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## AMENDMENTS OF JANUARY 2018 TO THE ACT ON THE INSTITUTE OF NATIONAL REMEMBRANCE – COMMISSION FOR THE PROSECUTION OF CRIMES AGAINST THE POLISH NATION IN LIGHT OF INTERNATIONAL LAW

### Abstract:

*This article analyses the amendments of January 2018 to the Act on the Institute of National Remembrance (INR) of 1998, which has raised doubts in light of international law and provoked diplomatic tensions between Poland on one side and Germany, Ukraine, United States of America and Israel on the other. The INR is a national institution whose role is, among others, to prosecute perpetrators of international crimes committed between 1917-1990. The article proves that the wording of the amendments is inconsistent with international law, as it ignores the principles of international responsibility, definitions of international crimes, and disproportionately limits freedom of expression. In consequence, it cannot be expected that third states will cooperate with Poland in the execution of responsibility for violation of the newly adopted norms.*

**Keywords:** denial crime, double criminality, freedom of expression, freedom of speech, Institute of National Remembrance, memory law, rule of law

### INTRODUCTION

The Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (INR) was adopted in 1998.<sup>1</sup> The aim of the newly established institution is, according to the current version of the law, to:

properly record, collect, store, process, secure, make available and publish documents of the state security authorities, produced and accumulated from 22 July 1944 until 31

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<sup>1</sup> Journal of Laws 1998, No. 155, item 1016. English version available at: <https://ipn.gov.pl/en/about-the-ipn/documents/327,The-Act-on-the-Institute-of-National-Remembrance.html> (all accessed 30 June 2018). The article presents state of Polish law as at 24 May 2018.

July 1990, as well as the documents of the security authorities of the Third Reich and the Soviet Union relating to Nazi and communist crimes, as well as other international crimes like crimes against peace, humanity, or war crimes; establish a procedure for the prosecution of the crimes; protect personal data of the people referred to in the documents collected in the archive of the Institute of National Remembrance; perform activities in the field of public education; look for resting places of persons killed in the fight for independence and unity of the Polish State, in particular those killed in the fight against the imposed totalitarian system or as a consequence of totalitarian repressions or ethnic cleansing in the period between 08 November 1917 and 31 July 1990; conduct activities related to commemorating historic events, places, and persons in the history of the struggle and martyrdom of the Polish nation, both in the country and abroad, as well as the places of struggle and martyrdom of other nations within the territory of the Republic of Poland, in the period between 08 November 1917 and 31 July 1990.<sup>2</sup>

In consequence, the INR combines prosecutorial tasks with educational or scientific ones. Therefore the wording of the Act can be perceived as a compromise between lawyers and historians, and as each group attaches different meanings to notions such as, e.g., genocide, it is understood that not all the provisions would satisfy international lawyers' expectations. However the Act, when used for purely legal purposes – especially in the case of criminal prosecutions – should meet the highest standard of legislation (especially if we take into account that violation of newly introduced norms is penalized by up to three years of deprivation of liberty) and must be carefully, i.e. narrowly, worded in order to not threaten, among other rights, freedom of expression protected by Human Rights Law. Moreover, as the Act refers to international crimes it should also properly refer to notions and principles of international law. Unfortunately, it does not.

The first part of this article examines the newly adopted Chapter 6c – “Protection of the reputation of the Republic of Poland and the Polish Nation” – with a focus on criminal provisions. It indicates those terms which are used in a way that could raise doubts in light of international law. In its second part, the article assesses newly the adopted law in light of Human Rights Law. The third part refers to issue concerning criminal jurisdiction which are essential for effective implementation of the Act.

## 1. THE AMENDMENTS IN LIGHT OF INTERNATIONAL LAW ON RESPONSIBILITY

Chapter 6c – “Protection of the reputation of the Republic of Poland and the Polish Nation” – was supposed to be an effective tool in combating the use of such notions as “Polish death camps”, “Polish extermination camps”, and “Polish concentration camps” which as allegedly historically false have a tremendous impact, inasmuch as they threaten the good name of the Polish state and nation abroad by creating the impression that the Polish state and nation is responsible for the Third Reich's crimes.<sup>3</sup> Polish authorities are frustrated with the consistent German historical policy which employs widely accepted descriptions

<sup>2</sup> *Ibidem*, Article 1.

