MEMORY OF NATIONS

Democratic Transition Guide

[The Argentine Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

María Cecilia Alegre and Gabriela Ippolito-O'Donnell

INTRODUCTION

From 1976 to 1983 Argentina experienced the most brutally repressive dictatorship of its entire history: the *Proceso de Reorganización Nacional* (Process of National Reorganization), as the military named the authoritarian experiment.[1]

During the seven years that the dictatorship lasted, a carefully designed strategy of repression was put into effect. This strategy included forced disappearances, torture in clandestine centers of detention, kidnapping children, expropriation of private property, and murder of those considered opponents to the regime. The *Proceso de Reorganización Nacional* (hereafter PRN) aimed at the eradication of left-wing guerrilla groups, as well as of all political and social groups committed to democracy. In addition to sheer repression, the PRN implemented a neoliberal economic program aimed at entirely changing the political economy of the country and, in so doing, disciplining workers and lower class citizens by reversing previously acquired social rights.

In 1982, economic mismanagement and the mobilization of human rights organizations, parties and unions led the dictatorship to embark on the Malvinas/Falkland war against Great Britain in a desperate attempt to regain some legitimacy. Two days before Argentina invaded the Malvinas/Falklands Islands, the dictatorship faced a massive mobilization and a general strike. The demise of the Malvinas/Falkland war on June 14 of 1982 precipitated the collapse of the dictatorship and triggered a rapid transition to democracy.

THE 1983 ELECTION AND THE LEGAL CONDITIONS OF INVESTIGATION OF POLITICALLY MOTIVATED CRIMES

After a very short period of liberalization,[2] the PRN convoked the celebration of national free and fair elections on October 30 of 1983. Before the elections, on March 23 of 1983, and in the absence of a broad agreement of PRN with opposition forces to manage the transition process, the military passed Law 22.924, which exonerated them from all responsibilities for human rights violations. This law is known as the Self-Amnesty Law (Ley de Autoaministia). The military also enacted a secret decree that ordered the destruction of records and other evidence of their past crimes.

During the electoral campaign, human rights violations committed by the PRN became a central issue of debate. The two main candidates running for the presidency Raúl Ricardo Alfonsín of the UCR (Unión Cívica Radical) and Italo Luder of the PJ (Peronist Party) adopted very different positions on the issue. One month after the PRN announced the Self-Amnesty Law, on April 25 of 1983, the UCR candidate Raúl Ricardo Alfonsín denounced the law, claiming that it was part of a broader impunity pact between the military and union leaders closely linked to the Peronist Party. Even without proof of such a pact, the position expressed by Italo Luder, the Peronist Party Presidential candidate, stressing that the Self-Amnesty Law "was irreversible", seemed to confirm its very existence. In September of 1983, in a crowded political meeting at the Ferro soccer Club Stadium, the UCR presidential candidate Alfonsín promised that, once in government, he would declare null the Self-Amnesty Law.

CRIMINAL PROSECUTION OF THE CRIMES OF THE PREVIOUS POWER: THE RETURN OF DEMOCRACY

The UCR candidate Raúl Ricardo Alfonsín won the election with a 52 % share of the votes on October 30 of 1983 and took power on December 10. As promised during the campaign, the new government began to deal with the issue of human rights violations by revising the activities of the dictatorship. As soon as President Alfonsín assumed power, he repealed the Self-Amnesty Law and reformed the Military Code (with the agreement of Congress) expecting the military themselves to give an account of past human rights abuses by way of military tribunals, something that did not occur. The military commanders argued that they had followed orders to exterminate the left-wing guerrilla, orders that had been signed by the democratic constitutional government of President Isabel Perón in 1975, before the military coup of 1976. As a consequence of the military's resistance to give an account of their actions through military tribunals, the newly elected democratic government undertook an unprecedented task: to establish a National Criminal Court of Appeals, and put the top commanders of the PRN on trial. The trials were made possible due to a comprehensive investigation carried out by the National Commission for Disappeared Persons (CONADEP – Comisión Nacional de Desaparición de Personas), a special commission established by a presidential decree on December 15, 1983.[3]

The CONADEP commission was formed by a plural broad-based group of personalities among them Eduardo Rabossi, Gregorio Klimovsky, Hilario Fernández Long, Marshall Meyer, Ricardo Colombres, Monsignor Jaime de Nevares, Magdalena Ruiz Guiñazú, René Favaloro, and Carlos Gattinoni. World-known writer Ernesto Sábato chaired the commission.

The CONADEP worked with human rights organizations, political parties, and other political and social groups, which were already involved in investigating state terrorism during

1 For a comprehensive review of those years see Guillermo O'Donnell (2008).
2 O'Donnell et al. 1986.
3 Comisión Nacional sobre la Desaparición de Personas, Decree 187/83, 15. 12. 1983, http://www.derechos.org/ddhh/arg/ley/conadep.txt

the dictatorship, to elaborate a special report. The report produced by the commission was titled NUNCA MAS (Never Again) and compiles (in 50,000 pages) a significant number of cases of human rights violations, torture, disappearances and murders, and served as the basis for the trial of the military Juntas.[4] The report registered 8,961 individuals who were disappeared and 380 clandestine centers of detention and torture.

On April 22 of 1985, the trial of the military Juntas began. The main prosecutors were Julio César Strassera and his assistant Luis Moreno Ocampo. The trial was presided over by a tribunal of six judges: León Arslanián, Jorge Torlasco, Ricardo Gil Lavedra, Andrés D'Alessio, Jorge Valerga Aráoz, and Guillermo Ledesma. Prosecutors presented 709 cases, of which 280 were heard. A total of 833 witnesses testified during the cross-examination phase, which lasted until August 14. After several months of allegations, it became clear that the PRN had implemented a systematic and well-design repression plan. For this reason, the members of the three first military Juntas that had governed the country were found guilty.[5] Sentencing was issued on December 9. General Jorge Videla and Admiral Emilio Massera were sentenced to life imprisonment; General Roberto Viola to seventeen years; Admiral Armando Lambruschini to eight years; and General Orlando Agosti to four and a half years. Omar Graffigna, Leopoldo Galtieri, Jorge Anaya and Basilio Lami Dozo were acquitted, but later the three were court martialed for malfeasance in waging the Malvinas/Falkland war of 1982.

The Argentina military Juntas trial is the only case of transitional justice undertaken by civilian courts in Latin America. Also, it was the first major trial held against military commanders since the Nüremberg Trials in Germany following World War II. It is worth noting, that in contrast to the Nüremberg Trials, in Argentina, the process did not involve the participation of any foreign power.

The CONADEP report, allegations during the Juntas trial, and the Self-Amnesty law being repealed, opened the possibility to extend the trials to lower ranking officers involved in PRN repression. In 1986 new trials began to unfold, which generated a state of rebellion among lower ranking military officers. President Alfonsín had to confront three separate military upheavals between 1987 and 1988. This forced the new government to propose to Congress two new Laws to limit the number and scope of trials, and settle the matter once and for all: the *Punto Final* and the *Obediencia Debida* laws.

The *Punto Final* law (Final Point Law 23.492)[6] was passed on December 24 of 1986, and mandated the end of investigation and prosecution of individuals accused of political violence during the dictatorship, up to the restoration of democratic rule on December 10, 1983. It was passed after only a 3-week debate. The *Obediencia Debida* law (Due Obedience Law 23.521)[7] was passed a year later and exempted subordinates from prosecution when they were carrying out orders. Both laws were very controversial and hurt the legitimacy of the government, but they decreased unrest in the military and prevented a democratic breakdown.

DEMOCRATIC CONSOLIDATION AND THE ENDLESS STRUGGLE FOR TRUTH, MEMORY AND JUSTICE

Between 1989 and 1991, under the Presidency of Dr. Carlos Saúl Menem of the PJ (Peronist Party), civic-military relationships would change drastically. President Menem sanctioned ten decrees to grant pardons to all participants involved in actions of state terror during the dictatorship. Furthermore, in 1998 the *Punto Final* and the *Obediencia Debida* laws were repealed.[8] The military were totally demobilized by these decisions.

On August 12, 2003, under the Presidency of Dr. Néstor Kirchner of the PJ (Peronist Party) a new law (25.779) superseded the *Punto Final* and *Obediencia Debida* laws as well as the pardons previously issued by President Menem.[9] Starting in 2005, by a Supreme Court decision, any action framed under the figure of "state terror" became a crime against humanity and imprescriptible. These decisions allowed many cases of human rights violations by the PRN to be reopened. President Néstor Kirchner also changed the extradition policy, allowing extradition for people prosecuted abroad and not facing charges in Argentina. In 2003, Argentina became a signatory of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. A creative interpretation of the convention by the courts allowed them to circumvent the statutory limitations to crimes committed decades in the past, and also the *ex post facto* applicability of laws that were not in force at the time of the crimes.

Today the trials continue. In 2016, a court convicted 15 officials of conspiring to kidnap and assassinate dissidents during the US-backed Operation Condor, which killed 60,000 to 80,000 people in six Latin American nations from 1975 to 1989. As recent as November of 2017, a court sentenced 29 former soldiers for crimes against humanity, 19 of them received between 8 and 25 years, 6 were acquitted. Two of the officers received life sentences for piloting the so-called death flights, in which individuals were tortured, then drugged, and then killed, by being thrown out of airplanes into the river or sea. Among the victims were two French nuns abducted in December of 1977.

However, the most resonant recent cases are those of Alfredo Astiz, known as the "Blond Angel of Death," and Jorge Acosta, nicknamed "The Tiger," who also received life sentences for several crimes, including the 1977 disappearance of the 17-year-old Swedish citizen Dagmar Hagelin. Courts had already sentenced both men to life in prior trials. In spite of these achievements, in early 2017 the Supreme Court decreased jail time for human rights abuses, awakening fears of a regression.

It is worth noting as a way of closing, that the courts have begun to deal with the civilian accomplices of the PRN. A former Ford factory director and an ex-security officer are accused of conspiring with security forces to target workers at Ford's suburban factory, north of the Argentine capital in 1976. According to the prosecution, they provided names, ID numbers, pictures and home addresses to military officials who then abducted 24 factory employees and union members. The victims were allegedly

4 Code of Military Justice, Law 23.049, 9. 2. 1984, http://servicios.infoleg.gob.ar/infolegInternet/anexos/25000-29999/28157/norma.htm

5 The PRN had four military Juntas, but only the first three were set to trial.

6 Final Point Law 23.492, 23. 12. 1986, http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21864

7 Due Obedience Law 23.521, 8. 6. 1987, http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=21746

8 See Law 24.952, 25. 3. 1998, http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=50364

9 See Law 25.779, 21. 8. 2003, http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/88140/norma.htm

subjected to hours of torture, electric shocks and interrogation on the factory premises in the suburb of General Pacheco before being hauled off to military prisons.[10]

LESSONS LEARNT AND RECOMMENDATIONS

In the field of transitional justice, Argentina is an exceptional case. Never before in the history of the country, or any country in Latin America, has a civilian court put on trial military commanders accused of crimes against humanity. The experience of Argentina has not been one of reconciliation, but one of truth, memory and justice. For this reason, even today, the trials continue here and there. The identification of the perpetrators by their victims and their families is an ongoing process. Democratic institutions, fragile as they still are in many respects, have endured the many attempts by the perpetrators and their ideological supporters to stop the process of investigation and prosecution of state terrorism. It has not been an easy process; advances and setbacks are intertwined.

There are several lessons to learn from Argentina's transitional justice process. There are three aspects to take into account for an evaluation of the process as a whole: leadership, political opportunities, and organization.

First, it is clear that much of what has been achieved in terms of truth, justice and memory has depended upon the commitment of leaders, especially of Presidents, to the cause of human rights. President Alfonsín and President Kirchner were definitely committed to condemn state terrorism. But leaders do not act in a vacuum; the political opportunities they face are also part of the equation of their eventual success or failure. This is a second aspect to take into account. President Alfonsín faced a very complex political environment to fully implement a policy of investigation and prosecution of crimes; he had to sustain some important setbacks. The military still had, at the time, significant power of retaliation. This contrasted sharply with the most favorable environment President Kirchner faced to reverse the policies implemented in favor of the military by President Menem, and make further advances in search of memory, truth and justice.

Third, leadership and favorable political opportunities are not the only factors that count for the successful implementation of a transitional justice strategy. As the case of Argentina shows, a dense civil society, highly mobilized for the cause of human rights, is a crucial aspect for success. Human rights organizations, domestic and international, as well as individual advocates have been fundamental in establishing synergies with other groups in government (all three branches, Executive, Judicial and Legislative) and in society to sustain collective action against impunity. The main recommendation is thus to consider these three aspects when designing a strategy of transitional justice.

10 Natalie Muller, "Argentina: Ex-Ford executives on trial for aiding 1970s dictatorship torture", in *Deutsche Welle*, 19. 12. 2017, https://www.dw.com/en/argentina-ex-ford-executives-on-trial-for-aiding-1970s-dictatorship-torture/a-41857423

SOURCES USED AND FURTHER READING

Brysk, Allison, *The Politics of Human Rights in Argentina*, Stanford, CA: Stanford University Press, 1994

Lessa, Francesca, *Amnesty in the Age of Human Rights Accountability: Comparative and international perspectives*, United States: Cambridge University Press, 2012

Novaro, Marcos, Palermo, Vicente, *La Dictadura Militar 1976/1983: Del golpe de Estado a la restauración democrática*, Buenos Aires: Paidós, 2003

Ocantos, Ezequiel González, "Persuade Them or Oust Them: Crafting Judicial Change and Transitional Justice in Argentina", in *Comparative Politics*, 46, 4, 2014

O'Donnell, Guillermo, *Catacumbas*, Buenos Aires: Prometeo, 2008

O'Donnell, Guillermo, Schmitter, Philippe, *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies*, Baltimore: Johns Hopkins Press, 1986

WEBSITES

https://www.abuelas.org.ar/

http://www.apdh-argentina.org.ar/

https://www.cels.org.ar/web/

http://www.derechoshumanos.net/lesahumanidad/informes/argentina/informe-de-la-CONADEP-Nunca-mas.htm

http://www.derechos.org/ddhh/arg/ley/conadep.txt

https://www.dw.com/en/argentina-ex-ford-executives-on-trial-for-aiding-1970s-dictatorship-torture/a-41857423

http://www.hijos-capital.org.ar/

http://servicios.infoleg.gob.ar/

MEMORY OF NATIONS

Democratic Transition Guide

[The Cambodian Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Pechet Men

CRIMINAL PROSECUTION OF CRIMES OF THE KHMER ROUGE REGIME

From 1975 to 1979, the Khmer Rouge regime wreaked havoc upon Cambodian society, causing the deaths of around 1.7 million people, nearly 25 % of the country's population of 8 million.[1] Despite the fall of the regime in 1979, the horror of the Khmer Rouge continued. Throughout the 1980s and 1990s, the Khmer Rouge remained active along the Cambodian–Thai border, waging civil war against the successor government. Only in 1999 did the Khmer Rouge's reign of terror finally come to an end, when most of its followers surrendered; their crimes essentially going unpunished. It was only in 1997 that the United Nations (UN) and Royal Government of Cambodia (RGC) began to discuss the establishment of a tribunal to prosecute the crimes of the Khmer Rouge. It took almost six years of negotiation before the two parties came to an agreement in 2003, establishing a tribunal known officially as the Extraordinary Chambers in the Courts of Cambodia (ECCC).

In January 2001, while negotiation was still underway, the Cambodian National Assembly adopted the draft law (hereinafter "ECCC Law") establishing the ECCC. In October 2004, the UN-RGC Agreement, and Amendments to the 2001 ECCC Law were approved by the National Assembly, making them official legislation. After waiting for so long, the ECCC began its operation in 2006 as a hybrid tribunal in Phnom Penh. Being hybrid, the ECCC is part of Cambodia's domestic court sitting in Cambodia, which applies both to Cambodian law and international law, and is staffed by both local and international staff. A unique and complicated feature of the tribunal is that Cambodian judges make up the majority of the judges at all levels of the Chambers including the pre-trial Chamber, trial Chamber and Supreme Court Chamber. The prosecution office and investigation office are composed of two co-prosecutors and two co-investigating judges respectively – one national and one international. The ECCC offers legal aid to defendants who can select both local and international lawyers to represent them. Another exceptional feature of the ECCC concerns the recognition of victims as a formal party to the case. Victims are also entitled to lawyers to represent their interest before the ECCC.

PEOPLE'S REVOLUTIONARY TRIBUNAL (PRT)

As a matter of fact, the ECCC was not the first tribunal to look into the crimes committed by the Khmer Rouge. Immediately after the fall of the Khmer Rouge regime in January 1979, the new government of the People's Republic of Kampuchea (PRK) attempted to bring about some forms of accountability. The little-known People's Revolutionary Tribunal (PRT) conducted a trial *in absentia* in Phnom Penh of the Khmer Rouge's former Prime Minister Pol Pot and former Minister of Foreign Affairs, Ieng Sary. The trial that lasted just five days from 15 to 19 August 1979 found the two defendants guilty of genocide and sentenced both of them to death, and ordered the confiscation of all their property. Although it was the world's first tribunal to prosecute individuals for crimes defined under the 1948 Genocide Convention, the tribunal bore no legal significance, and was considered a "sham trial" by the international community.[2] The trials failed far short of upholding international due process; the two defendants still actively controlled parts of the country and were not in custody.

Clearly, the right of the defendants to be presumed innocent was not respected by the PRT. Just one day before the trials began, the presiding judge Keo Chenda issued a political statement indicating the already decided objective of the tribunal, which was meant to "expose all the criminal acts… and… the true face of the criminals who are posting as representative of the people of Kampuchea[,]".[3] The defense lawyers were appointed without the knowledge and consent of the defendants, and had no communication with them relative to the trials. The defense counsels accepted all crimes charged, and did not carry out any cross-examination of witnesses. Regardless of the quality of the lawyers, the ultimate result was already pre-determined, and that was conviction. Regardless of the respect for due process, the politics of the cold war at the time already dictated that the verdict of the revolutionary tribunal was a politicized one, and would have made no impact whatsoever. Both the survivors and the international community rejected the PRT and continued to advocate for a legitimate prosecution.

INVESTIGATION OF CRIMES OF THE KHMER ROUGE

Although Cambodia and the international community had failed to put an end to the impunity of the Khmer Rouge, they were not forgotten. Relentless efforts by survivors and activists led to the adoption of the Cambodian Genocide Justice Act in April 1994 by the US Congress. President Bill Clinton signed the Act in May of that year. The Act mandated the US State Department to support the effort to look into the crimes committed by the Khmer Rouge between April 17, 1975 and January 7, 1979, and to arrange

1 The most cited figure for the death toll of 1.7 million was given by Ben Kiernan in his book "The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–79," (New Haven: Yale University Press, 1996). The ECCC estimated the death toll to be between 1.8 and 2.2 million and about 800,000 died of violent deaths. The exact figure is not known. The total death figure is controversial, ranging from 740,000 to 3.314 million; please see Tom Fawthrop, Helen Jarvis, *Getting Away With Genocide, Elusive Justice and the Khmer Rouge Tribunal*, University of New South Wales Press, 2005, 3–4.

2 Ibid.

3 Kelly Whitley, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006.

for an investigation into that period.[4] As part of this investigation, Lawyers Jason Abrams and Stephen Ratner were commissioned in 1994–5 to produce a legal analysis of the criminal responsibility of members of the Khmer Rouge relating to war crimes, crimes against humanity and genocide. The two lawyers concluded in their findings that they found *prima facie* evidence for all identified crimes and suggested a number of options for prosecution.

The Cambodian Genocide Program (CGP) of Yale University was awarded the grant from the US State Department to carry out research, training and documentation, and thereafter established a field office in Phnom Penh known as the Documentation Center of Cambodia (DC-Cam). Immediately, DC-Cam started to collect and document primary materials from the Khmer Rouge regime. In 1995, CGP and DC-Cam hosted an international conference where the two lawyers presented their findings. In 1995 and 1996, DC-Cam held its first legal training program for government officials, legal practitioners and judges on international justice. By early 1997, DC-Cam had gathered and documented a huge amount of primary documents. In January 1997, DC-Cam became an independent non-governmental organization (NGO) in Cambodia and, since then, continued to document crimes of the Khmer Rouge.

