a sum of money for an indicated social purpose is made on the basis of Article 448 CC. Both case law and literature generally accept the admissibility of application of Article 448 CC as the basis for awarding monetary compensation to a legal person in the case of infringement of their personal rights; however, dissenting opinions can also be heard.[34] This requires recognition that a legal person may suffer non-pecuniary damage as a result of an infringement of personal rights. In addition, in the case of an award of compensation or an appropriate sum of money for a social purpose, it is difficult to consider that the claim only has a compensatory function. In the case of legal persons anchored in public law, the award of compensation will also serve the functions of granting satisfaction, sanctioning, preventing, and educating.[35] However, compensation for the violation of the good name of the Republic of Poland and the Polish Nation does not fall within the scope of the case law to date. Pursuant to Article 53o of the IPN Law, the State Treasury is entitled to compensation, even though it is not an entity whose reputation is protected under this provision. Undoubtedly, this will not constitute compensation for the civil law entity for the violation of their individual interests. In the case of an award, it will rather be a repressive measure or an educational instrument. The fact that it is not possible to customise the damage to be compensated in this way may give rise to fears of arbitrary assessments by those entitled to bring an action.

Conclusions

The regulations on the protection of the good name of the Polish Nation or the Republic of Poland have been in force since 1 March 2018. However, so far there have been no rulings issued on their basis. At the same time, the protection offered by civil law of the sense of national identity as a personal interest is increasingly accepted, both in the legal doctrine[36] and in case law.[37]

[34] See Supreme Court judgement of 13.1.2012, I CSK 790/10, Legalis; Warsaw Appellate Court judgement of 6.9.2013 I ACa 456/13, Legalis; Warsaw Appellate Court judgement of 1.8.2013, VI ACa 902/12, Legalis, Krakow Appellate Court judgement of 28.9.1999, I ACa 464/99, Legalis; Warsaw Appellate Court judgement of 9.2.2007, VI ACa 960/06, OSA 2009, no. 5, item 16; and G. Gorczyński, 'Komentarz do art. 43 KC'..., op. cit., NB: 31 and the relevant literature quoted there.

[35] See Supreme Court judgement of 24.9.2008, II CSK 126/08, OSNC-ZD 2009, no. B, item 58.

[36] See J. Panowicz-Lipska, 'Komentarz do art. 23', in: M. Gutowski (ed.), *Kodeks cywilny*, vol. I: *Komentarz do art. 1–352*, Warszawa 2018, Nt. 17.

[37] Suffice it to mention a fragment of the Warsaw Appellate Court judgement of 20 January 2020, V ACa 569/19: "...national identity (sense of belonging to a nation) and national dignity (pride of belonging to a nation) are part of a generally and socially accepted set of values which may constitute an important element of a person's state of consciousness and affections and, if they are professed and cultivated by a person, should be considered as their personal interest to be protected

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It is therefore necessary to propose the revocation of the provisions of the IPN Law under discussion, which in their current wording will not contribute to eliminating critical statements made abroad about the Polish Nation or the Republic of Poland. In Poland, in turn, they may constitute a constraint on the public debate and the freedom of research. A transfer of historical disputes to a courtroom will by no means further knowledge of the truth and will not lead to the reconciliation of the parties.

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as provided for in Art. 23 i CC". Similarly: Supreme Court judgement of 28 February 2003 V CK 308/02, Białystok Appellate Court judgement of 30 September 2015, I ACa 403/15, Warsaw Appellate Court judgement of 31 March 2016, I ACa 971/15, Krakow Appellate Court judgements of 2 August 2019, I ACa 768/18 and of 22 December 2016, I ACa 1080/16, Krakow Regional Court judgement of 28 December 2018, I C 2007/13, Krakow Regional Court judgement of 25 April 2016, I C 151/14.

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Abstract

In 2018, the Law on the Institute of National Remembrance introduced special protection of the good name of the Republic of Poland and the Polish Nation. This regulation deserves a more detailed analysis, because it is an unusual case of application of civil law institutions to protect public interests. At the same time, the manner in which this protection is regulated raises numerous concerns as to its subjective and objective scope and the civil protection measures of the "wronged party". Analysis of the foregoing leads to the conclusion that the provisions in their current form will not contribute to the elimination of critical statements expressed abroad against the Polish Nation or the Republic of Poland, while in Poland they may both constrain the public debate and the freedom of research.

Keywords: protection of the reputation of the Republic of Poland and the Polish Nation, personal rights, right to national identity, freedom of expression, freedom of research

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Constitutional courts vs. jurisprudence of international tribunals in a question of just compensation for the losses incurred as a result of international crimes[1]

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Introduction

In connection with the ongoing process of judicialisation, courts, including international tribunals, are playing an increasingly important role in shaping not only international but also domestic relations.[2] However, the influence of international tribunals depends not only on the content of international agreements, which constitute the basis for their functioning and on the number of parties to such agreements, but also on the solutions of national constitutional law. International courts tend to agree that in the event of a conflict between a rule of international law and a rule of national law, the rule of international law takes precedence, while Article 27 of the Vienna Convention on the Law of Treaties lays down that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[3] On the other hand, however, it is the national constitutional law that determines the place of international law in the national legal order and, indirectly, the effectiveness of judgements of international courts. E. Denza believes that the adoption of a monistic or dualistic theory in a given national legal system is of secondary importance for determining the relationship between international law and national law. The rules of national constitutional law are of fundamental importance for the determination of this relationship.[4] On the other hand, national constitutional law is subject to interpretation by the national constitutional court. As a rule, the latter is reluctant to give up the monopoly of having

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[2] Cf. A. v. Bogdandy, I. Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers', *German Law Journal*, 2011, p. 979.

[3] E. Denza, 'The Relationship between international and national law', in: M.D. Evans (ed.), *International Law*, Oxford 2010, p. 413, cf. K. Culver, M. Guidice, 'Not a system but an Order', in: J. Dickson, P. Eleftheriadis (eds.), *Philosphical Foundations of EU law*, Oxford 2012, p. 56 ff.

[4] E. Denza, *The Relationship between*..., op. cit., p. 418.

the final say in legal disputes, very often of significant political importance, in a given country. Therefore, the reception of international tribunals in the jurisprudence of national constitutional courts has a significant impact on the actual position of international tribunals in multi-tiered legal systems. The paper will focus on the verification of the above thesis by referring to examples of the jurisprudence of constitutional courts, with a special reference to the Italian and German Federal Constitutional Court (FCC).

Admittedly, the inclusion of the Court of Justice of the European Union (hereinafter referred to as CJEU) and the European Court of Human Rights (hereinafter referred to as ECHR) alongside international courts of a universal nature may give rise to doubts, due to the specific relationship between, respectively, EU law and the European Convention on Human Rights and Fundamental Freedoms and national constitutional law. Despite the unique position of the European Courts in both relevant literature and the case law of the constitutional courts, the European international courts are taken into account together with the international courts, especially when it comes to the constitutional restrictions on the application of legal rules originating from another legal system in the national legal order. An example of such an approach is the thesis contained in the judgment of the Italian Constitutional Court of 22 October 2014, which will be the subject of a more detailed analysis below. In this judgment, the Constitutional Court stated: "As was upheld several times by this Court, there is no doubt that the fundamental principles of the constitutional order and inalienable human rights constitute a 'limit to the introduction (...) of generally recognized rules of international law, to which the Italian legal order conforms under Article 10, para. 1 of the Constitution' (Judgment no. 48/1979 and no. 73/2011) and serve as 'counter-limits' [*controlimiti*] to the entry of European Union law (*ex plurimis*: Judgments no. 183/1973, no. 170/1984, no. 232/1989, no. 168/1991, no. 284/2007), as well as limits to the entry of the Law of Execution of the Lateran Pacts and the Concordat (Judgments no. 18/1982, no. 32, no. 31 and no. 30/1971)."[5] The aforementioned similarity of conditions for the reception of legal rules originating in legal systems which are "foreign" with respect to the national system and also to the case of law of international courts, which provide interpretations of these rules, is often backed up by a close relationship between constitutional provisions concerning the position of international law and the position of EU law in the domestic legal order. We should mention here Art. 10 and Art. 11 of the Italian Constitution,[6] Art. 23 and Art. 25 of the Basic Law for

[5] The Italian Constitutional Court, Judgement of 22 October 2014, file no. 238/2014, para. 3.2., https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S238_2013_en.pdf (accessed 15.10.2018).

[6] Constitution of the Italian Republic of 22 December 1947, Art. 10. The Italian legal system conforms to the generally recognised principles of international law. (...); Art. 11 Italy rejects war as

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the Federal Republic of Germany[7] (hereinafter referred to as BL). The constitutional principle of openness to international law is the basis for the development of the principle of openness of the law towards EU law or the European Convention on Human Rights, which takes place also in Polish constitutional law.[8]

The relationship between the European constitutional courts and the CJEU and the ECHR is the subject of the most extensive case law of the constitutional courts of European countries. The above-mentioned jurisprudence of national constitutional courts, including the constitutional basis for the application of European law and CJEU and ECHR rulings, respectively, are among the best explored and described relations between constitutional courts and international courts, within the framework of the so-called European constitutional law.[9] The CJEU and its extensive case law play a special role, given the level of development of the EU legal system. However, despite the principle of the precedence of EU law over the national law of the Member States, as developed in the CJEU jurisprudence,[10] some Member States generally neither give absolute precedence to EU law over national law, nor accept unconditionally the CJEU jurisprudence.[11]

Germany's FCC has since the early 1970s developed a doctrine of limitations to the process of European integration, resulting from the inviolability of the constitutional identity of the state, which in the initial phase focused on guaranteeing a level of respect for fundamental rights which would correspond to the level of protection defined on the basis of BL provisions. Another precursor of the above restrictions was, in addition to Germany's FCC, the Constitutional

an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends; https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (accessed 15.10.2018).

[7] The Basic Law for the Federal Republic of Germany of 23 May 1949, Grundgesetz für die Bundesrepublik Deutschland, Bundesgesetzblatt (German Federal Journal of Laws, hereinafter as BGBl.), BGBl. p. 1, as amended. The last the amendment(s) to the Act by the by Article 1 of the Act of 29 September 2020 (BGBl. I, p. 2048). Art. 23.1. With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law; https://www.gesetze-im-internet.de/englisch_gg/ (accessed 15.12.2020).

[8] M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, p. 263 nn., https://www.bibliotekacyfrowa.pl/Content/79679/Polski_i_niemiecki_Trybunal_Konstytucyjny.pdf (accessed 15.12.2020).

[9] A.v. Hatje, P.-M. Müller-Graff (eds.), *Enzyklopädie Europarecht*, Bd. 1: *Europäisches Organisations- und Verfassungsrecht*, Baden-Baden 2014.

[10] P. Craig, G. de Búrca (eds.), *EU Law: Text, Cases, and Materials*, Oxford 2008, p. 346.

[11] K. Culver, M. Guidice, 'Not a system'..., op. cit., p. 57; M. Bainczyk, *Polski i niemiecki Trybunał*..., op. cit., p. 142 nn.

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Court of Italy, which in its *Frontini* decision formulated the *controlimiti* doctrine, which lifts the precedence of EU law if its rule violates the core of Italy's Constitution, i.e. human rights.[12] This doctrine was consistently developed in later years.

Since the 1990s to date, to protect the inviolable constitutional identity, Germany's FCC has developed the doctrine of the democracy rule, seen as the retention of decision-making competence in matters of prime importance for the state by the national parliament, i.e. the Bundestag.[13] In 2005, in a judgment concerning the accession treaty, the Polish Constitutional Tribunal made a creative reception of the doctrine of limiting the effectiveness of EU law in the national legal order, due to the possible contradiction of these rules with the superior rules of the Constitution of the Republic of Poland.[14]

Within this trend to limit the effectiveness of norms of EU law violating the constitutional identity of the Federal Republic of Germany we can also invoke the FCC's decision of 6 July 2010,[15] where Germany's FCC allowed the application of the *ultra vires* doctrine to CJEU decisions. In the case at hand, the FCC referenced the judgement of CJEU, where the latter allowed a direct application of a directive in a horizontal relation before the deadline for its implementation.[16] The FCC observed that its review of *ultra vires* is exceptional and can take place

[12] The Italian Constitutional Court, Judgement of 18 December 1973, file no. 183/1973: F.C. Mayer, M. Wendel, '§ 4 Die Verfassungsrechtlichen Grundlagen des Europarechts', in: A. Hatje, P.-Ch. Müller-Graff, *Enzyklopädie Europarecht*, Bd. 1: *Europäisches Organisations- und Verfassungsrecht*, Baden-Baden 2014, no. 220 ff; A. Kustra, *Przepisy i normy integracyjne w konstytucjach wybranych państw członkowskich UE*, Toruń 2009, p. 156 ff.

[13] M. Bainczyk, *Polski i niemiecki Trybunał...*, op. cit., p. 322.

[14] Judgement of the Polish Constitutional Court of 24 November 2005, file no. K 18/04, thesis 11 "Given its supreme legal force (Article 8(1)), the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorisation or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution."; thesis 14 "The principle of interpreting domestic law in a manner that is "favourable to European law", as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.", translation in: *Studia i Materiały Trybunału Konstytucyjnego*, vol. LI, 'Selected rulings of the Polish Constitutional Tribunal concerning the Law of the European Union (2002–2014)', Warszawa 2014.

[15] The German Federal Constitutional Court, Order of 6 July 2010, *Honeywell*, file no. BvR 2661/106; M. Bainczyk, 'Pomiędzy otwartością a kontrolą ultra vires – orzeczenie niemieckiego Bundesverfassungsgericht dotyczące skutków wyroku TS w sprawie Mangold II', *Europejski Przegląd Sądowy*, 2013, no. 5, p. 33 ff; M. Bainczyk, *Polski i niemiecki Trybunał...*, op. cit., p. 216 ff.

[16] Judgement of the Court of Justice of the European Union of 22 November 2005, case C-144/04, *Werner Mangold v. Rüdiger Helm*, ECLI:EU:C:2005:709.

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in case of a qualified violation of the principle of competence entrusted to an EU institution. That concept means that the infringement by an EU institution of the division of competences is obvious and the contested act results in structural changes in the division of competences between the Member States and the EU. Therefore, the judgment raises doubts from the point of view of the principle of delegated competences and being bound by a law, implied by the rule of law principle.[17] The above doctrine of the FCC is further developed in the FCC's decision of 5 Mai 2020,[18] which has been directly addressed also to the decision of the CJEU,[19] recognised by the FCC as *ultra vires*.

Germany's FCC adopted moreover a restrictive approach to the use of ECHR's decisions, stating e.g. that while the principles of being bound by the law under Art. 29 para. 3 of BL includes the recognition, within methodologically permissible interpretation, the laws of the European Human Rights Charter and the decisions of the ECHR, both a lack of reference to the decisions of the ECHR and an automatic "enforcement" of such a decision, which would infringe a higher law, might violate the fundamental rights due to the rule of law principle.[20] Having regard to ECHR rulings, the German state authorities should take into account their impact on the national legal order. This applies in particular to the national law subsystem, in which different legal positions protected by fundamental rights must be balanced.[21]

The following analysis will address not only to the relationship between the constitutional courts and CJEU and ECHR, described well in the doctrine, but the relationship between the constitutional courts and the case law of the International Court of Justice (ICJ) against the background of the solutions adopted by the constitutional courts in relation to the European courts, and in particular whether parallel solutions exist in this respect. First, the author will briefly

[17] Order of FCC *Honeywell*, theses 58–62.

[18] The German Federal Constitutional Court, Judgment of of 05 May 2020, file no. 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915.

[19] The Court of Justice of European Union, Judgment of 11 December 2018, *Weiss et al*., C-493/17, EU:C:2018:1000.

[20] Cf. The Italian Constitutional Court, Judgment of 26 March 2015, file no. 49/2015, para. 7, whereby "it would be mistaken [...] to conclude that the ECHR has turned national legal operators, including first and foremost the ordinary courts, into passive recipients of an interpretative command issued elsewhere in the form of a court ruling, irrespective of the conditions that gave rise to it".

[21] The German Federal Constitutional Court, Order of 14 October 2004, file no. 2 BvR 1481/04, ECLI:DE:BVerfG:2004:rs20041014.2bvr148104, theses 47 and 57 in reference to the Judgement of the European Court of Human Rights of 26 February 2004, *Görgülü v. Germany*, no. 74969/01; M. Bainczyk, 'Stosowanie Europejskiej Konwencji Praw Człowieka i Podstawowych Wolności przez organy władzy publicznej Republiki Federalnej Niemiec. Studium przypadku', *Krakowskie Studia Międzynarodowe*, 2013, no. 2, pp. 25–43; M. Bainczyk, 'Wpływ Europejskiej Konwencji Praw Człowieka na interpretację praw podstawowych w RFN', *Krakowskie Studia Międzynarodowe*, 2017, no. 4, p. 42 ff.

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analyse the legal nature of the ICJ case law, then its status in the system of national constitutional law and possible limitations on the basis of selected judicial decisions. What is relevant in the context of the volume, the abovementioned case law both of the ICJ and constitutional court relates to the question of just compensation for the losses incurred as a result of international crimes of the Third Reich during the World War II.

ICJ's judgements from the point of view of international law

One can distinguish three principal aspects of ICJ's judgements from the perspective of international law. Firstly, in line with Art. 59 of the Statute of ICJ, the decision of this Court is effective only *inter partes*, i.e. has no binding force except between the parties and in respect of that particular case. The judgment therefore has legal effects, but on an international level between the parties to a particular dispute. The enforcement of the judgment rests with the parties to the dispute, who are obliged to do so under Article 94(1) of the UN Charter.[22] If one of the parties fails to execute the judgment, the other party may apply the sanctions permitted under international law under the principle of self-help and, on the basis of Article 94(2) of the UN Charter, request the Security Council to take steps to give effect to the judgment.[23]

Secondly, under Art. 38 para. 1 letter d of the ICJ Statute, they are not sources of law, but are subsidiary means for the determination of rules of law. ICJ's judgements may be invoked first of all to justify the occurrence of binding legal practice.[24]

Thirdly, the general nature of the legal norms referred to the interpretations of the ICJ, the nature of international disputes, the manner of formulating decisions on the basis of the *chain novel*[25] construction, and the increasing role of international courts might imply the use of the *stare decisis* principle in reference to ICJ's judgements, and thus their law-making character, yet relevant literature indicates the unequivocal wording of Art. 59 of the ICJ Statute,[26]

[22] G. Cataldi, 'The Implementation of the ICJ's Decision in the Jurisdictional Immunities of the State case in the Italian Domestic Order: What Balance should be made between Fundamental Human Rights and International Obligations?', *ESIL Reflections*, 2013, vol. 2, issue 2, p. 2.

[23] M Schröder, '7. Abschnitt. Verantwortlichkeit, Völkerstrafrecht, Streitbeilegung und Sanktionen', in: W. Graf Vitzthum (ed.), *Völkerrecht*, Berlin 2007, p. 628. As to the procedure under Art. 94 section 2 of the Charter of the UN; A. Tanzi, 'Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations', *European Journal of International Law*, 1995, no. 6, pp. 539–572.

[24] W. Graf Vitzthum, 'III. Die Rechtsquellen des Völkerrechts', in: W. Graf Vitzthum (ed.), *Völkerrecht*, Berlin 2007, p. 69 ff.

[25] R. Dworkin, *Law's Empire*, Cambridge 1986, p. 228 ff.

[26] H. Thirlway, *The Sources of International Law*, Oxford 2014, p. 120; J. Klabbers, *International Law*, Cambridge 2017, p. 28.

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while the Court itself stated that "It is not a question of holding [the parties to the current case] to decisions reached by the Court in previous cases. The real question is whether, in his case, there is cause not to follow the reasoning and conclusions of earlier cases."[27] On the other hand, the interpretation of the doctrine indicates that the judgements are treated as precedents. The above dilemma concerning the effects of ICJ's judgements *inter partes versus erga omnes* resembles in fact the disputes concerning the legal ramifications of CJEU's judgements.[28]

From the perspective of this article, it is first of all vital that the parties are bound by ICJ's judgements and that these judgements are recognised by the constitutional court of a given state, which moreover recognise in their case law that the ICJ's judgements are subsidiary means for the determination of rules of law.

ICJ's judgement in Italian law in light of the judgment of the Constitutional Court of Italy of 22 October 2014

A key provision for the determination of the status of international law in Italian constitutional law is Art. 10 para. 1 of the Constitution of the Republic of Italy,[29] under which Italy's legal system is compatible with generally adopted principles of international law. The above provision transforms generally adopted norms of international law seen as norms of common law. On the other hand, it is disputable whether they gain the status of norms of constitutional law or only have priority over statutes.[30] The following judgment adopts their constitutional status. As already indicated, Article 10 of the Italian Constitution is to be read in conjunction with Article 11 of the Constitution, which forms the basis for Italy's participation, on the basis of sovereign equality, in the activities of the international community with a view to ensuring peace and justice between peoples, which may lead to a reduction in the sovereignty of the state.[31] Of prime importance for the determination of the status of norms of international law is

[27] The International Court of Justice, Judgement of 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria*, 1998 ICJ Rep 275, para. 28.

[28] Cf. Art. 267 TFEU; U. Karpenstein, 'Vorabentscheidungsverfahren', in: E. Grabitz, M. Hilf, M. Nettesheim (eds.), *Das Recht der Europäischen Union*, 64rd ed., München 2018, para. 104–106.

[29] Article 10 [International Law] (1) The legal system of Italy conforms to the generally recognized principles of international law.

[30] P. Kunig, '2. Abschnitt. Völkerrecht und staatliches Recht', in: W. Graf Vitzthum (ed.), *Völkerrecht*, Berlin 2007, p. 107.

[31] Art. 11. Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organisations furthering such ends.