<sup>3</sup> See the official justification of the draft amendments: <https://bit.ly/2Inj9uR> (accessed 30 June 2018).

of the Third Reich's crimes not as German crimes, but as Nazi crimes (without therefore an indication of the state responsible for them). Moreover, the focus in contemporary public discussion is not on German responsibility for the World War II atrocities, but on the extent of collaboration of other states/nations (including Poland) with, e.g., the Holocaust. Poland, which suffered enormous losses (almost 6 million people, a figure which is ten times more than, for example, France lost during the whole war), would prefer to describe the heroic actions of its people rather than explain tragic but marginal incidents in which local Polish communities committed crimes against, e.g., Jews. Those crimes in which Polish citizens were involved are sometimes referred to as definitive proof of a Polish state policy, which clearly was not the case. Thus, based on the conviction that the historic narration is unfavourable to Poland, Polish authorities decided to use legal tools to change it.

After entry into force of the amendments, the public use of notions similar to those mentioned above (e.g. "Polish concentration camps") should entail not only criminal but also civil responsibility. Surprisingly, none of these controversial notions were enumerated in the amendments. The Polish legislator decided to introduce a general prohibition against the denial of, e.g., Nazi crimes in order to include all expressions which could be perceived as insulting to the Polish state or nation.

The original version of the Article 55 of the Act states that "[a]nyone who publicly and contrary to the facts denies crimes referred to in Article 1(1) shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public." The mentioned Article 1 enumerates:

Nazi and communist crimes; other crimes against peace, humanity or war crimes, perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 until 31 July 1990; and other politically motivated reprisals, instigated by the officers of the Polish law enforcement agencies or the judiciary or persons acting on their order which were disclosed in the contents of the rulings made on the strength of the Act, dated 23 February 1991, on considering as invalid the rulings made in the cases of persons oppressed for their activities for the cause of an independent Polish State; the actions of the state security authorities described in Article 5.

The Act defines communist crimes<sup>4</sup> and crimes against humanity<sup>5</sup> but it does not

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<sup>4</sup> See Article 2, which states: "As conceived of by the Act, communist crimes are actions performed by the officers of the communist state between 08 November 1917 and 31 July 1990 which consisted in applying reprisals or other forms of violating human rights in relation to individuals or groups of people or which as such constituted crimes according to the Polish penal act in force at the time of their perpetration. As communist crimes are also regarded the actions of those officers in the period in question in the preceding sentence which bear the hallmarks of the unlawful acts defined in articles 187, 193 or 194 of the ordinance of the President of the Republic of Poland, dated 11 July 1932 – the Penal Code or article 265(1), article 266(1, 2, or 4), or article 267 of the Act dated 19 April 1969 – the Penal Code, performed in relation to the documents within the understanding of article 3(1 and 3) of the Act dated 18 October 2006 on the disclosure of information relating to the documents of the state security authorities from the period between 1944 and 1990 and the contents of those documents (...) to the detriment of the persons referred to in the documents."

<sup>5</sup> See Article 3, which states: "As crimes against humanity are especially considered the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948 (...), as well as other serious persecutions based on the ethnicity of the

provide a definition of Nazi crimes, crimes against peace, or war crimes. Taking into account the period which is specified as being within the remit of the institution i.e. 1917-1990, this omission is justified by the argument that the definition of those crimes and principles of responsibility for them changed throughout this period, which would mean that a prosecutor should apply norms (of national or international law) which were binding at the time of commission of the crimes.

The amendments to the Act adopted in January 2018 added new crimes to the above-mentioned list, i.e. “crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich.” These crimes were defined as:

acts committed by Ukrainian nationalists between the years 1925-1950 consisting in the use of violence, terror or other violations of human rights against individuals or groups of population. A crime of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich is also the participation in the extermination of the Jewish population or genocide of the citizens of the 2<sup>nd</sup> Republic of Poland on the territory of Volhynia and Eastern Lesser Poland.

As a result of the amendments, Ukrainians are the only national group directly mentioned in the Act as perpetrators of crimes, and the Act does not refer even to Germans or Russians but instead prefers to speak about crimes of the “Third Reich” or of the “communists.” Not surprisingly, Ukrainians have felt offended by this “distinction.” Moreover, the Act qualifies the extermination of Polish citizens on the territory of Volhynia and Eastern Lesser Poland as genocide and at the same time it does not apply the same classification to the case of extermination of the Jewish population.