The Khmer Rouge ran their regime with extreme secrecy using code names and numbers in their documents. This has presented as a huge challenge to those looking into their conduct. In addition, the Khmer Rouge leaders managed to burn many of their documents before the Vietnamese army and Cambodian resistance force took control of the country in January 1979. Further, in the post-Khmer Rouge era, people did not understand the value of materials from the Khmer Rouge period. There were reports of these primary documents being used to wrap fried banana sold on the streets of Phnom Penh.[5]

According to DC-Cam, there are two major categories of documentary materials collected and documented since its inception.[6] The first category involves original materials produced during the Khmer Rouge regime, and contains mostly documents produced during the era, and by the Khmer Rouge officials themselves, prisoner confessions, and documents from foreign countries. The second includes materials produced after the fall of the Khmer Rouge in 1979. They consist primarily of survivor petitions, interview transcripts of survivors, and mapping reports of extensive mass grave and memorial studies. DC-Cam has uncovered roughly 20,000 mass graves and about 200 detention centers where those deemed enemy of the state were kept and tortured. These documents have become an important source of evidences in the trials of the surviving Khmer Rouge leaders.

IDENTIFICATION OF LEADERS OF THE KHMER ROUGE

The prosecution of those responsible for the crimes of the Khmer Rouge is a political as much as a legal matter. The negotiations on the establishment of the tribunal involved complex political issues taking place between 1997 and 2003. The Cambodian government and the United Nations had differences on almost every aspect of the tribunal. The differences included the type of tribunal – special or domestic –, who would make up the majority of judges, which legitimate authority would appoint the judges and prosecutors, the number of defendants and, among other things, the issue of amnesty.[7]

PERSONAL JURISDICTION

One of the most heated aspects of the negotiation was, perhaps, who were to be included under the tribunal's personal jurisdiction. The discussion on the personal jurisdiction of the tribunal was a complicated political negotiation.[8] The UN argued that both "senior leaders" and "those most responsible" for the crimes committed during the Khmer Rouge regime should fall under the jurisdiction of the tribunal. A group of experts – Ninian Stephen, Rajsoomer Lallah, and Steven Ratner – sent by the UN Secretary General to carry out legal assessment of the feasible prosecution in 1999, put forward an estimate of 20–30 individuals.[9] The Cambodian government strongly rejected the number. Cambodia's Prime Minister Hun Sen announced publicly in late 1999 that only a limited number of individuals would be prosecuted, limiting the number to 4 or 5 individuals.[10] He cited the risk of civil war. Critics argued that this move serve self-interest. The Prime Minister himself, before defecting to Vietnam in 1977, and other high-ranking officials were once serving parts of the Khmer Rouge regime. A large number of defendants may put these officials in the hot seat.[11]

Prior to discussions on the personal jurisdiction of the tribunal, according to Professor David Scheffer who was one of the UN negotiators, the prosecutorial targets referred to during 1997 and 1998 were surviving senior leaders of the Khmer Rouge leadership. At the time, the negotiators were not even aware that Duch, the chairman of the Khmer Rouge's notorious torture chamber S-21, who was later convicted and sentenced in 2012 to life in prison by the ECCC, was still alive.[12] Scheffer emphasized that the focus, then, was on securing the arrest or surrender of surviving Khmer Rouge leaders, including Pol Pot (who died in 1998), Ta Mok (who died in 2006), Ke Pauk (who died in 2002), Ieng Sary (who died while on trial in 2013), Khieu Samphan and Nuon Chea (who both have been sentenced to life imprisonment in Case 002), Ieng Thirith (the spouse of Ieng Sary, who was found unfit to stand trial by the ECCC in 2011, and later died in 2015) and other senior leaders, as opposed to the actual number of individuals. According

4 Tom Fawthrop, Helen Jarvis, *Getting Away With Genocide, Elusive Justice and the Khmer Rouge Tribunal*, University of New South Wales Press, 2005.

5 Michelle Vachon, "When I Believed in the Khmer Rouge", in *The Cambodia Daily*, 2006, https://www.cambodiadaily.com/stories-of-the-month/when-i-believed-in-the-khmer-rouge-438/

6 John D. Ciorciari, Youk Chhang, Documenting the Crimes of Democratic Kampuchea, in Jaya Ramji, Beth V. Schaack (ed.), *Bringing the Khmer Rouge to Justice, Prosecuting Mass Violence Before the Cambodian Courts*, Edwin Mellen Pr., 2005.

7 Kelly Whitley, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006.

8 Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011; David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

9 Kelly Whitley, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in John D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006.

10 David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

11 John D. Ciorciari, History and Politics Behind the Khmer Rouge Trials, in John D. Ciorciari, and Anne Heindel, (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009.

12 David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

to Scheffer, before the tense discussion on personal jurisdiction, the estimate was about 10 individuals. Despite this initial estimate, the proposal of 20–30 suspects was a firm position by the UN.

The UN's initial draft law in late 1999 establishing the Khmer Rouge tribunal, drafted by Scheffer, described the tribunal's personal jurisdiction as "senior leaders of Democratic Kampuchea and *all persons* responsible for the most serious violation of Cambodian law…". Such a description would have given wide discretion to the prosecution, but was rejected by the Cambodian government.[13] By January 2000, the Cambodian government returned with the language "senior leaders of Democratic Kampuchea and those who were responsible for serious violation…" In a letter to Prime Minister Hun Sen in March 2000, UN Secretary General Kofi Annan referred to personal jurisdiction as "senior leaders of Democratic Kampuchea and those responsible for crimes and serious violation of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia…".[14]

All along, the assumption of the negotiators was that there were two distinct groups that would fall under the jurisdiction of the tribunal – "senior leaders" and "those responsible". The remaining concern was how large the second group would be. In a letter dated March 24, 2000 to his Cambodian counterpart, Hans Corell, the UN Legal Counsel was concerned that the Cambodian government would propose too many potential suspects to be included in the second group, and implicitly reflect a reduction in number from the 20–30 suspects. It was only then that the UN negotiators proposed the second group to be "those who were most responsible" taking into consideration the capacity of the discussed tribunal.[15] The agreed language went into the ECCC draft law.

On January 2, 2001, the Cambodian National Assembly adopted the ECCC draft law even before the agreement with the UN was reached. Article 1 of the law described the ECCC's personal jurisdiction as "… senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws…" Hans Corell raised the problems he saw in the adopted law in a letter to the late Senior Minister Sok An who led the Cambodian Task Force in negotiations with the UN on the establishment of the tribunal; personal jurisdiction was not one of them. From then on, both parties appeared to be silent on the issue of personal jurisdiction, which seemed to suggest that the issue was resolved. On January 19, 2001, Prime Minister Hun Sen visited the Khmer Rouge's last stronghold of Anlong Veng and spoke to over 1000 Khmer Rouge residents of the area. He assured them that "[J]ust top leaders" would be prosecuted and that would include Duch as one of those who were most responsible. He also softened his previous position on a controversial issue related to a royal pardon granted by the King to Ieng Sary, the Khmer Rouge's Minister of Foreign Affairs, by stating that the King had "no right to protect anyone from prosecution".[16] According to the news coverage of his visit to Anlong Veng, the Premier described the number of suspects to be between 4 and 10 individuals only.[17]

CASE 001 AND CASE 002

Although negotiations on personal jurisdiction appeared to be agreed upon on the surface, the negotiating teams had reached an impasse on other aspects of the tribunal, leading the UN team to formally withdraw from the negotiations by early 2002. The cessation of the negotiation had drawn condemnation from UN member states. The UN was later pressured to return to the negotiating table. In a resolution sponsored by France and Japan in late 2002, the UN began its engagement with the Cambodian government. By the end of 2003, the UN agreed that it was assumed that the number indicted would range from 5 to 10, but stressed that this number could change based on the court's investigation.[18] The two parties reached an agreement in 2003 and, in October 2004, the UN-RGC Agreement and Amendments to the 2001 ECCC Law were approved by the National Assembly. The ECCC began its legal operation in 2006 as a hybrid tribunal in Phnom Penh.

Soon after its inception, the ECCC indicted 5 persons, two of whom have since died, in two cases – Case 001 and Case 002.[19] Case 001 concerned Duch and Case 002 Nuon Chea, Ieng Sary (deceased), Khieu Samphan and Ieng Thirith (deceased).

- *Kaing Guek Eav* (known as "Duch") was Chairman of the notorious torture chamber S-21 in Phnom Penh where an estimated 14,000 victims were tortured and killed. His case, Case 001, began its trials in February 2009 and he was convicted and sentenced to life imprisonment by the Supreme Court Chamber in February 2012. In June 2013, Duch was transferred to Kandal Providial Prison to serve his life sentence.
- Nuon Chea (known as "Brother Number Two") was Deputy Secretary of the Communist Party of Kampuchea (CPK) and a member of the CPK Central and Standing Committee. Case 002 began its trial in 2011 and was severed into two trials: Case 002/01 and Case 002/02. Nuon Chea together with Khieu Samphan were found guilty by the Trial Chamber in August 2014 and confirmed by the Supreme Court Chamber in November 2016 for crimes against humanity in Case 002/01. The Trial Chamber of the ECCC announced on November 16, 2018 that Nuon Chea and Khieu Samphan were sentenced to life imprisonment in Case 002/02 for genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949. The crimes were committed at various locations throughout Cambodia between 1975 and 1979. While Nuon Chea was convicted for genocide against the Cham and Vietnamese ethnics, Khieu Samphan was convicted for genocide against only the Vietnamese ethnic. Lasting for 283 hearing days, the Chamber heard the testimony of 185 individuals, including 114 witnesses, 63 Civil Parties and 8 experts.[20]

13 Ibid.

14 Ibid.

15 Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011; David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

16 David Scheffer, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011.

17 Steve Heder, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011.

18 Ibid.

19 Anne Heindel, Overview of the Extraordinary Chambers, in John Ciorciari and Anne Heindel (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009.

20 Public Affairs Section of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (2018), "Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment in Case 002/02", Press Release dated on November 16, https://www.eccc.gov.kh/sites/default/files/media/20181116%20Case%20002.02%20Press%20Release_ENG_Final.pdf. For Trial Chamber's Summary of Judgement Case 002/02, please visit: https://www.eccc.gov.kh/sites/default/files/media/20181116%20Summary%20of%20Judgement%20Case%20002-02_Courtesy%20Copy_Public%20version_Final-ENG.pdf

- Khieu Samphan was head of state and a member of CPK Central Committee.
- Ieng Sary, husband of Ieng Thirith, was Deputy Prime Minister and Minister of Foreign Affairs and a member of the CPK Central and Standing Committees. He died in detention while on trial in March 2013.
- Ieng Thirith, wife of Ieng Sary and sister-in-law of Pol Pot, was Minister of Social Affairs and Action and also a candidate member of the CPK Central Committee. In November 2011, the ECCC found her unfit to stand trial, due to dementia, and was released from the tribunal detention in 2012. She later died in August 2015 in Pailin near the Thai border.

CONTROVERSIAL DISPUTE ON PERSONAL JURISDICTION

A few months before the start of the Duch trial, former international Co-Prosecutor Robert Petit filed on November 18, 2008 a notice of disagreement between him and his Cambodian counterpart with regard to judicial investigation into additional suspects. He filed two new introductory submissions and one supplementary submission, which had since been withdrawn. These new submissions contained charges against six additional suspects, one of whom had since died. The author did confirm at the time that the sixth suspect had died. This new investigation was strongly contested by the national Co-Prosecutor Chea Leang, and later by the national side of this hybrid tribunal and the Cambodian government.

The views on this dispute between the two co-prosecutors were mixed. NGOs, outside observers and a large portion of the Cambodian public, held the view that they support additional prosecution and this additional prosecution would prove the court's independence and legitimacy.[21] While others argued that it made no difference and the ECCC should focus on the five already accused and charged, and get it done quickly. Based on the ECCC Law, the disagreement had to be resolved before a five-membered Pre-Trial Chamber, whose decision needed an affirmative vote of at least four judges. This complicated feature was a compromise agreed during the complex negotiation. This meant that at least one international judge had to agree with the decision of the three Cambodian judges in order to stop the investigation. In this case, the three Cambodian judges voted against additional investigation and the two international judges voted in favor. Because of the lack of a super majority decision to stop the requested investigations, the new investigations moved forward by default.

The ECCC then began its investigation into an additional 5 suspects and they became known as Case 003 (Meas Muth and Sou Met), Case 004 (Yim Tith), Case 004/01 (Im Chaem) and Case 004/02 (Ao An).[22] Sou Met died in 2013. The four surviving suspects have since been charged, but the ECCC found one of them (Im Chaem) to be outside of its jurisdiction.

- Case 003: Meas Muth was alleged to be a member of the CPK Central Committee, General Staff Deputy Secretary, Division 164 (including the navy) Secretary and Kampong Som Autonomous Sector Secretary. He has been charged with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the 1956 Cambodian Penal Code.
- Case 004: Yim Tith (also known as "Ta Tith") was alleged to be Southwest Zone Sector 13 Secretary, Kirivong District Secretary and Northwest Zone Deputy Secretary and Sector 1, 3 and 4 Secretary. He has been charged with genocide of ethnic Khmer Krom and ethnic Vietnamese, crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the 1956 Cambodian Penal Code.
- Case 004/02: Ao An (also known as "Ta An") was alleged to be Central Zone Deputy Secretary and Sector 41 Secretary. He has been charged with genocide of ethic Cham, crimes against humanity, and violations of the 1956 Cambodian Penal Code.
- Case 004/01: Im Chaem was alleged to be Preah Net Preah District Secretary and Northwest Zone Sector 5 Deputy Secretary. She was charged with homicide and crimes against humanity. On February 2017, the Co-Investigating Judges dismissed the case against her by deciding that she did fall within the personal jurisdiction of the tribunal. The International Co-Prosecutor, without the support of his National Co-Prosecutor, appealed against the decision. The Pre-Trial Chamber had again had split decision between the national and international judges. Three national judges found that the ECCC lacks personal jurisdiction over Im Chaem, while the two international judges found that Im Chaem was among those most responsible, and thereby under ECCC jurisdiction. However, because the ECCC needed four out of five votes to overturn the decision of the Co-Investigating Judges, the Case against Im Chaem was dismissed in June 2018.

Without the support and cooperation of their national counterparts and of the Cambodian government, the investigation was extremely challenging. The ECCC needs the cooperation of their national counterpart to make arrests and, among others, call witnesses to testify. It was widely believed that the Cambodian government was working to prevent additional cases from moving forward.[23] Prime Minister Hun Sen was reported to have said in his meeting with UN Secretary General Ban Ki-moon that additional cases were not allowed.[24] This perception is strongly reflected in the consistent position of Cambodian lawyers, judges and staff at the ECCC by their opposition in moving these two cases forward.[25] The controversy in Case 003 and 004 has drawn strong criticism and allegation of political interference and even corruption.[26] Three international investigating judges have either resigned or have been blocked from their official function since the start of the controversy. Although the legal process has seemed to move forward more smoothly recently, the rift between the national and international staff at the tribunal appeared to remain as evidenced by the recent split decision to dismiss the Case against Im Chaem.

---

21 Terith Chy, "Questions on Additional Prosecution Posted by the Co-Prosecutors at the Extraordinary Chambers in the Courts of Cambodia (ECCC)", 2009.

22 "ECCC at a glance", January 2018, https://www.eccc.gov.kh/sites/default/files/publications/ECCC%20at%20a%20glance%20-%20january%202018_5.pdf

23 Randle DeFalco, "Case 003 and 004 at the Khmer Rouge Tribunal: The Definition of 'Most Responsible' Individuals According to International Criminal Law", in *Genocide Studies and Prevention: An International Journal*: Vol. 8: Issue 2: 45–65, 2014.

24 "No third Khmer Rouge trial, says Hun Sen", in *RFI*, 2010, http://en.rfi.fr/asia-pacific/20101027-no-third-khmer-rouge-trial-says-pm

25 Open Society Justice Initiative, "Political Interference at the Extraordinary Chambers in the Courts of Cambodia", July 2010, https://www.opensocietyfoundations.org/sites/default/files/political-interference-courts-cambodia-20100706.pdf

26 John D. Ciorciari, Anne Heindel, "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal", 35 Mich. J. Int'l L. 369, 2014.

LESSONS LEARNT

For the victims who are still alive today, the ECCC is their last hope of bringing to justice the Khmer Rouge leaders who had inflicted so much pain and devastation. But the journey has not been an easy one. There have been so many challenges along the way. The negotiation on the establishment of the ECCC took 6 years, and the UN had to walk away once before an agreement was reached. While the investigation and trials of Case 001 and Case 002 seemed to be proceeding rather smoothly and two surviving leaders of Khmer Rouge have been sentenced to life imprisonment in Case 002 for genocide and crimes against humanity, a few charged persons and suspects have died along the way. Case 003 and Case 004 have proceeded with so much controversy that the credibility of the tribunal itself has been questioned. A few observers of the tribunal went so far as to suggest that the UN should pull out of the process completely.[27] Personal jurisdiction and, perhaps, balance of influence have been central to this controversy. The ECCC has accomplished 3 convictions and spent over 200 million over ten years, while at the same time the status of Case 003 and Case 004 remain uncertain and the credibility of the tribunal has been seriously affected. Despite some limited success, many observers suggest avoiding the ECCC model for future tribunal, mainly due to its complicated features and being politically vulnerable.[28]

27 John D. Ciorciari, "Justice and Judicial Corruption", Cambodia Tribunal Monitor, 2007; Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia", 2012.

28 John D. Ciorciari, Anne Heindel, "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal", 35 Mich. J. Int'l L. 369, 2014.

SOURCES USED AND FURTHER READING

Chy, Terith, "Questions on Additional Prosecution Posted by the Co-Prosecutors at the Extraordinary Chambers in the Courts of Cambodia (ECCC)", 2009

Ciorciari, John D., Chhang, Youk, Documenting the Crimes of Democratic Kampuchea, in Ramji, Jaya and Schaack, Beth V. (ed.), *Bringing the Khmer Rouge to Justice, Prosecuting Mass Violence Before the Cambodian Courts*, Edwin Mellen Pr, 2005

Ciorciari, John D., History and Politics Behind the Khmer Rouge Trials, in Ciorciari, John D., Heindel, Anne, (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009

Ciorciari, John D., Heindel, Anne, "Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal", 35 Mich. J. Int'l L. 369, 2014

Ciorciari, John D., "Justice and Judicial Corruption", Cambodia Tribunal Monitor, 2007

DeFalco, Randle, "Case 003 and 004 at the Khmer Rouge Tribunal: The Definition of 'Most Responsible' Individuals According to International Criminal Law", in *Genocide Studies and Prevention: An International Journal*: Vol. 8: Issue 2: 45–65, 2014

"ECCC at a glance", January 2018, https://www.eccc.gov.kh/sites/default/files/publications/ECCC%20at%20a%20glance%20-%20january%202018_5.pdf

Fawthrop, Tom, Jarvis, Helen, *Getting Away With Genocide, Elusive Justice and the Khmer Rouge Tribunal*, University of New South Wales Press, 2005

Heder, Steve, "A Review of the Negotiations Leading to the Establishment of the Personal Jurisdiction of the Extraordinary Chambers in the Courts of Cambodia", Cambodia Tribunal Monitor, 2011

Heindel, Anne, Overview of the Extraordinary Chambers, in John Ciorciari and Anne Heindel (ed.), *On Trial: The Khmer Rouge Accountability Process*, Phnom Penh: DC-Cam, 2009

International Bar Association, "The ECCC – A Failure of Credibility", 2012

Kiernan, Ben, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge, 1975–79*, New Haven: Yale University Press, 1996

McCargo, Duncan, "Politics by other means? The Virtual trials of the Khmer Rouge tribunal", in *International Affairs* 87:3, 2011

"No third Khmer Rouge trial, says Hun Sen", in *RFI*, 2010, http://en.rfi.fr/asia-pacific/20101027-no-third-khmer-rouge-trial-says-pm

Open Society Justice Initiative, "Political Interference at the Extraordinary Chambers in the Courts of Cambodia", July 2010, https://www.opensocietyfoundations.org/sites/default/files/political-interference-courts-cambodia-20100706.pdf

Open Society Justice Initiative, "Recent Developments at the Extraordinary Chambers in the Courts of Cambodia", 2012

Public Affairs Section of the Extraordinary Chambers in the Courts of Cambodia (ECCC) (2018), "Nuon Chea and Khieu Samphan Sentenced to Life Imprisonment in Case 002/02", Press Release dated on November 16, https://www.eccc.gov.kh/sites/default/files/media/20181116%20Case%20002.02%20Press%20Release_ENG_Final.pdf. For Trial Chamber's Summary of Judgement Case 002/02, please visit: https://www.eccc.gov.kh/sites/default/files/media/20181116%20Summary%20of%20Judgement%20Case%20002-02_Courtesy%20Copy_Public%20version_Final-ENG.pdf

Scheffer, David, "The Negotiating History of the ECCC's Personal Jurisdiction", Cambodia Tribunal Monitor, 2011

Vachon, Michelle, "When I Believed in the Khmer Rouge", in *The Cambodia Daily*, 2006, https://www.cambodiadaily.com/stories-of-the-month/when-i-believed-in-the-khmer-rouge-438/

Whitley, Kelly, History of the Khmer Rouge Tribunal: Origins, Negotiations, and Establishment, in Ciorciari, John D. (ed.), *The Khmer Rouge Tribunal*, Phnom Penh: DC-Cam, 2006

MEMORY OF NATIONS

Democratic Transition Guide

[The Czech Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Pavel Žáček

Just like any other totalitarian regime, the Communist regime in Czechoslovakia upheld its own existence via a power and ideology apparatus, through applying instruments of mass repression as well as terror and by inherently suppressing human rights and freedoms of the opponents of the regime.[1] The Communist authorities and national bodies governed by the communists committed hundreds of thousands of crimes from the time when they came to power on February 25th 1948, but until the fall of the Communist regime, it was impossible to reveal, investigate and punish these crimes.