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also Art. 117, under which they have precedence over domestic law.[32] One of the most interesting decisions of the Constitutional Court of Italy concerning the relation between Italian constitutional law and international law, in particular concerning ICJ's judgements, is a decision of 22 October 2014.[33] It concerns the enforcement of ICJ's judgement of 3 February 2012, issued in the case Germany v. Italy, Greece intervening.[34] In 2008, the Federal Republic of Germany began a procedure against Italy in the International Court of Justice, claiming that Italy had violated international law, in particular jurisdiction immunity of the Federal Republic of Germany before Italian courts. The violation in question consisted in allowing civil cases aiming at receipt of compensation by natural persons for the losses incurred as a result of international crimes of the Third Reich during World War II. Furthermore, the infringement of international immunity was to involve commencement of enforcement from a property belonging to Germany, located in Italy, i.e. the Villa Viagoni, and enforcement in Italy of rulings of Greek courts, granting compensation to Greek citizens because of the mass murder committed by German troops in the Greek town of Distomo in 1944.

Importantly, the rulings of both Italian and Greek courts[35] were adopted due to the consistent policy of the Federal Republic of Germany, i.e. minimising payments of compensation to natural persons, not German nationals, for the losses incurred due to the illegal action of the Third Reich during World War II.[36] H.G. Hockerts observes that 90% of the victims of the criminal activity of the Third Reich were not German citizens, while after World War II only 10% of the amount for compensation was disbursed to this group of people.[37] For example, by the end of 2019, 48.454 billion euro were paid to German citizens or former German citizens under only one federal compensation law (German *Bundesentschädigungsgesetz*, BEG).[38] Polish citizens are estimated

[32] Art. 117 Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU-legislation and international obligations.

[33] Cf. note 4.

[34] https://www.icj-cij.org/en/case/143 (accessed 4.08.2018).

[35] The Italian Court of Cassation, Judgment of 11March 2004, file no. 5044/2004 *Ferrini*, The Italian Court of Cassation, Judgment of 13 January 2009, file no. 1072/2008 *Milde*; The Greek Supreme Court (*Areios Pagos*), *Prefecture of Voiotia v. Federal Republic of Germany*, Judgment of 4 Mai 2000, no. 11/2007.

[36] M. Bainczyk, 'Asymetria odszkodowań dla obywateli Polski za szkody poniesione w II wojnie światowej w stosunku do odszkodowań wypłaconych obywatelom innych państw', *Przegląd Zachodni*, 2019, no 1, p. 83 ff.; K.H. Roth, H. Rübner, *Wyparte. Odroczone. Odrzucone. Niemiecki dług reparacyjny wobec Polski i Europy*, Poznań 2020, p. 259 ff.

[37] H.G. Hockerts, 'Die Entschädigung für NS-Verfolgte in West- und Ost-Europa. Eine einführende Skizze', in: H.G. Hockerts, C. Moisel, T. Winstel (eds.), *Grenzen der Wiedergutmachung*, Göttingen 2006, pp. 7–8.

[38] Bundesministerium der Finanzen- Referat V B 4, Bundesministerium der Finanzen- Referat V B 4, *Leistungen der öffentlichen Hand auf dem Gebiet der Wiedergutmachung Stand: 31. Dezem-*

to have received from Germany compensation in the amount of 1.429 billion euro, with a vast majority of this money paid after 2000.[39]

Citizens of the occupied states did not receive compensation under German law, in particular the above compensation law (BEG) of 1953, which was based on the territorial criterion, i.e. granted compensation to persons living in the Federal Republic of Germany. Some of the victims were granted little compensation under bilateral international agreements, concluded in fact by Germany under the pressure of international opinion.[40] Since no further compensation could be obtained under both international law and German law, and the legal remedies brought in such cases before German courts were ineffective,[41] the victims brought actions for damages before national courts, respectively Greek and Italian courts, which did violate the principle of State immunity before national courts, yet gave priority to the principle of respect for human rights and awarded compensation to citizens who had suffered as a result of the German occupation.[42]

A similar case in Poland is the case of W.N., a Polish citizen, who suffered severe injuries as a result of the massacre of the Polish population in the village of Szczecyn in 1944.[43] However, unlike the Greek and Italian courts, the Polish Supreme Court, by virtue of a decision of 29 October 2010[44] ruled that at the present stage of development of international law, the German state is eligible to jurisdiction immunity in matters related to compensation for illegal action carried out by German armed forces during World War II in the territory of Poland.[45]

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ber 2019, https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Oeffentliche_Finanzen/Vermoegensrecht_und_Entschaedigungen/leistungen-oeffentlichen-hand-wiedergutmachung.pdf?__blob=publicationFile&v=8 (accessed 07.02.2021).

[39] J. Sułek, 'Od odszkodowań indywidualnych do pomocy humanitarnej i świadczeń finansowych. Bilans wypłat z Niemiec z lat 1991–2011 dla ofiar nazizmu w Polsce', in: W.M. Góralski (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego traktatu o dobrym sąsiedztwie i przyjaznej współpracy*, Warszawa 2011, p. 582.

[40] K.H. Roth, H. Rübner, *Reparationsschuld. Hypotheken der deutschen Besatzungsherrschaft in Griechenland und Europa*, Berlin 2017, p. 106 ff.

[41] M. Bainczyk, 'Raporty Służb Naukowych Bundestagu w sprawie reparacji wojennych dla Polski i odszkodowań dla polskich obywateli', *IZ Policy Papers*, no. 26, p. 34 ff., https://www.iz.poznan.pl/plik,pobierz,2721,ea91761886de622fcde600b1b566318e/IZ%20Policy%20Papers%2026.pdf (accessed 7.10.2018).

[42] G. Cataldi, 'The Implementation of the ICJ's'..., op. cit., p. 1.

[43] D. Brewing, *W cieniu Auschwitz. Niemieckie masakry polskiej ludności cywilnej 1939–1945*, Poznań 2019, pp. 10–13, in German D. Brewing, *Im Schatten von Auschwitz: deutsche Massaker an polnischen Zivilisten 1939–1945*, Darmstadt 2016.

[44] File no. IV CSK 465/09, cf. the Italian Supreme Court – Civil Section, the *Ferrini* case (2004).

[45] M. Wasiński, 'Immunitet państwa a jurysdykcja terytorialna (na tle orzeczenia SN w sprawie Natoniewski v. RFN)', *Państwo i Prawo*, 2012, no. 10, p. 72 ff.; M. Kałduński, 'State Immunity and War Crimes: the Polish Supreme Court on the Natoniewski Case', *Polish Yearbook on International*

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A similar position was taken by the ICJ in its judgement of 3 February 2012, stating that the Italian Republic had violated its obligation to respect the immunity which the Federal Republic of Germany enjoyed under international law by allowing civil claims to be brought against it based on violations of international humanitarian law committed by the German Reich between 1943 and 1945, by taking measures of constraint against Villa Vigoni, by declaring enforceable in Italy the decisions of Greek courts based on violations of international humanitarian law committed in Greece by the German Reich,[46] The ICJ called upon Italy to 'ensure that the decisions of its courts and those of other judicial authorities infringing [upon Germany's immunity] cease to have effect',[47] On 21 December 2012, the Italian Parliament passed Law no. 5 which stipulates in its Article 3 that Italian judges are obliged to decline jurisdiction in pending proceedings when the ICJ has ordered Italy to do so.[48]

After the ICJ's judgement, a domestic court in Florence filed a motion to the Constitutional Court of Italy to review the compatibility with Art. 24[49] in conjunction with Art. 2[50] of the Italian Constitution of the norms which oblige it to refuse to hold three judicial proceedings aiming at receipt of compensation by Italian citizens for the losses resulting from illegal actions of the Third Reich during World War II due to the immunity of the state in the interpretation adopted by the ICJ of 3 February 2012.

The Constitutional Court of Italy stated in the ruling of 22 October 2014 that the motion is to review the compatibility of the rule of international law related to state immunity, as interpreted by the ICJ, with the fundamental principles of the Italian Constitution: the right to due process under Art. 24 of the Italian Constitution in conjunction with Art. 2 of this Constitution, enshrining the rule of respect for fundamental rights. As the Constitutional Court of Italy moreover observed, in this case we deal with the reflection on norms which have the same importance as the constitution.[51] The fundamental principles of constitutional order and the inalienable rights of the

Law, 2010, p. 235 ff.; R. Nowosielski, 'State Immunity and the Right of Access to Court. The Natoniewski Case before the Polish Courts', *Polish Yearbook on International Law*, 2010, p. 263 ff.

[46] E. Olas, 'Immunitet jurysdykcyjny państwa (uwagi na tle wyroku MTS)', *Państwo i Prawo*, 2013, no. 12, p. 73 ff.

[47] ICJ, judgement of 3 February 2012, *Germany v. Italy, Greece intervening*, para. 139.

[48] G. Cataldi, 'The Implementation of the ICJ's'..., op. cit., p. 3.

[49] Art. 24 of the Italian Constitution All persons are entitled to take judicial action to protect their individual rights and legitimate interests. (...)

[50] Art. 2 of the Italian Constitution The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.

[51] The Italian Constitutional Court, Judgement of 22 October 2014, file no. 238/2014, para. 3.1.

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individual, the characteristic and indispensable elements of this order not subject to amendment under Art. 138 and Art. 139 of the Italian Constitution, constitute limitations for the principles of international law in the meaning of Art. 10 para. 1 of the Italian Constitution.[52] Should the rule of international law be incompatible with the fundamental principles and inviolable rights of constitutional order, the principle will not become part of Italian legal order and will not be applied as a result.

The Constitutional Court of Italy in its earlier case law[53] recognised that the fundamental right to judicial protection may be limited due to the application of state immunity, but the limitation of this right, qualified as an inviolable element of constitutional legal order, must be justified by the protection of justifiable public interest. In the present case, the ICJ recognised the principle of state immunity as an absolute principle, with the result that the protection of the right to justice of victims of war crimes is completely excluded. According to the Italian court, however, there is no general interest in the constitutional order which would justify such a far-reaching restriction of the fundamental rights of those persons. The Constitutional Court of Italy indicated moreover that the immunity applies to the typical activities of state authority rather than illegal actions which violate the fundamental rights. "Therefore, in an institutional context characterized by the centrality of human rights, emphasized by the receptiveness of the constitutional order to external sources (Judgment no. 349/347), the denial of judicial protection of fundamental rights of the victims of the crimes at issue (now dating back in time), determines the completely disproportionate sacrifice of two supreme principles of the Constitution. They are indeed sacrificed in order to pursue the goal of non-interference with the exercise of the governmental powers of the State even when, as in the present case, state actions can be considered war crimes and crimes against humanity, in breach of inviolable human rights, and as such are excluded from the lawful exercise of governmental powers."[54] In light of the above, the Constitutional Court answered the first question from the Florence national court as follows: "Insofar as the international law of immunity of States from the civil jurisdiction of other States includes acts considered *jure imperii* that violated international law and fundamental human rights, the Court is obliged to declare that, to the extent that international law extends immunity to actions for damages caused by such serious violations, the referral of Article 10, para. 1 of the Constitution does not operate. Consequently, insofar as the law of immunity from

[52] Idem., para. 3.2.

[53] The Italian Constitutional Court, Judgement of 2 February 1982, file no. 18/1982; The Italian Constitutional Court, Judgement of 15 July 1992, file no. 329/1992.

[54] The Italian Constitutional Court, Judgement of 22 October 2014, file no. 238/2014, para 3.4.

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jurisdiction of States conflicts with the aforementioned fundamental principles [of the Constitution], it has not entered the Italian legal order and, therefore, does not have any effect therein." In the light of the foregoing, a customary rule of international law is not incorporated into national law at all if it violates fundamental principles and constitutional rights, as was the case with the principle of the jurisdictional immunity of a foreign state in the case at hand.[55]

The second question referred by the national court of Florence concerned the Italian Republic being bound by Art. 94 para. 1 of the UN Charter. The Constitutional Court of Italy observed that the limitation of state sovereignty under Art. 11 of the Italian Constitution by the ICJ is constitutional if neither the principles nor constitutionally protected rights are violated. The above conflict occurs between the law expressing consent to a state being bound by the UN Charter, and Art. 2 and Art. 24 of the Constitution, to the extent the ICJ's ruling of 3 February 2012 obliged the Italia state, and thus Italian judges, to refuse enforce jurisdiction as to compensation claims for the losses incurred as a result of crimes against humanity, which is an obvious violation of the right to the judicial protection of fundamental rights.[56]

The Constitutional Court of Italy moreover found the incompatibility of Art. 3 of Law no. 5/2013 with Art. 24 in conjunction with Art. 2 of the Italian Constitution, by which Italy authorized the accession and the full execution of the UN Convention on Jurisdictional Immunities of States and Their Property, adopted in New York on 2 December 2004. Art. 3 was adopted, as the Parliamentary proceedings prove, in order to ensure explicitly and immediately respect of the ICJ Judgement of 3 February 2012. The given provision specifically regulates the obligation of the Italian State to comply with all of the rulings by which the ICJ excluded certain conducts of a foreign State from civil jurisdiction. It requires that the judge declares *ex officio* at any stage of the proceeding their lack of jurisdiction, and also provides for an additional ground for the revision of final judgments when they conflict with the ruling of the ICJ. As such, the impugned law also derogates from the what has been explicitly established in the United Nations Convention on Jurisdictional Immunities of States and their Property. This is confirmed by the interpretative declaration deposited by the Italian government at the time of the accession, which explicitly excludes the application of the Convention and its limitations to the rule of immunity in case of damages or injuries caused by the activity of armed forces in the territory of the State of the court seized.[57]

[55] Critically as to the answer to the first question; C. Pinelli, 'Decision no 238/2014: between fiction and constitutional principles', *Questions of International Law*, 2015, p. 35, 39.

[56] The Italian Constitutional Court, Judgement no. 238, 2014, para 4.1.

[57] The Italian Constitutional Court, Judgement no. 238, 2014, para. 5.1.

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Importantly, the above ruling clearly recognises the incompatibility of the principle of state immunity in the interpretation of the ICJ in its judgement of 3 February 2012 in a particular factual state and the obligation of enforcing this ruling by the Italian state, which arises both from Art. 94 para. 1 of the UN Charter and from a specific provision of the law concerning the UN Convention on Jurisdictional Immunities of States and Their Property with inviolable norms of the Italian Constitution, establishing the respect for the fundamental rights. Importantly, the Constitutional Court of Italy applied in this case a construct recognisable from its jurisprudence, concerning the application of Community law, where it clearly indicated the norms of the Italian Constitution as reference norms of the so-called "counterlimits doctrine" (*dottrina dei controlimiti*).[58] Art. 2 of Italy's Constitution is an inviolable rule, and the standard of fundamental rights protection cannot be lowered as a result of application of a rule of EU law, a ruling of the CJEU, a provision of international law, and a ruling by the ICJ. Characteristically, the ruling under discussion contains numerous references to the case law of the Constitutional Court of Italy concerning limitations on the use of EC/EU law in the Italian legal system. In this respect, then, we can speak about parallel limitations applied in the case of EU and international law.[59]

Conditional openness of the German legal order to international law in the light of the case law of the German Federal Constitutional Court (FCC)

The Basic Law of Germany makes no specific provision concerning the effectiveness of ICJ judgments in the German legal system. On the other hand, the wording of the preamble and a number of the provisions[60] helped formulate the principle of the BL's favourable treatment of international law (*Völkerrechtsfreundlichkeit*).[61] This principle applies also to the case law of international courts, not only with the *inter partes* effect. The FCC defined this principle in the context of rulings of the ECHR as follows: "(...) for against the background that the decisions of international courts have at least a *de facto* effect as precedents, the Basic Law is intended, where possible, to avoid conflicts between

[58] G. Boggero, 'The Legal Implications of Sentenza no. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the 'Triepelian Approach' Possible?', *Zeitschrift für ausländisches öffentliches Recht*, 2016, no. 76, p. 204.

[59] G. Cataldi, 'The Implementation of the ICJ's'..., op. cit., p. 5 ff.

[60] Preamble of the BL "(...) Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people", cf. Art. 1 para. 2, Art. 9 para. 2, Art. 23–25, Art. 59 para. 2 of the BL, https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0017

[61] K. Vogel, *Die Verfassungsentscheidung des Grundgesetzes für eine internationale Zusammenarbeit*, Tübingen 1964; M. Herdegen, 'Präambel', in: T. Maunz, G. Dürig (eds.), *Grundgesetz-Kommentar*, 83rd ed., München 2018, para. 64; M. Bainczyk, *Polski i niemiecki Trybunał*..., op. cit., p. 263 ff.

the obligations of the Federal Republic of Germany under international law and national law. The openness to international law of the Basic Law is thus the expression of an understanding of sovereignty which is not only in conflict with an integration into international and supranational contexts and their further development, but actively presumes and expects them. Against this background, even the 'last word' of the German constitution is not opposed to an international and European dialogue of courts, but is the normative basis for this."[62] Therefore, this principle does not take absolute precedence over other constitutional principles, as the constitution as such is the reference point for the reception of international law. Its effectiveness is limited by the so-called eternity clause under Art. 79 para. 3 of the BL, which lists the unchanging principles of the German Basic Law, and in particular the principles of respect for human dignity and fundamental rights, democracy based on the sovereignty of the nation, the separation of powers, as well as the rule of law.[63]

Fundamental for the determination of the place of international law in the German legal order is Article 25 of the BL, which states that the general rules of international law shall be an integral part of federal law and they shall take precedence over the laws. Moreover Article 9 para. 2 of the BL applies to international agreements which, in the light of doctrine, have the status of federal laws, and any collisions with later enacted German federal laws should be decided on the basis of the principle of friendly approach towards international law.[64]

Taking into account, first of all, the principle of friendly approach towards international law, German authorities should both execute the obligations arising from the ICJ judgment and take into account in their case law its judgments as a source of knowledge of law. However, it should be remembered that in the case of a conflict between a provision of international law and German constitutional law, if a friendly interpretation cannot be made, the rule of German constitutional law will have priority, and in particular the norms qualified in the German legal order as unchangeable norms.

The FCC has developed this doctrine primarily in relation to Community/Union law, but it also has a universal dimension, as reflected in the FCC's judgment on the Lisbon Treaty.[65] In this judgement the FCC observed that "The Basic Law strives to integrate Germany into the legal community of peaceful and

[62] The German Federal Constitutional Court, Judgment of 4 May 2011, file no. 2 BvR 2365/09, 740/10, 2333/08, 1 152/10, para. 89 c.; ECLI:DE:BVerfG:2011:rs20110504.2bvr236509; M. Bainczyk, *Wpływ Europejskiej Konwencji*..., op. cit., p. 44 ff.

[63] M. Bainczyk, *Polski i niemiecki Trybunał*..., op. cit., p. 165 ff.

[64] M. Nettesheim, 'Art. 59 GG', in: T. Maunz, G. Dürig (eds.), *Grundgesetz-Kommentar*..., op. cit., para. 186–187.

[65] The German Federal Constitutional Court, Judgment of 30 June 2009, file no. 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 340.

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free states but does not waive the sovereignty contained in the last instance in the German constitution as a right of the people to take constitutive decisions concerning fundamental questions as its own identity. There is therefore no contradiction to the aim of openness to international law if the legislature, exceptionally, does not comply with international treaty law – accepting, however, corresponding consequences in international relations – provided this is the only way in which a violation of fundamental principles of the constitution can be averted."[66] In the above, the FCC accepted, despite the openness of the BL to international law, the exceptional non-application of a rule of international treaty law if it is contrary to fundamental constitutional principles, supporting its ruling with arguments included in the CJEU ruling in the Kadi case.[67] Analysing compatibility of the regulation issued in connection with the implementation in the EU Member States of the UN Security Council resolution, the CJEU did not recognise the unconditional primacy of international law over the EU legal system, observing that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty."[68]

The above doctrine of the FCC is further developed, e.g. in reference to the use in the Federal Republic of Germany of the European Human Rights Charter as interpreted by the ECHR. As to precautionary measures, the FCC observed that "Limits to an interpretation that is open to international law follow from the Basic Law. In the first instance, such an interpretation may not result in the protection of fundamental rights under the Basic Law being restricted; this is also excluded by the European Convention on Human Rights itself (...). The possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution."[69]

[66] The German Federal Constitutional Court, Judgment of 30 June 2009, file no. 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 340.

[67] M. Bainczyk, 'Key European Communities and European Union Treaties and accord in the case law of the German and the Polish Constitutional Tribunals', *Krakowskie Studia Międzynarodowe*, 2017, no. 4, p. 13 ff.

[68] CJEU, Judgement of 3 September 2008 in joined cases C-402/05 P and C-415/05 P (Yassin Abdullah Kadi, Al Barakaat International Foundation), ECLI:EU:C:2008:461, para. 285; W. Czapliński, 'Glosa do wyroku TS z dnia 3 września 2008 r., C-402/05 i C-415/05. Prawo UE a prawo międzynarodowe', *Europejski Przegląd Sądowy*, 2010, no. 4, p. 38 ff.

[69] The German Federal Constitutional Court, Judgment of 4 May 2011, file no. 2 BvR 2365/09, 740/10, 2333/08, 1 152/10, para. 93.