It can be understood why the genocide label was omitted in the case of the Holocaust. Even the International Military Tribunal in Nuremberg, despite Rafał Lemkin’s efforts, did not have jurisdiction over genocide and in consequence did not use this notion in its final judgment. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted only on 9 December 1948,<sup>6</sup> i.e. after the Holocaust took place, and even the Israeli court when deciding on the responsibility of Adolf Eichmann referred to classification of the Holocaust as genocide but not as a distinct international crime but as a specific genre of crime against humanity.<sup>7</sup> Notwithstanding, Polish courts such as, e.g., the Polish National Supreme Court did not hesitate to designate Nazi crimes committed in Poland during World War II as genocide,<sup>8</sup> therefore it is hard to understand why this qualification is avoided now. A possible argument on the

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people and their political, social, racial or religious affiliations, if they were performed by public functionaries or either inspired or tolerated by them.”

<sup>6</sup> 78 UNTS 277.

<sup>7</sup> District Court of Jerusalem, Israel, *Attorney General v. Adolf Eichmann*, Criminal Case No. 40/61, 11 December 1961, para. 26.

<sup>8</sup> See e.g. Supreme National Tribunal (SNT), *Artur Greiser Judgment*, p. 16 (Judgment published in: T. Cyprian, J. Sawicki, *Siedem wyroków Najwyższego Trybunału Narodowego* [Seven judgments of the Supreme National Tribunal], Instytut Zachodni, Poznań: 1962, pp. 1 ff). Summary published also in Law Reports of Trials of War Criminals, Vol. XIII, United War Crimes Commission, London: 1949, pp. 70 *et seq.*

non-retroactive application of the Genocide Convention would be inconsistent with classification of the massacre in Volhynia (which took place 1943-45, i.e. in a similar time period as the Holocaust) as genocide in the same sentence of the Amendment. In addition, the use of such undefined notions as “Ukrainian nationalist” should raise doubts, as it is not clear if all Ukrainians are perceived by the Polish legislator as nationalists or whether courts should make an additional assessment of Ukrainians as nationalists, based on unspecified criteria.

The amendments also refer to human rights violations during the period 1925-1950, while for most of this time there was war in the territory of Poland (an international one and a civil one). Therefore, references should be made not to the human rights law regime (developed only after World War II), but to the law of war, the regime of which legitimizes, e.g., violence against military objectives. The Polish Act seems to ignore this, which can result in prosecution of Ukrainians for mere participation in hostilities against the Polish army. This is not unlawful *per se*, as even the contemporary Additional Protocol II to the Geneva Convention of 1949 indirectly allows for prosecution of non-state party members for participation in hostilities (Article 6(5)).<sup>9</sup> However, such a solution is controversial inasmuch as it equals attacking military objectives with the extermination of a civilian population (which definitely took place in Volhynia and Eastern Lesser Poland) – a result which should not be satisfactory to either the Polish or Ukrainian side.

The amendments of January 2018 introduced Article 55a, according to which:

1. Whoever publicly and contrary to the facts attributes to the Polish Nation or to the Polish State responsibility or co-responsibility for the Nazi crimes committed by the German Third Reich, as specified in article 6 of the Charter of the International Military Tribunal (...), or for any other offences constituting crimes against peace, humanity or war crimes, or otherwise grossly diminishes the responsibility of the actual perpetrators of these crimes, shall be liable to a fine or deprivation of liberty for up to 3 years. The judgment shall be communicated to the public.
2. If the perpetrator of the act specified in section 1 above acts unintentionally, they shall be liable to a fine or restriction of liberty.
3. An offence is not committed if the perpetrator of a prohibited act set out in sections 1 and 2 above acted within the framework of artistic or scientific activity.

Article 55b emphasizes that irrespective of the law applicable at the place of commission of the prohibited act, this Act shall be applicable to a Polish citizen as well as a foreigner in the event of commission of the offences set out in Article 55 and Article 55a.

Article 55a refers to both the alleged responsibility of Polish state and the responsibility of Polish nation. World War II confirmed that occupation cannot be treated as a legitimate way of acquiring territory and it does not result in ending the existence of a state. In consequence, throughout the entire World War II period the Polish state existed. Its representatives in exile took part in negotiations, and Poland was one of the original members of the United Nations (despite its non-participation

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<sup>9</sup> 1125 UNTS 609.

in the United Nations Conference on International Organization at San Francisco).<sup>10</sup> However, as Polish authorities (both those in exile as well as the Polish underground) did not control Polish territory, obviously the crimes committed by Nazi Germany cannot be attributed to the Polish state on any known basis.<sup>11</sup> The Polish state could not have prevented them, did not approve them, and did not collaborate with the Third Reich (as did, e.g., the Vichy government), therefore there was no complicity in Nazi crimes to any extent on behalf of the Polish state. However, Article 55a raises doubts insofar as it mentions not only responsibility of the Polish state, but also of the Polish nation.