During the 1948–1989 period, there were at least 257,864 people given unconditional sentences in Czechoslovakia as part of the so-called class-struggle.[2] Around 250 men (and one woman) were executed based on the political processes.[3] The Communist border guards killed at least 280 people on the borders to Austria, the Federal Republic of Germany, or even on the border to the German Democratic Republic, 143 of these people were shot and 95 were killed by the electric fence.[4]

From 1948 until 1953, about 22,000–23,000 people were sent to forced labor camps, the Czechoslovak gulags without any court ruling.[5] During the 1950–1954 period, the Communist regime assigned approximately 60,000 people to the special military labor units, the so-called technical support battalions (*Pomocné Technické Prapory*, hence the abbreviation *PTP*) and to the later *technical battalions* (*Technické Prapory*, hence the abbreviation *TP*), 22,000 of which were demonstrably assigned to these units due to political reasons (the so-called classification "E").[6]

The political bodies within the Communist Party of Czechoslovakia, the People's Militia, the national administration and self-administration bodies, especially the security services (State Security, Public Security), the Czechoslovak People's Army, the Border Guard and the Guard of the Interior, the prosecution offices, state and people's courts, national committees etc. participated in different forms of repression. With very few and rare exceptions, the Communist regime protected these bodies and didn't allow for them to be prosecuted, frequently not even in cases when their members or employees broke valid legal standards.

LEGAL CONDITIONS OF INVESTIGATION OF POLITICALLY MOTIVATED CRIMES

It was already during the "Velvet Revolution" at the end of 1989 that the investigation authorities were overloaded with applications demanding the politically motivated crimes committed during the 1948–1989 period by the communist nomenclatura, the repressive forces and other state bodies to be investigated. In this way, the citizens tried to pave the way for justice, yet according to valid legislation, their only recourse were the hitherto existing institutions: the General or Military Prosecution office, investigation units within the National Security Corps, various inspection bodies that in turn were more or less occupied by communist structures supporters. The disappointment caused by these police bodies, or rather by the justice not working and also by the fact that the judicial system was occupied by Communist Party members too, frustrated people and made them mistrust the post-totalitarian system. There was an objective factor complicating the investigation which consisted of the long period throughout which the totalitarian regime prevailed and frequently, a significant stretch of time had elapsed since the crimes had been committed, the perpetrators and victims were very old (and had sometimes even died), written evidence was systematically being destroyed. Furthermore, part of the society was unwilling to help as it had wanted the criminal system to remain operational.

On November 13th 1991, the Act No. 480/1991 on the Era of non-Freedom was adopted by the Federal Assembly as a sign of political compromise declaring: "*Between 1948 and 1989, the Communist regime breached human rights and even its own laws.*" This act stated simultaneously that the legal acts adopted during this era may only be annulled by special acts.

It was as late as on July 9th 1993 that people managed to put through the Act No. 198/1993 Sb. on Illegality of the Communist Regime and on Resistance to it. This was an expression that people knew it was necessary to reappraise the Communist regime. The Czech Parliament representatives said that the Communist Party of Czechoslovakia, its management and members are responsible for the type of government in our country in the 1948–1989 period, "*which especially refers to the organized destruction of traditional European civilization values, to the wittingly committed breaches of human rights and freedoms, to the moral and economic decay accompanied by judicial crimes and terror against people who have another opinion – all of this having been done by replacing a functional market economy by a centrally organized one, by destroying traditional approaches towards property rights, by misuse of education, science and*

1 Michal Reiman: *O komunistickém totalitarismu a o tom, co s ním souvisí*, Praha: Nakladatelství Karolinum, Praha, 2000, 62.

2 This refers to the number of convicted people who were rehabilitated later on according to Act No. 119/1990 Sb., but excluding the people convicted by military courts. František Gebauer, Karel Kaplan, František Koudelka, Rudolf Vyhnálek, eds., *Soudní perzekuce politické povahy v Československu 1948–1989. Statistický přehled*, Praha: ÚSD AV ČR, 1993, 64.

3 Otakar Liška a kol., eds., *Tresty smrti vykonané v Československu v letech 1918–1989*, Sešity No. 2, Praha: ÚDV, 2006; Ivo Pejčoch, *Vojáci na popravišti*, Cheb: Svět křídel, 2011. There is a specific category of several thousands of people killed or tortured to death in custody, prisons, penitentiaries or forced labor camps.

4 Martin Pulec: *Organizace a činnost ozbrojených pohraničních složek. Seznamy osob usmrcených na státních hranicích 1945–1989*. Sešity 13, Praha: ÚDV, 2006, 173.

5 Karel Kaplan: *Tábory nucené práce v Československu v letech 1948–1954*, Praha: Nakladatelství R, 1992, 136.

6 Jiří Bílek: *Pomocné technické prapory 1950–1954*, Praha: Nakladatelství R, 1992, 53.

culture for political and ideological reasons and by recklessly destroying nature."

The Parliament stated that the Communist regime including those who had been supporting it, had committed the following:

*"**a/** deprived its citizens of any opportunity to freely express their political will, forced them to hide their opinion about the situation within the country and made them say they agreed even with things they actually regarded as a lie or a crime – all this being done under the threat of persecution of the people, their families or friends,*

***b/** abused human rights systematically and consistently, suppressing certain political, social or religious groups of people,*

***c/** breached the fundamental principles of a democratic constitutional state, international contracts and even its own laws, posing thus the Communist Party's and its representatives' will and interests above the level of law,*

***d/** ade use of any power instruments for the purposes of persecution, especially:*

- *executed, murdered, incarcerated people in prisons and forced labor camps, making use of brutal methods including physical and psychological torture and exposure to inhuman ordeals during investigations and during incarcerations,*
- *deprived people arbitrarily of property and breached their property rights,*
- *hindered people from doing their employment, occupation or function and prevented them from achieving a university or vocational degree,*
- *hindered them from travelling freely abroad or returning back freely,*
- *drafted people for army service in the Technical Support Battalions or in the Technical Battalions for an indefinite period of time,*

***e/** the regime didn't hesitate to commit crimes in order to achieve its targets, enabling crimes to be committed with impunity and offering unjustified benefits to those participating in those crimes and persecutions,*

***f/** formed an alliance with a foreign power upholding the above-mentioned state of affairs with this power's occupation army from 1968 onwards."*

The law stated that the functionaries, organizers and instigators within the communist regime and its political as well as ideological sphere are entirely co-responsible for the crimes that had been committed as well as for other issues.

The regime based upon Communist ideology which had absolute power from February 25th 1948 until November 17th 1989 in respect of governing the country and the Czechoslovak people's fate, was declared to be criminal, illegal and despicable especially due to the above-mentioned acts. Furthermore, the Communist Party was declared to be a criminal and despicable organization, like other organizations based upon its ideology, i.e. organizations that strived for the suppression of human rights and the democratic system.[7]

Again, the act declared support for anybody who had been unjustly affected or persecuted by the regime, but who had not been supporting this regime stating that such a person deserved some kind of participation and moral satisfaction. Additionally, the Czech government was empowered to make up for some injustices committed towards Communist regime opponents or towards people affected by this regime's persecutions – be it in the social, health or financial sphere. What followed during the next decade of government was social support for former political prisoners, for people sent to military forced labor camps or to technical support battalions, or for people who were arrested or exmatriculated etc.

CRIMINAL PROSECUTION OF THE CRIMES OF THE PREVIOUS POWER

This very important legal standard significantly influenced the subsequent criminal prosecution of Communist crimes. The period between February 25th 1948 and December 29th 1989 still didn't count as being part of the limitation period "*if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state.*" This paragraph enabled the Office for the Documentation and the Investigation of the Crimes of Communism, the prosecuting offices and the courts to continue criminally prosecuting the Communist regime representatives.

Last but not least, this act significantly set the way towards establishing a legal standard regulating rebellion and resistance against the Communist regime which on the one hand provided for these movements to be put on the same level as resistance against the Nazi regime and furthermore led to these movements being acknowledged: "*The people's resistance against this regime which they expressed – be it individually or in a group – due to their politically, religiously or morally guided democratic conviction through rebelling against the regime or through another activity or which they expressed wittingly and in public, on national territory or abroad, even in an alliance with a foreign democratic power, was a legitimate, justified act which deserves to be acknowledged.*"

The fact that the Communist Party has not been banned, the fight for its electorate, the significant polarization of legislative acts addressing significant problems with the totalitarian past, or rather with the necessary transformation of the legal system, public administration and the whole society during the transition from the totalitarian regime towards a democracy caused the process of putting through the legislative as well as factual means for at least a partial remedy to these problems to last until now – and this is definitely to be regarded as a negative aspect.

STATUS OF INVESTIGATING AUTHORITIES

The first specialized institution to have been established was the **Department for Documentation and Investigation of State Security Activities under the Federal Ministry of the Interior** set up in the middle of September 1991, which was directly controlled by the minister who had the task of analyzing archive materials, dealing with proposals made by natural as well as legal persons in relation to the State Security, and who was to investigate crimes committed by members of the Communist secret police. Although the volume of staff under the guidance of Jiří Šetina didn't exceed twenty people, this department managed to process 56 proposals during 1991 and 245 in 1992.

7 For comparison, see Pavel Žáček, *Boje o minulost. Deset let vyrovnávání se komunistickou minulostí*, Brno: Barrister & Principal, 2000, 67–68.

Shortly before Czechoslovakia broke up into the Czech Republic and Slovakia, to be more precise – in November 1992 – the department was transformed into a new Office for Documentation and Investigation of State Security Activities, under the Investigation Office for the Czech Republic. The management of the Office for Documentation and Investigation presided over by the political prisoner Lubomír Blažek preferred to gradually educate its own investigators and documentarians (experts). Logically, the demands on the respective police officers and civil employees were very high as far as suitable character requirements were concerned – no one compromised by a burdening relationship towards the pre-revolutionary power could become an employee of this office.[8]

The **Coordination Centre for the Documentation and Investigation of Violence against the Czech Nation from 8. 5. 1945 until 31. 12. 1989**, i.e. an office that was part of the General Prosecuting Office of the Czech Republic and managed directly by the General Prosecutor, was founded in March 1993. The coordination centre's main task was solving crimes against peace and humanity, or possibly further extraordinarily severe crimes committed in relation to citizens, and deducing the legal responsibility for the revealed illegal acts. Solving these crimes was to refer both to illegally acting people, as well as to leading functionaries who had caused or ordered such an activity. Apart from solving, documenting and investigating, the coordination centre was to carry out an analysis and publish the specific results of its activities.

Yet the investigation files from the former Investigation Directorate at the State Security became the main information sources. The coordination centre employees tried to secure further information and evidence via questionnaires that were to serve for recording cases of persecution and to note down specific testimonies.

From May until November 1993, the coordination centre received 538 applications, solving 214 of these cases: 7 were passed on for criminal prosecution, 10 were postponed, 7 were referred to the Office for Documentation and the Investigation, 19 to another department within the General Prosecuting Office, 28 to the Regional Prosecuting Offices, 3 to the Central Military Prosecuting Office, 140 cases were terminated another way.

The transformation process from the prosecuting offices to the Prosecutor's Offices was accompanied by this office's new orientation and by the new title of the authority – **Centre for Documentation of the Unlawfulness of the Communist Regime of the Ministry of Justice of the Czech Republic**.[9]

It was as late as on the advent of the Act on the Illegality of the Communist regime and Resistance against it when it was stated that the period from February 25th 1948 until December 29th 1989 does not count as a limitation period "*if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state.*" (§ 5). This paragraph de facto provided for the investigation and criminal prosecution of some of the most severe communist crimes.[10]

Until December 1993, the *Office* for documentation and investigation dealt with 1,135 suggestions directed at State security members concluding 616 cases. It mainly focused on files that had been handed over after the inspection of the Federal Ministry of the Interior had been abolished. Approximately 200 suggestions referred to people labelled as secret collaborators – agents where the criminal prosecution of an unknown delinquent was demanded.[11]

In spite of this, it had been demonstrated by the years of 1993/1994 that the Office for the Investigation and Prosecution which was de facto the only state institution responsible for reappraising the past, had been founded too late and vested with too little powers. It appeared on the stage at a time when the deceitful opinion among most of its partners – the administrators of the secret archive materials – prevailed that they had already completed the reappraisal process with the past.

In March 1994, an agreement was concluded between the office and the centre in order to prevent the duplicity of new applications. In August 1994, the office's management stated that it was focusing on 1,400 cases, estimating that it would be possible to start criminal prosecution in about less than one percent of the cases.

By the end of the limitation period for a public official's abuse of power (which is by December 29th 1994), the Office for Documentation and the Investigation of Crimes of the State Security concluded 1,055 applications; in 44 cases, the investigators filed charges against the respective people.[12]

In January 1995, the office and the centre were united and the **Office for the Documentation and Investigation of the Crimes of Communism** was founded, chaired by the dissident and politician Václav Benda. Defining the new office's competence, the Minister of the Interior made use of § 5 of the above-mentioned act that defined the limitation periods in the Communist era. Apart from checking notifications and applications as well as investigating crimes committed by Communist functionaries, organizers and supporters in the period from February 25th 1945 until December 29th 1989, the office was to focus on reports, suggestions, investigations of crimes and on detecting the perpetrators. Last but not least, it was to collect, evaluate and document facts and activities connected to the illegality of the Communist regime and the support against it.

In November 1995, V. Benda said in one of the interviews he gave about the Office for the Documentation and Investigation that this office represents "*a unique investigation authority of this kind within the whole post-communist block, vested with the full powers of a police force, yet being confined to the 1948–1989 era and to crimes that can be characterized as having been committed under political pressure. In contrast to usual investigation units and taking into consideration the above-mentioned restrictions we are also obliged to document crimes that cannot be prosecuted due to the perpetrators having died or due to insufficient evidence.*" He described the Czech Republic's approach in reappraising the totalitarian past as "*hesitant, but in a way purposeful*" because "*we intend to gradually reappraise the past.*"[13]

Carrying out its activities, the investigation department paid due respect to the Constitution of the Czech Republic and

8 Žáček, *Boje o minulost*, 59–60.

9 Ibid. 60–65.

10 The Act No. 198/1993 Sb., on the illegality of the Communist Regime and the Resistance against it, § 5. For comparison, see Jiří Kozák, *Právo na pomezí diktatury a demokracie. Právní vyrovnání s totalitní minulostí v České republice po roce 1989*, Praha: Auditorium, 2014, 87–88.

11 Pavel Žáček: Překonávání totalitní minulosti na český způsob, in: Petr Fiala, František Mikš, eds., *Česká konzervativní a liberální politika. Sborník k desátému výročí založení revue Proglas*, Brno: CDK 2000, 393–394.

12 Žáček, *Boje o minulost*, 69–71.

13 Ibid. 80–81.

the Charter of Fundamental Rights and Freedoms following the Criminal Code, the Criminal Act, the Act on the Police of the Czech Republic and other legal rules and internal standards applicable to the police and the Ministry of the Interior. It started its investigations based upon suggestions and criminal information handed in by natural and legal persons, or upon its own initiative which was mostly based upon archive materials having been researched by the documentation sector with a specific suspicion that a crime had been committed or possibly, based upon information that resulted from already ongoing investigations.[14]

IDENTIFICATION OF THE CRIMINALS OF THE TOTALITARIAN REGIME

The Office for the Documentation and Investigation focused on investigating more important cases related to high-ranking party and security nomenclatura within the Communist Party of Czechoslovakia (high treason of 1968), or on cases related to medium- and higher-ranking security apparatus posts (e.g. the "Asanace" (*Sanitation*) campaign, i.e. the forced removal of unpleasant people to foreign countries), shooting on the border or the escapes from forced labor camps, or the torture methods applied by investigators during the fifties.[15]

At the end of 1996, the investigators pertaining to the Office for the Documentation and Investigation were in the process of criminally prosecuting 110 people. In 30 cases, the investigation was concluded and passed on to the prosecutor's office with the proposal to file charges. In approximately 8 cases, the action was brought before the court. The office was forced to stop several other criminal prosecutions or to postpone them – due to failure of evidence, the perpetrator having died or due to other reasons. At that time, director Benda declared: "*The harsh reality is that most of the crimes will remain unpunished. Let's not deceive ourselves that we could punish all the evil that has been committed during the 42 years of the Communist regime. Our work mainly serves the future, creating a constitutional state. We do want to reestablish the knowledge that any crime, be it a crime committed with the utmost support from above, can be punished once. We do want that anybody who committed such crimes lives in fear until the end of his days that he may have to reap the consequences of his behavior.*"

In April 1997, the overall number of accused people decreased to 100, yet altogether, 13 people were charged, and 4 people faced trials. One month later, V. Benda mentioned: "*Currently, more than 100 people are being prosecuted and we are counting with the option of prosecuting several other hundreds, yet within two or three years, this number shall be reduced to about one tenth. It's realistic to assume that a more complete documentation of the crimes of communism will consume another ten to fifteen years.*" He again stressed the international scope of the office's activity: "*We are the only regular police authority of this type within the countries of the former Eastern Block. Not even the Gauck-Authority in Germany, which has three thousand five hundred employees, is an institution with this purpose. At first, our concept had been doubted by people from abroad, but the situation has radically changed. We are now being admired by the West and the East, people are trying to establish similar institutions.*"

During 1997, the Office for the Documentation and Investigation of the Crimes of Communism was also entrusted with some cases falling into the time period prior to February 1948. This was one of the reasons why the Minister of the Interior broadened the power of this authority to crimes committed in the time from 1939 to 1945 "*on citizens of Roma origin in connection to the Protectorate authorities that founded and managed punitive detention camps*".