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In a commentary to the BL, M. Nettesheim notes that, where a German public authority is obliged to take power in Germany and that obligation is derived from an act of foreign authority which may lead to a violation of fundamental rights, that authority is bound by an obligation to respect fundamental constitutional rights under Art. 1 para. 3 of the BL.[70]

The above argumentation concerning the possibility of not applying a rule of international law in case of its contradiction with the rule of national constitutional law, both in the above-mentioned judgments of the FCC and in the German doctrine, is very similar to the argumentation applied by the Italian Constitutional Court in its judgment of 2014. However, this does not change the fact that in 2006 the FCC did not apply its own, extensively developed doctrine of respect for fundamental rights and reached completely different conclusions from those adopted by the Italian Constitutional Court as regards the right to compensation for damages suffered by natural persons as a result of violations of international law by soldiers of the Third Reich during the Second World War. In a decision issued in 2006, the FCC[71] did not accept for recognition constitutional complaints of four Greek citizens whose parents had been murdered by SS troops in 1944 in Distomo; the complaints concerned the rulings of the German state court, a higher state court and of the Supreme Court of the Federal Republic of Germany which dismissed claims for compensation of the plaintiffs and did not take into consideration the ruling of the Greek Livadeia court of 30 October 1997, which granted such compensation to the Greek citizens. The latter claimed in the constitutional complaints lodged with the FCC that the rulings of the German courts had violated a number of human rights as guaranteed by the BL, the right to personal development under Art. 2 para. 1 of the BL in line with the principles of respect for human dignity under Art. 1 para. 1 of the BL and with the right to personal inviolability under Art. 2 para. 2 of the BL, and the right to equal treatment under Art. 3 para. 1 of the BL. The FCC moreover observed that the activities of the SS troops were under the authority of the Third Reich and is subject to jurisdiction immunity.[72]

Moreover, the *ratio decidendi* included less or more bizarre legal constructs or evaluations. One of them stipulated that the accountability of the state for the unlawful activities of its officials under § 839f *Bürgerliches Gesetzbuch* (BGB) is excluded due to § 7 of the law on the accountability of the Reich for its officials of 22 May 1910,[73] which required reciprocity between Germany and the country of origin of the claimant. Such reciprocity in the recognition of claims

[70] M. Nettesheim, 'Art. 59 GG'..., op. cit., para. 225.

[71] The German Federal Constitutional Court, Judgment of 15 January 2006, file no. 2 BvR 1476/03, ECLI:DE:BVerfG:2006:rk20060215.2bvr147603.

[72] Ibid., para. 18.

[73] German: *Gesetz über die Haftung des Reichs für seine Beamten*, RGBl. 798.

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for compensation from the treasury was only established between Greece and Germany after the Second World War.[74] Taking into account the above reasoning and the German courts' assessment of the actions of the SS as a mere act of the authority of the state, it may well be the case that Greece guaranteed such reciprocity only in 1957. Otherwise, it could theoretically have been held liable for the damage suffered by Third Reich officers in connection with the occupation of Greece. Even more controversial arguments concern the assessment of SS actions as not related to National Socialist unlawfulness (*NS-Unrecht*) and thus not subject to compensation under the provisions on compensation for National Socialist unlawfulness.[75] This statement is important because the concept of National Socialist injustice was used in the German policy of dividing victims in order to assign them to different categories and differentiate their legal status, which also led to the payment of differentiated benefits.[76] The FCC did not find an infringement of the law to equal treatment under Art. 3 para. 1 of the BL since "(...) the legislator is not prevented from making a distinction between a general plight of persons affected by the war, although difficult and connected with the infringement of international law and the victims which were in a particular manner subject to ideologically-based persecution."[77]

Conditional openness of the Constitution of the Republic of Poland to international law?

The above considerations concerning the limitation of the application of a rule of international law in the domestic legal order due to its incompatibility with fundamental constitutional principles is of significant importance from the perspective of Poland, in particular in the context of the motion submitted by a group of Members of the Polish Parliament to the Polish Constitutional Court in October 2017.[78] The object of the request is not to examine the compatibility of a rule of international law with the Constitution of the Republic

[74] The German Federal Constitutional Court, Judgment of 15 January 2006, file no. 2 BvR 1476/03, ECLI:DE:BVerfG:2006:rk20060215.2bvr147603, para. 24.

[75] Ibid., para. 26.

[76] K.H. Roth, 'Die neue Reparationsdebatte in Polen', *IZ Policy Paper*, 27 (II), p. 18, https://www.iz.poznan.pl/plik,pobierz,2906,b6b738155e8a93f7a8944ed39a2d4bcf/IZ%20Policy%20Papers%2027%20DE.pdf (accessed 20.11.2018), cf. ICJ's judgement of 3 February 2012, issued in the case Germany v. Italy, Greece intervening thesis 99 "The Court considers that it is a matter of surprise – and regret – that Germany decided to deny compensation to a group of victims on the ground that they had been entitled to a status which, at the relevant time, Germany had refused to recognize, particularly since those victims had thereby been denied the legal protection to which that status entitled them."

[77] The German Federal Constitutional Court, Judgment of 15 January 2006, file no. 2 BvR 1476/03, ECLI:DE:BVerfG:2006:rk20060215.2bvr147603, para. 30.

[78] Motion of a group of deputies to Polish Sejm of the 8th term of 26 October 2017, file signature K 12/17.

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of Poland, but the compatibility of the provisions of the national law, as interpreted in accordance with the understanding of the rule of international law on State immunity adopted by the ICJ in the judgment of 3 February 2012, which was challenged in the judgment of the Italian Constitutional Court of 2014. In October 2017, a group of Members of Polish Parliament requested that the compatibility of Article 1103(2) of the Law of 17 November 1964 – Code of Civil Procedure (hereinafter referred to as CCP)[79] be reviewed to the extent it excludes obligations of compensation due from a foreign state on account of war crimes, genocide and crimes against humanity, because of the recognition by the adjudicating court of state jurisdiction immunity in such cases under Art. 9, Art. 21 para. l, Art. 30 and Art. 45 para. l of the Constitution of the Republic of Poland of 1997. The motion likewise questioned the compatibility of Art. 1113 of CCP[80] in that it allows the recognition of state immunity for the protection of foreign states against being brought before a Polish court for war crimes, genocide and crimes against humanity under Art. 9, Art. 30 and Art. 45 para. l of the Constitution of the Republic of Poland of 1997. In the justification of the motion, the group of MPs indicated e.g. that the "the exclusion of obligations to compensate a foreign State for war crimes, genocide and crimes against humanity, on the ground that a court adjudicating on the existence of the jurisdictional immunity of the State in such cases violates human dignity. It favours the foreign State, even though its acts grossly interfere with fundamental human rights derived from human dignity; at the same time, it leaves the victims of those acts without any guarantee; it interferes with the essence of the dignity expressed in Article 30 of the Constitution of the Republic of Poland". Furthermore, the group of MPs stressed that "in Poland, due to its tragic history, a number of social groups find themselves in a situation where the exclusion of the chance to claim a foreign state in Poland will preclude any possibility of acquiring compensation for the war crimes, genocide and crimes against humanity committed against them and their ancestors".[81]

[79] Law of 17 November 1964 (Journal of Laws of 2016, item 1822 as amended). Art. 1103^7 of the CCP. Matters resolved in the process, other than those mentioned in Articles 1103^1 – 1103^6, belong to the national jurisdiction, even when: 1) the obligations arise from a legal action that has been taken or is or was to be made in the Republic of Poland, 2) the obligations do not arise from a legal action that has been taken or is or was to be made in the Republic of Poland.

[80] Art. 1113 of the CCP. Judicial Immunity. The Court *ex officio* takes judicial immunity into consideration in every state of the case. If the existence of immunity is identified, the Court rejects the application or request. Recognition of the case in violation of judicial immunity renders the proceedings null and void. If the person against whom or with the participation of whom a case is instituted acquired judicial immunity in the course of the proceedings, the Court shall dismiss the proceeding.

[81] Motion of a group of deputies to Polish Sejm of the 8th term of 26 October 2017, file signature K 12/17, p. 25 ff.

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The preparation of the motion took into account both the ruling of the ICJ and the case of law of Greek and Italian courts regarding State immunity.[82]

The provisions of the Code of Civil Procedure challenged in the motion do not directly establish the jurisdictional immunity of the State in the aforementioned scope, but such meaning was given to these provisions in the case law of the Polish courts, in particular in the decision of the Supreme Court of 29 October 2010.[83] The applicants referred to Article 9 (principle of friendly approach towards international law), Article 21 para. 1 (protection of property and succession of property), Article 30 (principle of respect for dignity) and Article 45 para. 1 (right to a court) of the Constitution of the Republic of Poland. It seems, however, that in this case, Art. 30 and Art. 45 para. 1 of the Constitution is of fundamental importance. In this respect, the model of control would be similar to the model used by the Italian Constitutional Court. It is therefore crucial whether the Polish Constitutional Tribunal adopts an interpretation similar to the one adopted in the above judgment of 2014, which is essentially shared by Polish Parliament in the position expressed in the proceedings before the Polish Constitutional Tribunal.[84]

Arguments in the motion concerning Article 9 of the Constitution as a model of control for the discussed provisions raise doubts, which were also reflected in the position of the Sejm of 26 July 2018.[85] This provision should be referred to in the explanatory memorandum to the ruling on the motion of Members of Parliament to examine the constitutionality of the aforementioned provisions of the Code of Civil Procedure, as Article 9 of the Constitution contains a comprehensive obligation for Poland to comply with international law, including common international law and international court rulings.[86] Importantly, the obligation under Art. 9 of the Polish Constitution is far broader than the content of the obligation of the state under Art. 10 of Italy's Constitution and under Art. 25 of the German BL.

At the same time, the Polish Constitutional Court has since 2005 developed

[82] 100 posłów PiS złożyło wniosek do Trybunału. Chodzi o odszkodowania za zbrodnie wojenne, http://www.tvn24.pl (accessed 10.11.2018).

[83] File signature IV CSK 465/09; M. Stürner, 'Immunitet państwa w sprawach o odszkodowanie z tytułu zbrodni wojennych. Glosa do postanowienia Sądu Najwyższego z dnia 29 października 2010 r. (IV CSK 465/09)', *Polski Proces Cywilny*, 2011, vol. 3, p. 154 ff.; W. Czapliński, 'Postanowienie Sądu Najwyższego – Izba Cywilna z dnia 29 października 2010 r., IV CSK 465/09', *Orzecznictwo Sądów Polskich*, 2011, vol. 7, no. 82.

[84] Position of the Sejm of the Republic of Poland of 26 July 2018 regarding the motion of a group of deputies to Polish Sejm of the 8th term of 26 October 2017 (file signature K 12/14), p. 37.

[85] Ibid., p. 20 ff.

[86] A. Wasilkowski, 'Przestrzegania prawa międzynarodowego (art. 9 Konstytucji RP)', in: K. Wójtowicz (ed.), *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, Warszawa 2009, p. 9 ff.

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the doctrine of supremacy of Constitutional provisions in case of the collision of its norms with a rule arising from another legal system.[87] To date, the doctrine has been used primarily in reference to the standards of EU law, but it seems that the principle of respect for constitutional identity, formulated in the ruling of the Constitutional Court concerning the Lisbon Treaty may, and in fact should be applied to norms of international law. In the above ruling, the Polish Constitutional Court observed that "Constitutional identity is then the notion delimiting the scope 'of exclusion from competence of transfer of (...) hard core matters, fundamental for the foundations of the state's political system", whose transfer would not be possible under Art. 90 of the Constitution. Notwithstanding the difficulties in establishing a detailed catalogue of non-transferable competences, the following should be included among the subjects covered by the absolute prohibition of transfer: provisions laying down the general principles of the Constitution and provisions concerning the rights of individuals designating the identity of the State, including in particular the obligation of assuring protection of human dignity and constitutional rights [Author's emphasis], the principle of statehood, the principle of democracy, the principle of the rule of law (...)."[88] In this respect one can furnish arguments *ad maiorem ad minus*, since membership in the EU as an international organisation of supra-national character implies far-reaching obligations of the state, including the transferability authority competences under Art. 90 para. 1 of the Constitution, other than in the case of being bound by a rule of customary international law, i.e. the principles of constitutional identity should be preserved also with respect to the use of norms of common international law and with respect to the enforcement of ICJ rulings. Unfortunately the Polish Constitutional Court has not taken any position yet.

Discussion

Constitutional courts, wishing to preserve the constitutional identity of a state, apply limitations resulting from constitutional provisions considered inviolable or fundamental with regard to the application of rules of EU law, but also international law, including judgments of the ICJ. It should be noted that the doctrine of limitations in relation to EU law and international law in the case of Italy and Germany is being developed in parallel. In the case of the Polish Constitutional Tribunal, the doctrine of limitations resulting primarily from the interpretation of Article 8 of the Constitution of the Republic of Poland has so far been applied primarily in relation to EU law. However, in connection

[87] M. Bainczyk, *Polski i niemiecki Trybunał...*, op. cit., p. 153 ff.

[88] Judgement of the Polish Constitutional Court of 24 November 2010, file signature K 32/09, para. 111.

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with the request to examine the constitutionality of the Code of Civil Procedure, which is the basis for excluding the possibility of seeking compensation from a foreign state for damages resulting from war crimes, genocide and crimes against humanity, a question arises about the application of the doctrine of limitations, including the principle of respect for human dignity and constitutional rights in relation to the application of the rule of international law and possible judgment of the ICJ.

On the other hand, however, as the examples of Greece and Italy demonstrate, the application of such restrictions does not necessarily mean the practical implementation of the constitutional rights of individuals, and therefore in the specific case of the enforcement of national court rulings and the payment of compensation from a foreign state for damage suffered as a result of international crimes. Such judgments, like the judgment of the Italian Constitutional Court, in addition to their symbolic aspect, may constitute a form of pressure,[89] including on the ICJ, for respect for human rights to become a real determinant of the actions of both international organisations and states, including European states, especially as the demand for political settlement of compensation included in the grounds for the ICJ judgment has not yet been implemented.[90]

The second important element in the aforementioned judgment is the dissimilar approach to the protection of human rights in relation to the consequences of international crimes by the ICJ, but also by the European international courts – ECHR[91] and CJEU[92], the FCC of the Federal Republic of Germany and of the Italian Constitutional Court. In particular, the jurisprudence of the German FCC concerning the issue of compensation for the victims of the Third Reich may arouse controversy in the context of Article 1 of the BL. This provision was supposed to be expressive of a strong disconnection from the policies pursued by the Third Reich[93] and became the basis for the development of a very extensive doctrine of fundamental rights protection. This doctrine, however,

[89] Cf. Judgement of the ECHR of 16 June 2009, *Grosz v. France*, file no. 14717/06.

[90] ICJ's judgement of 3 February 2012, issued in the case *Germany v. Italy, Greece intervening*, thesis 104 "It considers however that the claims arising from the treatment of the Italian military internees referred to in paragraph 99, together with other claims of Italian nationals which have allegedly not been settled – and which formed the basis for the Italian proceedings – could be the subject of further negotiation involving the two States concerned, with a view to resolving the issue".

[91] Judgement of the ECHR of 12 December 2002, *Kalogeropoulou et al. v. Greece and Germany*, file no. 59021/00; M.A. Nowicki, *Wokół Konwencji Europejskiej. Komentarz do Europejskiej Konwencji Praw Człowieka*, Warszawa 2013, p. 547.

[92] Judgement of the CJEU of 15 February 2007, case C-292/05, *Eirini Lechouritou and Others v Dimosio tis Omospondiakis Dimokratias tis Germanias*, ECLI:EU:C:2007:102.

[93] M. Herdegen, 'Art. 1 Abs. 1 GG', in: T. Maunz, G. Dürig (eds.), *Grundgesetz-Kommentar*..., op. cit., para. 15–16; J.W. Tkaczyński, *Prawo ustrojowe Niemiec*, Kraków 2015, para. 77 ff.

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applies selectively, in particular with regard to the settling of old scores with the past in criminal law[94] and in material terms.[95]

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Abstract

In connection with the ongoing process of judicialisation, courts, including international tribunals, are playing an increasingly important role in shaping contemporary domestic and international relations. However, the influence of international tribunals depends not only on the content of international agreements, which constitute the basis for their functioning and on the number of parties to such agreements, but also on the solutions of national constitutional law. Because it is the national constitutional law that determines

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the place of international law in the national legal order, and indirectly the effectiveness of decisions of international courts. On the other hand, national constitutional law is subject to interpretation by the national constitutional court. As a rule, the latter is reluctant to give up the monopoly of having the final say in legal disputes, very often with a significant political dimension, in a given country. Therefore, the reception of international tribunals in the jurisprudence of national constitutional courts has a significant impact on the actual importance of international tribunals in multi-tiered legal systems. The paper will focus on the verification of the above thesis by referring to examples of the jurisprudence of constitutional courts, with a special reference to the German Constitutional Court, the Italian and Polish Constitutional Court. What is relevant in the context of the volume, the abovementioned case law both of the ICJ and constitutional court relates to the question of just compensation for the losses incurred as a result of international crimes of the Third Reich during the World War II.

Keywords: ICJ, constitutional courts, compensations, II World War, Germany, Italy, Poland, constitutional identity

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Starvation as an international crime

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Hunger as a physiological state can be caused by a natural disaster (e.g. drought), state activity, illness, or deliberate human behaviour. The following article refers to the factual states related to the second option and therefore resulting from action or omission of state bodies. Unfortunately, humankind has sometimes witnessed such situations; representatives of state authorities have inflicted hunger on hundreds, thousands or even millions of people, in extreme cases leading to death, including genocide. In the 20th century, it was enough to mention the *Holodomor* (Great Famine in Ukraine) in 1932–1933, the famine plan (Backe Plan) drawn up by the Third Reich in 1941, the Great Famine in China in 1958–1962, or the famine in North Korea in 1995–1999. In recent years, the images and accounts from Venezuela (2014–2019) showed the world that the local government's policy has led to the malnutrition of around 3.7 million people.[1] Despite differences in the number of deaths and the degree of starvation, there is one common element in these factual states, i.e. the state is the "perpetrator". This is, in fact, because the state as a fundamental body of public international law is the principal guarantor of food security and the right to food.[2] While humanity is capable of providing enough food to itself,[3] apart from extreme and sudden cases of natural disasters, states and their representatives are primarily responsible for famine disasters.

[1] Report of the United Nations High Commissioner for Human Rights on the situation of Human Rights in the Bolivarian Republic of Venezuela, Human Rights Council, forty-first session 24 June–12 July, 5.07.2019, A/HRC/41/18, par. 15; FAO, 'Panorama de la Seguridad Alimentaria y Nutricional en América Latina y el Caribe, 2018', http://www.fao.org/3/CA2127ES/ca2127es.pdf (accessed 20.01.2020).

[2] See T. Srogosz, *Międzynarodowe prawo żywnościowe*, Warszawa 2020, p. 31; idem, 'Prawo do (odpowiedniej) żywności w prawie międzynarodowym publicznym', in: I. Kraśnicka (ed.), *Prawo międzynarodowe. Teoria i praktyka*, Warszawa 2020, pp. 193–206.

[3] UN Special Rapporteur on the Right to Food Mr. Jean Ziegler indicated that "we could feed *12 billion* human beings properly, providing food equivalent to *2,700 calories* a day" (Economic, Social and Cultural Rights. Right to Food. Report by the Special Rapporteur on the Right to Food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2001/25, Commission on Human Rights, 10.01.2002, E/CN.4/2002/58, p. 10, http://repository.un.org/handle/11176/238734 (accessed 20.01.2020).

In view of the above, a question arises whether starvation is a crime of law of nations? If so, what are the grounds for this liability under international law, including whether it involved genocide through starvation, so-called mass starvation, or whether it causes malnutrition of a part of the population? Finally, does international law regulate possible crimes comprehensively and consistently, or are changes needed to take into account, for example, situations of not only deliberate but also reckless state policies leading to famine, by introducing a classification of so-called famine crimes? Is this a crime against humanity, a war crime or perhaps genocide? Is it a crime that only concerns international armed conflicts or also non-international armed conflicts? The answers to the above questions are essential in view of the question of possible liability under international law for causing famine in recent years in Venezuela, North Korea, Syria, or Yemen. They should, as a matter of priority, be based on the existing rules of international criminal and humanitarian law, from the Geneva Conventions to the Statute of the International Criminal Court.

Geneva law

The origins of international criminal law, including the regulation of international crimes, are inextricably linked to the development of international humanitarian law, including the humanitarian protection of prisoners of war and civilians. The regulations on the international liability of individuals and states for international crimes were preceded by efforts by the international community to improve the fate of the wounded and prisoners of war and civilians in armed conflicts. The right to food was first mentioned in Geneva law. Article 11 of the Convention relating to the Treatment of Prisoners of War of 1929[4] introduces an obligation to retain food rations at the level corresponding to the quantity and quality of rations in military units and garrisons. Collective food disciplinary measures were prohibited. The 1949 Convention on the Treatment of Prisoners of War defined minimum food rations in captivity,[5] while the Convention for the Protection of Civilian Persons in Time of War established that food supplies for the civilian population in the occupied territory should be "adequate".[6]

[4] Convention relative au traitement des prisonniers de guerre, *Genève*, 27.07.1929, https://ihl-databases.icrc.org/dih-traites/INTRO/305?OpenDocument (accessed 20.01.2020).

[5] "The basic daily food rations shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners (...)"; Geneva Convention relative to the treatment of prisoners of war, Geneva, 12.08.1949, UNTS, vol. 75, p. 135, https://treaties.un.org/pages/showDetails.aspx?objid=0800000280159839 (accessed 20.01.2020), Art. 26.

[6] "To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate (...)"; Geneva Convention relative to the protection of civilian persons in time

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The 1977 Additional Protocols introduced an explicit ban on the starvation of civilians during military activities (as a method of warfare).[7]

Geneva law, on the one hand, provides a benchmark for the interpretation of international crimes related to starvation, setting minimum standards for feeding during (international and non-international) armed conflicts. On the other hand, it has introduced into international law, including international criminal law, the concept of starvation, as confirmed by Article 8(2)(b)(xxv) of the Statute of the International Criminal Court.[8] It should be remembered that Geneva law, which related to international humanitarian law rather than international criminal law, introduced a ban on starving civilians, but not in the context of an international crime. As indicated earlier, it was a point of reference for the parallel development of Nuremberg law, as confirmed by the definition of war crimes in Article 8(2) of the ICC Statute, referring to the Geneva Conventions and to the "laws and customs applicable to international armed conflicts". In international humanitarian law, therefore, starvation is a prohibited method (means) of warfare, while in international criminal law, it is an international crime, the evolution of which harks back to after 1945 and the Nuremberg trials.