A nation (people) is not classified as distinct from a state in terms of being a subject of international law. The only exception is attribution of the right to self-determination to all peoples<sup>12</sup> and the limited subjectivity of insurrectional movements whose violations of international law can be attributed to the state of which the movement becomes the new government.<sup>13</sup> As the Polish state existed throughout the entire whole World War II, it is impossible to talk on one hand about Polish state responsibility and separately about the responsibility of the Polish nation at the same time. It also cannot be ignored that the question of responsibility for crimes against peace, crimes against humanity, or war crimes is discussed in international law only in the context of state responsibility or individual responsibility.<sup>14</sup> Even though the International Military Tribunal declared that some legal entities, like Gestapo, SD or SS, were responsible for the above-mentioned international crimes, the responsibility for Nazi crimes was not attached to the German nation.

Even if we decide to distinguish the nation from the state as separate subjects of international law in the context of responsibility for international crimes, we should still apply some general rules concerning the responsibility of subjects of international law (if we agree that some common standards exist).<sup>15</sup> Thus it must be decided which norms of international law were binding for a nation (definitely customary ones, but not clear with respect to treaty norms, as the contemporary discussion concerning international obligations of non-state actors proves<sup>16</sup>), and what conduct can be attributed to the

<sup>10</sup> See Article 3 of the United Nations Charter of 26 June 1945, 1 UNTS XVI.

<sup>11</sup> Cf. Articles 4-11 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission 2001, vol. II, Part Two.

<sup>12</sup> Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant of Economic, Social and Cultural Rights of 16 December 1966, 999 UNTS 171 and 993 UNTS 3. See also M.N. Shaw, *International Law* (6<sup>th</sup> ed.), Cambridge University Press, Cambridge: 2008, pp. 251 et seq., and W. Czapliński, A. Wyrozumka, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. Systemic issues] (2<sup>nd</sup> ed.), C.H. Beck, Warszawa: 2004, p. 473.

<sup>13</sup> Article 10 of the Draft Articles on State Responsibility of States for Internationally Wrongful Acts.

<sup>14</sup> See e.g. Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, 1996, vol. II, Part II.

<sup>15</sup> See A. Czaplińska, *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej* [Responsibility of international organizations as an element of universal system of international responsibility], Uniwersytet Łódzki, Łódź: 2014, pp. 298 et seq.

<sup>16</sup> See e.g. J. Kleffner, *The Applicability of International Humanitarian Law to Organized Armed Groups*, 93(883) International Review of the Red Cross 443 (2011).

nation. These issues are not resolved in contemporary international law, therefore they should raise doubts all the more in the context of World War II.

In the official justification of the amendments to the Act, it is explained that the concept of “nation” which is used in Article 55a should be understood in the same way as in the preamble of the Polish Constitution of 2 April 1997, i.e. as all citizens of the *Res Publica*.<sup>17</sup> It is not clear however whether the Polish legislator is of the opinion that the conduct of every Polish citizen can be attributed to Polish nation, in which case every Polish citizen would be an organ/agent of the Polish nation. This understanding would be absurd as it would broaden responsibility of this kind of “subject” of international law to the extreme. That is why the more logical interpretation is that the Polish legislator did not mean the attribution of Nazi crimes to the Polish nation as a separate subject of international law, but the attribution of responsibility to individual Polish citizens. However, this would result in the possibility of prosecution of all those who would raise the issue of individual participation of Polish citizens in Nazi crimes e.g. as inspired by Germans in pogroms similar to the one in Jedwabne in 1941.

The amendments stress that responsibility is attributed only when public statements are made contrary to the facts, but at the same time that the responsibility is linked also with the gross diminishment of the responsibility of the actual perpetrators. In the case of complicity it is impossible to precisely state to what extent each participant was responsible, therefore the interpretation of the words “grossly diminishes the responsibility” could in fact limit the discussion on the involvement of Polish (and other states’) citizens in the crimes committed by the Third Reich crimes. Any mistake concerning the number of victims – and in the case of many WWII atrocities it is still impossible to obtain exact numbers of victims; for example the estimation of the number of victims of the Wola massacre oscillates between 40 and 60 thousand – could be treated as diminishment of responsibility of the perpetrators as well as improper classification of the conduct.

We should also recall how many controversies have been provoked by the qualification or non-qualification of a particular atrocity as genocide. Genocide is perceived not only as legal term but also as a moral, sociological, or historical one.<sup>18</sup> There is a dispute over whether genocide should be considered as the “crime of crimes”, i.e. the crime which is the gravest among all international crimes.<sup>19</sup> Therefore it cannot be excluded that merely undermining the classification of a particular atrocity as genocide could be perceived as “gross diminishment of the responsibility” of the actual perpetrators.