By the end of 1997, the office had processed 39 proposals for indictment, the state prosecutors accused 25 people, yet hitherto, only one had been sentenced – the former State Security officer Jaroslav Daniel. At that time, director Benda complained about some judges' "ideological" approach. "*I underline that this isn't a universally present phenomenon but it's the case of individual judges who are starting to interpret the cases in a purely ideological way. I would say that this is a large-scale offensive intended to stop the prosecution of communist crimes from the previous era…*"[16]

Following the elections of 1998 won by the Social Democratic Party which was the sole party to form the government, indifference about the office's activity prevailed and changes in its management were carried out with bureaucratization and subsequent ineffectiveness prevailing and almost wiping out the investigation of crimes and the documentation of power support during the communist regime era. The office's management basically switched to a rigid mode where quality was replaced by quantity. The fact that the leading functionaries from this office hardly appeared in the media and that the subordinates received hardly any support, furthermore meant that the office which had been initiating a qualified discourse in society and determining the topics of discussions turned into a toothless institution, some kind of alibi established by the state and the police for the political prisoners and for foreign countries.[17]

In spite of that, the Crime Act Amendment introduced by Act No. 327/1999 Sb. succeeded in prolonging the limitation period thanks to the provision of § 67 subs. 1 letter b) of the Crime Act from ten to twelve years stipulating at the same time the imprescriptibility of a limited scope of crimes (listed in § 67a letter d) of the Crime Act). The punishability of the crimes committed in the period from February 25th 1948 until December 29th 1989 didn't end after the limitation period of these crimes ran out "*where the maximum period of imprisonment is at least ten years, if a politically motivated final court conviction or acquittal had been proclaimed that would be incompatible with the fundamental principles of the constitutional order within a democratic state, and if these crimes were either committed by public officials or in connection to prosecuting individuals or groups due to political, racial or religious reasons.*"[18]

In spite of the crisis, investigating Communist crimes didn't stop. In 2005, the structure of the former Communist regime representatives criminally prosecuted by the Office for the Documentation and Investigation of the Crimes of Communism under the Criminal Police Administration was as follows: 114 National Security Corps members (there were 2 members of the Police with the other prosecuted people coming from the State Security – including chiefs of units within the political police), 30 border

14 Pavel Gregor, "Informace o činnosti odboru vyšetřování", in *Securitas Imperii*, 2006, (14), 424.

15 For comparison, see Pavel Žáček, Proces demokratizace a vyrovnávání se s totalitou v oblasti práva, in: *Auseinandersetzung mit der Totalitären Vergangenheit. Deutsche und Tschechische Wege nad 1989 – ein Vergleich*, Berlin: BWV, 2008, 185–186.

16 Žáček, *Boje o minulost*, 79–85.

17 Ibid, 95–107.

18 Gregor, "*Informace o činnosti odboru vyšetřování*", 424.

guard members, 13 Communist Party nomenclatura cadre members (including people from the Federal and National Ministry of the Interior) seven judges, six prison guards, four prosecutors (one of them being an investigator), two military intelligence members, state administration functionaries and doctors, one General Staff of the Czechoslovak People's Army member and one intelligence member.[19]

By October 2006 the criminal prosecution of 188 people had started; and in 98 of these cases, the state prosecutor agreed with the investigation results, i.e. came to the conclusion that a crime had been committed and that it had been committed by the accused person. 29 people were finally convicted, 21 of these people received a suspended sentence with a probation period. Furthermore, the courts came to final conclusions in the cases of 48 people who were acquitted or where criminal prosecution was stopped due to amnesty, as a result of a limitation period having run out or due to death. As far as the other cases are concerned, no final decision was arrived at.

After the checking procedure, the investigation department decided to put aside 700 other cases and in 450 of these cases it came to the conclusion that it wasn't possible to prove that a crime had been committed (§ 159a subs. 1 Criminal Code); in 123 cases, the suspect had died or been granted amnesty which prevented the opening of criminal proceedings (§159a subs. 2 Criminal Code); and in 127 cases, the reason for putting the cases aside was that it wasn't possible to detect facts which would enable the opening of the respective person's criminal proceedings (§ 159a subs. 4 Criminal Code).[20]

At the end of 2006, the Ministry of the Interior management decided to transfer 22 workplaces from the documentation department, i.e. people who were in no way linked to the course of the investigation itself, to the Department of Security Services of the Ministry of the Interior (which was carried out on February 1st and on July 15th 2007) – this was part of the preparations for adopting the act on establishing the National Memory Institute (respectively Institute for the Study of Totalitarian Regimes and Security Services Archive). The Office for the Documentation and Investigation furthermore had 36 system-internal police staff and 2 civil employees.

According to statistics provided by the Office for the Documentation and Investigation of the Crimes of Communism, this office prosecuted 212 people in 114 criminal cases during the period ranging from 1995 until 2013. This institution's police officers filed 113 proposals for action at the respective prosecuting offices (36 of these were placed repeatedly) related to 136 accused people. The prosecutors subsequently accused 112 people in 84 (21× repeatedly) cases. Until now, the courts have come to a final decision related to 54 people. According to available information, the lowest sentence was a 1 year suspended sentence with a probation period of 18 months and the highest sentence 6 years of unconditional detention. This statistic does not include data on people criminally prosecuted or sentenced prior to the Office for the Documentation and Investigation's establishment.

Furthermore, during the same period, there were 41 actions initiated at the Supreme Prosecuting Office in Brno for extraordinary remedies to achieve the respective courts' final decision (this referred to a total of 106 people). This number consisted of:

- 16 applications for complaints initiated due to a breach of law resulting in a disadvantage to the accused,
- 11 applications for reviews of an appeal, again resulting in a disadvantage to the accused people,
- 12 applications for complaints initiated due to a breach of law resulting in an advantage for the accused – referring to the period prior to 1989 (the so-called remaining penalty),
- 2 applications for revision.

Hitherto, the Supreme Court of the Czech Republic has given its approval in 25 cases, whereas in 15 cases, the application was rejected.

The Office for the Documentation and Investigation also handed over information regarding crimes of aliens from the former USSR, Bulgaria, Hungary, the former GDR and Poland through the channels of international judicial assistance.[21]

LESSONS LEARNT AND RECOMMENDATIONS

Finally, it remains to be stated that also striving for the punishment of communist crimes was part of the transformation process – on the one hand, this was promoted as part of the process of introducing justice and on the other hand, it formed an indispensable condition for establishing a constitutional state. The process of criminal law reappraisal of the totalitarian past is to be commenced once the political conditions following the fall of the totalitarian regime enable this. If it is possible, a special police and judicial body shall be entrusted with investigating these specific crimes and this authority shall be composed of uncompromised people who are free of any connections to the former totalitarian regime (which also applies to judges who would lack any connections to the policy of the past). Above all, these investigation authorities' attention should be drawn to solving cases of murder, torture, politically motivated executions, judicial crimes and unclear deaths, manslaughter on the border and also corruption.

Punishing the most severe crimes committed by a totalitarian power is an important element of reestablishing the constitutional state and also represents an indispensable form of prevention against any other attempt which would lead to the usurpation of power. In this sense, it also needs to be stressed that restoring justice is a very difficult legal process where it's necessary to tackle retroactivity, presidential pardons etc., including a different approach towards the accused who are using all the conveniences available in a constitutional state to defend themselves. Prosecuting the judicial system's employees, especially the judges, remains another specific issue.

19 Pavel Žáček, "Úřad dokumentace a vyšetřování zločinů komunismu", in *Pamäť národa*, 2005, (2), 83.

20 Gregor, "*Informace o činnosti odboru vyšetřování"*, 425.

21 Pavel Žáček, *Memory of Nations in Democratic Transition. The Czech Experience*, Praha: Zaostreno, CEVRO LKA, 2015, 38–39.

SOURCES USED AND FURTHER READING

Act No. 198/1993 Sb., on the illegality of the Communist Regime and the Resistance

Bílek, Jiří: *Pomocné technické prapory 1950–1954*, Praha: Nakladatelství R, 1992

Gebauer, František, Kaplan, Karel, Koudelka, František, Vyhnálek, Rudolf, eds., *Soudní perzekuce politické povahy v Československu 1948–1989. Statistický přehled*, Praha: ÚSD AV ČR, 1993

Gregor, Pavel, "Informace o činnosti odboru vyšetřování", in *Securitas Imperii*, 2006, (14), 424–432

Kaplan, Karel, *Tábory nucené práce v Československu v letech 1948–1954*, Praha: Nakladatelství R, 1992

Kozák, Jiří: *Právo na pomezí diktatury a demokracie. Právní vyrovnání s totalitní minulostí v České republice po roce 1989*, Praha: Auditorium 2014

Liška, Otakar a kol., eds., *Tresty smrti vykonané v Československu v letech 1918–1989*, Sešity No. 2, Praha: ÚDV, 2006

Pejčoch, Ivo: *Vojáci na popravišti*, Cheb: Svět křídel, 2011

Pulec, Martin, *Organizace a činnost ozbrojených pohraničních složek. Seznamy osob usmrcených na státních hranicích 1945–1989*, Sešity 13, Praha: ÚDV, 2006

Reiman, Michal, *O komunistickém totalitarismu a o tom, co s ním souvisí*, Praha: Nakladatelství Karolinum, 2000

Žáček, Pavel: *Boje o minulost. Deset let vyrovnávání se komunistickou minulostí*, Barrister & Principal, Brno 2000

Žáček, Pavel: Proces demokratizace a vyrovnávání se s totalitou v oblasti práva, in *Auseinandersetzung mit der Totalitären Vergangenheit. Deutsche und Tschechische Wege nad 1989 – ein Vergleich*. Berlin: BWV 2008, 175–189

Žáček, Pavel: Překonávání totalitní minulosti na český způsob, in Fiala, Petr, Mikš, František, eds., *Česká konzervativní a liberální politika. Sborník k desátému výročí založení revue Proglas*, Brno: CDK 2000, 388–398

Žáček, Pavel, "Úřad dokumentace a vyšetřování zločinů komunismu", in *Pamäť národa*, 2005, (2), 81–84

Žáček, Pavel, *Memory of Nations in Democratic Transition. The Czech Experience*, Praha: Zaostreno, CEVRO LKA, 2015

MEMORY OF NATIONS

Democratic Transition Guide

[The Estonian Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Meelis Saueauk

INTRODUCTION

The Soviet regime committed acts of terror in Estonia in the 1940s and 1950s – mass murders, deportations, etc., which by their nature are qualified as international crimes without statutory limitations – genocide, crimes against humanity, and war crimes. Approximately 2,000 people were killed and about 10,000 people were deported *en masse* in 1941. Mass arrests were made, hundreds of people were executed or perished in prison camps, and over 1,500 people were murdered in the woods in 1944–1945. Over 20,000 people were banished from Estonia in the course of the mass deportation of 1949, etc. A total of about 70,000 people were murdered on the spot, arrested, or deported from Estonia to the Soviet Union.

DESCRIPTION OF THE DEFAULT SITUATION

After Stalin's death in 1953, the new political orientation was admittedly set towards doing away with mass repressions, and imprisoned persons and deportees started being released in stages. A few leaders of State Security were also prosecuted, but it was inconceivable in the Soviet Union and the Estonian SSR that the acts committed would officially be treated as anything other than "mistakes" and even less so that judicial investigations would be carried out concerning such matters. In the latter half of the 1980s a "new wave" began in the rehabilitation process in the Soviet Union, the distinct feature of which was "further investigation" connected to repressions. The main objective here became the "rehabilitation" of victims.

The investigation of international crimes without statutory limitations has had a central role as a measure of transitional justice since the time of the Nuremberg Trials of Nazis. It became permissible to openly and publicly discuss crimes committed mainly during the Stalinist era in Estonia during the process of restoring independence starting in 1988. After the Estonian SSR declared its sovereignty, the Extrajudicial Mass Repressions in Soviet Estonia in the 1940s–1950s Act was passed, which declaratively proposed that the Estonian SSR Prosecutor's Office should begin reviewing applications and notifications concerning mass murders and other acts against humanity committed in Soviet Estonia, and should make decisions on questions concerning the commencement of criminal proceedings and the criminal prosecution of offenders. Even though a few criminal proceedings were thereafter launched at the Prosecutor's Office concerning the murders of 1941, their investigation did not lead to any convictions. Although victims were rehabilitated and property that had been confiscated from them also started to be returned to them, the perpetrators of these crimes were not brought to justice.

DESCRIPTION OF THE TRANSITION

It was only the restoration of Estonia's independence in August of 1991 that opened up the legal and political preconditions for investigating the crimes of communism and prosecuting the perpetrators of those crimes. Already on 26 September 1991, Estonia joined two UN conventions – the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968) – by decision of its transitional parliament, the Supreme Council. With these conventions, Estonia also took upon itself the obligation to work out the corresponding legislative framework and to commence investigation of crimes without statutory limitations and of the perpetrators of those crimes.

The Estonian State Commission on Examination of the Policies of Repression (ORURK) was established in accordance with the decision issued on 26 March 1992 by the Presidium of the Supreme Council of the Republic of Estonia. The committee's task was to:

1/ analyse the repressive policy imposed in the territory of the Republic of Estonia in the 20th century during the years of occupation by the Soviet Union and Germany;
2/ identify crimes of genocide committed against citizens of the Republic of Estonia during the periods of occupation;
3/ assess the economic damage caused to the Estonian people by the occupations;
4/ form an objective, research-based assessment of the actions of the 20th century occupying regimes in Estonia.[1] Although carrying out criminal investigations was not within the jurisdiction of OKURK (the chairman of which was the writer Jaan Kross, and later the clergyman, theologian, historian and man of letters Vello Salo), the broad-based and comprehensive expertise of the committee greatly contributed to improving the state of the investigation of international crimes not subject to statutory limitations. The Estonian International Commission for Investigating Crimes against Humanity (the chairman of which was the former Finnish Ambassador to the UN and Sweden Minister Max Jakobson), established in 1998 at the initiative of the President of the Republic of Estonia Lennart Meri, continued doing roughly the same work, using as its legal framework, the Rome Statute of the International Criminal Court definitions of international crimes.

Nevertheless, from among the Baltic States, it took Estonia the longest to start implementing criminal-judicial measures. A curious situation emerged where in 1994; a parliamentary ad hoc committee (the chairman of which was Enn Tarto)

1 Riigikogu, questions of the State Committee for Investigating the Repressive Policy of Occupations, passed on 17 June 1993 *Riigi Teataja*; https://www.riigiteataja.ee/akt/13098133 (last visited 1 April 2017).

requested the commencement of criminal proceedings to investigate the mass deportations of the 1940s and 1950s, yet this could not be done because the corresponding provisions were missing from the Penal Code.[2] At about the same time for instance (in March of 1994), the former head of the Latvian branch of the Soviet secret service Alfons Noviks was arrested in Latvia and charged with genocide against the Latvian people.

Amongst a background of political bickering, it took until the end of that same year, when finally on 9 November 1994, the Riigikogu passed an amendment to the Criminal Code of the Republic of Estonia, which derived from the time of Soviet rule, establishing responsibility for crimes against humanity and war crimes. Its Article 61-1 stated that "For crimes against humanity, including genocide, as per definition of these crimes in international law, that is for deliberate acts whose aim it is to fully or partially eradicate a group, based on national, ethnic, racial or religious distinction, which is resisting an occupation regime, or any other social group; for the killing of a member of such a group or for causing him/her grave or very grave bodily injuries or mental dysfunction or for torturing him/her; for removal of his/her children by force; for deportation of the indigenous population or for banishment into exile once an armed invasion, occupation or annexation has occurred, and for depriving them of their economic, political and social human rights or for restriction of these rights – the penalty is deprivation of liberty for between 8–15 years or the death penalty".[3] This definition differed slightly from those usually found in international legislation. For example, deliberate acts against a group, which is resisting the occupation regime, or against a social group, were categorised as crimes against humanity, and the crime of genocide was in a way included in the crimes against humanity.

The pre-trial investigation of crimes against humanity is a task that was assigned to the Estonian Security Police Board (since 2013 in English – *Estonian Internal Security Service*). The Security Police Board was established in 1993 and was formed without employing former employees of the Soviet state security forces – the KGB, except for some technical specialists. A special unit for investigating crimes against humanity was established within the structure of the Security Police Board.

The Security Police acted quickly and by the spring of 1995, five criminal cases were already pending for investigating crimes against humanity and war crimes. Although the Security Police started out by investigating crimes from the Soviet era, it has also worked in parallel on investigating crimes from the time of the German occupation. The criminal cases concerning war crimes and crimes against humanity being processed by the Internal Security Service can be roughly divided into four categories:

1/ Crimes committed during the Soviet occupation of 1940/41;
2/ Crimes committed during the German occupation (1941–1944);
3/ Crimes against civilians committed in Estonia for the purpose of suppressing resistance to the occupying regime during the Soviet occupation of 1944–1991;
4/ The mass deportation of March, 1949.[4]

One of the first investigations was launched and carried out concerning the former regional head of state security Vassili Riis. The investigation concerning Riis was launched in 1995 in accordance with the Criminal Code article on crimes against humanity. In 1941, Riis (1910–98), gave written consent to the arrest or deportation of 1,062 citizens of the Republic of Estonia. In 1996, the criminal case was transferred to the Court, but the trial was suspended due to the poor health of the defendant and terminated in 1998 due to his death.

Some of the subsequent investigations also suffered the same fate – the accused was in such a condition that it was no longer possible for him to stand trial due to his age and the state of his health. Thanks to the time factor (about 50 years had already passed since the crimes under consideration had been committed), most of the higher-ranking figures and the individuals who gave the orders, as well as witnesses, were no longer alive. The archival material that the KGB had handed over to the Republic of Estonia had many gaps in it, for this reason the acquisition of written evidence also required a great deal of work. Thus the investigation of crimes against humanity became a race against time.

The first investigation to result in a court case was in 1999 when the former KGB employee and operative officer Johannes Klaassepp was sentenced according to Article 61-1 of the Criminal Code for participation in the mass deportation of 1949, deporting 15 people and attempting to deport two more. The youngest of Klaassepp's victims was 4 years old. Enn Sarv, a member of ORURK, was involved in the trial as an expert and drew up a comprehensive statement on the deportation and its legal assessment. The court verdict sentenced Klaassepp to eight years conditional imprisonment with a probation period of two years, and subsequently became a precedent for such cases. Altogether, Estonian courts have found eight people guilty of the deportation of the March, 1949 as a crime against humanity.

CURRENT STATUS

The ascertainment of offenders continued under slightly amended legal grounds after the reform of the Penal Code carried out at the turn of the century in Estonia. The new Penal Code that went into effect in 2002 added an article on genocide alongside the necessary elements of crimes against humanity. The new definitions of crimes against humanity and of genocide according to the valid Penal Code are as follows:

"§ 89. Crimes against humanity – Systematic or large-scale deprivation or restriction of human rights and freedoms, instigated or directed by a state, organisation or group, or killing, torture, rape, causing health damage, forced displacement, expulsion, subjection to prostitution, unfounded deprivation of liberty, or other abuse of civilians, is punishable by 8 to 20 years imprisonment or life imprisonment.