The Nuremberg trials and the Tokyo trials

Although one of the greatest famine disasters in history caused by deliberate action on the part of the state authorities took place in Ukraine before the Second World War (the *Holodomor*), the international community saw the possibility of pursuing international criminal liability for starving the population only after 1945, as a result of the devastating extermination policy of the Third Reich. One of the officers of the Third Reich who was to be tried by the International Military Tribunal in Nuremberg was H. Backe (Minister for Food and Agriculture). He was not charged in the so-called ministers' trial, because on 6 April 1947, for fear of being transported to the Soviet Union, he committed suicide in

of war, Geneva, 12.08.1949, UNTS, vol. 75, p. 287; https://treaties.un.org/pages/showdetails.aspx?objid=0800000280158b1a (accessed 20.01.2020), Art. 55.

[7] "Starvation of civilians as a method of warfare is prohibited. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations (...)"; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), Geneva, 8.06.1977, UNTS, vol. 1125, p. 3; https://treaties.un.org/pages/showdetails.aspxobjid=08000002800f3586 (accessed 20.01.2020), Art. 54; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), Geneva, 8.06.1977, UNTS, vol. 1125, p. 609, https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f3cb8 (accessed 20.01.2020), Art. 14.

[8] Rome Statute of the International Criminal Court, Rome, 17.07.1998, UNTS, vol. 2187, no. 38544; entered into force on 1.07.2002.

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a Nuremberg prison. Earlier, on 21 February and 14 March 1947, he had been interrogated. His name is primarily linked to the so-called Hunger Plan, which was implemented by the Third Reich in the wake of the invasion of the Soviet Union in 1941. Although Backe was not indicted, his so-called *Hungerplan* (*der Backe-Plan*) should be seen as an example of an international crime consisting in the starvation of civilians and POWs. *Der Backe-Plan* was developed under the supervision of H. Göring as part of a comprehensive Oldenburg Plan, envisaging economic exploitation and devastation of Eastern territories. The Oldenburg Plan was approved upon Hitler's orders at a confidential meeting on 1 March 1941. It assumed the confiscation of raw materials and equipment located in factories in the Soviet Union and their transfer to the Third Reich and the destruction of all those that were to remain on site. Within the framework of the Oldenburg Plan, H. Backe was to design a plan for the starvation of the population inhabiting the areas occupied upon the invasion of the Soviet Union and for the confiscation of food for the German army and German society. *Der Hungerplan* was a result of the work of a specially designated commission, who envisaged the death of a few million people. The objective was twofold: to feed the Germans and to exterminate other nationalities east of the River Vistula.[9] Around four million people are estimated to have suffered from hunger during the German occupation, including, above all, prisoners of war, Russians, Ukrainians, Belarusians, and Jews. The most stringent conditions were applied to Red Army soldiers imprisoned in German camps; around 3 million prisoners of war died of starvation between 1941 and 1945.[10] Fortunately, the Backe Plan was not implemented on a comparable scale with respect to civilians. Importantly, starvation as a method of warfare was applied not only in the Soviet Union occupied by the Third Reich; the echo of *der Hungerplan* reverberated, e.g. in H. Frank's General Government.[11]

The fate of millions of people subject to starvation and dying because of it as a result of the Backe Plan did not escape the attention of the International Military Tribunal in Nuremberg, particularly in connection with the indictment of Göring and Frank. The Tribunal invoked Article 6(b) (war crimes) and (c) (crimes against humanity) of the IMT Charter,[12] according to which violations of the laws and customs of war, including *inter alia* the murder or

[9] More on the topic see J. Kay, 'Germany's Staatssekretäre, Mass Starvation and the Meeting of 2 May 1941', *Journal of Contemporary History*, 2006, vol. 41 (4), pp. 685–700.

[10] See T. Snyder, *Skrwawione ziemie: Europa między Hitlerem a Stalinem*, Warszawa 2011, p. 204.

[11] See S. Schwaneberg, 'Eksploatacja gospodarcza Generalnego Gubernatorstwa przez Rzeszę Niemiecką w latach 1939–1945', *Pamięć i Sprawiedliwość*, 2009, no. 1, p. 135–139.

[12] Charter of the International Military Tribunal, London 8.08.1945, UNTS, vol. 82, p. 284, http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf (accessed 21.01.2020).

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ill-treatment of civilians and prisoners of war, are classified as war crimes. In contrast, murder, extermination and other inhumane treatment of civilians are classified as crimes against humanity. At the same time, the Tribunal noted that some of the war crimes were recognised under international law before the Second World War on the basis of Geneva law, in particular under Articles 2–4 of the 1929 Convention, referring to the humane treatment of prisoners of war.[13] The Tribunal indicated the inhumane treatment of Soviet POWs as a result of systematic plans to murder. The POWs in the camps were starving, and many of them died as a result (*they were starved, and in many cases left to die*). The Tribunal moreover invoked a letter of A. Rosenberg to W. Keitel.[14] The judgment also discusses, as part of the crime against humanity, the treatment of civilians, including in concentration camps, in particular, by providing inadequate amounts of food. It points out that in the occupied territories, on Göring's orders, there was a policy of confiscating natural resources, raw materials, equipment or food for the benefit of the Third Reich, which *inter alia* led to famine.[15] Some of the activities of the German authorities on Polish soil took place without the participation of Governor-General H. Frank, but there is no doubt that he was "a willing and knowing participant in the use of terrorism in Poland; in the economic exploitation of Poland in a way which led to the death by starvation of a large number of people".[16]

This leads to the conclusion that, during the Nuremberg trials, starvation was treated both as a war crime against prisoners of war and civilians and a crime against humanity in the form of extermination. In the Tokyo trial, the equivalent of Article 6(b) and (c) of the IMT Charter covering these crimes was Article 5(b) and (c) of the Charter of the International Military Tribunal for the Far East.[17] During the trial, attention was drawn above all to atrocities against prisoners held in Japanese camps, which atrocities qualified as war crimes. The inhumane treatment consisted *inter alia* in the gradual reduction of food rations, which could not exceed 420 g of rice in 1942, according to top-down instructions, and 390 g of rice per day in 1944. Nevertheless, regulations

[13] International Military Tribunal (Nuremberg), Judgment of 1 October 1946, (in:) The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part 22 (22nd August, 1946 to 1st October, 1946), https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf (accessed 21.01.2020), p. 467.

[14] Ibid., pp. 450–452.

[15] Ibid., p. 457–458, 498.

[16] Ibid., p. 498.

[17] Charter of the International Military Tribunal for the Far East, Tokyo 19.01.1946, "Treaties and Other International Agreement of the United States of America 1976–1949. Multilateral 1946–1949", Department of State Publication 8521, 1970, p. 20, http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed 19.01.2019).

in this regard turned out to be fictional because the principle was actually introduced in the camps where such minimum rations were offered to prisoners able to work, while the others were denied them. In addition, the camp commanders ignored the instructions and did not even provide the prisoners able to work with these minimum rations. In 1943, further guidelines were introduced under which those prisoners who did not take a special oath of allegiance to the Japanese Government were to be kept under special surveillance, in fact involving immobilisation for a few days without water, food or sanitary facilities, often in full sunshine. This was intended to induce them to sign the above oath. This policy resulted in constant malnutrition among the Allied POWs and an increasing number of famine victims.[18]

Raphael Lemkin's idea and the 1948 Convention

The Nuremberg trials made the international community aware that starvation can be an instrument of state policy aimed at exterminating national or ethnic groups. *Der Hungerplan* was not the first time that civilians were intentionally starved on a large scale. A decade earlier, tragic events took place in Ukraine (so-called *Holodomor* in 1932–1933). R. Lemkin, the author of the concept of genocide, was an indirect witness to these events. Twenty years after the Great Hunger, he wrote an article about it, entitled 'Soviet Genocide in the Ukraine.'[19] The Lemkin concept was not included into the definition of international crimes in the Charter of the International Military Tribunal and the Charter of the International Military Tribunal for the Far East. However, it was referred to in the Nuremberg indictment, where the term "genocide" was used for the first time (probably because Lemkin was an advisor to Judge R. Jackson).[20] The notion and criminal sanctioning of genocide was addressed in the 1948 Convention,[21] to which R. Lemkin contributed a lot.

According to the Convention definition, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about

[18] International Military Tribunal for the Far East, Judgment of 4 November 1948, in: J. Pritchard, S.M. Zaide, D.C. Watt (eds.), *The Tokyo War Crimes Trial*, vol. 22, New York 1981, pp. 688–698; https://www.legal-tools.org/doc/8bef6f/pdf (accessed 19.01.2019).

[19] R. Lemkin, 'Soviet Genocide in the Ukraine', in: L.Y. Luciuk (ed.), *Holodomor: Reflections on the Great Famine of 1932–1933 in Soviet Ukraine*, Kingston 2008.

[20] K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc*, Warszawa 2010, p. 25.

[21] Convention on the Prevention and Punishment of the Crime of Genocide, Paris 9.12.1948, UNTS, vol. 78, p. 177; entered into force on 12.01.1951.

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its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group (Art. II). The definition, then, covered three of the eight fields of life addressed by Lemkin,[22] i.e. economic, physical and biological, the first two being connected with the crime of starvation. Genocide in the economic sphere is about destroying the basis of the economic existence of a national, ethnic, racial or religious group, while genocide in the physical sphere can consist of racial discrimination in nutrition or the creation of life-threatening conditions. These two categories are included in Article II(c) of the Convention. It should be borne in mind that the crime of genocide involving the deliberate creation of living conditions for members of a group calculated to cause their physical destruction in whole or in part may occur both in war and in peace.

The 1948 Convention amended the catalogue of international crimes. While during the Nuremberg trials *der Hungerplan* and the crimes committed by Frank and Göring were treated as war crimes and crimes against humanity, upon the adoption of the 1948 Convention they should be seen rather as genocide, defined there. This also concerns the Great Famine in the Ukraine between 1932 and 1933, which the Appellate Court in Kiev and part of the international community recognised on 13 January 2010 as the crime of genocide. The Ukrainian court closed the proceedings because of the death of the perpetrators (Stalin, Molotov, Kaganovich, Postyshev, Kosiora, Chubar, Katavevich), concluding that they had committed genocide under the 1948 Convention. The court established that the facts of the case prove that the criminal activities of the persons indicated by the investigators were directed against the very existence of part of the Ukrainian national group. The factual evidence gathered and verified confirmed that the living conditions imposed on the Ukrainian national group were aimed at its partial physical destruction through the *Holodomor* in Ukraine, which resulted in the extermination of 3,941,000 people. It was proved that the characteristics of the *Holodomor* meet the criteria set out in the 1948 Convention. The Court stated that the perpetrators listed in the resolution were found guilty of masterminding the genocide of part of the Ukrainian ethnic group by creating living conditions designed to destroy it through the *Holodomor* between 1932 and 1933.[23] The resolution of the Ukrainian court was not the only such act. The *Holodomor* was declared a crime of genocide by the state authorities of other

[22] R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington 1944, p. 82f; R. Lemkin divides genocide into political, social, cultural, economic, biological, physical, religious, and moral; see K. Wierczyńska, *Pojęcie*..., op. cit., pp. 13–15.

[23] https://holodomormuseum.org.ua/en/resolution-of-the-court (accessed 20.01.2020).

countries (Poland,[24] the United States,[25] Estonia, Australia, Canada, Hungary, Lithuania, Paraguay, Peru, Slovakia, Georgia, Argentina, Colombia, Czechia, Ecuador, Latvia, Portugal) and the European Parliament.[26]

The path to the International Criminal Court

The Nuremberg trials and the subsequent Nuremberg principles and the concept of genocide no doubt had a decisive impact on the development of international criminal law as to the prevention and penalisation of international crimes. Half a century after the adoption of the 1948 Convention, the Statute of the International Criminal Court in 1998 was approved without any changes. Although the ICC Statute draws to a large extent on the legacy of Nuremberg law and the 1948 Convention, we must note the significant evolution that occurred since 1948, above all in the area of human rights protection. The year 1948 did not go down in history just as the year of preventing and penalising the crime of genocide. The Universal Declaration of Human Rights adopted one day after the Convention (10 December 1948)[27] ushered in an unprecedented expansion of human rights, which determined the approach of the international community to many issues, international crimes included. The latter began to be seen in the context of human rights violations, not necessarily a point of reference in the Nuremberg and

[24] Resolution of the Polish Senate of 16 March 2006 on the anniversary of the Great Famine in Ukraine, MP, no. 21, item 234: "The Senate of the Republic of Poland would like to recall that the Great Famine of the *Holodomor* was deliberately provoked by the tyrannical Bolshevik regime ruling the Soviet Union, and was intended to weaken and destroy the Ukrainian nation, thus suppressing its aspirations for freedom and rebuilding its own independent state; (...) in view of the above, the Senate of the Republic of Poland expresses its solidarity with the Ukrainian position that the Great Famine of 1932–1933 should be considered a crime of genocide and that the main culprits as well as the individual perpetrators responsible for these crimes should be identified".

[25] Interestingly, the US Senate in its resolution of 14 March 2018 on the Great Famine in Ukraine referred to Raphael Lemkin's legacy: "Whereas Raphael Lemkin, who devoted his life to the development of legal concepts and norms for containing mass atrocities and whose tireless advocacy swayed the United Nations in 1948 to adopt the Convention on the Prevention and Punishment of the Crime of Genocide, authored an essay in 1953 entitled, 'Soviet Genocide in [the] Ukraine,' which highlighted the 'classic example of Soviet genocide,' characterizing it 'not simply a case of mass murder [, but as] a case of genocide, of destruction, not of individuals only, but of a culture and a nation". Paragraph 3 of the US Senate resolution read: "recognizes the findings of the Commission on the Ukraine Famine as submitted to Congress on April 22, 1988, including that 'Joseph Stalin and those around him committed genocide against the Ukrainians in 1932–1933'"; https://www.govinfo.gov/content/pkg/BILLS-115sres435ats/pdf/BILLS-115sres435ats.pdf (accessed 21.01.2020).

[26] European Parliament resolution of 23 October 2008 on the commemoration of the artificial famine in Ukraine from 1932 to 1933, OJEU, 21.01.2010/C15/E16; the European Parliament considers the *Holodomor* to be a crime against humanity and also invokes the 1948 Convention.

[27] Universal Declaration of Human Rights, Resolution 217 of the UN General Assembly of 10 December 1948, http://www.un.org/en/universal-declaration-human-rights (accessed 22.02.2020) – UDHR.

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Tokyo trials. These rights might have been referred to only tangentially, as the rights of prisoners of war and civilians during armed conflicts.

The codification of the crime of genocide and the development of international human rights law after the Second World War has contributed to a change in the view of the functions of the state. Confirmed in the UDHR and subsequently in the Human Rights Covenants,[28] the right to food[29] made the state the principal guarantor of food security.[30] The famine artificially caused by states like North Korea became an object of interest not only for international criminal courts, as before, but also for international bodies dealing with human rights protection. It is telling that while the pre-war Great Famine in Ukraine was treated solely as an international crime (genocide), similar contemporary situations are no longer regarded as crimes of international law, but also as human rights violations.[31] The international crime of starvation is seen as a grave violation of the right to food. We deal, therefore with a twofold approach in the evolution of international law on combating hunger in peace. On the one hand,

[28] International Covenant on Economic, Social and Cultural Rights, New York, 16.12.1966, UNTS, vol. 993, p. 3; entered into force on 3.01.1976, entered into force on 18.06.1977 (ICESCR); International Covenant on Civil and Political Rights, New York 16.12.1966, UNTS, vol. 999, p. 171, entered into force on 23.03.1976, entered into force on 18.06.1977 (ICCPR).

[29] There are three tiers of the right to food. The first one, which includes the right to life as the first generation right (Article 3 of the PDPC and Article 6 of the ICCPR), includes the citizen's right to food and imposes a positive obligation on the state of taking all necessary steps to provide the population with food sources to the extent necessary to preserve life (preventing loss of life). The second, under the obligation of the fundamental socio-economic right to food, i.e. the second generation right (Article 11 of the ICESCR), obliges states to take all steps to protect the population from hunger or malnutrition (right to freedom from hunger). The third tier, i.e. the socio-economic right to food, beyond the fundamental obligation, is connected with the state's obligation to raise the standard of living, the implementation of which depends on the socio-cultural environment (see T. Srogosz, *Międzynarodowe*..., op. cit., pp. 1–38).

[30] The concept of food security was clarified at the World Food Summit in 1996 and relates to physical, economic and social access to quantitatively adequate, safe and nutritious food to meet dietary needs and food preferences for an active and healthy life (Rome Declaration on World Food Security, World Food Summit 13–17 November 1996; http://www.fao.org/docrep/003/w3613e00.htm (accessed 22.02.2020).

[31] See Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HCR/25/63, https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx (accessed 22.02.2020): "The rights to food, freedom from hunger and to life in the context of the Democratic People's Republic of Korea cannot be reduced to a narrow discussion of food shortages and access to a commodity. The State has used food as a means of control over the population. It has prioritized those whom the authorities believe to be crucial in maintaining the regime over those deemed expendable (...) The commission found evidence of systematic, widespread and grave violations of the right to food in the Democratic People's Republic of Korea. While acknowledging the impact of factors beyond State control over the food situation, the commission finds that decisions, actions and omissions by the State and its leadership caused the death of at least hundreds of thousands of people and inflicted permanent physical and psychological injuries on those who survived (...) The commission is concerned that structural issues, including laws and policies that violate the right to adequate food and freedom from hunger, remain in place, which could lead to the recurrence of mass starvation".

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the international criminal tribunals established at the end of the 20th century continue the legacy of Nuremberg law in relation to war crimes, crimes against humanity and genocide. On the other hand, we must note the general acceptance of the concept of the responsibility of protection, which in a way crowns the legal and human achievements of the international community in the second half of the 20th century.[32] According to this concept, it is the state that is obliged to meet the fundamental needs of the population, including nutrition, within the so-called humanitarian security.[33] This trend is conducive to a reflection on extending the scope of international crimes, for example by the actions of state authorities, which recklessly lead to a food crisis and hunger among the population[34] (e.g. a question arises about the personal liability of principal officials of the Venezuelan state in connection with the crises continuing since 2014, referred to later on in this text).

While the statutes of the International Criminal Tribunal for the Former Yugoslavia (Art. 2–5)[35] and of the International Criminal Tribunal for Rwanda (Art. 2–4)[36] reiterated the definitions and the catalogue of war crimes, crimes against humanity and genocide enshrined in the ICC Charter, the ICC Statute provides a more detailed and comprehensive list of such acts (Art. 5–8). The casuistry of the ICC Statute provided for the first literal reference to the starvation of population in an international instrument defining international crimes. Under Art. 7(2)(b), extermination as a crime against humanity consists, e.g. in the deliberate creation of such living conditions as *inter alia* deprivation of access to food, with the intent to destroy part of the population.[37] War crimes include deliberate starvation of civilians as a method of warfare by depriving them of

[32] See *The Responsibility to Protect. Report of the International Commission on Intervention and State Responsibility*, Ottawa 2001, http://responsibilitytoprotect.org/ICISS%20Report.pdf (accessed 22.02.2020); Resolution of the UN General Assembly A/RES/60/1 of 16 September 2005, 2005 World Summit Outcome Document, http://undocs.org/A/RES/60/1 (accessed 22.02.2020), sections 138–139.

[33] Ibid., p. 15.

[34] See D. Marcus, 'Famine Crimes in International Law', *American Journal of International Law*, 2003, vol. 97.

[35] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed 23.02.2020).

[36] Statute of the International Tribunal for Rwanda, https://legal.un.org/avl/pdf/ha/ictr_EF.pdf (accessed 23.02.2020).

[37] "'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population". The essential element of extermination is not the death of a specific group of people; the result is the creation of living conditions, including deprivation of access to food, designed to destroy part of the population, which must be distinguished from starvation, which is the result of a war crime as provided for in Article 8(2)(b xxv). While starvation means depriving civilians of "adequate" food in terms of quantity and quality, or, in the case of prisoners of war, minimum rations as referred to in Geneva law, extermination includes (during armed conflicts or at the time of peace) deprivation of access to any food (Article 7(2)(b) does not refer to "adequate food").

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objects indispensable to their survival – Art. 8(2) (b) (xxv).[38] The crime against humanity as defined in Article 7(1)(k) may also be mentioned and also considered in the context of intentional (deliberate but not reckless) starvation of the population,[39] although the notion of extermination prevailed earlier in reference to all artificial famine disasters.

However, does not the excessive casuistry of the ICC Statue make its provisions weaker than the general terms of Nuremberg law? The criticism concerns two aspects. Firstly, in Article 8(2)(a-d) on international conflicts, starvation of civilians is listed as a war crime, while in Article 8(2)(e) on non-international conflicts, this crime is no longer present. Secondly, the development of international human rights law and the concept of the responsibility to protect may lead to the conclusion that the concept of extermination contained in the ICC Statute may prove insufficient, with the result that some, for example, reckless actions by state authorities leading to starvation will never be judged from the perspective of international liability.

Based on the literal wording of the ICC Statute, we can say that the war crime involving deliberate starvation of civilians may only be committed during an international conflict,[40] while a similar act committed during a non-international conflict is no longer an international crime. It is hard to judge whether the foregoing loophole is a deliberate action on the part of the statute drafters or simply an oversight. It is an excellent example of the disadvantage of excessive casuistry in trying to create an exhaustive catalogue of crimes. It makes it necessary to supplement this catalogue by applying the procedure for amending the Statute provided for in Article 121 of the Statute. Interestingly, this possibility was used by the States Parties in 2010, resulting in the addition of subsections xiii-xv to Article 8(2)(e). Regrettably, these provisions do not address starvation but the use of poisons, including gases and certain types of projectiles causing excessive suffering. Actually, the amendments to Article 8(2)(c) consisted of copying the analogous regulations from Article 8(2)(a)(xvii-xix) relating

[38] "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions".

[39] "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".

[40] It should be stressed that starvation, as part of a war crime, does not require proof of the effect of the death of a human being or a specific group of people; the effect here is already starvation, i.e. deprivation of food rations as provided for under Geneva law (see K. Dörmann, 'War Crimes under the Rome Statute of International Criminal Court with a Special Focus on the Negotiations on the Elements of Crimes', *Max Planck Yearbook of United Nations Law*, 2003, vol. 7, pp. 388–389).