Article 55a refers to Nazi crimes enumerated in Article 6 of the International Military Tribunal Charter (which mentions crimes against peace, crimes against humanity, and war crimes) and to other offences constituting crimes against peace, crimes against

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<sup>17</sup> Journal of Laws, No. 78, item 483. English version available at: <https://bit.ly/2s5vPeN> (accessed 30 June 2018).

<sup>18</sup> See L. Nijakowski, *Rozkosz zemsty. Socjologia historyczna mobilizacji ludobójczej* [Pleasure of revenge. Historical sociology of genocidal mobilization], Wydawnictwo Naukowe Scholar, Warszawa: 2013, p. 33.

<sup>19</sup> See P. Akhavan, *Reducing Genocide to Law: Definition, Meaning and the Ultimate Crime*, Cambridge University Press, Cambridge: 2012, *passim*.

humanity, and war crimes. Therefore, Article 55a enumerates the same crimes twice. If we reject the idea that part of section 1 of Article 55a is superfluous, the mentioned repetition can be explained as an attempt to avoid problems related with the narrow scope of Article 6 of the IMT Charter of 1945, which was supposed to be applied only to the “major war criminals of the European Axis countries” (thus excluding the crimes of citizens of the USSR from the scope of the IMT), and the fact that the definition of crimes against humanity was changed even in reference to crimes committed during WW II, which Article II of the Control Council Law no. 10 of 20 December 1945 proved. Therefore even in the case of crimes against humanity committed during World War II it is possible to operate under different definitions of this crime.

Having in mind the doubts concerning interpretation of the amendments in light of international law, the establishment by Polish authorities of responsibility also for unintentional public statements (where there was no intent to engage in unlawful conduct and knowledge about circumstances and possible consequences of the conduct) in which the responsibility for Nazi crimes is attached to the Polish state and Polish nation should provoke astonishment.<sup>20</sup> The prosecution of offences committed without an intent (in the case of either a lack of knowledge about the existence of the prohibition or lack of intent to violate the prohibition) is extremely rare and is applied to the most serious cases, like killing a person as a result of gross negligence vis-à-vis the basic rules of safety.<sup>21</sup> The choice of the Polish legislator to include the attribution of Nazi crimes to the Polish state or Polish nation contrary to the facts in the category of the gravest crimes (i.e. prosecuted even in case of unintentional commission) must be perceived as controversial to say the least, and will impact cooperation with other states concerning the extradition of perpetrators of such crimes. It is interesting that the Polish legislator did not qualify the denial of the Holocaust as such a crime of the same gravity. Therefore, according to the new law it is possible to avoid responsibility in the case of denial of Holocaust by reference to the lack of knowledge/intent, but this possibility is excluded in case of attribution of responsibility for the Holocaust to the Polish nation.

## 2. THE AMENDMENTS IN LIGHT OF HUMAN RIGHTS LAW

The Polish authorities explained that the inclusion of a separate crime concerning attribution of responsibility for Nazi crimes to the Polish state or Polish nation contrary to the facts should be perceived in similar way like other memory laws which were adopted in numerous states and which penalize denial of the Holocaust or other international crimes. In addition, the amendments were supposed to implement the European Union's

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<sup>20</sup> According to the official justification the purpose of the criminalization of unintentional public statements described above was necessary in order to guarantee the jurisdiction of Polish courts in civil proceedings concerning protection of reputation of Polish state and nation based on Article 7.3 of the 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, [2012] OJ L 351.

<sup>21</sup> See Article 8 of the Polish Criminal Code of 1997, Journal of Laws 1997, No. 88, item 553.



Framework Decision 2008/913/JHA, which aimed to harmonize criminal measures against racism and xenophobia.<sup>22</sup> In consequence, the Polish authorities, by referring to the concept of memory laws and European Union law wanted to cut short any discussion concerning the violation of the right to hold opinions without interference, and the issue of freedom of expression.<sup>23</sup>

The mentioned Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law entitles states to punish conduct such as:

publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Article 1(c))

and:

publicly condoning, denying or grossly trivialising the crimes defined in article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group (Article 1(d)).

Therefore, it does not limit memory laws only to crimes committed during World War II, but it obliges states to punish, e.g., the trivialisation of crimes against humanity or war crimes in a specific context i.e. when this such trivialisation is made to spread racism or xenophobia or to incite violence and hatred.