§ 90. Genocide – A person who, with the intention to destroy, in whole or in part, a national, ethnic, racial or religious group, a group resisting occupation or any other social group, kills or tortures members of the group, causes health damage to members of the group, imposes coercive measures preventing childbirth within the group or forcibly transfers children of the group, or subjects members of such group to living conditions which have caused danger for the total or partial physical destruction

2 Harri Mägi, *ENSV KGB tegevuse lõpetamine*, Tallinn: Varrak, 2012, 125–126.
3 Kriminaalkoodeks (Criminal Code), *Riigi Teataja*; https://www.riigiteataja.ee/akt/184289 (last visited 1 April 2017).
4 Estonian Internal Security Service, "20 years of investigating universal crimes", in *Estonian Internal Security Service Annual Review 2015*, Tallinn, 2016, 39.

of the group, shall be punished by 10 to 20 years imprisonment or life imprisonment."[5]

As we can see, the crime of genocide is now considered to be a separate crime distinct from a crime against humanity, yet the concept of a crime of genocide remains expanded compared to that of the Convention on the Prevention and Punishment of the Crime of Genocide. The treatment of genocide has been internationally contested since the adoption of the concept, and different countries and institutions have interpreted it differently in their legislation as well.[6]

Over the 20-plus intervening years, a total of 12 criminal cases have been prosecuted in Estonian courts under the section of crimes against humanity, and 11 persons have been convicted:

1/ 8 persons have been convicted in connection with the deportation of March, 1949 (J. Klaassepp, V. Beskov, M. Neverovski, V. Loginov, J. Karpov, A. Kolk, V. Kask and P. Kislyi (Kislõi)). These persons were former Soviet state security officers (MGB or MVD) and were sentenced for crimes against humanity (See the description of the sections from the Penal Code or Criminal Code). As a rule, the sentence for such crimes was imprisonment for 8 years suspended on probation. Tactically speaking, the investigation of deportations was conducted region by region because this was also how the carrying out of the deportation operation was organised;

2/ 3 persons have been convicted of murdering members of the national armed resistance ("forest brothers") in the 1940s–1950s – K. L. Paulov, V. Penart and R. Tuvi;

3/ No person prosecuted for crimes against humanity has been acquitted. In addition, court proceedings were terminated due to the death of the person on trial (11 persons) and due to poor health (7 persons).[7]

The majority of criminal cases against the Soviets are initiated by the Internal Security Service (the former Security Police Board) and its special unit for investigating crimes against humanity. In a few cases (like the Paulov case, who was sentenced for the murders of members of the national armed resistance), criminal proceedings are initiated on the request of citizens. All convicted persons were former officers of the Soviet secret police (NKVD/MGB/KGB) or militia who were operating at the executive level of the deportation operation.

Last, but not least, the Estonian Parliament passed the Declaration of the Crimes of the Occupying Regime in Estonia in 2002, which declared the communist regime of the Soviet Union criminal, which committed crimes against humanity, and the organs of the Soviet Union that violently carried out these crimes, like the NKVD, NKGB, KGB and others, and tribunals and special counsels formed by these agencies, as well as destruction battalions and people's defence battalions and their activity. The Riigikogu stressed that the Communist Party of the Soviet Union and its subordinate organisation, the Estonian Communist Party, which controlled the repressive organs of the Soviet Union, are responsible for the crimes against humanity and war crimes committed in Estonia by those repressive organs.[8]

LESSONS LEARNT

In the case of Estonia, the investigation of the crimes of the former regime has developed into an instrument of retrospective justice. This has been done as an attempt to establish justice in regard to crimes that have been committed about half a century ago and the offenders of which were persons who no longer played a political role in Estonia during the period of transition. While the investigating agencies have been criticised for the fact that the leading figures in the crimes were not convicted, the situation developed in this way because the leading figures were no longer alive by the time the investigation was carried out. The number and volume of investigations corresponded to the resources allocated for this purpose by the government.

Primarily, the fact that communist crimes were given a legal assessment in the form of court verdicts – both domestically and Europe-wide – can be considered positive. In 2004, August Kolk and Pjotr Kislyiy, found guilty of deportation, and Vladimir Penart, convicted of murdering "forest brothers", lodged appeals with the European Court of Human Rights against the Republic of Estonia. The appeals emphasised that, pursuant to the principles of criminal law, a person is not punishable for an act that was not a crime under the law in force at the time of its commission. The appellants claimed that at the moment the crimes were committed, the 1926 Criminal Code of the Russian SFSR – which did not establish a punishment for a crime against humanity – was effective in Estonia. As the deportation of Estonian nationals and the persecution of "forest brothers" had been carried out under the law of the USSR, the appellants claimed they could not have known that their acts were criminal. The appeals also claimed that, as the Charter of the Nuremberg Tribunal had been developed in order to ensure the punishment of German war criminals for crimes committed during World War II, its principles did not apply to crimes committed by the Soviet authorities after the war. In 2006, the European Court of Human Rights declared all the appellants' arguments unfounded and rejected the appeals. The court concluded that, even if the acts committed by Penart, Kolk and Kislyiy were regarded as "lawful" pursuant to Soviet law, they were, however, crimes against humanity pursuant to international law. In so doing, the court's decision equated the crimes of Communism and Nazism, corroborating that the same international principles and legal sources applied to both. The court refuted the appellants' claims that the principles of the Nuremberg Trials – one of the sources of contemporary international law – did not apply to the USSR, which had won World War II, and that the crimes could be justified by the "specific nature" of the legal system of the criminal regime. In addition, the European Court of Human Rights explicitly noted that, in violation of international law, Estonia was occupied by the Soviet Union from 1940 to 1941 and from 1944 to 1991, and statements to the contrary could not be taken seriously by the international community. In fact, the long period of occupation was the reason the individuals having committed international crimes without statutory limitations in Estonia while serving the communist regime could not be held criminally liable earlier.[9]

5 Karistusseadustik (Penal Code), passed on 6 June 2001, *Riigi Teataja*; https://www.riigiteataja.ee/akt/126022014006 (last visited 1 April 2017)

6 Eva-Clarita Pettai, Vello Pettai, *Transitional and retrospective justice in the Baltic States*, Cambridge, 2015, 80.

7 Kaitsepolitseiamet (Estonian Internal Security Service), "International crimes not subject to statutory limitations", *Kaitsepolitseiamet*; https://www.kapo.ee/eng/areas-of-activity/international-crimes-notsubject-to-statutory-limitations/background-information (last visited 1 April 2017). Data from the Estonian Internal Security Service.

8 Riigikogu, Declaration of the Crimes of the Occupying Regime in Estonia, passed on 18 June 2002, *Riigi Teataja*; https://www.riigiteataja.ee/akt/174385 (last visited 1 April 2017).

9 Estonian Internal Security Service, "*20 years of investigating*", 40–41.

The investigation of mass deportation, region by region, and county by county, which formed a separate structural unit of the operation, can be considered a success. This admittedly took more time, but it made it possible to structurally work through the entire mechanism and to achieve synergy in both the investigation and the course of the court session. It was possible for all individuals interested in the matter from the entire region to attend the court session.

In the opinion of Eva-Clarita Pettai and Vello Pettai, in comparison to Latvia and Lithuania, in Estonia, though the national media would report on individual trials and their outcomes, this rarely went beyond mere statements of facts, and the criminal justice process remained rather disconnected from broader historical and moral discourses on the Soviet period.[10]

A deficiency was that due to limited resources and a certain delay in establishing the necessary legislative framework, valuable time for investigation was lost. The accused and the witnesses grew successively more elderly and in some important cases (Vassili Riis, Idel Jakobson, Arnold Meri and others), they did not last until the court session, or to its conclusion. At the current time, the investigation of crimes without statutory limitations is in the home stretch in Estonia because the last individuals that can potentially be accused will soon pass away.

RECOMMENDATIONS

Based on Estonia's experience, the following recommendations should be highlighted for dealing with international crimes without statutory limitations:

1/ In working out the legislative framework, the aim of future trials – the restoration of justice – and the corresponding norms of international law should be carefully followed;

2/ When the crimes under investigation have been committed decades ago, limited time should be taken into consideration in planning the investigation and thus to concentrate resources;

3/ Experienced historians and experts on secret services should be added to the staff of the investigating agency or be included in their work;

4/ A committee consisting of historians, sociologists, etc. that would help to study the crimes that have been committed more broadly and completely should be added to criminal investigations that have focused on gathering evidence for bringing charges against perpetrators who are still alive;

5/ The investigation procedure should correspond to rules prescribed by legislation and respect the human rights of the accused;

6/ The victims of crimes who participate in the trial as aggrieved parties and witnesses should be provided with access to victim support and legal advice that is free of charge similarly to other crime victims, and taking into consideration their distinctive nature in order to alleviate re-experiencing traumas of the past;

7/ The reporting of the investigation and the court trial in the press should correspond to the principles of the presumption of innocence and should not develop into a part of current political competition.

10 Pettai & Pettai, *Transitional and retrospective justice,* 113.

SOURCES USED AND FURTHER READING

Hiio, Toomas, Maripuu, Meelis, Paavle, Indrek, eds., *Estonia 1940–1945. Reports of the Estonian International Commission for the Investigation of Crimes Against Humanity*, Estonian International Commission for the Investigation of Crimes Against Humanity, Tallinn: Inimsusvastaste Kuritegude Uurimise Eesti Sihtasutus, 2006

Hiio, Toomas, Maripuu, Meelis, Paavle, Indrek, eds., *Estonia since 1944: reports of the Estonian International Commission for the Investigation of Crimes Against Humanity*, Estonian International Commission for the Investigation of Crimes Against Humanity, Tallinn: Inimsusvastaste Kuritegude Uurimise Eesti Sihtasutus, 2009

Estonian Internal Security Service, "20 years of investigating universal crimes" – *Estonian Internal Security Service Annual Review 2015*, Tallinn: Estonian Internal Security Service, 2016, 39–42

Mägi, Harri, *ENSV KGB tegevuse lõpetamine*, Tallinn: Varrak, 2012

Pettai, Eva-Clarita, Pettai, Vello, *Transitional and retrospective justice in the Baltic States*, Cambridge: Cambridge University Press, 2015

Salo, Vello et al. (eds.), Estonian State Commission on Examination of the Policies of Repression, *The white book: losses inflicted on the Estonian nation by occupation regimes 1940–1991*, Tallinn: Estonian Encyclopaedia Publishers, 2005

Sarv, Enn, *Õiguse vastu ei saa ükski: Eesti taotlused ja rahvusvaheline õigus*, Tartu: Okupatsioonide Repressiivpoliitika Uurimise Riiklik Komisjon, 1997

WEBSITES

www.kapo.ee/eng/areas-of-activity/international-crimes-notsubject-to-statutory-limitations/background-information
www.riigiteataja.ee

MEMORY OF NATIONS

Democratic Transition Guide

[The Georgian Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Irakli Khvadagiani

INTRODUCTION

During the last years of Soviet rule in Georgia and the short painful transition, the crimes of the communist totalitarian rule were always a topic of public discussions (after 1989). However, anti-Soviet rhetoric, questions of responsibility, and the need for prosecution never transformed into any real action, and were never implemented at the legislative level. Symbolic attempts to investigate any concrete "cases" of crimes were not sufficient and were always combined with issues of lustration and the dismantling of the Soviet state security apparatus. Finally, after failing the "projects", the attempt to persecute Soviet crimes was left without real changes.

SYSTEM CHALLENGES BLOCKING INVESTIGATION AND PROSECUTION IN SOVIET GEORGIA

Today it's difficult to identify the character and the level of sensibility of citizens regarding Soviet crimes at late 1980's. They are perhaps ambivalent about the issue, since the active phase of Soviet mass terror (1920–1950's) has long since passed. There are no documentary sources or new researches attempting to illustrate the real numbers and the horrors of mass terror in Stalin's time. Information about these crimes are based on underground, collective knowledge and personal family experiences. The gaps in memory lead citizens to only imagine the Soviet terror, without concrete personalities and direct responsibilities for crimes.

After the death of Joseph Stalin and Laverty Beria in 1953, there was a mass purge of "Beria's guards" in the state security system. As a result of this, in 1955–1956 some former officers of NKVD-MGB[1] faced an open trial for "mass violation of socialistic orders in 1937–1938". It was a minor prosecution for crimes in 1937, but generally rather symbolic. The trial was organized as part of Nikita Khrushchev's agenda to explain Soviet mass terror in 1937 as the personal crimes of Stalin and Beria and "their" people in state institutions, but not as systemic violence. In 1980's, after many decades, no matter how difficult it is to imagine, people with direct responsibility for the mass terror of 1920–1950 were still alive.

Soviet mass terror of the late 1930s may seem like the deep past, but there have been examples of human rights violations, political terror and mass crimes in the recent past as well. Some have been linked with the suppression of dissident movements, some of them with internal battles in the Georgian Communist Party, and "mafia wars" kinds of reprisals, or with the violations against the protest movement in 1989. In the following text we outline some of them, emphasizing that in transitional times, there were enough "hot" and painful cases in Georgian society, which became part of public discussion. These cases might be examples for new investigation and prosecution:

THE GAIOZ KERATISHVILI'S CASE

Gaioz Keratishvili was bishop (metropolitan) of the Georgian Orthodox Church in 1970's. In 1977 he was considered for the future patriarch of Georgian Orthodox Church, but another bishop, Ilia Shiolashvili (patriarch Ilia II), was elected. A struggle for power from the Keratishvili side was obvious, and there were also several other scandals in Georgian church during 1977–1978. On 25th May 1978, Keratishvili was arrested, and accused of the robbery of historical icons from the Georgian church and sentenced by the court to 15 years in prison. At the time, there were a variety of versions and conspiracies around his arrest, splitting the church and creating an internal battle in the Communist Party of Georgia as a new secretary of the Georgian Communist Party, Eduard Shevardnadze, was cleaning up the circle of former secretary, Vasil Mzhavanadze, who was deeply involved in corruption, and Keratishvili was considered to be close to him. In spite of plenty of questions and versions surrounding Keratishvili's arrest, there was not any attempt to investigate his case again when he was released from prison after an amnesty in 1989.

THE NAZI SHAMANAURI'S CASE

Nazi Shamanauri was freelancer journalist of the communist newspapers from the Dusheti region (north-north east part of Georgia) in 1970–1980s. She was living in the countryside and witnessed complex problems in the collective farm system resulting from the total corruption of Party structures and state institutions. When she began to print articles in the press about the problems, she was blackmailed and ignored. Later, when she tried to express her protest in a national celebration openly to crowd in 1983, she and her mother were arrested and sent to a psychiatric hospital. There she went on a hunger strike and became the victim of violent pressure and torture. As result of this, Nazi Shamanauri finally died in the hospital. Although her case was widely known in the1980's as an illustration of the corruption and brutality of the Soviet regime, there was no initiative to investigate and persecute the culprits.

THE "AIRPLANE'S BOYS"

In 1983, a group of young artists hijacked an airplane flying from Tbilisi to Batumi, trying to force the pilots to cross the border with Turkey. The airplane's crew managed to subdue them; however, during the clash there were casualties on both sides as well as among passengers. The airplane returned to Tbilisi airport, where Special Forces confronted it and freed the hostages; during the operation some of the hijackers and passengers were injured. The court sentenced to death a majority of the hijackers,

1 NKVD (НКВД) – Peoples Commissariat of Internal Affairs, MGB (МГБ) – Ministry of State Security

including their friend, the priest Teimuraz Chikhladze, who was not participating in the terrorist attack. He, however, was designated by prosecutors as the "ideological organizer" of the hijacking. This case is well-known and shocked the country, since there were many questions about the necessity of the death penalty and the fate of an innocent priest. Later, after collapse of the Soviet Union, the new Georgian government (with president Zviad Gamsakhurdia) promised to begin a new investigation, but has not been done in any real sense.

THE SOLIKO KHABEISHVILI CASE

Soliko Khabeishvili was a high ranking official of the Georgian Communist Party (member of Central Committee) and close friend of the secretary of the Georgian Communist Party, Eduard Shevardnadze. In 1985, after Shevardnadze left Georgia and became minister of foreign affairs of the Soviet Union, Khabeishvili was considered as his successor in Georgia. However, Jumber Patiashvili was chosen by the "center" (Moscow) as first secretary of the Georgian Communist Party. In an internal battle for power, Patiashvili started to push for arrests of former high rank officials accused of corruption. In the same year (1985), Khabeishvili was released from the Central Committee and was arrested soon after. The court sentenced him to 15 years in prison. He was released in 1989, but until his murder in 1995, there were no attempts to re-investigate his criminal case.

COMMISSION OF INVESTIGATION OF TRAGEDY OF 9 OF APRIL 1989 IN TBILISI

The only precedent for the investigation of Soviet state crimes in Georgia is linked with the investigation of the suppression of an anti-Soviet demonstration in the center of Tbilisi, 9 April of 1989, when 21 people died and hundreds were injured with chemical weapons and variety of physical attacks. After the tragedy, the Communist Party and state tried to hide information about the actual casualties and details of the operation of the dissolution of demonstration. Due to extensive protests, counter reaction in society, and international pressure, a special Commission of Investigation of the Tragedy was created in Supreme Council of USSR (Soviet Union). The Commission published a conclusion on December of 1989. Based on documents, interrogation of representatives of the civil and military authorities (who participated in the suppression of demonstration), eyewitnesses, injured victims etc., the conclusion stated that malfeasant decisions against peaceful demonstration were made by the Communist Party highest officials and heads of Transcaucasian military district. However, despite the conclusion, there was no legal continuity in identifying individuals who were responsible for the tragedy; not even after declaring the independence of Georgia in 1991. The state has never announced any kind of judgment and court decision against the Soviet Communist Party officials (including Georgian Communist Party high ranking officials), military commanders and state security officials, who share responsibility for the tragedy of 9th April 1989.

Besides the Supreme Council Commission, there have been several, official, individual, and journalist investigations of the tragedy of 9 of April, as well as civil initiatives to support a fair investigation.

"COMMISSION OF THE SUPREME COUNCIL OF GEORGIAN SSR FOR RE-STABLISHING JUSTICE FOR VICTIMS OF REPRESSIONS WHICH TOOK PLACE IN THE 1930–40 AND 1950'S"

In last phase of its existence, the Georgian Communist Party began to try to coordinate its agenda with the agenda of protest movement against Soviet rule. Specifically, the Party presented its new demands as part of a "new policy" of the communist state and transferred critical political and social demands from a revolutionary street environment into "cabinet" style resolutions on the state bureaucratic level. This was an attempt to reform the Soviet state and Communist Party within Gorbachev's "Perestroika".

As in Moscow, in Soviet Georgia, on 29 March of 1989, a special "Commission of the Supreme Council of the Georgian SSR for re-establishing justice for victims of repressions that took place in 1930–40 and 1950's" was founded to revise cases and to rehabilitate the victims of Soviet repressions, to assist with the social protection of the victims and to work on issues of compensation.

The Commission was comprised of state officials (executive branch, prosecutor office and state security and ministry of internal affairs representatives) and a few representatives of civil (Soviet) organizations.

However, in practice, its work showed that the Commission was focused only on one category of victims, members of the Communist Party. From the very beginning there was a subcommission of a "Party control group" which showed itself as the main active group between 1989–1990 and most of the revised cases were prepared by the group.

Up to the end of 1990, the Commission revised 1 110 cases concerning 1 391 persons. Demands for the re-investigation of the cases, the so-called Protests, concerning 1 022 persons were sent to the Supreme Court of Georgian SSR and 84 to the Supreme Court of USSR. Generally, until the end of 1990, the Supreme Court of Georgian SSR rehabilitated around 633 persons. 387 persons were rehabilitated towards the Party line. The Georgian SSR KGB investigation division prepared conclusions for 11 203 persons for the rehabilitation process.

The results of re-investigation were published as short summaries – statistics of revised cases and personalities of people who were rehabilitated by the Commission. However, the questions of the criminal dimension of the repressions and of individual responsibilities of people who participated in mass crimes have never been raised at the legal level. There were only a few talks about the inhumanity of the system and a few press-interviews with the head of the Commission.

Besides the Commission, there were no other initiatives attempting to revise the cases of victims of Soviet terror from 1921–1991 who were members of other parties, or non-party people. Also, questions about the prosecution of the participants of the mass violation of human rights have never been raised. Demands for the prosecution of crimes from former dissidents and their supporters did not lead to any general changes in this field.

LESSONS LEARNT

Georgia has mostly a symbolic experience concerning the investigation and prosecution of Soviet state crimes. Therefore, we can make only a few conclusions:

- The Investigation of Soviet crimes for Georgian society is unclear. Decades of Soviet rule marked by mass terror, massive state propaganda and censorship have eliminated collective memory and the understanding of the Soviet-Stalinist time crimes are a current challenge of responsibility. As a result of this, at the end of the1980's, society considered the Soviet mass terror of 1921–1953 as a very old story, and re-establishing justice could only be imagined through the publishing of information about Soviet repressions and victims.
- Soviet Georgian and independent Georgian judiciary and prosecutors were not successful in prosecuting individuals, and state officials, accused of violations of law and human rights abuses, with legal investigations and trials, even on symbolic level, without the presence of suspects. There simply was not enough continuity in the prosecution of mass crimes of Soviet regime, like the tragedy of 9 April of 1989.
- Because of the complex political and social crisis during the time of transition, questions about the prosecution of the crimes of the regime were not part of the main political (anti-Soviet) agenda. It always stayed at a verbal-symbolic level.