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to international conflicts.[41] The catalogue of war crimes that can be committed during a non-international conflict remains inconsistent with humanitarian law, the starting point for international criminal law; specifically, this applies to the ban on starvation as a means of warfare introduced by the 1977 Additional Protocol to the Geneva Convention for the Protection of Victims of Non-International Armed Conflicts. This inconsistency was noted in 2018 by Swiss representatives to the Working Party on the Amendment of the ICC Statute, who proposed the inclusion of the crime of starvation in Article 8(2)(e). The Swiss request was supported by many delegations, who pointed to the need to rectify an inaccuracy that had arisen at the interface between international and non-international conflicts. Reference was made to the customary nature of the crime of starvation in non-international armed conflicts and to UN Security Council Resolution 2417/2018, which treats starvation of civilians as a war crime, making no distinction to types of conflict.[42] Some argued that since the prohibition of starvation is customary, there is no need to amend Article 8(2)(e). In response, the Swiss representatives rightly pointed out that the penalisation of war crimes as defined in the ICC Statute is, after all, based on the well-known criminal law principle of *nullum crimen sine lege*. This brief discussion aptly illustrates the weakness of the ICC Statute compared with Nuremberg law. Since starvation was defined as a war crime in relation to international armed conflicts, the logical line of reasoning of a defender of a potential participant in a non-international armed conflict would be that this cannot possibly constitute a war crime in his case, because despite the customary nature of the crime, the principle of *nullum crimen sine lege* prevails. As a result, the working group adopted a resolution recommending that the Assembly of States Parties amend the ICC Statute, Article 8(2)(e), by adding a sub-paragraph defining the starvation of civilians.[43]

Responsibility to protect

Another aspect related to the critique of the ICC Statute concerns the excessively narrow definition of starvation as an international crime, referring to the provisions of Nuremberg law and Geneva law from the latter half of the

[41] Resolution RC/Res.5. Amendments to Article 8 of the Rome Statute, 10.06.2010, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf (accessed 27.02.2020).

[42] "Underlining that using starvation of civilians as a method of warfare may constitute a war crime" – Resolution 2417 (2018) adopted by the Security Council at its 8267th meeting, on 24 May 2018, S/RES/2417(2018), http://unscr.com/en/resolutions/2417 (accessed 27.02.2020).

[43] "Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies", Report of the Working Group of Amendments, seventeenth session, The Hague 5–12 December 2018, ICC ASP/17/35, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP17/ICC-ASP-17-35-ENG.pdf (accessed 27.02.2020).

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20th c., but without developing the concept of the responsibility to protect and the attendant role of the state as the primary guarantor of the right to food. Nuremberg law and Geneva law do not take account of the new developments of the 21st century in international relations and subsequently in international law. The growing importance of humanitarian security, including food security, a result of the evolution of human rights, has led to changes in the perception of sovereignty and the functions of the state. It is stressed that the concept of human rights has given rise to additional demands and expectations in relation to the way states treat their own citizens, and sovereignty involves a dual responsibility. Externally, this responsibility involves respect for the sovereignty of other states, while internally, it consists in respect for the dignity and fundamental rights of all people in a state.[44] States, including the high-ranking officials, are no longer seen only in terms of international security, as after 1945, when shadowing the birth of the UN were the Nuremberg trials, and R. Lemkin's concept was gaining momentum. The evolution outlined above, the foundations of which were laid as early as 1948 in the UDHR, has changed the perception of famine disasters caused by states. Until very recently, the international community was only interested in cases of starvation, which clearly met the criteria of genocide or crimes against humanity, and therefore consisted in the deliberate creation of conditions designed to destroy (such as the *Holodomor*). At the end of the 20th century, attention was drawn to the disaster of famine, which would not necessarily be caused deliberately, although the issue of culpability could certainly be seen as controversial here. The report of the Special Commission appointed by the UN Human Rights Council to investigate human rights violations in North Korea emphasises that the exercise of the right to adequate food entails the obligation for the state to implement appropriate policies aimed at avoiding malnutrition and hunger. The Commission identified the famine in North Korea as a complex problem, arising not only from the deliberate activities of the authorities consisting in so-called *Songbun* (segregation of the population influencing the food rations received) but also from the misguided agricultural policy. In the Commission's view, North Korea had violated its population's right to food not only through deliberate policy but also through the failure to implement: a/ the positive obligation to take all measures to provide the population with food sources that are sufficient to preserve life (the citizen's right to food) and b/ the obligation to take all measures to protect the population from hunger or malnutrition (a fundamental obligation under the socio-economic right to food). In its conclusions, the Commission stated that "crimes against humanity have been committed against a starving population; these crimes are the result of decisions and policies that violate the universal human right to food; they were taken with

[44] *The Responsibility*..., op. cit., pp. 7–8.

the aim of maintaining the existing political system, in the full knowledge that they could exacerbate hunger and entail deaths". The last sentence is especially noteworthy: "They were taken for purposes of sustaining the present political system, in full awareness that they would exacerbate starvation and contribute to related deaths."[45] Analysis of the above sentence may justify a conclusion that the Commission need not have taken into account intent, set out under Art. 6 (*genocide means any of the following acts committed with intent to*...) and Art. 7 of the ICC Statute (*extermination includes the intentional infliction*...), assuming in these provisions the form of the *dolus directus*.[46] Rather, the Committee's findings point to a culpability that ranges between recklessness and potential intent. This trend stems from the evolution of the international legal order from a state-centred to an anthropocentric one linked to the expansion of human rights. The international community is now responding not only in a situation of evident and deliberate mass starvation, comparable to that of the *Holodomor*, but is also taking on the responsibility for civil protection when reckless action by the authorities does not necessarily result in starvation with fatalities. For this reason, we must note the proposals to revise the current treaty acquis on famine crimes, the aim of which is to prevent crimes from being concealed under the veil of the centuries-old "myth" of natural famine.[47]

Famine crimes?

D. Marcus distinguishes four degrees relating to the authorities' faminogenic behaviour, depending on the commitment and motivation of senior state officials. The fourth degree (the least severe) covers situations where a corrupt government leads to a food crisis and is unable to meet the basic needs of the population, which results in a famine. The third degree concerns authoritarian governments which turn a blind eye to the problem of food shortages yet have the appropriate means to respond. Their behaviour is characterised by indifference and does not always involve awareness (*mens rea*), for which there is international responsibility. The second degree is already linked to recklessness[48] and government policy

[45] 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, https://www.ohchr.org/en/hrbodies/hrc/coidprk/pages/reportofthecommissionofinquirydprk.aspx (accessed 23.02.2020), pp. 144–209, 333.

[46] See T. Iwanek, *Zbrodnia ludobójstwa i zbrodnie przeciwko ludzkości w prawie międzynarodowym*, Warszawa 2015, p. 237.

[47] D. Marcus, *Famine*..., op. cit., p. 280.

[48] This is an Anglo-Saxon form of recklessness in that the perpetrator deliberately does not aim to establish the actual state of affairs and the related possibility of committing a prohibited act (this is so-called wilful blindness); see S. Frankowski, *Wina i kara w angielskim prawie karnym*, Warszawa 1976, p. 113. The above concept of so-called conscious unintentionality (recklessness) perfectly proves the existence of a tenuous line between unintentionality (in Poland in the form

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leading to hunger. Finally, the most stringent form of famine crimes (of the first degree) covers a deliberate policy, where hunger is used as a tool of extermination of selected populations. D. Marcus proposes to consider the first and second degree actions as international crimes.[49] Importantly, D. Marcus's four-degree catalogue of faminogenic behaviour, where the first and second degrees concern international crimes, does not mean that the state always meets international obligations of the right to food by taking action defined as the fourth or third degree. In these cases, there is a violation of the right to adequate food, but without the consequences of international criminal responsibility.

In view of the above, we should consider whether the codified and internationally recognised catalogue of international crimes is currently sufficient and does not need to be supplemented, for example with new categories of so-called famine crimes. The significance of this question is evident in the context of the established concept of responsibility for protection, the content of the right to food and the recent famine in Venezuela or the crisis in North Korea. The latter has been described above, while the former, continuing from 2014, is the most serious economic collapse of recent decades. The background was the sharp fall in the price of oil, the staple of the Venezuelan economy. The crisis has resulted in growing shortages of food supplies. In 2017, hunger and malnutrition affected around 75% of the country's population, while around 90% of the population found themselves in poverty. The food crisis was primarily due to Venezuela's previous dependence on food imports.[50] The report of the UN High Commissioner for Human Rights emphasises that the economic collapse and the violation of socio-economic rights, including the right to food (the number of hungry and undernourished people is estimated at around 3.7 million) are caused by misguided economic policy, a crisis in state institutions and corruption. In the Commissioner's view, the government has not shown that it has exhausted all the available resources to ensure the progressive exercise of the right to food, nor that it has sought international support to make up for the shortfall. The economic and social policies adopted in recent decades have undermined food production and distribution systems, increasing the number of people dependent on food aid programmes. Furthermore, the report points out that the Venezuelan government introduced in 2016 a special food

of recklessness and in the Anglo-Saxon system in the form of wilful blindness) and intent in the form of the so-called potential intention (see M. Kowalewska-Łukuć, *Zamiar ewentualny w świetle psychologii*, Poznań 2015, pp. 135–137).

[49] D. Marcus, *Famine*..., op. cit., pp. 246–247.

[50] See T. Srogosz, *Międzynarodowe*..., op. cit., p. 50; 'Zoos are forced to slaughter animals to feed others in Venezuela, where bone-thin pumas have become the face of the crisis', Mail Online, 1.03.2018, https://www.dailymail.co.uk/news/article-5449023/Venezuelans-eat-rats-dogs-economy-nosedives.html (accessed 28.02.2019).

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distribution programme (CLAP – Local Committees for Supply and Food Distribution), which did not cover the entire population because not all people were on the government's list of beneficiaries.[51]

The famine situations described above were caused by states. The pattern was similar and boiled down to socio-economic policies that violated the right to adequate food and even the right to life.[52] Evident in these policies is the discrimination of specific social groups (*Songbun* and CLAP), yet we cannot speak here about acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The allegation of genocide should, therefore, be regarded as incorrect. The same can be said of the charge of crimes against humanity. The condition for accountability is to prove a "systematic attack against civilians", including extermination. However, this boils down to deliberately creating conditions designed to destroy parts of the population (acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) extermination (...) includes the intentional infliction of conditions of life, (...) calculated to bring about the destruction of part of a population). Even if we agreed that the crime involves potential intent[53] (although such a position is untenable given the literal interpretation of Article 8(1) and (2)(b) of the ICC Statute, which refers to a deliberate attack on civilians; moreover, "designing" or "calculating" living conditions so as to lead to the destruction of the population requires deliberate and planned action[54]), the situations in Venezuela and

[51] Report of the United Nations High Commissioner for Human Rights on situation of human rights in the Bolivarian Republic of Venezuela, 5.07.2019, A/HRC/41/18, https://www.ohchr.org/Documents/Countries/VE/A_HRC_41_18.docx (accessed 24.01.2020).

[52] A more distant famine caused by reckless state policy was the Great Famine in China between 1958 and 1962, caused by collectivisation leading to the collapse of agricultural production; it is estimated to have claimed between 42 and 60 million deaths (see F. Dikötter, *Wielki Głód. Tragiczne skutki polityki Mao 1958–1962*, Wołowiec 2013).

[53] See Art. 30(2b) of the ICC Statute – "In relation to a consequence, that person (...) is aware that it will occur in the ordinary course of events"; however, we should bear in mind that the ICC is inconsistent in the interpretation of Art. 30 of the Statute, allowing once for a broad interpretation and indicating the possibility of commitment of an international crime even in conscious unintentionality, and thus also with a potential intention (Prosecutor v. Lubanga, ICC PT. Ch., Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, 29.01.2007, https://www.icc-cpi.int/pages/record.aspx?uri=266175 (accessed 25.02.2020), par. 352ff), and on another occasion limiting intention under Art. 30 of the ICC Statute solely to the *dolus directus* (Prosecutor v. Bemba Gombo, ICC PT. Ch., Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15.06.2009, https://www.icc-cpi.int/pages/record.aspx?uri=699541 (accessed 25.02.2020), par. 360); the doctrine highlights that prevailing in the current ICC practice is a restrictive interpretation of intent (M.E. Badar, S. Porro, 'Article 30.2 (b)', in: M. Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Brussels 2017, p. 319).

[54] Prosecutor v. Al Bashir, ICC PT. Ch. I, Second Decision on the Prosecution's Application for a Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-94,

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North Korea could hardly be included in the category of crimes under Art. 8 (1) and (2) of the ICC Statute. No doubt, they differ from the crimes which impacted the origins of the notion of genocide and crimes against humanity (*Holodomor* and *der Hungerplan*). They did not have the clear aim of starving the population to death through planned policies. Indeed, Stalin and Göring used hunger as a means of fighting against nations and ethnic groups; in the case of the Soviet Union, it was used against a social group (so-called kulaks). This perception of starvation as an international crime is still valid today and is reflected in the casuistic regulations of the ICC Statute, still embedded in the realities of the Nuremberg trials and the 1953 article by R. Lemkin. There is a no broader reference to the violation of the right to food, the cause of which may be, as in the case of the famine in North Korea and Venezuela, a reckless (deliberately unintentional) state policy (second degree of faminogenic behaviour in D. Marcus' classification).

The statement of the special commission established by the UN Human Rights Council might provide an argument in favour of treating the famine in North Korea as a crime against humanity (in addition, crimes against humanity have been committed against starving populations; these crimes have their source in decisions and policies violating the universal human right to food; they were taken for purposes of sustaining the present political system, in full awareness that they would exacerbate starvation and contribute to related death[55]). However, it should be remembered that the author of these words was not an international court or the UN Security Council, but a commission set up by a subsidiary body of the UN General Assembly. Secondly, the commission does not refer to concepts laid down in Nuremberg law and codified in the ICC Statute, but to violations of the right to food. Thirdly, in the commission's statement, perhaps unconsciously, a structure resembling wilful blindness appears; as has been said earlier, it is not supported by the existing treaty definitions of international crimes.

Nevertheless, the commission's statement may serve as a good indicator for the development of regulations relating to so-called famine crimes. At this stage of the development of human rights, there is no doubt that extending the catalogue of international crimes to include the second category of famine crimes (according to D. Marcus' classification) is necessary and obvious. The best solution is to amend the ICC Statute, because the custom that was the cornerstone of the concept of genocide even after the Second World War,

12.07.2010, https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-94 (accessed 25.02.2020), par. 33; M. Gillet, 'Extermination', in: M. Klamberg (ed.), *Commentary*..., op. cit., p. 40.

[55] Report of the detailed findings..., op. cit., p. 333.

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is now unthinkable because of the principle of *nullum crimen sine lege*, firmly anchored in international criminal law.

One might wonder whether to go further than D. Marcus' proposal. Since the violation of the right to adequate food is a tort committed by the state as a subject of international law, should not individual liability be introduced for the fourth and third category of famine crimes? After all, the concept of responsibility to protect has changed the perception of the state in international law. It is the main guarantor of human rights, and its role is to meet the basic needs of the population. From this perspective, a corrupt power, or one that turns a blind eye to the problems of feeding the population, should be treated in the same way as one that pursues a reckless or deliberate policy that results in famine.

In conclusion, the following proposals can be made: 1. add to Article 8(2)(e) (on non-international armed conflicts) a sub-paragraph defining starvation of civilians; 2. add the criterion of recklessness to Articles 30, 7(2)(b) and 7(1)(k), which recklessness would consist in deliberate negligence; 3. alternatively, create a new category of famine crimes (under the ICC Statute or under a separate framework convention on international food law[56]) which involves starving civilians as a result of reckless policies of state authorities (including corruption or refusal of external aid).

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[56] See T. Srogosz, *Międzynarodowe*..., op. cit., pp. 220–221.

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Abstract

Famine has been usually seen as a natural disaster. Meanwhile, cases of extermination of populations by state authorities are known in history, during war or peace. Hence it is important to answer the questions: is starvation a international crime? what are its constituent elements? does international law exhaustively regulate this crime? Answer is possible after discussing a genesis of crime based on the Geneva conventions on protection of prisoners of war and civilians, and then analyzing a development of international law of human rights and the responsibility to protect. The statute of ICC is a result of development of nuremberg laws and humanitariam law, which requires changes because of necessity to abolish a gap between norms of war crimes in international conflicts and non-international conflicts and because of necessity to conform to international law of human rights and responsibility to protect. Considering the situations of hunger in North Korea or Venezuela, it may be first proposed to add to the ICC statute the form of recklessness of starvation, or, secondly, to establish a category of famine crimes (under the ICC statute or separate convention), taking into account a starvation of civilians due to reckless public policy (including corruption, or a refusal to aid from abroad).

Keywords: public international law, international crime, starvation, war crime, genocide, crime against humanity

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Evolution of the statute of limitations of crimes under international law in international law

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Explanation of the term "crimes under international law"

The analysis of the issue of the statute of limitations of crimes under international law in international law requires prior clarification of the term "crimes under international law", since not every international crimes are crimes under international law. At the begin it should be remarked that in the area of the naming of crimes of international character a terminological chaos exists.

On the international forum various names are used. In the opinion of the author of this paper, accurate and proposed in this elaboration is the view according to which the term "international crimes"[1] is a parent term to the term "crimes under international law",[2] which should be descriptively explained as crimes directly criminalized by international law[3] or crimes that involve direct criminal responsibility under international law.[4] Today only crimes being subject to the jurisdiction of the International Criminal Court are recognized as crimes under international law.[5] These crimes include: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. In the English-language literature crimes under international law are also called "core crimes"[6] or "international crimes in the narrow sense".[7]

Other international crimes (international crimes being not crimes under international law) can be referred to as ordinary international delicts. In the

[1] See A. Aust, *Handbook of International Law*, New York 2010, p. 250 ("There is no agreed definition of 'international crime', but it is a convenient term for those crimes that are of concern to every State because of their corrosive effect on international society or their particularly appalling nature.").

[2] See this term in: G. Werle, *Principles of International Criminal Law*, The Hague 2005, p. 25.

[3] So R. Cryer, 'International Criminal Law', in: M.D. Evans (ed.), *International Law*, New York 2010, p. 752.

[4] G. Werle, *Principles...*, op. cit., p. 25.

[5] Compare: ibid.

[6] See, e.g.: ibid.; R.S. Clark, 'Treaty crimes', in: W.A. Schabas (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge 2016, p. 214. Compare: A. Cassese, *International Criminal Law*, New York 2003, p. 110; R. Cryer, H. Friman, D. Robinson, E. Wilmshusrt, *An Introduction to International Criminal Law and Procedure*, Cambridge 2009, p. 2.

[7] R. Cryer, *International Criminal Law*..., op. cit., p. 752.

literature, other international crimes are also called "treaty-based crimes" or "treaty crimes".[8] They include, for example, narcotics trafficking, acts of terrorism, torture, and counterfeiting of money.[9] The basis for prosecution and punishment of other international crimes is not international law, but domestic legislation. In such cases international law, in particular international agreements, merely obligate states to declare certain offences criminal.[10]

In the literature, a view is also presented that international crimes include crimes against humanity, genocide, war crimes, aggression, torture (as distinct from torture as one of the categories of crimes against humanity or war crimes) and international terrorism. By contrast, the notion of international crimes does not embrace other classes of criminal offences, such as piracy, traffic in persons, or exploitation of prostitution, unlawful arms trade and money laundering.[11]

It should be mentioned about an opposite opinion on the term "international crimes". According to that opinion, the term "international crimes" refers to those "offences over which international courts or tribunals have been given jurisdiction under general international law" and an international crime may be defined as "an offence which is created by international law itself, without requiring an intervention of domestic law".[12]

The author, being Polish, would also like to mention about literature of her country. Similarly to the English-language literature, it is a chaos in the Polish-language literature. Many researchers, even those specializing in international law or criminal law, are often imprecise and use – for example during academic conferences – various terms. In the Polish literature the Latin term *delicta iuris gentium* is commonly used to describe crimes of international character.[13] It embraces not only very serious crimes like, for example, war crimes and crimes against humanity, but also less serious crimes like, for example, narcotics trafficking.[14] In Poland, the term "*przestępstwa traktatowe*" ("treaty crimes/offences") is also used. Among crimes of international character the most serious crimes of international importance are distinguished. This descriptive term has been used in the translation of the Rome Statute of the International Criminal

[8] See e.g.: R.S. Clark, *Treaty crimes*..., op. cit., p. 214.

[9] See e.g.: A. Cassese, *International Criminal Law*..., op. cit., p. 110.

[10] Compare: R. Cryer, H. Friman, D. Robinson, E. Wilmshusrt, *An Introduction*..., op. cit., p. 2, 58; A. Aust, *Handbook*..., op. cit., p. 250.

[11] So A. Cassese (revised by A. Cassese, P. Gaeta, L. Baig, M. Fan, Ch. Gosnell, and A. Whiting), *Cassese's International Criminal Law*, Oxford 2008, p. 21.

[12] R. Cryer, H. Friman, D. Robinson, E. Wilmshusrt, *An Introduction*..., op. cit., p. 2, 5.

[13] L. Gardocki, *Prawo karne*, Warszawa 2017, p. 44; T. Bojarski, *Polskie prawo karne. Zarys części ogólnej*, Warszawa 2003, p. 68; T. Bojarski, in: T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warszawa 2016, p. 289; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2017, p. 208; N. Kłączyńska, in: J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2012, p. 664.

[14] See, e.g.: L. Gardocki, *Prawo*..., op. cit., p. 44; T. Bojarski, *Polskie*..., op. cit., p. 68.

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Court into the Polish language.[15] The term "*zbrodnie międzynarodowe*" is also often used in Poland.[16] In the literal translation it means "international crimes". However, in the opinion of the author of this paper, after the ratification of the Rome Statute the Polish term "*zbrodnie międzynarodowe*" should be used in the meaning of the term "crimes under international law". In other words, the term "*zbrodnie międzynarodowe*" should be reserved for crimes being subject to the jurisdiction of the International Criminal Court.