Article 1(2) of the Framework Decision emphasizes that states can “punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting.”<sup>24</sup> Therefore, the Framework Decision refers to Article 10(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which emphasizes that the freedom of expression may be restricted, but only if it is prescribed by law (the adoption of the Act fulfils this condition) and is 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 (...).”<sup>25</sup>

<sup>22</sup> [2008] OJ L 328.

<sup>23</sup> See e.g. Article 19 of the ICCPR; Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 UNTS 2889.

<sup>24</sup> Cf. ECtHR, *Perincek v. Switzerland* (App. no. 27510/08), Grand Chamber, 15 October 2015, para. 280.

<sup>25</sup> It should be noted that the European Court of Human Rights at first discussed cases concerning denial of the Holocaust in light of the Article 17 (abuse of right), but recently changed this approach in order to assess whether all the conditions mentioned in Article 10(2) of the Convention concerning restriction of freedom of expression are fulfilled. The so-called “automatic guillotine effect” of Article 17 is

It cannot be excluded that the attribution of Nazi crimes to the Polish state or nation could be done in order to promote hatred or to incite to violence against Polish citizens, but definitely not all mistaken (unintentional) statements (e.g. statements on “Polish camps” made by a person who meant that the Nazi camps were situated in Poland, not that they were organized by Polish state) disturb order or have as their aim insulting someone. Even if we agree that the purpose of the amendments is consistent with the requirements of the European Convention of Human Rights and of the above-mentioned Framework Decision, and thus that its aim is not only to guarantee the proper interpretation of the facts but also to protect public order, there still can be doubts about whether the amendments are necessary to protect public order and, taking into account the severe penalties prescribed by the new law, the amendments might be considered as a disproportional interference in the freedom of expression.

It should also be noted that the Framework Decision on memory laws refers to the punishment of denial or minimisation of international crimes or the clear negation of their existence.<sup>26</sup> The Framework Decision cannot be used to justify punishment for a broadly understood diminishment of responsibility of the actual perpetrators, which – as was mentioned above – could halt any discussion concerning the scope of involvement of Polish and other citizens in Nazi crimes.

The Polish legislator was however persuaded that the inclusion of the exception of “artistic or scientific activity” sufficiently guarantees the protection of freedom of expression. However, the amendments do not explain what is meant by “artistic or scientific activity.” Thus, inasmuch as an article in a newspaper or voice in a discussion in mass media is not normally treated as scientific activity but as the popularization of science (at least when a scientist’s work is assessed by his/her peers), statements for or through the media might not be covered by the exception introduced in the Article 55a (3) of the amended Act. It might be also possible to prosecute a scientist for making public statements in the media which were undermined by other scholars. If the method used by scientist was alleged to be wrong or wrongly applied, it could be argued that the particular work cannot be treated as scientific one and therefore there is a ground for

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limited in cases involving the assessment of historic facts, which was applauded by the doctrine, *see e.g.* P. Lobba, *Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime*, 26 *European Journal of International Law* 1 (2015).

<sup>26</sup> S. Gorton, *The Uncertain Future of Genocide Denial Laws in the European Union*, 47 *George Washington International Law Review* 421 (2015), pp. 426 et seq. *See also* ECtHR, *Garaudy v. France* (App. No. 65831/01), 7 July 2003; as well as Article 6 of the *Additional Protocol* to the *Convention* of 28 January 2003 on *Cybercrime*, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Reference, ETS No. 189 (“Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.”)

prosecution. The lack of bad intentions would not prevent the criminal proceeding, as the current Polish law criminalizes even unintentional statements made contrary to the facts and which might be considered as insulting for the Polish state or nation.

In addition, it should be stressed that freedom of speech could be violated not only by the application of the criminal provisions, but also by the application of those provisions which establish civil responsibility (Articles 53 o-q), which raise enormous doubts also in light of Polish national law.<sup>27</sup> According to the amendments, the legal regime for the protection of personal interests should be applied to the protection of the reputation of the Republic of Poland and of the Polish nation. The amendments attach personal interests to the Polish State as such and to the Polish nation, therefore they establish new subjects of civil law (or in other words they qualify them as new legal entities) and attribute them with personal interests. Moreover, the amendments allow non-governmental organizations acting within the scope of their statutory goals to bring a case on behalf of the Polish state or Polish nation, which is a kind of *actio popularis* – an institution not used in the case of protection of personal interests as they are usually defined as non-material, individual values within the sphere of the feelings and psychological life of a particular person.<sup>28</sup>

The civil protection of private interests of the Polish state and nation is not linked with wrong attributions of responsibility to the Polish state and nation for Nazi crimes. Most disturbing is the fact that the amendments did not establish any exception from civil responsibility in the case of artistic or scientific activity. In consequence, even if a scientist could avoid criminal prosecution, the INR (or any other non-governmental organization!) may bring a case to protect the reputation of the Republic of Poland and claim immense compensation. A scientist who would like to investigate crimes committed by Polish citizens or the scale of Polish collaboration risks the loss of his time, money and reputation in lengthy proceedings against her/him commenced by someone who feels insulted. Such severe consequences must impact the scope of freedom of speech and freedom of scientific activity, as promotion of its results could in some instances be qualified as non-scientific activities.