RECOMMENDATIONS

Recommendations based on poor experiences and critical analysis of the Georgian case of investigation and prosecution of crimes of the Soviet regime can only be reviewed on a general level:

- It is necessary to have a protest or resistance movement with a group of individuals, who can collect sources, testimonies and information about the crimes of the regime, emphasizing concrete individuals who have committed violations of laws and human rights, in order to raise questions of responsibility, and to be able to start the legal process at the time of changes and transition.
- On a system level, the real face of the regime should be published based on non-arguable facts and documents. Questions of responsibility and prosecution should be combined with a discussion of the inhumanity of state institutions and state security activities of the totalitarian regime. They should be investigated and described. On a personal level, all individuals, state officials, members of Party organizations, state security systems, informers of state security, officials of the court and state prosecutors' office investigated should draw special attention.

SOURCES USED AND FURTHER READING

Appeal to state prosecutor of Georgian SSR Vakhtang Razmadze, by the civil organization under "Rustaveli society" "Democratic Elections in Georgia" (DAS), in *Sakartvelo* #4 (9), 27. 2. 1990, 3

Commission of Investigation of 9 of April in Supreme Council of Georgian SSR, *Saqinform* (Georgian informative bureau), "In commission of Georgian supreme council", in *Komunisti* #95 (20364), 22. 4. 1989, 2

Conclusions of the Commission of Assembly of People's Deputies of the USSR on Investigation of the Events Taking Place in Tbilisi on 9th of April, 1989, http://sobchak.org/rus/docs/zakluchenie.htm

Gotsiridze, Irakli, *Following the truth: Tragedy of 9 of April*, Tbilisi, 1990

Order of Supreme Council of Georgian SSR about creation of "Commission of supreme council of Georgian SSR for re-establishing justice for victims of repressions which took place in 1930–40 and 1950's", in *Komunisti* #78 (20419), 4. 4. 1989

Saqinform, Let's re-establish justice, in *Komunisti* #45 (20691), 21. 2. 1990, 3

Saqinform, We will re-establish justice, in *Komunisti* #222 (20563), 24. 9. 1989, 3

MEMORY OF NATIONS

Democratic Transition Guide

[The German Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

JUDICIAL RECONCILIATION OF THE GDR'S PAST

Christoph Schaefgen

INTRODUCTION

There have been two totalitarian regimes in Germany in the previous century with the Nazi regime prevailing from 1933 until 1945 and during the 1945–1989 period, the communist dictatorship gained control over the eastern part of Germany, in the GDR. Following the breakdown of both systems, it was each time the German criminal justice's task to prosecute and punish the injustices that had been committed. The criminal prosecution of Nazi crimes that had been eagerly put through in the early stages by the victorious powers, almost came to a standstill after the Federal Republic of Germany had been founded as there was a massive desire for amnesty. It was as late as in the 60s that the following generation started posing questions when the time of keeping silent and pushing the issue to one side ended. Due to this temporarily missing will to prosecute, the German criminal justice system still has to deal with the darkest chapter of German history even after more than 70 years. In the time between the peaceful revolution in autumn 1989 and the reunification with the old Federal Republic of Germany on October 3rd 1990, criminal justice with the GDR-judiciary was responsible for communist state injustice reconciliation – this judicial system had hitherto remained a supportive structure of the system that had broken down. Thus the focus wasn't laid on the violation of human rights which is an immanent feature of a dictatorship but on the economic privileges provided to communist leaders and on the electoral frauds that could hardly be denied any more. It was only with the judicial system of a reunited Germany when all aspects of state injustice within the GDR were criminally prosecuted. The mistakes committed during the reconciliation of injustice from the Nazi period were not to be repeated and people were able to make use of their legal expertise. The judicial reconciliation that was finished after more than a decade, already belongs to history today.

THE HUMAN RIGHTS SITUATION IN THE GDR UNTIL 1989

The GDR constitution didn't contain any fundamental rights area protected against the state's influence. On the one hand, it laid down civil rights, yet on the other hand, these rights were not to be understood as individual rights of freedom in relation to the state but rather represented rights of participation and discretion in establishing the communist state order and the communist social order. The immanent borders of the fundamental rights that were understood in this way, were constituted by the "societal interests" which in turn were interpreted by the Socialist Unity Party of Germany (SUPG) as binding on the basis of this party's monopoly of knowledge and leadership[1].

The GDR inhabitants had been hindered right from the beginning until the end of the country's existence from living a life according to their own ideas and from 1961 onwards, they were even imprisoned by a border protected by the army. Using power that was not derived from the people's will but vested upon the impeccability of the communist party that was the leader of the workers and peasants, there were trials to establish the first anti-fascist and socialist country on German soil. Heavy human rights violations pertaining to the criminal categories of murder, manslaughter and deprivation of liberty were committed on a large scale and systematically by the military that was protecting the borders, by the judiciary in politically motivated criminal proceedings and by the Stasi which led operations directed against people who had been declared enemies of the GDR. At least 265 people were killed by gunfire or mines in an attempt to cross the border from East to West Germany and several hundreds were partially or very seriously wounded.[2] According to estimates, more than 280,000 people fell victim to the politically motivated judiciary.[3] There were 72 death penalties, 52 of which were actually carried out.[4] Especially within the first years, political prisoners were housed under inhumane conditions, blackmailed to make certain declarations and mistreated – though not systematically. Prosecuting these deeds as a crime was intentionally hindered.

The Ministry for State Security persecuted persons that had fled from the GDR or who had harmed the GDR from its point

1 Iris Keller, *Die strafrechtliche Aufarbeitung von DDR – Justizunrecht*, Frankfurt: Peter Lang GmbH, 2013, 161 referring to Ernst-Wolfgang Böckenförde, *Die Rechtsauffassung im kommunistischen Staat*, München: Kösel-Verlag, 1967, 45f; Kurt Sontheimer, Wilhelm Bleek, *Die DDR: Politik, Gesselschaft, Wirtschaft*, Hamburg: Hoffmann und Campe, 1979, 126.

2 Falco Werkentin, "Souverän ist, wer über den Tod entscheidet". Die SED-Führung als Richter und Gnadeninstanz bei Todesurteilen, in Roger Engelmann, Clemens Vollnhals, eds., *Justiz im Dienste der Parteiherrschaft*, Berlin 1999, Ch. Links Verlag, 184; Karl Wilhelm Fricke, *Politik und Justiz in der DDR. Zur Geschichte der politischen Verfolgung 1945–1968*, Köln: Verlag Wissenschaft und Politik, 1990, 525. The number of the hitherto proven death penalties amounts to 205 – see Fricke, Politische Straf-Justiz im SED-Staat in Aus Politik und Zeitgeschichte, Supplement to the weekly *Das Parlament*, B 4/93 (22. 1. 1993), 22, at least 170 death penalties were carried out, see Federal Ministry of Justice (BMJ) – Exhibition Catalogue "Im Namen des Volkes", Leipzig 1994, 217.

3 Andreas Märker, *Psychische Folgen politischer Inhaftierung in der DDR aus Politik und Zeitgeschichte*, in *Aus Politik und Zeitgeschichte*, B 38/95, 30, Falco Werkentin, *Politische Strafjustiz in der Ära Ulbricht Politische Strafjustiz in der Ära Ulbricht. Vom bekennenden Terror zur verdeckten Repression*, Berlin: Ch. Links Verlag 1995, 13, considers the estimations counting from 200,000 up to 250,000 victims as not exaggerated. Ansgar Borbe lists an overview of several estimates, *Die Zahl der Opfer des SED-Regimes*, Erfurt: Landeszentrale für politische Bildung Thüringen, 2010, 16–18.

4 Werkentin, "*Souverän ist, wer über den Tod entscheidet*", 184; Fricke, *Politik und Justiz*, 525. Hitherto, at least 205 death penalties have been proven – see Fricke, *Politische Straf-Justiz im SED-Staat*, 22, at least 170 death penalties were carried out, see "*Im Namen des Volkes*", 217.

of view, even abroad – intending to liquidate these people. Furthermore, hundreds of people were kidnapped from the West, smuggled into the GDR and sentenced there. Within the country, there was a nationwide monitoring of long-distance calls, letters and parcels that also served to gather foreign currency and the so-called Zersetzung (or: decomposition) methods were being applied in order to fight the "negative and adverse forces". The latter especially included systematically discrediting and undermining the self-confidence and opinion of selected people.[5] The high value ascribed to the performance of athletes in relation to the GDR's reputation within the world and to stabilizing the country internally made the GDR develop a state-administered doping system where not only the consequent health problems of adults but also those same problems among unaware youths were willingly accepted.

OPTIONS AND LIMITS FOR PROSECUTION

When the GDR entered the FRG on October 3rd 1990, the application area of the old republic, the FRG was extended to the former GDR territory.[6] A transition regulation was applied to crimes committed within the GDR prior to its accession.[7] An amnesty for crimes committed by members of the GDR state apparatus hasn't been provided for herein which is why also impacts on the life, health and freedom of people were subject to criminal inspection. This criminal law was considered as indispensable for a successful unification process, for a reconciliation between victims and offenders and for establishing a strengthening of trust into the constitutional state. On the other hand, all the responsible people were aware of the fact that criminal law could play an important role within the unification process, yet not the main one. It was foreseeable that criminal justice would merely be able to react to part of the injustice. Apart from criminal reconciliation, rehabilitating and awarding damages to the victims, compensating the incurred financial losses but also historical and political revision were to be used.

Criminal prosecution was limited merely by the limitation period. Thus it had been clarified both by jurisprudence and the legislator that the limitation period was suspended during the GDR era because, according to the leadership of the state and the party within the GDR, criminal prosecution of systematically committed injustice hadn't been promoted during this era.[8] The criminal prosecution limitation period had been further postponed through two other limitation period acts by three or five years respectively.[9]

Yet it was necessary to stick to the limits laid down by the Constitution. According to this, an act or the failure to act may be punished only if it is considered as criminal both prior to such an event according to an act and if it's considered criminal during the time when the decision is made as well. Applying this prohibition of retroactive punishment for deeds committed by state functionaries in the former GDR required three aspects: first, it was necessary to check, whether the punishable character was defined by law at the crime scene and at the time of the crime; furthermore, whether the punishability prevailed until the time when the decision was made and finally; which law was the more beneficial one for the perpetrator. This regulation whose principle for legal amendments within a legal system isn't conflictual, leads to significant problems, if it is to be applied to activities committed in another legal system that appear to be punishable where there are other value systems and protective mechanisms of norms.

The most significant difficulties were connected with answering the question regarding which law was applicable to the deeds committed during the GDR era. This defined the criminal liability of border soldiers and their commanders for the dead and injured at the border and the GDR judiciary members' liability for death penalties and deprivation of liberty due to a sentence.

The GDR had laid down a legal permission with the Border Act[10] and permitted the firing of even deadly shots in order to prevent escapes or to wound the so-called "border violators". The GDR's political criminal law which criminalized making the use of one's rights for freedom such as the freedom to exit, the freedom of opinion, the freedom of assembly and the freedom to demonstrate enabled the GDR judiciary to put through a hard line against citizens criticizing the regime or those willing to emigrate by punishing the "traitors" even with the death penalty.

There was a clarification process that lasted several years and referred to the criminal proceedings against the people responsible for killing refugees at the border. During this process, even the German Constitutional Court and the European Court of Human Rights were contacted by the accused and it has been found out that the GDR acts including the interpretation thereof shall not be paid any attention to in cases where the state severely crossed the line in its deeds that is given to any state according to common opinion.[11] In doing so, the Federal Court of Justice (*German abbreviation:* BGH) added up to its jurisprudence regarding the reconciliation with injustice from the Nazi period.[12] The standard for reviewing such a "crossed line" was the Human Rights Pact signed by the GDR and the UN Human Rights Declaration from 1948. It has been stated that the right to live in a society of peoples has a role superior to any other value and that the state is entitled to interfere in this right only in limited extraordinary cases. Given the Border Act and its application in everyday life, the protection of the border was prioritized over human life. This constituted an arbitrary decision regarding the right to live that could not be justified by anything. This jurisprudence posing limits to the right of the state "to govern its internal affairs" may be regarded as pioneering and groundbreaking also for the following criminal law approach regarding the misuse of a country's monopoly of power. The judiciary of the reunited Germany has become the "pacemaker of human rights protection".[13]

Thus, it was possible to prosecute and punish the people responsible for killing the refugees. The prosecution offices filed

5 Directive 1/76; BStU, ZA, DSt, BdL-Dok. 3235.

6 Art. 8 of the Reunification Contract from 31. 8. 1990 BGBl. II, 889ff, as amended by the Act from 23. 9. 1990 regarding the contract from 31. 8. 1990 concluded between the Federal Republic of Germany and the German Democratic Republic on the Reunification of Germany – Reunification Contract – and the agreement of 18. 9. 1990, BGBl. II 1990 885 ff.

7 Appendix I Chapter III Topic C Section II Nr. b) regarding the Reunification Contract

8 Limitation Period Act from 26. 3. 1993 (BGBl I 1993 S 392), BGHSt [Federal Criminal Court], Bd. 40, 113 ff.

9 Art. 315a EGStGB; 2. and 3. of the Limitation Period Act 27. 9. 1993 (BGBl 1993 I, 1657) and 22. 12. 1997 (BGBl 1997 I, 3223).

10 § 27 DDR-Grenzgesetz [the GDR Border Act] of 25. 3. 1982.

11 BGHSt 39, 1 ff.; 168 ff., 353 ff.; 40, 218 ff. and lately sentences from 20. 3. 1995 – 5 StR 111/94 – and from 24. 4. 1996 – 5 StR 322/95 –, where the Federal Court of Justice addresses all the arguments opposing its jurisprudence.

12 BGHSt 2,234 ff.

13 Gerhard Werle, "Rückwirkungsverbot und Staatskriminalität", in *Neue Juristische Wochenschrift*, 2001, 3001 ff.

charges against approximately 500 persons due to completed or attempted manslaughter. 275 of the accused were also sentenced.[14] The Politburo members and the National Defense Council members who organized the deadly regime and other high ranking military leaders were sentenced to up to seven and a half years in prison. Soldiers acting upon a command and mostly committing a preventable mistake in relation to what they did, were given suspended sentences.

The fundamental conviction of all civilized peoples regarding the general prohibition of killing made jurisprudence consider the GDR judiciary's death penalties as lawful only in cases where the most severe injustice and most severe guilt was punished.[15] A judge blunted by his/her political conviction and submissiveness to his/her political leaders could not refer to having committed an unintentional act nor did a provision of a reduced sentence on the basis of having committed a mistake apply to him/her.[16]. The responsible judges and lawyers were sentenced because of a perversion of justice and manslaughter because of the fact that the GDR judiciary pronounced death sentences and executed these even in cases where the act that had been committed didn't cause significant damage. Yet judiciary members who were involved in GDR citizens being hindered on a large scale from exerting their human rights such as the freedom to exit, the freedom of opinion, the freedom of assembly and the freedom of association due to prison sentences, could hardly be criminally prosecuted given the prohibition of retroactivity. It was almost only in cases where the type or the level of the sanction was in gross disproportion to the crime committed that led to the moderate conviction of less than 200 judges or prosecutors.

Punishing members from the Ministry for State Security for the measures that were disrespectful to the life and freedom of people was predominantly complicated due to the difficulties in proving these and due to the perpetrators' bad state of health. On the other hand, there were predominantly legal difficulties preventing a criminal prosecution below the level of interventions that had an impact on life, health or freedom. Only 69 members from the Ministry for State Security were convicted.

FINAL REMARKS

Due to the given legal situation that it was on the one hand necessary to start proceedings even in cases where there was a slight suspicion but on the other hand, it was almost exclusively necessary to apply the GDR's written law as there was the prohibition of retroactivity and to consider also the other procedural rights of the accused applicable in a constitutional state, there was a tremendous discrepancy between the high number of approximately 74,000 investigation proceedings led against approximately 100,000 suspects and the low number of merely 753 convicted people. It is understandable that most of the victims of the systematic injustice within the GDR are disappointed by this result. Bärbel Bohley, the GDR human rights activist who has unfortunately died way too early expressed her discontent this way: "What we wanted was justice, what we've got is a state under the rule of law." Allegedly, if another form of approaching the injustice committed by and in the GDR, such as an amnesty or a commission for finding out the truth and serving the reconciliation had been opted for, the result would not have been more but less justice that can never be achieved but which one can merely strive for. Within Germany, it was politically correct to opt for criminal prosecution and against amnesty. Penalties for infringements of law are the rule in a constitutional state. In contrast to many other states where the regime changed, people didn't have to fear any civil war like conditions neither did they have to fear social unease. The overwhelming majority in both German countries was against an amnesty. The political rulers from the former GDR and the successor to the Socialist Unity Party of Germany, the SUGP, were too weak to have a decisive influence on forming the political will within the reunited Germany. To a large extent, it was possible to switch the elite within the former GDR territory even in the sphere of the judiciary as there was a large amount of unburdened and competent personnel available in West Germany available to transfer the legal and administration system from West Germany to the former GDR territory. It was due to these positive conditions present during the reunification process that enabled and committed Germany to start an attempt led by rule of law principles and to work on a reconciliation with all forms of communist injustice within the GDR through criminal penalties.

The communist regime in the GDR showed its inhumane face by killing people on the border between East and West Germany and people succeeded in punishing these most severe crimes. Apart from the cases where decisions were made, general declarations were stated regarding the fact where the borders for a dictatorship lie in relation to its interfering with human rights. Currently, given the legal situation and following the change of regimes, the rulers are facing sentences merely in cases of interference into somebody's life or physical integrity. In the case of the infringement of other rights the citizens have, especially their civil liberties, the perpetrators do not have to fear too much. The national law they designed protects them. Something has to change about this. Without freedom of opinion there are no other rights.[17] The Berlin trials contain another lesson international law still has to learn. Withholding fundamental rights constitutes a crime.[18] Let's hope that this understanding falls upon fruitful soil in the long term within the international community and is reflected in international criminal law.

LESSONS LEARNT

Criminal justice thus contributed to protecting fundamental human rights by criminal law. In spite of the GDR's opposed legal practice, it was possible to punish and individually ascribe severe human rights violations. The prohibition of retroactivity did not prevent this. A state's arbitrarily killing people cannot be justified by the state's legalizing this nationally. Another key contribution of these criminal proceedings is clarifying and recognizing the GDR's past. The actual judicial findings can – apart from their legal evaluation – claim to be substantially reliable.[19]

14 Klaus Marxen, Gerhard Werle, Petra Schäfter, *Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen*, Berlin: Stiftung zur Aufarbeitung der SED-Diktatur – Humboldt-Universität, 2007, 41.

15 BGHSt, 41, 317.

16 BGHSt, 41, 317, 339.

17 Salman Rushdie at the occasion of opening the 67th Frankfurt Book Fair; see Volker Breidecker, "Alle Grenze offen", in *Süddeutsche Zeitung*, 14. 10. 2015.

18 Heribert Prantl, "Honecker, Mielke et al.", in *Süddeutsche Zeitung*, 1. 9. 1999, 4.

19 Klaus, Marxen and Gerhard Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht, Eine Bilanz*, Berlin – New York: Walter de Gruyter, 1999, 244, 245.

Both the period required for the whole procedure and a unified approach have been negatively impacted by the fact that the legislator didn't make any declarations regarding the applicable criminal law leaving this aspect up to practical experience and that the competence area for criminal prosecution hasn't been properly adapted given this task's special character. If a **centralized** police and criminal prosecuting office had been established, the procedures would have been speedier and divergences within the prosecution activities would have been prevented.