Subject and temporal scope of the analysis of the statute of limitations

Bearing in mind the above, it should be clearly stated that the subject of the analysis in this elaboration is the international-law development of the statute of limitations of the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The analysis will focus on the evolution of the institution of the criminal-law statute of limitations in international law and not on the historical outline of penalization and the issue of the statute of limitations of particular crimes. Beginnings and the current legal existence of the statute of limitations will be shown. A difference in the way of the regulation of the statute of limitations, which occurred over the years, will be indicated.

As to international crimes being not crimes under international law it is worth mentioning at this place that international law in no way regulates their statute of limitations. It is the responsibility of individual states to regulate the statute of limitations for these crimes. It depends on individual states whether or not they exclude these crimes from falling under the statute of limitations.

Genesis of the statute of limitations in international law

Research of literature on international law leads to the conclusion that on the international forum, they began to talk about criminal-law statute of limitations only after the Second World War. This was done in the context of the functioning of the International Military Tribunal in Nuremberg. The Charter of this Tribunal was an appendix to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (called the "London Agreement"), signed by the four so-called Great Powers (the United Kingdom of Great Britain and Northern Ireland, the United States of America,

[15] See Art. 5 of the Rome Statute in the Polish language, Journal of Laws of 2001, no. 98, item 1065.

[16] See, e.g.: M. Królikowski, P. Wiliński, J. Izydorczyk, *Podstawy prawa karnego międzynarodowego*, Warszawa 2008, p. 113.

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France, and the Soviet Union) on 8 August 1945 in London.[17] In the Charter crimes against peace, war crimes and crimes against humanity were defined for the first time in the history. Either the Charter of the Nuremberg Tribunal or the London Agreement have not referred to the issue of the statute of limitations of these crimes. Similarly, the Charter of the International Military Tribunal for the Far East[18] has not regulated the statute of limitations of crimes being under the jurisdiction of the Tokyo Tribunal.

The above does not mean that criminal-law statute of limitations did not exist under international law. Admittedly, the Charter of the Nuremberg Tribunal (and the Charter of the Tokyo Tribunal) has not contained a provision on the statute of limitations of crimes being subject of the jurisdiction of this Tribunal, but in the literature a view is accepted that it was so-called "qualified silence", meaning a rejection of the admissibility of falling of these crimes under the statute of limitations.[19] It should be mentioned that violation of international peace and the laws of war, as well as offences against humanity have been rightly recognized as crimes that have long existed in customary international law.

Similarly, in the opinion of the author of this paper, it should be recognized that the exclusion of crimes against peace, war crimes and crimes against humanity – being the most serious *delicta iuris gentium* – from falling under the statute of limitations have existed in customary international law since time immemorial (for a very long time). The sources of the unlimited in time punishability of the most serious crimes being concern to the international community should be seen in the law of nature, in the very essence of the humanity and in the right of nations for peaceful coexistence.[20] In the opinion of the author, the exclusion from the statute of limitations occurred with the very appearance of the first acts constituting crimes against peace, war crimes and crimes against humanity.

[17] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.2_Charter%20of%20IMT%201945.pdf (accessed 4.11.2019).

[18] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf (accessed 4.11.2019).

[19] See, e.g.: A. Sakowicz, in: M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna*, t. II: *Komentarz do artykułów 32–116*, Warszawa 2010, pp. 833–834; R. Koper, K. Sychta, J. Zagrodnik, 'Karnomaterialne aspekty instytucji przedawnienia – zagadnienia wybrane', in: Z. Ćwiąkalski, G. Artymiak (eds.), *Współzależność prawa karnego materialnego i procesowego*, Warszawa 2009, p. 222. See also C. Van den Wyngaert, J. Dugard, 'Non–Applicability of Statute of Limitations', in: A. Cassese, P. Gaeta, J. Johnes (eds.), *The Rome Statute of the International Criminal Court*, vol. I, New York 2002, pp. 876–879.

[20] This view about sources of norms excluding the statute of limitations I already expressed in: K. Banasik, *Przedawnienie w prawie karnym w systemie kontynentalnym i anglosaskim*, Warszawa 2013, p. 30.

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Statute of limitations in international conventions

The first legal act of international law *expressis verbis* concerning the problem of the statute of limitations was the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This Convention was adopted by the General Assembly of the United Nations on 26 November 1968 in New York and entered into force on 11 November 1970.[21] It is worth emphasising that Poland was the initiator of the establishment of this Convention.[22] Poland was also the first state that signed (on 16 December 1968) and ratified (on 14 February 1969) this Convention.[23]

The extent of the regulation of this Convention includes: a) war crimes as they are defined in the Charter of the International Military Tribunal (particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; b) crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, and – not mentioned in the title of the convention – the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed (Art. 1 of the Convention).

Article 1 of the Convention states that these crimes are not subject to statutory limitation regardless of the date of their commission. This provision was not of constitutive character since it did not create the exclusion of these crimes from the statute of limitations, but only declared it.[24] The Convention itself indicates such an interpretation by pointing out in its preamble that the regulation in question expresses a confirmation in international law of the rule of non-applicability of the statutory limitation to war crimes and crimes against humanity. A relevant section of the preamble states: "Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation, (...) Recognizing that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".

[21] https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.27_convention%20statutory%20limitations%20warcrimes.pdf (accessed 4.11.2019).

[22] L. Kubicki, in: I. Andrejew (ed.), *System prawa karnego. O przestępstwach w szczególności*, vol. IV, part I, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1985, p. 172.

[23] https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en (accessed 4.11.2019).

[24] K. Banasik, 'Karnoprawne normy przedawnienia w prawie międzynarodowym', *Prokuratura i Prawo*, 2011, no. 7–8, p. 59.

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At this place it is worth mentioning about one more convention. It is not an international convention, but an European convention (created on the forum of the Council of Europe), which *expressis verbis* relates to the statute of limitations. It is about the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes of 25 January 1974, adopted in Strasburg.[25] Article 1 of the Convention obliges the contracting states to adopt any necessary measures to ensure that statutory limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law: 1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948; 2. (a) the certain war crimes specified in the 1949 Geneva Conventions, (b) any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences; 3. any other violation of a rule or custom of international law which may hereafter be established and which the contracting state concerned considers as being of a comparable nature to those referred to in paragraphs 1 or 2 of this article.

According to Article 2 paragraph 1, the Convention applies to offences committed after its entry into force in respect of the contracting state concerned. Article 2 paragraph 2 of the Convention states that it applies also to offences committed before such entry into force in those cases where the statutory limitation period had not expired at that time.

As of the end of December 1999, the Convention was ratified only by the Netherlands (on 25 November 1981) and signed by France (on 25 January 1974), Belgium and Romania. Article 3 paragraph 2 of the convention required three ratifications for the entry of the Convention into force. The Convention entered into force on 27 June 2003, after it had been ratified by Romania (on 8 June 2000) and Belgium (on 26 March 2003). As of November 2019, only eight states are parties to the convention.[26] By the way, it can be noted that France, although the first signatory, has not ratified the Convention to date. Poland has not even signed the Convention. This is, however, justified, having in mind the ratification of the above-mentioned international convention of

[25] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007617f (accessed 4.11.2019).

[26] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/082/signatures?p_auth=uOaVoMss (accessed 4.11.2019).

1968. It can be concluded that the significance of this European convention is only symbolic.

Statute of limitations in the statutes of international criminal tribunals

The first of contemporary international criminal tribunals was the International Criminal Tribunal for the former Yugoslavia (the ICTY). It was established by the Security Council of the United Nations in the resolution of 25 May 1993. The Statute of the ICTY was an appendix to this resolution.[27] In accordance with its Statute, the Tribunal had authority to prosecute and try individuals on four categories of offences: grave breaches of the 1949 Geneva conventions (Art. 2 of the ICTY Statute), violations of the laws or customs of war (Art. 3 of the ICTY Statute), genocide (Art. 4 of the ICTY Statute) and crimes against humanity (Art. 5 of the ICTY Statute). The ICTY was established not as a permanent tribunal, but as a temporary (*ad hoc*) institution.[28] It had the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 (Art. 1 of the ICTY Statute). Its Statute did not contained a provision on the statute of limitations.

The second of the contemporary international tribunals, established also as an *ad hoc* tribunal,[29] was the International Criminal Tribunal for Rwanda (the ICTR). It was established by the Security Council of the United Nations in the resolution of 8 November 1994.[30] The Statute of the ICTR,[31] based on the Statute of the ICTY, was an appendix to this resolution. In accordance with its Statute, the Tribunal had jurisdiction over genocide (Art. 2 of the ICTR Statute), crimes against humanity (Art. 3 of the ICTR Statute) and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Art. 4 of the ICTR Statute), committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States between 1 January 1994 and 31 December 1994 (Art. 1 of the ICTR Statute). The Statute of this Tribunal also contained no provision concerning the statute of limitations.

[27] https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (accessed 4.11.2019).

[28] Compare: G. Sluiter, 'Ad hoc international criminal tribunals (Yugoslavia, Rwanda, Sierra Leone)', in: W.A. Schabas (ed.), *The Cambridge Companion...*, op. cit., p. 117; A. Henriksen, *International Law*, Oxford 2017, pp. 309–311; A. Cassese, *International Criminal Law...*, op. cit., pp. 335–336.

[29] Compare: G. Sluiter, '*Ad hoc international criminal tribunals*'..., op. cit., p. 117; A. Cassese, *International Criminal Law...*, op. cit., pp. 335–336.

[30] https://unictr.irmct.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf (accessed 4.11.2019).

[31] https://unictr.irmct.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf (accessed 4.11.2019).

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The creation of a permanent international criminal court was of great significance for the development of international criminal law. There is a widely accepted opinion that this event made a "change of epoch (age)" and was "the beginning of a new era" in international criminal law.[32] K. Annan, who at that time was the Secretary-General of the United Nations, accurately assessed the significance of this step with following words: "The establishment of the court is (...) a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".[33] It is about the International Criminal Court (the ICC) which was established under the Rome Statute, being an international agreement of 17 July 1998, agreed in Rome during the diplomatic conference of the United Nations.[34] In accordance with Art. 5 of the Rome Statute, the jurisdiction of the ICC shall be limited to the most serious crimes of concern to the international community as a whole. The ICC has jurisdiction with respect to the following crimes: the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[35]

Article 29 of the ICC Statute states: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations". It should be explained that they are subject to neither limitation on prosecution nor limitation on enforcement of punishment. The exclusion of any statute of limitations has been made distinctly.

During the preparatory works on the Statute there were no protests from the vast majority of delegates against the exclusion of the statute of limitations for the crimes within the jurisdiction of the ICC. However, an opposite opinion to this issue was expressed by, for example, the delegates of China and Japan.[36] China agreed to express its opinion only in the footnote

[32] See, e.g.: J. Kugler, in: H.-H. Hühne, R. Esser, M. Gerding (eds.), *Völkerstrafrecht*, Osnabrück 2007, p. 57; K. Ambos, 'The Legal Basis of the International Criminal Court. An analysis of the Rome Statute', in: L. Arbour, A. Eser, K. Ambos, A. Sanders (eds.), *The Prosecutor of a Permanent International Criminal Court*, Freiburg im Breisgau 1998, p. 40.

[33] Cited in: K. Ambos, 'Der neue Internationale Strafgerichtshof – Ein Überblick', *Neue Juristische Wochenschrift*, 1998, 51, p. 3746. K. Annan said the same in a letter of 31 August 1998 to Professor Bassiouni: "The adoption of the Rome Statute of an International Criminal Court marks a giant step forward in the march towards universal human rights and the rule of law." (see M.C. Bassiouni, *The Legislative History of the International Criminal Court*, vol. 1: *Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence*, New York 2005, p. xiii).

[34] https://www.icc-cpi.int/resourcelibrary/official-journal/rome-statute.aspx (accessed 4.11.2019).

[35] On the scope and mutual relationship of crimes against peace and the crime of aggression see K. Banasik, 'Od zbrodni przeciwko pokojowi do zbrodni agresji', *Palestra*, 2012, no. 5–6, pp. 101–109.

[36] M. Płachta, *Międzynarodowy Trybunał Karny*, vol. I, Kraków 2004, pp. 604–605.

in the working group report. Japan changed its mind during the conference, however maintained that a long elapse of time should be taken into account as a mitigating factor.[37]

The above-cited provision of the Rome Statute, which excludes the crimes falling under the jurisdiction of the International Criminal Court from the statute of limitations, has a declarative character. It only confirms the universal principle rooted in international criminal law for a long time. The argument in favour of this interpretation is that the relevant provision of the convention adopted 30 years earlier was of a declarative character.[38]

Conclusions

The analysis of the issue of the statute of limitations in international law has clearly shown that the statute of limitations in international law has evolved over the years. The above-made analysis leads to the conclusion that in international law a transition from silent to distinct exclusion of the statute of limitations of crimes under international law occurred. Initially, the exclusion of the statute of limitations of the most serious *delicta iuris gentium* had a silent character. A landmark event in this issue was the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity by the General Assembly of the United Nations in 1968. Criminal-law norms on the limitation period of punishability have been *expressis verbis* written in two conventions devoted to the problem of the statute of limitations, i.e. in the above-mentioned convention of the United Nations of 1968 and in the Convention of the Council of Europe of 1974 on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.

In the opinion of the author of this paper, the creation of the International Criminal Court in 1998 should be recognized as a next landmark event in the issue of the regulation of the statute of limitations. The Statute of this Court was the first legal act being a basis for the functioning of an international criminal tribunal and containing a provision on the statute of limitations. This provision confirmed the exclusion of crimes under international law from the institution of the statute of limitations. Course of works on the Rome Statute showed that in the contemporary world the exclusion of crimes under international law from falling under the statute of limitations is commonly accepted by the international community.

[37] P. Saland, 'International Criminal Law Principles', in: R.S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague 1999, p. 204.

[38] Similarly K. Banasik, *Przedawnienie...*, op. cit., p. 47.

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Abstract

The aim of this paper is the analysis of the evolution of the statute of limitations of crimes under international law in international law. Crimes under international law are subject to the jurisdiction of the International Criminal Court and include: the crime of genocide, crimes against humanity, war crimes and the crime of aggression. The analysis is focusing on the evolution of the institution of the criminal-law statute of limitations under international law and not on the historical outline of penalization and the statute of limitations of particular crimes. The author mainly uses the formal-dogmatic research method. The author begins by explaining the terms "international crimes" and "crimes under international law". Then she proceeds to the genesis of the statute of limitations in international law. In the next parts she deals with the statute of limitations in international conventions and in the statutes of international criminal tribunals. She finishes her elaboration by giving some conclusions. She concludes by stating, among other things, that the analysis of the issue of the statute of limitations in international law has clearly shown that the statute of limitations in international law has evolved over the years. In international law, a transition from silent to distinct exclusion of the statute of limitations of crimes under international law occurred.

Keywords: statute of limitations, evolution of statute of limitations in international law, term "crimes under international law", term "international crimes", international criminal law

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Scope of Exclusion of the Statute of Limitations on Criminal Responsibility under Article 105(1) of the Polish Criminal Code in the context of State Liability for Crimes of International Law

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An international crime is defined in the literature in two ways: as a punishable offence imputable to an individual on the basis of fault, the commission of which offence directly contravenes the standards of international law and as an offence against international law imputable to the state as a form of *delictum iuris gentium*, giving rise to the international responsibility of the state, either in the now abandoned form of the so-called international crime of the state or as the more modern concept of serious violations of the peremptory standards of international law[1]. The outline of international jurisdiction and the catalogue of crimes of international law was defined in 1919 by the Treaty of Versailles[2], which applies this category to everything that violates the laws and customs of war (Article 228), as well as everything that shatters international morals and the seriousness of treaties (Article 227). This scope was subsequently extended by Article 6 of the Statute of the International Military Tribunal in Nuremberg[3], which identified

[1] See on this matter T. Iwanek, *Zbrodnia ludobójstwa i zbrodnie przeciwko ludzkości w prawie międzynarodowym*, LEX 2015; M. Gąska, A. Ciupiński, *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Wybrane problemy*, Warszawa 2001, p. 104; E. Dynia, *Przestępstwa prawa międzynarodowego. Odpowiedzialność prawnomiędzynarodowa jednostki*, Warszawa 1999; K. Lankosz, 'Penalizacja w międzynarodowym prawie publicznym czynów osób winnych najpoważniejszych zbrodni wagi międzynarodowej', in: K. Baran, A. Zoll, J. Stelmach, J. Halberda (eds.), *Dziedzictwo prawne XX wieku. Księga pamiątkowa z okazji 150-lecia Towarzystwa Biblioteki Słuchaczów Prawa Uniwersytetu Jagiellońskiego*, Kraków 2001, p. 247.

[2] Treaty of Peace between the Allied and Associated Powers and Germany, signed at Versailles on 28 June 1919, Protocol for the deposit of ratification of the Treaty of Peace signed at Versailles on 28 June 1919, Journal of Laws 1920, no. 35, item 200.

[3] Act of 2 June 1947 on the ratification of Poland's accession to the Agreement on the Prosecution and Punishment of the Major War Criminals of the European Axis, signed in London on 8 August 1945, Journal of Laws 1947, no. 48, 247; International Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, signed in London on 8 August 1945, Journal of Laws 1947, no. 63, 367; cf. also the Charter of the United Nations, the Statute of the International Court of Justice and the Agreement establishing the United Nations Preparatory Commission, Journal of Laws 1947, no. 23, item 90; T. Cyprian, J. Sawicki, *Materiały norymber-*

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the following types of crimes of international law: crimes against peace[4], war crimes[5] and crimes against humanity[6].

The concept of the state has been variously defined over the centuries during investigations on legal theory. It has been seen as a structure used by a society which, on the basis of the norms it lays down and with the help of an administrative apparatus created for this purpose, organises the activities of individuals and groups; as a form of organisation of a social group which has chosen a leading sovereign authority to control a certain territory through it; as a political union in which authority uses instruments for "control over people" (M. Weber); a "territorial corporation equipped with direct, self-contained superiority", which is moreover characterised by its legal personality (G. Jellinek), sometimes emphasizing its role as a structure set up to protect individual rights. In turn, G.W.F. Hegel saw the state as an "actualization of the ethical idea", while H. Kelsen perceived it as a normative structure, its form being legal order and its bodies both institutions with a ruling *empire* and human beings – citizens.[7]

The above inevitably leads to the conclusion that first the human person and then the state are behind not only a crime of international law, but also behind every act, understood as a manifestation of a person's decision of will. Faced with an individual's negatively assessed actions, the state can resort to a range of measures, the most drastic of which, used only when less radical measures fail to produce the intended protective effect, is criminal responsibility. The basis for accusations against the state, resulting in its liability, but of a different nature than that of a criminal one, may be an incorrect construction, and even less so the lack of measures intended to prevent an individual from behaving in a manner detrimental to rights protected by law.[8] One of such measures in criminal material law

skie, Warszawa 1948; E. Socha, 'Wpływ procesu norymberskiego na prawo międzynarodowe w zakresie ścigania i karania zbrodni ludobójstwa', *WPP*, 2007, no. 2.

[4] Under Art. VI (a) of the 1945 Agreement, crimes against peace include planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

[5] Under Art. VI (b) of the 1945 Agreement, war crimes are: violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

[6] Under Art. VI (c) of the 1945 Agreement, crimes against humanity include 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.

[7] https://encyklopedia.pwn.pl/haslo/panstwo;3953945.html (accessed 31.01.2020).

[8] See on this matter an interesting elaboration by A. Gubrynowicz, 'Ludobójstwo a immunitet państwa. Ewolucja judykatury amerykańskiej w zakresie procesów cywilnych wytaczanych obcemu

is the institution under Art. 105 § 1 of the Polish Criminal Code[9] (hereinafter CC), excluding the possibility of applying the statute of limitation with regard to crimes against peace, humanity and war crimes.

The mere fact that the above acts are punishable and the fact that they are not subject to statutory limitation because of their gravity does not in principle raise doubts and does not require further argumentation. The norms prohibiting this type of actions and then applying to prosecution and punishment invoke a threat to the essence of humanity, an absolute right, whose protection is universally accepted in the international community. The realisation of the characteristics of the types of crimes against peace or humanity in particular leads to the annihilation of humanity, the human race in the broad sense of its existence.[10] The crimes covered by these categories undermine the inalienable rights of human beings: their lives, freedom, physical integrity, health and dignity. These crimes are inhumane acts which, by their scope and seriousness, transcend the limits of tolerance on the part of the international community, because it is no longer individuals, but humanity as a whole who are the victims.[11]

A statute of limitation consists in an absolute repeal (by law) of the criminal responsibility for offences after the statutory period, without however taking away the nature of the offence.[12] It is not an expected right, i.e. an entitlement of the offender to expect that, after a certain period of time, their offence will cease to be punishable.[13]

Not disregarding the vast majority of arguments and views espoused by e.g. J. Czabański and M. Warchoł,[14] who assume that a statute of limitation is more of a trial than a material institution, as the underlying rationale for its use are evidentiary difficulties and a risk of an error rather than the pointlessness of

państwu z tytułu zbrodni ludobójstwa', *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*, 2019, issue 2, and M. Królikowski, *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Warszawa 2011.

[9] Law of 6 June 1997, Criminal Code, i.e. Journal of Laws of 2019, item 1950 as amended.

[10] L. Gardocki, in: ed. L. Gardocki, M. Bojarski (eds.), *System prawa karnego*, vol. 8: *Przestępstwa przeciwko państwu i dobrom zbiorowym*, Warszawa 2013; L. Gardocki, 'Nowelizacja przepisów o przestępstwach przeciwko pokojowi, przeciwko ludzkości i przestępstw wojennych', *CzPKiNP*, 2011, no. 15.

[11] Judgment of the Trial Chamber of the International Criminal Court of 4 September 1998 in the case Prosecutor v. J. Kambanda, ICTR-97-23-S, § 14–15.