### 3. CRIMINAL JURISDICTION

The preamble of the Act stresses “the obligation to prosecute crimes against peace and humanity and war crimes.” However, based on the subsequent provisions of the Act the crimes against peace, crimes against humanity or war crimes are encompassed

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<sup>27</sup> See J. Wyrembak, *Opinia prawna w sprawie projektu ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach, ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary oraz ustawy o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy budowli, obiektów i urządzeń użyteczności publicznej (druk sejmowy nr 806)*, 7 November 2016 (available at: [orka.sejm.gov.pl/RexDomk8.nsf/0/.../\\$file/i2195-16.docx](http://orka.sejm.gov.pl/RexDomk8.nsf/0/.../$file/i2195-16.docx), accessed 30 June 2018).

<sup>28</sup> S. Grzybowski, *Ochrona dóbr osobistych według przepisów ogólnych prawa cywilnego* [Protection of personal rights under general provisions of the civil law], Wydawnictwo Prawnicze, Warszawa: 1957, p. 78.

by the Act only if they were “perpetrated on persons of Polish nationality or Polish citizens of other nationalities between 08 November 1917 until 31 July 1990” (Article 1(a)). However, in Article 4.2 it is stressed that the mentioned crimes (as well as “Nazi crimes or communist crimes”) “committed against other persons than Polish citizens are within the cognizance of the organs established by the Act, provided they were committed on the territory of the Polish State.” Therefore the Act ignores the obligation to introduce and execute universal jurisdiction which is based on the nature of the crime and not on the citizenship of victims or perpetrators or on the place of commission. All states parties to the Geneva Conventions of 1949 were obliged to introduce this type of jurisdiction in their legislation in reference to grave breaches.<sup>29</sup> The obligation to introduce universal jurisdiction in reference to crimes against peace, humanity or genocide is linked with the status of the prohibition of commission of those crimes as *ius cogens*.<sup>30</sup>

Poland, as a party to the Geneva Conventions for the Protection of War Victims of 12 August 1949<sup>31</sup> since 26 November 1954 (it signed them in 1949), introduced universal jurisdiction in Article 115 (2) of the Polish Criminal Code of 1969,<sup>32</sup> and then in Articles 110(2) and 113 of the Polish Criminal Code of 1997, which derogated the previous one. Therefore, it is surprising that in the Act on the INR the legislator decided to limit jurisdiction only to crimes committed against Polish citizens or nationals or to crimes committed on Polish territory. As a result, crimes committed during the Second World War, e.g. against German Jews in Nazi concentration camps situated not in Poland but in Germany, are excluded from the jurisdiction of Polish courts.

The above-described amendments of January 2018 do not refer to the core crimes of international law, but they introduce a new national denial type crime, therefore the criminal prosecution of persons who publicly use such notions as “Polish death camps” could cause difficulties. The introduction of Article 55b as well as the official justification of the amendments stress that the focus would be on the prosecution of foreigners, which raises questions concerning possible criminal cooperation, including extradition procedures.

According to one of customary rules governing extradition an offence must be criminalized in both states engaged in an extradition proceeding (double/dual criminality).<sup>33</sup> In consequence, as no other state has similar provisions like those contained in the Act, the lack of double criminality of an offence might be used as an obstacle to extradition, including the European Arrest Warrant procedure (as an optional ground).

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<sup>29</sup> See e.g. Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31.

<sup>30</sup> M.Ch. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Virginia Journal of International Law 81 (2001), p. 104.

<sup>31</sup> 75 UNTS 31.

<sup>32</sup> Journal of Laws 1969, No. 13, item 94.

<sup>33</sup> M.Ch. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, Martinus Nijhoff, Leiden, Boston: 2013, p. 501.

It cannot be expected that the criminalization of public attributions of Nazi crimes to the Polish state will be “a fast and effective step in order to correct information which has no basis in historic truth”, as presented in the official justification. The only result of the adopted law for an accused person would be the threat of arrest of the defendant, which effectively would exclude him/her from public discussion in Poland. In consequence, the accused would not have an opportunity to confront his/her accusers or defend her/his opinions.