RECOMMENDATIONS

It isn't possible to generalize answers to the question regarding whether and how a reconciliation with the pre-democratic past is to be carried out. Both the way of the transition from dictatorship to democracy and the balance of political powers prior to and after the change represent the decisive factors. Hitherto and in any discussion led following a dictatorship being replaced by a democracy, the opposite poles are prosecute and punish on the one hand and forgive and forget on the other. Hidden amnesty through factual non-prosecution, full-scale or partial amnesty laid down by the law or the establishment of commissions striving for the truth and reconciliation are paths one can opt to go along. In our experience, the question as to which option a state chooses furthermore depends upon the fact whether the elite changes and which impacts the decision that is to be made will have on the internal peace and stability of the hitherto young democracy.[20] A recommendation to promote a certain approach towards a dictatorship past can thus not be made. Yet seen from the perspective of a constitutional state, punishment represents the normal reaction towards the breach of law. Furthermore, the discussion in many new democracies which opted for impunity demonstrates that the issue of punishing the perpetrators still remains subconsciously vivid and is being re-discussed whenever the slightest impetus emerges. Countries opting for criminal prosecution should consider the experience the German criminal justice has acquired which states that it is very difficult to prove the required personal responsibility for crimes committed by henchmen who have been given orders by their rulers within the regime that has collapsed, if it's the case of crimes below a threat to somebody's life. In that sense, partial amnesty should be considered.

20 Jutta Limbach, *Gerechtigkeit oder Versöhnung*, Speech at the occasion of the Chamber of Industry and Commerce New Year Convention in Berlin on 9. 1. 1998.

SOURCES USED AND FURTHER READING

Ausstellungskatalog "Im namen des Volkes", Leipzig: BMJ, 1994

Borbe, Ansgar, *Die Zahl der Opfer des SED-Regimes*, Erfurt: Landeszentrale für politische Bildung Thüringen, 2010

Böckenförde, Ernst-Wolfgang, *Die Rechtsauffassung im kommunistischen Staat*, München: Kösel-Verlag, 1967

Breidecker, Volker, "Alle Grenze offen", in *Süddeutsche Zeitung*, 14. 10. 2015

Fricke, Karl Wilhelm, *Politik und Justiz in der DDR. Zur Geschichte der politischen Verfolgung 1945–1968*, Köln: Verlag Wissenschaft und Politik, 1990

Fricke, Karl Wilhelm, Politische Straf-Justiz im SED-Staat, in Aus Politik und Zeitgeschichte, Supplement to the weekly *Das Parlament*, B 4/93, 22. 1. 1993

Keller, Iris, *Die strafrechtliche Aufarbeitung von DDR – Justizunrecht*, Frankfurt: Peter Lang GmbH, 2013

Limbach, Jutta, *Gerechtigkeit oder Versöhnung*, Speech at the occasion of the Chamber of Industry and Commerce New Year Convention in Berlin on 9. 1. 1998

Marxen, Klaus, Werle, Gerhard, *Die strafrechtliche Aufarbeitung von DDR-Unrecht. Eine Bilanz*, Berlin – New York: Walter de Gruyter, 1999

Marxen, Klaus, Werle, Schäfter, Petra, *Die Strafverfolgung von DDR-Unrecht. Fakten und Zahlen*, Berlin: Stiftung zur Aufarbeitung der SED-Diktatur, 2007

Märker, Andreas, *Psychische Folgen politischer Inhaftierung in der DDR aus Politik und Zeitgeschichte*, in Aus Politik und Zeitgeschichte, Supplement to the weekly *Das Parlament*, B 38/95

Prantl, Heribert, "Honecker, Mielke et al.", in *Süddeutsche Zeitung*, 1. 9. 1999

Sontheimer, Kurt, Bleek, Wilhelm, *Die DDR: Politik, Gesselschaft, Wirtschaft*, Hamburg: Hoffmann und Campe, 1979

Werkentin, Falco, *Politische Strafjustiz in der Ära Ulbricht. Vom bekennenden Terror zur verdeckten Repression*, Berlin: Ch. Links Verlag, 1995

Werkentin, Falco, "Souverän ist, wer über den Tod entscheidet". Die SED-Führung als Richter und Gnadeninstanz bei Todesurteilen, in Engelmann, Roger, Vollnhals, Clemens, eds., *Justiz im Dienste der Parteiherrschaft*, Berlin: Ch. Links Verlag, 1999

Werle, Gerhard, "Rückwirkungsverbot und Staatskriminalität", in *Neue Juristische Wochenschrift*, 2001, 3001–3008

WEBSITES

www.bstu.bund.de
www.bundesstiftung-aufarbeitung.de
www.deutsche-einheit-1990.de

MEMORY OF NATIONS

Democratic Transition Guide

[The Polish Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Radosław Peterman

After the collapse of communism in Central and Eastern Europe, new democratic governments had to handle the issue of reconciliation with perpetrators of repressions and human rights violation. Due to the complexity of the emerging problems, reconciliation with the past means adopting a deliberate policy with regard to the past, that is, planning and arguing a consistent catalogue of state activities relating to the history of public institutions, society and the legal system. The policy with regard to the past should strive to accomplish five basic goals: determination of the truth, imposition of punishment, moral condemnation, reparation for harm, cultivation of memory.

In Poland, prosecution of Stalinist crimes began in 1991. This was possible thanks to the transformation of the Main Commission for the Investigation of Nazi Crimes in Poland, which prosecuted Nazi crimes as of 1945 (initially under the name of the Commission for the Investigation of German Crimes in Poland) in the Main Commission for the Investigation of Crimes against the Polish Nation. It broadened the scope of action to include the prosecution of Stalinist crimes as crimes against individuals or groups committed by the authorities of the communist state until 31 December 1956 (Journal of Laws 1991.35.195). However, until 1998 the activities of the Institute of National Remembrance (IPN) did not produce tangible results. The reason for this was that the criminal proceedings followed a long way procedure, i.e. first the Institute of National Remembrance – the Commission for the Prosecution of Crimes against the Polish Nation prepared the case and then the prosecuting authorities prepared it again before referring the case to the court. The prosecution of Stalinist crimes got significantly prolonged. It was only after the amendment to the Act on the Institute of National Remembrance in December 1998 that IPN was able to be prosecute the cases more swiftly as IPN was then granted prosecution powers.

In spite of the passage of time, some officers of the Stalinist regime have been brought before the courts. In 1994, the Sejm condemned the "criminal activity" of Security Bureau [*Urząd Bezpieczeństwa (UB)*] and the Military Information [*Informacja Wojskowa (IW)*], responsible for the suffering and death of many thousands of Polish citizens. The most prominent trial of UB's officers was the case of col. Adam Humer, former head of the investigative department of the Ministry of Public Security [Ministerstwo Bezpieczeństwa Publicznego [MBP)]. In 1996 the Warsaw court sentenced him to 9 years of imprisonment for mistreatment of political prisoners between 1946–1954. In 1998, the court dismissed Humer's appeal, though for a formal reason the sentence was reduced slightly from 9 years to 7.5 years. Officials of the Military Information also stood trial. The first judgement against the IW officer was issued in 1998. The Military Garrison Court in Warsaw sentenced Wincenty Romanowski, 75, to 1.5 years of imprisonment for mistreatment of a prisoner in 1946. The court found the methods of the defendant not to have been nothing different from the methods of the Gestapo.

On the other hand, there has never been a judge issuing judgments as ordered by UB and IW or the Security Service [*Służba Bezpieczeństwa (SB)*] that has been sentenced in a final and binding manner. Having remembered court judgements of the 1980s, and especially of time of the martial law, after 1990 voices were raised that all judges who had shamelessly disobeyed the principle of judicial independence in those times should be disqualified and have the right to practice the profession revoked. The disciplinary law applicable after 1990, however, could not be applied to the so-called *flexible judges* as disciplinary offenses are barred by limitation after just one year. Hence, legislative intervention was required. The first attempt to regulate the possibility of dismissing a judge for court crimes or servility towards communist authorities was made in 1993. On 15 March 1993, an act on the system of common courts of law was passed. Under the act, the President, at the request of the National Council of the Judiciary of Poland [*Krajowa Rada Sądownictwa (KRS)*], could dismiss a judge found by the disciplinary court to have disobeyed the principle of judicial independence. It was assumed that judges unable able to resist external pressure have mental deficiencies that prevent them from performing the profession. However, this solution was recognized by the Constitutional Tribunal as incompatible with the Constitution.

As a result of the reluctance of the judicial environment, another attempt to purge it was made only after four years. On 17 December 1997, the Sejm passed a law amending the act on the system of common courts of law and certain other acts. This time, yet again, due to formal shortcomings in the procedure of passing the amendment, the Constitutional Tribunal considered the law unconstitutional. This notwithstanding, the Constitutional Tribunal pointed out the validity of the final regulation of the problem consistent with the procedures: "By restricting the deliberations only to the period closed by 1989, it must be borne in mind that such abuses of independence occurred at that time, that there is still a need for their disclosure and clarification", while "the general rules of the judge's liability, adjusted to the conditions of the democratic state, are not a sufficient mechanism."

Ultimately, the problem was statutory resolved on 3 December 1998, when the law on disciplinary liability of judges who disobeyed the principle of judicial independence between 1944–1989. BY virtue of the provisions of the act, with regard to a judge who disobeyed the principle of judicial independence between 1944–1989 when adjudging in trials that constituted a form of repression for independence activity, political activity, defence of human rights or the exercise of basic human rights, the application of the statute of limitation was excluded in disciplinary proceedings concerning judges. This exclusion was not indefinite – it was determined that it would end on 31 December 2002.

In the period between the date of this law becoming effective until October 2001, 30 cases were submitted, 28 of which were

filed by the Minister of Justice, and only two were submitted by Disciplinary Proceedings Representative. The National Council of the Judiciary of Poland made no request. In all the cases as requested by the Minister of Justice the Disciplinary Proceedings Representatives clearly distanced themselves from the cases, indicating that they acted as instructed by the minister. All the cases concerned only about 50 judges, mostly retired, of whom only one was not a penal judge. In the course of proceedings as many as 41 judges had already been released from the charges they faced. Four cases were immediately returned to the Disciplinary Proceedings Representative, and in the case of the others, as a result of the investigation, it was not proven that the judge had disobeyed the principle of judicial independence.

The whole verification process showed shameless corporate solidarity, which undoubtedly was the main cause of its failure. The farce was enhanced with was the decision of the Supreme Court in 2010, which replaced the legislator by providing the statutory concept of communist crimes with a sense that in fact denied the existence of court crimes throughout the times of the People's Republic of Poland, including the Stalinist times. This resolution, criticised even within the Supreme Court, was issued against IPN's request to waive the immunity of former SN judge Zdzisław Bartnik, who showed full dependence with regard to communist authorities during the martial law.[1] The Supreme Court held that IPN's request was clearly unfounded and entered the resolution in the so-called book of legal principles, a remnant of the law of the People's Republic of Poland, disciplining other courts and thereby violating the principle of their independence.

The aforementioned resolution put an end to the verification of the justice system of the People's Republic of Poland, but it is not surprising if all the scandalous actions of the judges of the People's Republic of Poland in today's justice system are analysed, if one unveils the "dedication and determination" of the judiciary and the prosecutors' – which refers primarily to the older staff – with which they began to verify their ranks and purge them to remove judges compromised by their dependence with regard to the communist regime.

The results of the verification of the justice system of the People's Republic of Poland showed that all the judges of the communist period acted ethically and were independent. The activities of disciplinary courts showed something different than what was known in society. Disciplinary courts proved, in spite of the facts, the innocence of the judges. The negligence and omissions of the disciplinary courts while handling of the abovementioned cases were evident.

Another form of justice for those who used repression was the so-called "dezubekizacja" [*anti-security intelligence activities*].[2] The first attempts were made in the 1990s to reduce pension benefits provided to former officials of the repressive apparatus. The first law passed by the Sejm in December 1992 was vetoed by President Lech Wałęsa. The second act, dated December 1997, was vetoed by President Aleksander Kwaśniewski. Finally, *the Act on Amendments to the Pensions Act of Professional Soldiers and Their Families and to the Pensions Act of Officers of Police forces, Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Central Anticorruption Bureau, Border Guard, Government Protection Bureau, State Fire Service and Prison Service and their families* (Journal of Laws of 2009, No. 24, item 145) was passed in 2009. The law entered into force in 2010.

This law was first appealed against to the Constitutional Tribunal (TK) by a group of left-wing (SLD) MPs. The MPs alleged that the law made use of collective responsibility, punishment without trial and determining guilt, breach of the principle of trust in the state and protection of acquired rights, the principle of equality and the right to social security. TK expressed the belief that the withdrawal of uniformed pensions would constitute of the removal of the unfairly acquired privilege. In 2010, a group of former security officers of the communist state filed a complaint with the European Court of Human Rights (ECHR) on the aforementioned act. In 2013, in its decision, the ECHR considered that the reduction of the pension did not imply "excessive burdens on the applicants who did not lose their means of subsistence or total deprivation of benefits, and that the scheme was even more beneficial than other pension schemes". The ECHR reminded that the Security Service (SB) officers worked for a security apparatus modelled on the Soviet KGB, it compared the services of the People's Republic of Poland to the Stasi and the Securitate. Judges of the ECHR explained that working in the SB, designed to violate fundamental human rights protected by the Convention, should be considered as an important factor for the definition and justification of categories of persons to be subject to reduced pension benefits. The aforementioned act reduced the pension of about 25 thousand former civil security intelligence officers of the People's Republic of Poland and former members of the Military Council of National Salvation [*Wojskowa Rada Ocalenia Narodowego* (WRON)].

In addition, it should be noted that according to the Act on Institute of National Remembrance, all political killings committed in the People's Republic of Poland shall be subject to the statute of limitations in 2030 while all other communist crimes shall be subject to the statute of limitations in 2020. In 2010, the Supreme Court considered those crimes, which are punishable by imprisonment for up to 5 years, barred by the statute of limitations.

At this point it is worth pointing out that the Main Commission for the Investigation of Crimes against the Polish Nation, operating within the Institute of National Remembrance, completed more than 14,000 investigations, over 60 percent of which refer to communist crimes. Most of the investigations were conducted from the beginning with the knowledge that it would be impossible for the perpetrators to be brought before the court because of their death. But it is important to identify all the circumstances of the crime, the symbolic and legal dimension, as well as important reference materials for further historical research. IPN prosecutors submitted 326 indictments with regard to 508 people. Pursuant to these indictments courts have so far convicted 137 people.

1 Martial law in Poland between 1981–1983 – state of exception introduced on 13th December 1981 in the territory of the People's Republic of Poland in violation of the Constitution of the People's Republic of Poland. It was suspended on 31 December 1982, and was abolished on 22 July 1983. Throughout its course, a total of 10 131 Solidarity activists were imprisoned and about 40 people lost their lives, including 9 miners from the Wujek mine during the strike pacification.

2 Dezubekizacja – The concept of reducing pension benefits of former officials of the repressive apparatus. Dezubekizacja is a term colloquially called to refer to *the Act on Amendments to the Pensions Act of Professional Soldiers and Their Families and to the Pensions Act of Officers of Police forces, Internal Security Agency, Foreign Intelligence Agency, Military Counterintelligence Service, Central Anticorruption Bureau, Border Guard, Government Protection Bureau, State Fire Service and Prison Service and their families* (Journal of Laws of 2009, No. 24, item 145).

However, it must be stated that, due to the lack of a reliable and comprehensive reference of the legal system to the past, no thought-out policy with regard to the past was created in Poland at the beginning of the political transformation. Polish politics at the beginning of the 1990s lacked the will to accomplish the five basic goals with regard to the past: determination of the truth, imposition of punishment, moral condemnation, reparation for harm, cultivation of memory. They were gradually implemented, which is why it is not fully understood in society. On the other hand, former officers and their principals often argue that they acted in accordance with the then generally applicable law, which consequently excludes the possibility of holding them liable, including criminally liable, in any way. In addition, there are problems related to the statute of limitations, resulting in the discontinuance of criminal prosecution or the ineffectiveness of civil law claims. Another issue is the reluctance of law enforcement agencies to take action which is not only of legal but also political nature Despite these reservations, it seems that the democratic state of law has an obligation to prosecute at least the worst crimes committed in the past. It also turns out that the actions taken repeatedly by officers of the state apparatus were acts which were not only contrary to the basic principles of human rights or international law but also to the law in force at that time. Unfortunately, in Poland no decision has been made to adopt any of the models of treating the past accepted in the world.

LESSONS LEARNT

- Poland has started to prosecute Stalinist crimes fairly quickly.
- In order to effectively prosecute the crimes, a special body was created bringing together prosecutors appropriately prepared to conduct such cases.
- Undue pension benefits were taken away from people involved in political repression against citizens.
- In Poland, the judging environment failed to purge itself.
- Newly created security intelligence and law enforcement agencies heavily relied on people involved in the repressions against citizens.

RECOMMENDATIONS

- The countries in which democracy is restored should first verify the judicial environment and the prosecution authorities.
- What is important is also the effective prosecution of persons who committed crimes in the context of political repression.

SOURCES USED AND FURTHER READING

Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation 1998 No. 155 Item 1016.

Dudek Antoni, *Instytut: osobista historia IPN*, Warszawa: Czerwone i Czarne, 2011

Dudek Antoni, *Pierwsze lata III Rzeczypospolitej: 1989–2001*, Kraków: Arcana, 2002

Kienzler Iwona, *Krwawa Luna i inni: prokuratorzy i śledczy systemu stalinowskiego w Polsce*, Warszawa: Wydawnictwo Bellona, 2016

Lipiński Piotr, *Bicia nie trzeba było ich uczyć: proces Humera i oficerów śledczych Urzędu Bezpieczeństwa*, Wołowiec: Czarne, 2016

Majchrzak, Grzegorz, *Inteligentna forma internowania: ćwiczenia i powołania do Ludowego Wojska Polskiego jako forma represji po 13 grudnia 1981 r*, Warszawa: IPN, 2016

MEMORY OF NATIONS

Democratic Transition Guide

[The Romanian Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Stefano Bottoni

This chapter analyzes the instruments the Romanian juridical system has adopted since 1989 to deal with the crimes perpetrated by different state agencies during the communist regime, and reconstructs the rugged path towards the establishment of a framework of legal regulation that would make possible the criminal prosecution of perpetrators and their political supervisors.

A JURIDICAL FARCE: THE CEAUȘESCU TRIAL OF DECEMBER 25, 1989

The first act of the transitional justice in Romania was the trial of Nicolae and Elena Ceaușescu on December 25, 1989. During and after the process, the entire responsibility for the multifaceted crimes committed throughout several decades in their modern repressive bureaucracy was directed on a single and highly symbolic target, the presidential couple. The personalization of the criminal past allowed many co-executors to avoid any civil and criminal liability.

On December 22, 1989 Ceaușescu and his wife fled the capital in a miltary helicopter but were captured and taken into custody by the armed forces. The idea of the public trial announced on December 23 by Ion Iliescu was quickly set aside. The jury was also chosen by the National Salvation Front (NSF). Two lawyers from Bucharest were called to "recite" the part of the office defense, respectively for Elena and Nicolae. The NFS' choice to form an extraordinary military tribunal alleviated some of the normal procedural guarantees and was therefore functional in the hurry to liquidate the President, but this posed serious legal challenges.

First, Nicolae Ceaușescu's repeated invocation of a judgment before the Grand National Assembly (GAN) was legally founded. Every member of the GAN was in fact protected by immunity and according to the 1965 Constitution was still in force, he/she could not be "stopped, arrested or sentenced in criminal trial without the prior approval of the Grand National Assembly during its sessions, or the State Council, in its sessions." The GAN was also invested in the power to elect and revoke the President of the Republic, as well as controlling its actions. In strictly legal terms, Ceaușescu was right to raise this objection, because the GAN had not yet been officially dissolved.

Obviously, any reasoning for the legitimacy of the judiciary conflicted with the crude reality of the institutional limbo that culminated on December 25, with the execution of the presidential couple. The legitimacy of the NSF was, in fact, to be demonstrated, and the shape of the new regime was still in the forefront, because the NSF turned itself into the nation's government on December 26. In that political void, the tribunal defined itself as "the people," and proclaimed that it had formed a new power structure. The Ceaușescus, on the other hand, refused to recognize the tribunal and regarded their overthrow as a foreign-directed "coup d'etat", a thesis that would become popular after 1990 among former Securitate officers and opinion makers.