[12] K. Marszał, *Przedawnienie w prawie karnym*, Warszawa 1972, p. 5; I. Andrejew, *Polskie prawo karne w zarysie*, Warszawa 1989, p. 316; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warszawa 1994, p. 482; A. Zoll, K. Buchała, *Polskie prawo karne*, Warszawa 1995, p. 478.

[13] See judgement of the Appellate Court in Katowice of 12 March 2008, II AKa 356/07, LEX no. 447045; decision of the judgement of the 2 July 2002, II KK 143/02, LEX no. 55526; Z. Ćwiąkalski, in: L.K. Paprzycki (ed.), *System prawa karnego*, vol. 4: *Nauka o przestępstwie. Wyłączenie i ograniczenie odpowiedzialności karnej*, Warszawa 2013, p. 755.

[14] J. Czabański, M. Warchoł, 'Przerwa i zawieszenie biegu przedawnienia – uwagi de lege ferenda', *Prok. i Pr.*, 2007, 10, p. 5.

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punishing the perpetrator, we should in this respect opt for the views espoused by A. Zoll and W. Wróbel, who stress the material character of this institution.[15] The expiry of the statute of limitation renders obsolete the achievement of punishment objectives (Art. 53 CC)[16], since after such a long time it is hard to talk about the achievement of the aim of prevention and education, which a sanction is supposed to offer to the person sentenced, or about the needs concerning the development of the legal awareness of the general public,[17] especially if the perpetrator, through his life and functioning in the community, has proved that these objectives have actually been achieved in relation to him.[18] However, in the case of the aforementioned categories of punishable acts, such as, in particular, war crimes and crimes against humanity, it remains doubtful whether the expiry of even the longest possible limitation periods will in fact render the achievement of punishment objectives obsolete here.[19] For all these reasons, a waiver of the statute of limitation has been adopted in the international order with respect to these categories of crimes. This is what the Polish legislator did in Article 43 of the Constitution of the Republic of Poland and in Art. 105 § 1 CC. However, due to the vast and varied scope of the regulation, this solution is not free from concerns and interpretation problems. Similar problems can also be encountered in other regulations and their analysis shows a different juridical understanding of the relevant terms.[20]

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[15] W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2010, p. 577; see also Z. Ćwiąkalski, in: L.K. Paprzycki (ed.), *System prawa karnego*..., op. cit., vol. 4, p. 749; A. Zoll, K. Buchała, *Polskie prawo karne*, Warszawa 1995, p. 85; R. Grupiński, 'Zmiana przepisów o przedawnieniu karalności w świetle zasady lex retro non agit', in: A. Szwarc (ed.), *Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka*, Poznań 1999, p. 127; W. Świda, *Prawo karne*, Warszawa 1986, p. 325; Z. Papierkowski, 'Kolizja przepisów ustawowych według projektu k.k.', *PiP*, 1956, issue 8–9, p. 421; J. Śliwowski, *Prawo karne*, Warszawa 1979, p. 45; J. Makarewicz, *Kodeks karny z komentarzem*, Lwów 1932, p. 57; and the decision of the Supreme Court of 11 March 1935, Zb.O. 1935, item 450; resolution of a panel of 7 judges of the Supreme Court of 13 October 1967, VI KZP 31/67, OSNKW 1967, no. 12, item 123, p. 3f.; judgement of the Supreme Court of 31 May 1977, II KR 106/77, OSNKW 1977, no. 9, item 106, p. 42; resolution of the Supreme Court of 7 June 2002, I KZP 15/2002, BISN 2002, no. 6; judgement of the Supreme Court of 10 March 2004, II KK 338/03, OSNwSK 2004/1/521.

[16] Vide the justification of the draft Criminal Code of 1997.

[17] Z. Ćwiąkalski, in: L.K. Paprzycki (ed.), *System prawa karnego*..., op. cit., vol. 4, p. 750.

[18] Judgement of the Supreme Court of 10.03.2004, II KK 338/03, OSNwSK 2004/1/521.

[19] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2007, p. 660.

[20] Resolutions of a panel of seven judges of the Supreme Court of 13 May 1992, I KZP 39/91, OSNKW 1992, issues 7–8, item 45; decision of the Supreme Court of 4 December 2001, II KKN 175/99, OSNKW 2002, issues 5–6, item 47; decision of the Supreme Court of 28 November 2012, V KK 168/12, LEX no. 1235905; decision of the Supreme Court of 30 January 2013, IV KO 79/12, LEX no. 1277778; decision of the Supreme Court of 4 December 2001, II KKN 175/99, OSNKW 2002, issues 5–6, item 47; decision of the Appellate Court in Lublin of 13 September 2011, II AKz 393/11, LEX no. 1108590; decision of the Supreme Court of 21 August 2013, III KK 74/13, LEX no. 1388230; decision of the Supreme Court of 23 May 2014, III KK 32/14, LEX no. 1467125.

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Historically, the general principle of non-application of the statute of limitations to war crimes and crimes against humanity is enshrined in the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the United Nations General Assembly on 26 November 1968 (hereinafter the 1968 Convention),[21] to which Poland acceded on 11 November 1970.[22] In the Polish system, however, provisions excluding the limitation period for these categories of crimes appeared earlier, in the Act of 22 April 1964 on the waiver of statutory limitation for the perpetrators of the gravest Nazi crimes committed during the Second World War.[23] The Criminal Code of 1932 did not contain such regulations.[24] A provision covering the exclusion of the limitation period for war crimes and crimes against humanity (Article 109) was introduced as late as in the Criminal Code of 19 April 1969.[25] The law of 6 June 1997, i.e. Provisions introducing the Criminal Code[26] (hereinafter prov. intro. CC) retained the binding character of the following laws: of 22 April 1964 on the waiver of statutory limitation with respect to perpetrators of Nazi crimes from the Second World War[27] (Art. 4 (2) prov. intro. CC), of 6 April 1984 on Central Commission for the Investigation of Crimes against the Polish Nation – Institute of National Remembrance[28] (Art. 4 (3) prov. intro. CC) and Art. 1 (1) of the decree of 31 August 1944 on the scope of punishment for the fascist Nazi criminals guilty of homicides and torture of civilians and prisoners and for the traitors of the Polish Nation[29] (Art. 5 § 1 (3) prov. intro. CC). The Criminal Code of 1997 was amended by Art. 105 § 1 CC, which waived the application of the provisions under Art. 101–103 with respect to crimes against peace, humanity and war crimes.[30] This regulation raised concerns since the very start.[31]

The definition of the scope of offences exempt from the statute of limitation adopted in Article 105 CC corresponds in principle to the title of Chapter XVI. The only difference is that the limitation period for crimes against

[21] https://libr.sejm.gov.pl/tek01/txt/onz/1968b.html (accessed 31.01.2020).
[22] Journal of Laws of 1970, no. 26, item 208.
[23] Journal of Laws of 1964, no. 15, item 86.
[24] Journal of Laws of 1932, no. 60, item 571 as amended.
[25] Journal of Laws of 1969, no. 13, item 94 as amended.
[26] Journal of Laws of 1997, no. 88, item 554 as amended.
[27] Journal of Laws of 1964, no. 15, item 86.
[28] Journal of Laws of 1984, no. 21, item 98.
[29] Journal of Laws of 1946, no. 69, item 377.
[30] Journal of Laws of 1997, no. 88, item 553 (original text).
[31] A. Zoll, in: K. Buchała, A. Zoll, *Kodeks karny. Część ogólna*, Kraków 1998, p. 600; L. Kubicki, 'Nowa kodyfikacja karna a Konstytucja RP', *PiP*, 1998, no. 9–10, p. 32; M. Kalitowski, Z. Sienkiewicz, J. Szumski, L. Tyszkiewicz, A. Wąsek, *Kodeks karny*, Warszawa 2010, p. 321; E. Bieńkowska, B. Kunicka-Michalska, G. Rejman, J. Wojciechowska, *Kodeks karny. Część ogólna. Komentarz*, ed. G. Rejman, Warszawa 1999, p. 1315.

peace, humanity and war crimes is waived and the title of the chapter covers crimes against peace, humanity and war crimes. Indeed, Chapter XVI also describes offences of various kinds and scope of characteristics (Art. 119 § 1 and 2, Art. 121 § 1 and 2, Art. 125 § 1, and Art. 126 § 1 and 2), which raises doubts as to the scope of exemption under Art. 105 CC.[32] These doubts concern at least three areas: the legislative technique used in the construction of Article 105 § 1 CC, the content of Article 43 of the Constitution and the wording of international treaties, including in particular Article 29 in conjunction with Article 5 of the Rome Statute of the International Criminal Court of 17 July 1998,[33] ratified by Poland on 12 November 2001,[34] which entered into force on 1 July 2002 (hereinafter ICC Statute).[35]

First, attention should be paid to the scope of exemption of the statute of limitation under Art. 43 of the Constitution of the Republic of Poland. Pursuant to this provision, in addition to the foregoing categories (war crimes and crimes against humanity), statute of limitation cannot be waived with respect to crimes against peace, which are in turn subject to waiver under Art. 105 CC.[36] Formulating the specific principle under Art. 43, the Constitution of the Republic of Poland does not contain a general principle stipulating statutory limitation of criminal responsibility and execution of penalties,[37] nor can such principle be derived from the principle of the rule of law.[38] This state of affairs, in particular the introduction into the Constitution of the Republic of Poland of specific provisions waiving the statute of limitation may actually

[32] See on this matter e.g. S. Tarapata, A. Zoll, in: W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna*, vol. I, part II: *Komentarz do Art. 53–116*, WK, 2016, *komentarz do Art. 105*; K. Banasik, 'Karnoprawne normy przedawnienia w prawie międzynarodowym', *Prok. i Pr.*, 2011, no. 7–8.

[33] Journal of Laws of 2003, no. 78, item 708.

[34] Ibid.

[35] Article 29 The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. Article 5 The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

[36] There are two groups of views on this issue in literature, the first being that the war crimes listed in Article 43 of the Polish Constitution include crimes against peace, e.g. A. Zoll, 'Nowa kodyfikacja karna w świetle Konstytucji', *Czasopismo Prawa Karnego i Nauk Penalnych*, 1997, no. 2, p. 105; and the opposite view, claiming that war crimes and crimes against peace are, both in domestic law and in international legal instruments, different categories, e.g. K. Banasik, 'Karnoprawne normy...' op. cit., p. 63.

[37] See e.g. A. Zoll, 'Nowa kodyfikacja karna'..., op. cit., p. 106. See also the decision of the Supreme Court of 7 June 2002, I KZP 15/2002, OSNKW 2002, no. 5–6, item 47; where the Supreme Court indicated directly that there is no constitutional principle of statute of limitation of offences and there is no "right to be subject to the statute of limitation or the protected prospect of this right". See also the decision of the Supreme Court of 13 May 1999, I KZP 15/99, OSNKW 1999, no. 7–8, item 39.

[38] TK – SK 44/03, K 35/06, P 4/08, P 30/11.

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imply that in the remaining scope all statutory regulations modifying this institution to the detriment of the perpetrator of an offence are excluded.[39] This conclusion could be legitimised if it were at the same time derived from another assumption, namely the guarantee character of the provision in Art. 43 of the Constitution of the Republic of Poland as to the perpetrator and their situation. In this respect it should be stressed that Art. 43 of the Constitution of the Republic of Poland is part of Chapter II titled *The freedoms, rights and obligations of man and the citizen*, which no doubt indicates its nature of a guarantee. Still, it is hard to accept that a norm excluding the possibility of a statute of limitation is a guarantee for the perpetrator. In this respect, it is understood that this is about guarantees for citizens to extend the possibility of holding the perpetrators of these categories of crimes to account.[40] Not following up on the above due to the limited framework of this study, it should be stated that apart from the indicated scope, the Constitution leaves the legislator's freedom to shape the institution of the statute of limitations in a direction consistent with criminal policy (the purposefulness of punishment).[41] However, this does not mean full freedom in this area. Given that the statute of limitations is bound to the advisability of punishment, limits are set e.g. by the principle of proportionality (Art. 31 of the Constitution of the Republic of Poland), which constrains the admissibility of a criminal sanction on grounds of necessity.[42]

In reference to the scope of waiver of the statute of limitation of criminal responsibility under Art. 43 of the Constitution of the Republic of Poland, we

[39] Such a position, based on Article 44 of the Constitution of the Republic of Poland, seems to be adopted by A. Wąsek, who states that the silence of the Constitution on the admissibility of extending the limitation period or repealing the effects of the limitation period in cases other than those regulated in that provision is of a qualified nature, that is to say, it expresses *a contrario* the prohibition of such changes. In the opinion of A. Wąsek, Articles 43 and 44 of the Constitution of the Republic of Poland limit the criminal legislator in the discretionary shaping of the institution of the statute of limitations for this type of crimes. A. Wąsek, 'W gąszczu problematyki przedawnienia w prawie karnym', in: P. Hofmański, K. Zgryzek (eds.), *Współczesne problemy procesu karnego i wymiaru sprawiedliwości. Księga ku czci Profesora Kazimierza Marszała*, Katowice 2003.

[40] See A. Zoll, 'Nowa kodyfikacja karna'..., op. cit., p. 97; K. Banasik, 'Karnoprawne normy...' op. cit., p. 63, see also the decision of the Supreme Court of 7 June 2002, I KZP 15/2002, OSNKW 2002, no. 5–6, item 47.

[41] A. Zoll, 'Nowa kodyfikacja karna'..., op. cit., decision of the Supreme Court of 2 July 2002, II KK 143/02, LEX no. 55526; Z. Ćwiąkalski, in: L.K. Paprzycki (ed.), *System prawa karnego*..., op. cit., vol. 4, p. 773.

[42] W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków 2003; P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, WKP 2019; R. Pawlik, 'Konstytucyjne podstawy i zakres prawa karania – zagadnienia wybrane z perspektywy odpowiedzialności za przestępstwo i wykroczenie', in: M. Grzybowski (ed.), *Państwo demokratyczne, prawne i socjalne: księga jubileuszowa dedykowana profesorowi Zbigniewowi Antoniemu Maciągowi*, vol. 3: *Studia prawne*, 2014; eadem, 'Wybrane zagadnienia granic kryminalizacji i ich ewolucja na przykładzie prowadzenia pojazdu w stanie nietrzeźwości lub pod wpływem środka odurzającego', in: *Idee nowelizacji kodeksu karnego*, ed. M. Lubelski, R. Pawlik, A. Strzelec, Kraków 2014.

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should first indicate the aforementioned Convention of 26 November 1968, which entered into force in Poland on 11 November 1970. Pursuant to its Art. I, no statutory limitation shall apply to the following crimes, irrespective of the date of their commission: a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims; and b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid , and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not violate the domestic law of the country in which they were committed. Pursuant to Art. IV, the States Parties to the Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles I and II of this Convention and that, where they exist, such limitations shall be abolished. In light of the above, the provision of Art. 43 of the Polish Constitution confirms the obligations assumed and binding on Poland after its ratification of the aforementioned Convention of 26 November 1968.[43] With regard to the scope referred to in Article 43, it is worth pointing out that, although it is true that constitutional concepts have an autonomous meaning, in this case it can be assumed that the legislator did not intend to define the concepts used differently from how they are defined in international law, since the aforementioned Convention of 26 November 1968 at the time of adopting the Constitution in 1997 was an element of the law in force in the Republic of Poland.[44] Importantly, it should be borne in mind that the 1952 Constitution, in force until 1997, did not contain a similar provision, which was however part of the aforementioned Art. 109 CC of 1969, which entered into force on 1 January 1970, although *de facto* the Convention of 26 November 1968 was ratified by Poland and entered into force only on 11 November 1970.

Summing up the above considerations, it should be stressed that the Constitution of the Republic of Poland in its Article 43 provides for a certain minimum standard for excluding the possibility of statutory limitation and, at the same

[43] P. Tuleja (ed.), *Konstytucja Rzeczypospolitej Polskiej*..., op. cit.
[44] Ibid.

time, an obligation for the legislator to introduce a non-applicability of statutory limitation for war crimes and crimes against humanity. A wider scope of the exclusion, however, due to the material nature of the institution of statute of limitations, is left to the legislator, who does so in Article 105 § 1 CC.

The above statement, however, also raises another question and another concern. Namely, how to interpret the scope of the exemption resulting from Article 105 § 1 of the CC in this situation (paying attention to Article 7 of the CC). With the assumptions made above, the scope of the exclusion of statutory limitation on punishment for war crimes and crimes against humanity is determined by the Convention of 26 November 1968 and Article 43 of the Constitution of the Republic of Poland, and only in the remaining scope is it possible to interpret it in accordance with legal statutory definitions contained, for example, in Article 7 CC. This means that each time, by excluding on the basis of Article 105 § 1 of the CC the possibility of statutory limitation for war crimes and crimes against humanity, it should be examined whether a specific act falls within the minimum standard set out in Article 43 of the Constitution as a consequence of the ratification of the Convention of 26 November 1968, and then the statute of limitations for criminal responsibility would be excluded.

Another problem of interpretation arises when comparing Article 105 § 1 of the CC with Article 29 of the ICC Statute, according to which crimes under the jurisdiction of the Court are not time-barred, while under Article 5 of the ICC Statute it is limited to the most serious crimes of concern to the international community and includes: the crime of genocide; crimes against humanity; war crimes, and the crime of aggression.[45]

Under Art. 91 (1) of the Constitution of the Republic of Poland, after promulgation in the Journal of Laws of the Republic of Poland, a ratified international agreement constitutes part of the domestic legal order and is applied directly, unless its application depends on the enactment of a statute. Under Art. 91 (2) of the Constitution, an international agreement ratified upon prior consent granted by statute has precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. If an agreement ratified by the Republic of Poland and establishing an international organization so provides, the laws established by it are applied directly and have precedence in the event of a conflict of laws.[46]

[45] On the latter, see an interesting text by S. Głogowska, 'Zbrodnia agresji – kolejne wyzwanie dla Międzynarodowego trybunału Karnego', *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury*, 2019, issue 4.

[46] In its decision of 23 May 2014, the Supreme Court assumed that the ICC Statute is part of the domestic legal order, which is directly implied by Art. 91 (1) of the Constitution of the Republic of Poland, III KK 32/14, LEX no. 1467125.

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The preamble of the ICC Statute and its Art. 1 clearly state that the Court is complementary to national criminal jurisdictions and the jurisdiction and functioning of the Court is governed by the provisions of this Statute. The complementarity involves supplementation or complementation of the cognition of national courts,[47] not as modification, alteration or transformation of the principles applicable in proceedings regulated withing the domestic legal order of individual states. The principle of complementarity means that national criminal courts have priority in the exercise of jurisdiction over the offences covered by the ICC Statute. However, should a State be unwilling or unable to conduct criminal proceedings, the Court may assume jurisdiction in such a case.[48] The evolution of the relation between national criminal law and international criminal law consists in the internationalisation of internal systems that regulate the responsibility for international crimes in individual countries, while at the same time aligning international law with national legal systems on the principles of the compromise reached between the latter two,[49] a case in point being especially the ICC.

The complementary nature of ICC jurisdiction is primarily an expression of respect for the primacy of the state legal order, illustrating respect for state sovereignty in international relations.[50] Historically, criminal law was an expression of the sovereign competence of individual states and was one of the major state prerogatives, which does not mean that the system of national criminal law operated in a vacuum.[51] Questions posed for a long time included: "Why

[47] https://sjp.pl/komplementarny (accessed 31.01.2020).

[48] Article 17. 1. (a) The case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.

[49] M. Rogacka-Rzewnicka, 'Wzajemne relacje między jurysdykcją krajową a jurysdykcją', *Prok. i Pr.*, 2009, 6; R. Pawlik, 'Identity of Criminal Law at the Time of European Integration Based on the Example of Poland – Some Comments', *Societas et Iurisprudentia*, 2015, 1; R. Pawlik, Z.M. Dymińska, 'The space of validity the Polish Criminal Code Act from the perspective of European integration – The international context (1)', in: *Národná a medzinárodná bezpečnosť*, Liptovský Mikuláš 2015, http://www.aos.sk/struktura/katedry/kbo/NMB2015/Zbornik_NMB_2015.pdf (accessed 12.02.2021).

[50] Contemporary reality shows that legal systems are in the phase between a monistic and dualistic concept, i.e. a phase leading to a pluralistic order, in which the participation of transnational common, identical and axiologically related legal regulations is important. This means that the principle of complementarity as the basis for determining the competent jurisdiction for crimes of international law is not an element of sanctioning differences, but only a means of emphasising the primacy of national jurisdiction, M. Rogacka-Rzewnicka, 'Wzajemne relacje...', op. cit.

[51] See e.g. W. Wróbel, A. Zoll, *Polskie prawo karne*..., op. cit., p. 69ff.; and an interesting monograph: C. Nowak, *Wpływ procesów globalizacyjnych na polskie prawo karne*, Warszawa 2014; idem, 'O pojęciu transnarodowego prawa karnego', *PiP*, 2012, issue 12, pp. 3–14; moreover H. Kelsen, *Principles of International Law*, New York 1952, p. 190–194; H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tübingen 1960; H. Kruger, G. Erler, *Zum Problem der Souveränität*, Karlsruhe 1957; U. Schliesky, *Souveränität und Legitimität von Herschgewalt*, Tübingen 2004; J. Helios, W. Jedlecka, *Suwerenność w dobie procesów integracyjnych i globalizacyjnych*, Wrocław 2004, pp. 22–31; more on this R. Pawlik, '*Ius puniendi* and its sources in the era of Eu-

do we have the right to punish?" "What should be punished?", and "How severe should the sanctions be?".[52] Traditionally, the *ius puniendi* was seen as the state's exclusivity in shaping the criminal law standard, i.e. exclusivity in determining the rules on liability for offences, the scope of its own jurisdiction and, above all, the scope of criminalisation and penalties for typified acts.[53] The basis of the right to punish was, on the other hand, seen in the so-called "natural right" (*ius naturale*), yet the moment a state emerged meant that each of the subjects renounced their individual *ius naturale* and strengthened the rights of the sovereign.[54] In a democratic state governed by the rule of law, human dignity and freedoms may, in principle, be restricted only because of the freedoms and rights of others.[55] Assuming a utilitarian objective of punishment, the Constitution of the Republic of Poland in its Art. 31 (3)[56] defines the criteria to be met to introduce an intervention of criminal law[57].