## CONCLUSIONS

The Amendments to the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation revealed many of the weaknesses of this regulation and added new ones. The poor wording of the amendments has caused diplomatic tensions between Poland and its allies – mainly Germany, Ukraine, United States of America and Israel – as it has provoked legal doubts in light of international law. The principles of international responsibility were largely ignored, as well as the definitions of international crimes adopted in international law. Moreover, the newly introduced crime, with its imprecise wording and severe punishment, limits freedom of speech, which is one of the basic values protected in democratic states. Fortunately, work on changes of the amended Act has been undertaken and the Polish President decided to ask the Constitutional Tribunal to verify the consistency of the amendments with, among others, Article 2 of the Constitution of the Republic of Poland of 1997, which states: “The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.” It would be recommended to verify the content of the amendments also in light of Article 9 of the Polish Constitution, which states: “The Republic of Poland shall respect international law binding upon it.”

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After submission of the article to the Polish Yearbook of International Law by the author, Articles 55a and 55b of the Act were repealed by the law of 27 June 2018 (Journal of Laws 2018, item 1277), adopted in a special (urgent) procedure.

On the same day a joint declaration of the Prime Ministers of the State of Israel and the Republic of Poland was adopted, which stated: “[w]e believe that there is a common responsibility to conduct free research, to promote understanding and to preserve the memory of the history of the Holocaust. We have always agreed that the term ‘Polish concentration/death camps’ is blatantly erroneous and diminishes the responsibility of Germans for establishing those camps.” It also added: “[w]e reject the actions aimed at blaming Poland or the Polish nation as a whole for the atrocities committed by the Nazis and their collaborators of different nations. (...) We support free and open historical expression and research on all aspects of the Holocaust so that it can be conducted

without any fear of legal obstacles, including but not limited to students, teachers, researchers, journalists and – with all certainty the survivors and their families – who will not be subject to any legal charges for using the right to free speech and academic freedom with reference to the Holocaust. No law can and will change that.”<sup>34</sup>

The passage of the amendments to the Institute of National Remembrance Law was warmly welcomed by the US Department of State, which issued a statement that: “[t]his action underscores Poland’s commitment to open debate, freedom of speech and academic inquiry. The Holocaust and the crimes of the Nazis are an unspeakable tragedy in the history of Poland and mankind. We agree that phrases attributing responsibility to the Polish state for crimes committed by the Nazis on occupied Polish territory, such as ‘Polish death camps’, are inaccurate and hurtful. Such misrepresentations are best confronted through free and open dialogue.”<sup>35</sup>

The linkage of adoption of the amendments to the law and the Polish-Israeli joint declaration proves that political arguments prevailed over legal ones as regards the shape of the memory law in Poland. However, the international discussion focused only on the criminal provisions, without focusing on the dangers related with other norms introduced in January 2018. The amendments of June 2018 repealed the most controversial articles of the January 2018 Amendments to the Act, which provided for criminal responsibility for a public, and factually inaccurate, attribution of responsibility to the Polish Nation or to the Polish State for the Nazi crimes committed by the German Third Reich. The June amendments were justified by the Polish government by the general aim of the law, which is the effective protection of the good reputation of the Polish State and Nation. According to Polish authorities, this aim may be achieved in civil procedures.

However, as was shown in this article, those provisions which establish civil responsibility for violation of personal interests of the Polish state and nation could also be considered as inconsistent with human rights standards, as they limit freedom of speech and scientific activity in a disproportional way and entitle NGOs to bring a lawsuit on behalf of the Polish state or nation. Moreover, the June 2018 amendments did not eliminate doubts concerning the wording of crimes covered by the Act on the Institute of National Remembrance, including “crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich.”

Not surprisingly, Ukrainian authorities are not satisfied with the recent changes. (It should be noted that the amendments of January 2018 were condemned by the Ukrainian parliament for equalizing crimes committed by the Ukrainian Insurgent Army – OUN-UPA – with Nazi and communist crimes). In consequence, the Act on the Institute of National Remembrance still needs to be adjusted in order to be consistent with international law.

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<sup>34</sup> Declaration available at: <https://bit.ly/2NkbPik> (accessed 3 July 2018).

<sup>35</sup> Statement by Department Spokesperson Heather Nauert – Legislation in Poland Regarding Crimes Committed During the Holocaust available at: <https://bit.ly/2IRQWI8> (accessed 3 July 2018).