Another thing is that complementarity can, in principle, function successfully in conditions of symmetry of liability rules before a national court and a court of international law. In the absence of symmetry, this functioning will

ropean integration – selected issues on the example of Poland', *Societas et Iurisprudentia* 2016, 2; eadem, 'Sanctions from the perspective of ius puniendi: between criminal liability and liability for a misdemeanour, and administrative liability. The example of Poland', *Societas et Iurisprudentia*, 2016, 3.

[52] A. Ashworth, *Principles of Criminal Law*, Oxford 2003; A. Ashworth, L. Zedner, P. Tomlin (eds.), *Prevention and the limits of the criminal law*, 1st ed., impr. 1, Oxford 2013, VIII; J. Deigh, D. Dolinko (eds.), *The Oxford handbook of philosophy of criminal law. Philosophy of criminal law*, New York 2011, XIII, [1].

[53] See e.g. W. Jedlecka, *Suwerenność w dobie*..., op. cit., pp. 22–31; W. Zalewski, 'Sprawiedliwość „sprawiedliwości naprawczej"', *GSP*, 2016, vol. 35, pp. 565–576; Z. Muras, 'Uprawnienia procesowe pokrzywdzonego w ustawodawstwie romańskim', *Prok. i Pr.*, 2009, no. 11–12, pp. 78–109; R. Kmiecik, 'Pokrzywdzony jako oskarżyciel a „sprawiedliwość naprawcza" – rys historyczny z perspektywy współczesnej', *Ann. UMCS*, Sect. G 2009–2010, vol. 56–57, pp. 93–112.

[54] More on this R. Pawlik, *Kontrawencjonalizacja w polskim prawie karnym i wykroczeń. Analiza teoretyczno-dogmatyczna na tle porównawczym*, Kraków 2016, p. 140ff.

[55] A. Zoll, in: T. Bojarski (ed.), *System prawa karnego. Źródła prawa karnego*, Warszawa 2011, p. 228; see Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol no. 2, Journal of Laws 1993.61.284, as amended.

[56] K. Wojtyczek, 'Zasada proporcjonalności jako granica prawa karania', *Cz.PKiNP*, 1999, 2, 33, p. 33ff.; see also M. Królikowski, 'Dwa paradygmaty zasady proporcjonalności w prawie karnym', in: T. Dukiet-Nagórska (ed.), *Zasada proporcjonalności w prawie karnym*, Warszawa, 2010, p. 48; see also a judgement of the Constitutional Court of 26 April 1995, K 11/94, OTK 1995, no. 1, item 12, LEX no. 25538.

[57] See e.g. L. Garlicki, 'Komentarz do Art. 31', in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. III, Warszawa 2003, p. 7; see also e.g. judgement of the Constitutional Court of 15 December 2004, K 2/04, OTK-A 2004, no. 11, item 117; see also e.g. judgement of the Constitutional Court of 29 June 2001, K 23/00, OTK 2001, no. 5, item 124; judgement of the Constitutional Court of 12 January 2000, P 11/98, OTK 2000, no. 1, item 3; judgement of the Constitutional Court of 30 October 2006, P 10/06, OTK-A 2006, no. 9, item 128; J. Warylewski, *Prawo karne. Część ogólna*, Warszawa 2004, p. 86; J. Potulski, 'Glosa do postanowienia SN z dnia 17 grudnia 2003 r., V KK 222/03', *GSP-Prz.Orz.*, 2005, 3, pp. 115–124.

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be significantly weakened or even eliminated.[58] In reference to Polish Criminal Code and ICC Statute, differences are indicated first and foremost in Art. 10 CC and Art. 26 ICC Statute; according to the latter the Court has no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime, while the Polish Criminal Code adopts as a rule the completion of 17 years of age, exception cases the 15th year of age but, interestingly, not in reference to any of the types under Chapter XVI. A lack of symmetry can be seen elsewhere, too, including e.g. under Art. 110 ICC Statute on the reduction of the sentence, and as to the person criminally responsible (Art. 30 ICC Statute), where the Polish legislator envisaged a wider scope of liability, including actions of both direct and possible intent. Some limitations of the scope of criminal responsibility arise moreover from the principle of individual criminal liability, known to the Polish domestic order (Art. 25 ICC Statute).[59]

With regard to the principle of complementarity, it is also worth noting that the ICC Statute in its provisions often uses concepts that are both imprecise and ambiguous and simply unknown to the Polish Penal Code. This presents fundamental difficulties in terms of their faithful reflection in national legislation, which also does not have a positive impact on the functioning of the above principle.[60] From the perspective of the Polish order, however, it should be stressed that for the principle of complementarity to function smoothly, it is also crucial to precisely define the scope of penalisation, so that the ICC can unequivocally assess the extent to which the crime was the subject of proceedings before a Polish court.

The Act of 20 May 2010 amending the Criminal Code, the Police Act, the Act – Provisions introducing the Criminal Code and the Act – Code of Criminal Procedure introduced a number of changes to the Criminal Code, including new types of offences, transferring to the Polish Criminal Code the solutions adopted in the ICC Statute. Thus, the scope of Article 113 CC was extended by the introduction of the following punishable offences: public provocation to initiate an aggression war and public praise for initiating or conducting such a war; acts perpetrated by taking part in a mass attack or one of the attacks against a group of people, undertaken with the aim of implementing or supporting the policy of the state or organisation; attack on a demilitarised zone; destruction, appropriation, damage, seizure, or misappropriation of property in an occupied area. The catalogue of offences penalised by Article 124 CC was moreover supplemented by actions such as *inter alia* forcing people to participate in armed activities against

[58] M. Rogacka-Rzewnicka, 'Wzajemne relacje...', op. cit.

[59] See on this e.g. A. Zabłocka, 'Statut Międzynarodowego Trybunału Karnego a polskie prawo karne materialne', *Kw.Pr.Pub.*, 2001, 3, 119.

[60] This relates e.g. to the crime of apartheid (Art. 7 (1j) of the ICC Statute) and the crime involving „other inhumane acts of a similar character" (Art. 7 (1k) of the ICC Statute).

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their own country, the use of corporal punishment, imprisonment, rape, assassination of personal dignity and recruitment to the armed forces of a person under 18 years of age or actual use of such a person in armed activities. A provision was added to penalise incitement to the foregoing. Penalties are moreover imposed on a person who allows the foregoing to be committed by someone under their actual authority or supervision, by failing to meet the obligation of adequate supervision over them.[61]

According to the explanatory memorandum to the draft amendment, the purpose of the amendment was to introduce into the Polish Criminal Code the types of offences which include the solutions and scope adopted in the ICC Statute, including crimes against humanity and certain war crimes.[62] According to the authors of the draft amendment, the proposed regulations along with the currently binding provisions of Chapter XVI of the Criminal Code will nearly completely correspond to the types of crimes under the ICC Statute, and will thus ensure the jurisdiction of Polish courts over perpetrators of such crimes to exclude jurisdiction of the ICC Tribunal in cases related to Polish citizens.

Summing up the above reflections on Art. 105 § 1 CC and the interpretation of the exemption arising from this provision, one should assume that the definitions of the crime of genocide (Art. 6 ICC Statute), crimes against humanity (Art. 7 ICC Statute), war crimes (Art. 8 ICC Statute) and the crime of aggression (Art. 8 bis ICC Statute) are constructed autonomously, for the purpose of the Statute, in isolation from the divisions of offences established in States Parties which, after all, derive from different legal cultures.[63] In such a situation, it is not possible to choose an internal legal order and, according to it, impose legal statutory definitions and solutions on the other States-Parties. As has already been emphasised, the division of offences adopted in a given state depends solely on its decision and varies significantly between the States-Parties to the ICC Statute.[64] In accordance with the Vienna Convention on the Law of Treaties drawn up in Vienna on 23 May 1969[65] (Art. 31), the treaty should be interpreted in good faith, in line with the ordinary meaning to be ascribed to the words used within it in their context and in light of its object

[61] Cf. justification of the draft Act of 20 May 2010 amending the Act – the Penal Code, the Police Act, the Act – Provisions introducing the Penal Code and the Act – the Penal Procedure Code. Lex-el.

[62] http://www.sejm.gov.pl/prace/prace.html (accessed 31.01.2020).

[63] R. Pawlik, 'Ius puniendi…', op. cit.; eadem, 'Sanctions from the perspective…', op. cit.

[64] In accordance with Article 128, the original of these Statutes was drawn up in Arabic, Chinese, English, French, Russian, and Spanish. 120 states voted in favour, 7 opposed and 21 abstained. Ratifications for 30 January 2020, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en

[65] Journal of Laws of 1990, no. 74, item 439.

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and objective. In view of the above, there is no basis for adopting automatic symmetry of concepts between the national order and the Treaty. Naturally, it is possible to use the acquis of international law, including the adopted network of concepts, even if the Articles of the Statute referred to explicitly state (Articles 6–8 bis of the ICC Statute) that the definitions contained therein are constructed for its purposes, but nevertheless, as it seems, such an operation in the case of the ICC Statute, due to the principle of complementarity, would require an explicit statement by the legislator, especially in a situation such as that of Article 105 § 1 CC where, in the international order, there are overlapping different possible understandings of the categories listed there. Furthermore, we cannot forget that one of the fundamental principles of criminal law, with primarily a safeguarding role, is that of adequate definition of the types of prohibited acts (*nullum crimen sine lege certa*), which imposes an obligation on the legislator to exercise maximum precision in the process of designing criminal provisions, leading to a result which enables a clear distinction to be made between punishable behaviour and non-punishable behaviour, and within the class of punishable behaviour – a clear distinction to be made between acts which meet the characteristics of different types of criminal offences.[66]

At this point, it can only be mentioned that the German legislator has adopted slightly different solutions to such offences, bringing national law into line with international criminal law, in particular the Rome Statute of the International Criminal Court, by introducing the *Völkerstrafgesetzbuch* (hereinafter VStGB), which comprehensively regulates the consequences of offences against the rights and values protected by international law in Germany. The law was proclaimed on 26 June 2002 and entered into force on 30 June 2002.[67] The VStGB in § 5 (*Unverjährbarkeit*) assumes that the prosecution of offences under this law and the enforcement of penalties imposed for them is not time-barred, without referring, as the Polish legislator does, to concepts which may have a different scope in the international order and using a kind of general clause covering all types described in the VStGB. In Section 2, the VStGB (*Straftaten gegen das Völkerrecht*) defines types of punishable offences, dividing this part into three principal sections: genocide and crimes against humanity (*Völkermord und Verbrechen gegen die Menschlichkeit*), war crimes (*Kriegsverbrechen*) and the crimes of aggression (*Verbrechen der Aggression*), and the fourth one, including other offences (*Sonstige Straftaten*) such as the violation of the supervision obligation and failure to

[66] R. Pawlik, 'Znamiona ilościowe w procesie kontrawencjonalizacji w kontekście zasady nullum crimen sine lege – wybrane zagadnienia', *Studia Prawnicze. Rozprawy i Materiały*, 2014, no. 2 (15), pp. 111–146.

[67] https://www.gesetze-im-internet.de/vstgb/BJNR225410002.html#BJNR225410002BJNG000200000

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report an offence.[68] Under § 2, provisions of general criminal law shall apply to the acts described in this Act, unless this Act provides for specific provisions in sections 1, 3–5 and 13 (4).

Leaving aside the legislative technique itself, which is to separately identify this issue within a specific law, it is vital to emphasise its transparency and compactness, which does not leave too much room for sometimes contradictory interpretations of the basic concepts known to other legal systems. The German regulation draws on the doctrine of international law, its transparency stemming from theoretical constructions, and thus does not stir the controversy that often arises at the interface of matters falling under different branches of normative order.

A similar problem as in the case of Art. 105 § 1 CC also emerged under Art. 4 Section 1 of the IPN Law.[69] Under this regulation, the crimes referred to in Article 1(1)(a), which constitute crimes against peace, humanity or war crimes under international law, shall not be subject to the statute of limitation.[70] In its resolution of 14 October 2015,[71] the Supreme Court observed that a deliberate deprivation of liberty of another person, once specific conditions are met, may be seen as a crime against humanity which is not subject to the statute of limitation, even if it does not meet the characteristics of an offence under Art. 118a § 2 (2) CC. When adopting the above opinion, the Supreme Court concluded that in order to decode Art. 3 and 4 of the IPN Law, one should also invoke international law instruments. On this basis, it was concluded that, pursuant to Article 4(1) of the IPN Law, there is no statute of limitations for an offence which meets the definition set out in Article 3 of the IPN Law, according to which crimes against humanity are, in particular, crimes of genocide within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948,[72] as well as other grave persecution of persons due to their membership in a specific

[68] A. Eser, H. Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, Bd. 1: *Deutschland* (von H. Gropengießer, H. Kreicker), Freiburg i. Br. 2003; J. Hartmann, 'Das deutsche Völkerstrafgesetzbuch', in: H.-H. Kühne, R. Esser, M. Gerding (eds.), *Völkerstrafrecht. 12 Beiträge zum internationalen Strafrecht und Völkerstrafrecht*, Osnabrück 2007, p. 121 ff; J. Geneuss, *Völkerrechtsverbrechen und Verfolgungsermessen. § 153f StPO im System völkerrechtlicher Strafrechtspflege*, Nomos Verlag 2013; G. Werle (ed.), *Völkerstrafrecht, Unterkapitel Völkerstrafrecht in Deutschland*, p. 167 ff., 3, Tübingen 2012.

[69] Law of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, i.e. Journal of Laws of 2019, item 1882.

[70] The provision of Article 4 Section 1 of the IPN Law, which excludes the application of the statute of limitations to the crimes referred to in Article 1 Section 1a of that Law, constitutes a special provision (*lex specialis*) with respect to Art. 105 § 1 CC, whose equivalent in Criminal Code of 1969 was Art. 109. Tak. V KK 290/17, LEX no. 2454230.

[71] I KZP 7/15, LEX no. 1808193

[72] Journal of Laws of 1952, no. 2, item 9, as amended.

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national, political, social, racial, or religious group, if they were committed by public officials or instigated or tolerated by them and is a crime against humanity within the meaning of Art. 7 (1) 1 ICC Statute. According to A. Zoll and S. Tarapata, the notion crimes against humanity used under Art. 105 § 1 CC, which should be interpreted in line with the order to adopt a uniform meaning for the same term used on the basis of the same law has, after all, a far different meaning than the term "crime against humanity under international law" to which the provision of Article 4(1) of the IPN Law refers, with respect only to the crimes referred to in Article 1(1a) of the IPN Law.[73]

In conclusion, it should be stressed first of all that the law of punishment is an individual law of the country concerned and can therefore only be modified by the will of the country itself. In the case of Article 105 § 1 CC, it is possible to see a construction that is not entirely precise and that meets constitutional standards. On the one hand, it is legitimate to assume that Article 7 CC containing legal definitions of crimes and misdemeanours should also apply to Article 105 CC, while on the other hand, looking at the content of Article 43 of the Constitution of the Republic of Poland, we should consider a solution consisting in repeated, in the case of applying the exclusion of the possibility of limitation based on Article 105 § 1 CC in the area of war crimes and crimes against humanity, examination of whether a specific act falls within the minimum standard set out in the Convention of 26 November 1968, and then in Article 43 of the Constitution of the Republic of Poland, and then the statute of limitations on the punishment of such an act would be waived. This interpretation does not require a specific statement by the legislator, as the Convention of 26 November 1968 ratified by Poland forms part of the domestic legal order (Art. 91 of the Constitution of the Republic of Poland). A slightly different situation will arise in the case of crimes against peace and war crimes, where it would be possible to adopt interpretative rules based on Art. 7 CC. Theoretically, a solution adopted by S. Tarapata and A. Zoll would be possible, consisting in the statement that the word "crime" used in Art. 105 § 1 CC, following the interpretative directive consisting in an order to adopt a uniform meaning of the same term used in the Act, must be understood similarly as under Article 7 § 2,[74] yet solely in a situation if the scope of actions penalised under Chapter XVI corresponded to the scope of actions under the Convention of 26 November 1968. Otherwise, i.e. if the scope of criminalisation were narrower than that provided for in the Convention, Article 105 § 1 CC would raise important questions of interpretation in the light of Article

[73] In this context see esp. – S. Tarapata, A. Zoll, in: W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna*, vol. I, Part II..., op. cit., *komentarz do Art. 105*, thesis 6 and 7.

[74] Ibid., p. 858.

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43 of the Constitution of the Republic of Poland. In this respect we might evoke the German construction adopted in the *Völkerstrafgesetzbuch*, whose § 5 assumes that the prosecution of offences under this law and the enforcement of penalties imposed for them are not subject to statutory limitation. The adoption of a similar, separate structure in the Polish order, in view of Article 91 of the Constitution of the Republic of Poland would, however, require alignment of the adopted solutions with international acts ratified by Poland, either by a typification of punishable behaviour based on the scope imposed by the aforementioned acts of international law, or by references to the conceptual framework used by international law. The advantage of excluding this category of offences in a separate regulation, as is the case in Germany, would be the fact that interpretation problems such as those arising in connection with Article 7 of the CC could easily be avoided.

For a long time the relevant literature has stressed the multicentricity of the system in light of increasing globalisation processes,[75] yet it must be remembered that one of the crucial principles of criminal law, of guarantee character, is the principle of an adequate identification of types of offences (*nullum crimen sine lege certa*), which imposes an obligation on the legislator to maintain maximum precision in the process of designing criminal provisions, ensuring an outcome which enables a clear distinction to be made between punishable behaviour and unpunishable behaviour, and in the former enabling a clear distinction between behaviours which carry the characteristics of individual types of criminal acts.

As the above considerations have shown, the definitions of the crime of genocide (Article 6 of the ICC Statute), crimes against humanity (Article 7 of the ICC Statute), war crimes (Article 8 of the ICC Statute), and crimes of aggression (Article 8 bis of the ICC Statute) are constructed autonomously, for the purposes of the ICC Statute, in isolation from the divisions of offences established in the States-Parties, which are countries with different legal cultures. Therefore, it is impossible to choose an internal legal order and accordingly to impose legal statutory definitions and specific systemic solutions. As emphasised above, the division of offences adopted in a given country depends solely on the decision of the country in question and is very different within the States-Parties to the ICC Statute. In view of the above, there is no basis for adopting automatic symmetry of concepts between the national order and the treaty.

Finally, we should invoke the aforementioned Vienna Convention on the Law of Treaties, according to which (Article 31) the Treaty must be interpreted in good faith, in accordance with the ordinary meaning to be attributed to the words used in it in their context and in light of its object and objective.

[75] More on this R. Pawlik, 'Ius puniendi...', op. cit.; R. Pawlik, 'Identity of Criminal Law...', op. cit.

Under Article 33, where a treaty text has been established as authentic in two or more languages, it shall have equal force in each of them, unless the treaty decides or the parties have agreed that, in case of divergence, the text concerned shall prevail. A version of the treaty in a language other than one of those which is seen as original for the text will be considered authentic only if the Treaty so provides or the parties agree. It shall be presumed that the words used in the Treaty have the same meaning in each of the original texts. When a comparison of the original texts shows a difference in meaning which is not removed by the application of Articles 31 and 32, the meaning which, having regard to the object and objective of the Treaty, best reconciles those texts, should be accepted.

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Abstract

Modern criminal law introduces as a general principle a solution not to prosecute offenders when it is actually possible to do so only after a considerable period of time has elapsed since it was committed. A criminal act is then very often completely erased from the memory of society, and its perpetrator is very often already physically and mentally different person, therefore doubts arise as to the advisability of further prosecution and conduct of proceedings in relation to such perpetrators. However, exceptions to this rule are provided. These include the principle of the non-expiration of the criminal responsibility for war crimes and crimes against humanity, which was expressed in the convention adopted on 26 November 1968 by the UN General Assembly and to which Poland acceded on 11 November 1970. The Constitution of the Republic of Poland of 2 April 1997 in Article 43 assumes, that war crimes and crimes against humanity are not subject to the statute of limitations. The consequence of this regulation is an exception contained in Article 105 of the Criminal Code, which excludes the possibility of statute of limitations for crimes against peace, humanity and war crimes. A similar provision in this respect was already included in the Criminal Code of 1969 in Article 109, except that its scope was limited to war crimes and crimes against humanity. In Article 105(1) of the Criminal Code, the principle of non-prescription was enshrined more broadly than in Article 43 of the Constitution of the Republic of Poland, also covering war crimes. It should be noted, that the definition of the scope of crimes not subject to the statute of limitations, adopted in Article 105(1), generally corresponds to the title of Chapter XVI of the Criminal Code (Offences against peace, humanity and war crimes). In Chapter XVI, however, there are also included regulations (e.g. Article 119(1) and (2), Article 121(1) and (2), Article 125(1) and Article 126(1) and (2)), in case of which there are significant doubts as to whether they may be covered by the principle indicated in Article 105(1) of the Criminal Code. This and other issues lead to a closer examination and analysis of the scope of exclusion of the statute of limitations for criminal offenses pointed out in Article 105 § 1 of the Polish Criminal Code, which will be the subject of this study.

Keywords: statute of limitations, crimes of international law

Although more than 75 years have elapsed since the end of the Second World War, the magnitude of crimes and their long-term effects, caused also by lawyers e.g. in German special courts, make the subject of liability of the state in the context of the Second World War ever topical and valid. *Historia magistra vitae est*, and the process of learning from history should in this case cover not only the years 1933–1945, but also the entire post-war period. Justice was neither restored nor meted out. One of the reasons for the lack of administration of justice was West Germany's conscious policy of personal continuity after the Second World War. The latter was the topic of the Rosenburg Exhibition – the Federal Ministry of Justice of the Federal Republic of Germany in the Shadow of National Socialist Past. The texts grew out of the context of the exhibition and show the far-reaching consequences of War and Nazi crimes in international relations of a legal nature.

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