Even if one takes for granted that the military court was legally entitled to judge the case, a further contradiction emerges. Although Ceaușescu had proclaimed a state of emergency on December 17, authorizing the military courts to operate in an exceptional procedure, such circumstances could not rule out the regular celebration of the trial. The two office lawyers provided to Ceaușescu talked about their special client in the most despicable terms and did not provide the slightest defense, even reaffirming at every opportunity the guilt of the defendants. The behavior of the judge was also far from correct, as he began to apostrophise the deposed President as a "coward," who had organized "orgies" and had worn "luxurious clothes".

On the other hand, the crimes that had been challenged by the two Ceaușescu and confirmed by the judgment – genocide, usurpation of state power, acts of diversion and compromise of the national economy – were all largely unfounded, with the exception of the compromise of the national economy. The latter, in fact, found easy evidence (though not exposed in a story) in the disastrous condition of the Romanian economy, a direct result of the policies of Ceaușescu. The rest of the accusations would probably have been dismantled by any defender under normal circumstances. A further element that contributes to undermining the legality of the trial was the complete lack of an investigation phase: the charges of imputation therefore revealed all their fragility and improvisation. The accusation of genocide, in fact, was based on the number of victims of repression. These were calculated on the basis of unsubstantiated estimations of 12,000 casualties, in Timișoara, provided by East European news outlets, that had spread stories of torture, massacre of pregnant women and children, of mass graves, of attempts to sabotage nuclear power plants and aqueducts, of snipers refugee in underground tunnels, and of foreign terrorists. The tribunal therefore spoke of 64,000 casualties, which were purported to be a result of the orders of the former President, which would have allowed, at least theoretically, to speak of genocide. The indiscriminate repression of more than 60,000 people in a few days could have not been assimilated to a mass extermination, but the absence of the conditions for that charge was already evident at that time. It is not a coincidence that, in the subsequent trials of the suspects responsible for the victims of Timișoara, the original charge of "genocide" was transformed into "aggravated killings".

The other two charges related to usurping of the powers of the state and of having committed acts of diversion held a strong symbolic value, but besides being inaccurate at the procedural stage, contained few legally relevant elements. The institutional system that converged on Nicolae Ceaușescu was in fact based on constitutional and legislative pillars, and in principle, was not the product of the abuse of power. If communist practices were found to be forbidden by the new power, they were rather

linked to the nomenclature which cynically exploited its privileged position. Ceaușescu's institutional architecture in Romania was not condemnable in terms of democracy and the rule of law, but the President's despotic role was written in clear letters in papers and statutes. Even in the case of the December 1989 events, Ceaușescu's behavior was morally despicable but legally unimpeachable. The President and Chief of the Armed Forces defended the power of what was seen by the threatened institutions as an attempt at subversion and sought, violently and unsuccessfully, to restore public order. The disputed diversioninary acts are correctly refered to in article 163 of the Penal Code, which provided for the death penalty for such offenses.

To further undermine the legal validity of the trial, the death sentence was most probably written before the trial began. There was no room for any alternative to the condemnation, no one mentioned the possibility of appeal. There was no time span between the self-proclaimed prosecution and the shooting; the ten days provided for by the Code of Criminal Procedure for the referral to appeal, or the five days of grace before the deaths of the perpetrators were not expected.

EARLY TRANSITIONAL JUSTICE: THE ANTI-COMMUNIST TRIALS OF THE 1990s

Between late December 1989 and January 1990, the new provisional government abolished numerous measures of illegal character – like the infamous abortion ban – and "contrary to the interests of the Romanian people" ordered on December 30 the dissolution of the communist State security agency (*Departamentul Securității Statului*). However, the new government's activity soon raised serious doubts about the committment of the authorities to decommunize. The 1965 Constitution was not formally abrogated: it was essentially forgotten and acted in an extra-constitutional space, at least until the decree of March 18, 1990, which entrusted the future parliament with the task of adopting a new Constitution. paper. The Securitate was not dismantled, but merely integrated into the Ministry of Defense and subsequently renamed the Romanian Information Service (SRI). Thirdly, the allegiences of the Warsaw Pact were kept loyal, wiping out any doubts about the ideological position of the new rulers: reformism within a system of values that was inherited from the previous regime and that no one intented to question. Finally, the orders, the directives, the institutional restructuring, and the same appointments came entirely from the political body, the Council of the Front, that assumed full powers. The Council of the Front also gave itself the power of nomination and revocation of the government, definition of the electoral system, nomination of the Committee for Constitutional Reform, approval of the state budget, signatory of international treaties, declaration of State of war, and the power to introduce capital punishment.

In the first months after the victorious revolution of December 1989, the new transitional power allowed and even stimulated some attempts at giving justice to the casualties of the revolutionary period. Extraordinary military courts were set up nationwide according to a decree published on January 8, 1990. The machinery of justice began with an emphasis on the prosecution of so called "terrorists", but their existence could not be proved and none of the supposed targets were brought to justice. A number of public trials took place in 1990–1991 against former dignitaries and army officers, and although none of the trails showed the same disregard for fair juridical procedures as that against Ceaușescu, they nonetheless contributed to undermine public confidence in the judiciary, due to exaggerated charges that had to be later changed or even dropped.

The first of them concerned Ceaușescu's four closest aides: former Interior Minister Tudor Postelnicu, former deputy Prime Minister Ion Dinca, former RCP organization chief Emil Bobu, and former deputy PM Manea Mănescu. The four dignitaries faced accusation of complicity in "genocide" because of the orders issued to fire on peaceful demonstrators in December 1989. They were sentenced to life imprisonment, and all of their properties were confiscated. In March 1990, a series of proceedings that came to be known as the "Timișoara Trial" charged 25 Securitate and criminal police (Miliția) officers with complicity in genocide for the mass killings in Timișoara. The trial lasted almost two years, during which the charges were downgraded to aggravated murder and complicty in murder. When the sentence was passed, on December 9, 1991 only eight defendants were jailed with sentences ranging from 15 to 25 years. Six defendants were acquitted, one had died during the process, while ten defendants were convicted but subsequently pardoned or released for their time served in prison taken into account. By 1994, all the previsouly convicted persons for the Timișoara massacre had been released for different reasons. The same happened for the trial started in Bucharest against the members of the Political Executive Committee of the RCP in July 1990. Just as in Timișoara several months before, the initial charge of "genocide" had to be modified to instigation of aggravated murder. At the end of the procedure, only 9 out of 21 defendants received relatively mild sentences for "complicity in murder" and "negligence of duty", and even those sentenced were soon liberated for health reasons. As Edwin Rekosh has shown in his analysis of the lustration process in Romania, the post-1989 trials shared the worst aspects of two contradictory political impulses. "They started as highly politicized show trials caught up in the hysteria of the moment, but in the end the concrete results were effectively subverted through indirect means, presumably due to political influence."[1]

Only the 1996 government change and the coming to power of the Democratic Convention made it possible for new, more professional and unbiased wave of trials. In 1997, military prosecutors brought to justice generals Victor Stănculescu and Mihai Chițac Athanasius as the main people responsible for the armed repression in Timișoara. In 2000, the generals were sentenced to serve 15 years in prison, but after a new political change, which brought back to power the postcommunist Social Democrats, the General Prosecutor of Romania made an appeal for annulment in 2001. The case was reopened and the defendants were released from custody. Finally, on October 15, 2008, the High Court of Cassation and Justice convicted the two generals to serve 15 years each in prison for involvement in the massacre of Timișoara. On March 2013, the European Court of Human Rights (ECHR) in Strasbourg compelled the Romanian Government to pay compensation of around 350,000 Euros to victims of the 1989 Revolution in Timișoara. "During these procedures, the examination of the case by the courts was repeatedly interrupted,"

1 Edwin Rekosh, Romania: A Persistent Culture of Impunity, in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, New York-Oxford: Oxford University Press, 1995, 134.

noted ECHR in its resolution, and "it took another eight years before the case file was settled".

THE CASE OF FORMER MINISTER OF INTERIOR DRĂGHICI

It must be noted that although the victims of Romanian communism have to be numbered in the hundreds of thousands of arrested, deported or executed people, until very recently only four indictments laid by public prosecutors referred to crimes ordered or committed by communist dignitaries before those of December 1989 (the so called "revolution file"). On the one hand, the state did not take any action to investigate the killings or inhuman treatment committed in the interrogation cells of the Securitate or in communist prisons. On the other hand, the complaints lodged with the prosecutor's office by the victims were investigated with a slowness equivalent to inaction. Certain criminal investigations were quickly stopped due to the death of incriminated persons, others were interrupted on the grounds of lack of evidence. In other instances, a combination of internal and external pressures stopped any attempts of justice. In August 1992, after former political prisoners had long asked to open a case against Alexandru Drăghici, former Interior Minister between 1952 and 1967, and one of the main men responsible for the mass repression of the Stalinist era and post-1956 period, the Romanian general prosecutor asked for Drăghici's extradition from Hungary, where the former high-ranking dignitary had fled with his wife after the 1989 revolution. In 1993, Drăghici and three Securitate officers were accused of instigation and aggravated murder. However, the accusations did not make reference to political crimes, but to the shooting, in 1954, of an individual having a personal conflict with Drăghici. Thus, the indictment did not refer to the role that Drăghici had played in repressing political opponents, but only to an act of personal abuse, which had no relevance to the political repression of the communist regime. The extradition request was rejected by the Hungarian authorities, which argued that the statute of limitation for this crime had expired. Drăghici died undisturbed in December 1993 in Budapest, although a Romanian court had found him guilty in another case of incitement to murder, and sentenced him *in absentia*.

LESSONS LEARNT

As shown well by Raluca Ursachi and Raluca Grosescu in their analysis of post-communst juridical practices of lustration, from a juridical perspective, the trials against former communist dignitaries in Romania after 1990 were based on the same legal framework of the time of the facts, according to the principle *nulle crimen sine lege*. The investigation of the various cases and their judgment in court were confronted in this context with a number of difficulties of juridical order, the major obstacles being: 1) the amnesty of certain crimes by presidential decree enacted at the end of Ceauşescu regime; 2) the statute of limitation; 3) the difficulty to frame these crimes and abuses as imprescriptible crimes as defined by the socialist Criminal Code. The extreme policitization of trials involving persons belonging to the former communist, and the social composition of courts that, where until very recent times judges and prosecutors whose career had started well before 1989, were in a dominant position, can also explain why the post-communist wave of trials failed to achieve the goal of providing justice for both communist crimes and the mass repression in December 1989.

SOURCES USED AND FURTHER READING

Marius, Mioc, *Procesele revoluţiei de la Timişoara: documente istorice*, Timişoara: Artires, 2004

Raluca, Grosescu, Raluca, Ursachi, *Justiţia Penală de Tranziţie, de la Nurneberg la postcomunismul românesc*. Iaşi: Polirom, 2009

Rekosh, Edwin Romania: A Persistent Culture of Impunity, in Naomi Roht-Arriaza, ed., *Impunity and Human Rights in International Law and Practice*, New York-Oxford: Oxford University Press, 1995

The Ceaușescu trial of December 25, 1989 in https://chnm.gmu.edu/1989/items/show/690

MEMORY OF NATIONS

Democratic Transition Guide

[The Russian Experience]

National Endowment for Democracy
Supporting freedom around the world

CEVRO

INVESTIGATION AND PROSECUTION OF THE CRIMES OF THE REGIME

Nikolai Bobrinsky

INTRODUCTION

In the field of criminal justice the results of the Russian transition are negligible: no person involved in organizing and implementing repressive communist regime policy in the USSR was convicted by Russian courts. Criminal investigation materials, initiated following political repressions, are not available to the public, and in some cases – classified. The main reasons for this outcome are the lack of political will of the new Russian government, weak social demand for holding Soviet officials liable as well as different legal constraints.

STATE VIOLENCE AND DISCRIMINATION IN THE USSR FROM THE STANDPOINT OF CRIMINAL LAW

It is not a stretch to state that the repressive policy against its own people was always inherent in the Soviet regime, except, perhaps, for the last few years of its existence. Its content, scale and victims underwent significant changes over time.

The law "On rehabilitation of victims of political repressions" adopted in October 1991 (hereinafter the Rehabilitation Law) provides the general definition of political repressions. They are understood as various coercive measures, applied by the state under political motives, and represented by the deprivation of life or freedom, placement for coercive treatment in mental health institutions, forced emigration and deprivation of citizenship, deportation of population groups from their places of permanent residence, exile, forced relocation to special settlements, forced labor under the restriction of freedom, as well as other ways of depriving or restricting the rights and freedoms of the persons who were recognized as socially dangerous to the state or political order in terms of the strata, social, national, religious and other features, implemented under resolutions of judicial and extrajudicial bodies, or administratively by local executive bodies and non-governmental organizations exercising administrative powers.

Obviously, according to the law authors this definition was to cover most cases of political violence and discrimination from the Soviet authorities. A sample of the description (incomplete) of the key Soviet repressive practices may be found in the report by Nikita Petrov "Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones".[1]

Following the fundamental legal principle of *nullum crimen sine lege*, criminal liability for political repressions may be based either on Soviet laws or on international law. The very fact that the political repressions were ordered by the Soviet state leaders would seem to exclude the possibility of their contradiction to the Soviet laws and, moreover, criminal liability for their committing. However, in fact, their relation to the positive law of the USSR varied during different historic periods of the Soviet regime and depending on the content of the repressive measures. According to the criterion of compliance with the Soviet law, political repressions may be roughly divided into those legalized, implemented under administrative regulations non-compliant with the law, and those fully deprived of any legal grounds, i.e. illegal ones. The issue of factual justification of repressive measures was not considered here.

An example of the first category is a criminal sentence on anti-Soviet agitation and propaganda, the second category – repressions applied by illegal extrajudicial bodies, the third – murders committed by the officers of the KGB without any legal records.

In the latter case it is evident that the Soviet law was violated. Since these political repressions were applied by public officers, their actions should be characterized as excess of power[2] (in the example above – combined with willful murder[3]). Nevertheless, it should be noted here that the Soviet criminal law, unlike the contemporary Russian law, did not stipulate criminal liability for carrying out an illegal order.[4] This way, the performers of even quite arbitrary acts of political violence, in case they were held criminally liable could refer to the unavailability of legal opportunity to avoid carrying out the order with no risk of being criminally prosecuted themselves.

In the second case the law might be violated due to the contradiction of administrative regulations, which served the grounds for non-judicial bodies, to the provisions of the Soviet Constitution and legislation. However, in this case repression performers could also refer to the fact that the correspondent administrative regulations were not considered illegal at the time of their application. They were unconditionally binding, otherwise the above performers could face criminal liability for negligence or for sabotage. These reasons, nonetheless, do not relieve of responsibility the persons who adopted the respective illegal regulations, who could be recognized accomplices of excess of power regardless of the actual perpetrators' liability.

1 Nikita V. Petrov, Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones, in *Crimes of the Communist Regimes. An assessment by historians and legal experts. Proceedings of international conference.*, Prague: Institute for the Study of Totalitarian Regimes, 2011, 87–92: https://www.ustrcr.cz/data/pdf/publikace/sborniky/crime/sbornik.pdf

2 In particular, art. 110 ("abuse of authority or office"), art. 193.17 ("abuse of power, excess of authority, omission of power, and negligence to the office of the high officials of the Workers' and Peasants' Red Army, Workers' and Peasants' Militia and the Directorate of the NKBD State security service") of the RSFSR Criminal Code of 1926, art. 171 ("abuse of power or office"), art. 179 ("compulsion of evidence") of the RSFSR Criminal Code of 1926.

3 Art. 102 ("aggravated willful murder") and 103 ("murder") of the RSFSR Criminal Code of and similar articles (136 and 137) of the RSFSR Criminal Code of 1926.

4 According to article 193.2 of the RSFSR Criminal Code of 1926 (as revised in 20. 10. 1934) non-fulfilment of any "order in the course of service" was punished, and in articles 238 "Defiance" and 239 "Non-fulfilment of Order" of the RSFSR Criminal Code of 1960 there was no criterion of connection between the order and service. In particular, officers of the state security bodies could have been held accountable under these articles of the Criminal Code.

Political repressions stipulated in the Soviet laws cannot be deemed wrongful and therefore are not criminal. In the above example the well-founded application of the criminal law on responsibility for anti-Soviet agitation and propaganda (article 70 of the RSFSR Criminal Code of 1960) by the investigator and judge may not be considered a crime under Soviet legislation.

In addition to the abuse of power, Soviet legislation established liability for governmental officials to be prosecuted for applying the repressive regulations in case of their obvious unfoundedness – abuse of authority, criminally prosecuting a person who is known to be innocent, wrongful sentence, arbitrary arrest or detention, compulsion of evidence.

Pursuant to international law, many episodes of Soviet political repressions may be characterized as war crimes or crimes against humanity. Those actions, being crimes against humanity (various acts of violence and discrimination under large-scale or systematic attacks against civilians), are recognized as such, regardless of whether they contradicted national law or not. However, the practical possibility of criminal prosecution under international law depends on the implementation of international crimes in the national law. In the USSR little was done in this respect: only some war crimes were subject to prosecution (in particular, looting, violence against civilians, ill-treatment of the prisoners of war).[5]

CRIMINAL PROSECUTION OF POLITICAL REPRESSION PARTICIPANTS IN THE USSR BEFORE PERESTROIKA

Some of the organizers of political repressions were prosecuted as early as during Stalin's years. In March 1938 the former director of NKVD (People's Commissariat for Internal Affairs), one of the Gulag (Central Administration of Corrective Labor Camps) organizers Genrikh Yagoda was convicted at the third "Moscow Trial" and several days later executed for his involvement in the plot of the "right-Trotskyist bloc". Two years later his successor Nikolay Yezhov, who headed the NKVD during the "Great Purge", was executed too. Some other leading officers of Stalin's secret police were purged during his rule. The race for power after Stalin's death resulted in prosecution of the ex-minister of Internal Affairs Lavrenty Beria and his subordinates in the state security bodies. In total, the policy of "denouncing Stalin's personality cult" in the years of Nikita Khrushchev's rule (1953–1964) led to 62 former *chekists* being repressed.[6]

It is hard to consider these criminal proceedings as just retribution for the Stalin epoch crimes. Except for Yagoda, the cases of purged chekists were considered in closed court hearings. They were convicted not for murders or the abuse of power, but for various counterrevolutionary crimes.

ATTEMPTS TO INVESTIGATE POLITICAL REPRESSIONS DURING PERESTROIKA AND THE FIRST YEARS AFTER THE USSR COLLAPSE

The Rehabilitation Law, which was passed two months prior to the collapse of the Soviet Union, contained the provision on liability for the prosecution of those involved in political repressions. "Officers of the VChK, GPU-OGPU, UNKVD-NKVD, MGB bodies, Prosecutor's Office, judges, members of committees, 'special meetings', 'dvoikas', 'troikas' (two- and three-person extrajudicial commissions, respectively), members of other bodies exercising judicial power, judges involved in investigating and considering cases on political repressions, are liable for prosecution under the existing criminal law" (part two, article 18). It was expected that the lists of the persons, duly recognized as guilty in framing-up cases, applying illegal investigation methods and in obstructing justice, would be published regularly.

This provision of the Rehabilitation Law, however, was not to be implemented. Even before adopting the law, starting from 1989[7] investigation bodies commenced criminal proceedings related to the political repressions of Stalin's times, mainly in response to finding the graves of their victims. By the time of initiating criminal proceedings at least 45 years had passed after the time of the mass executions. Most of the main organizers of Stalin's repressions had already died (those who lived longest among the Stalin period members of the Political Bureau of the Central Committee of the Communist Party, Vyacheslav Molotov and Georgy Malenkov died in 1986 and 1988, respectively, and Lazar Kaganovich died in 1991). Nonetheless, some of the rank and file members of Stalin's security bodies were still alive and were questioned as witnesses.[8] However, no information on indictments or trials related to Soviet political repressions has been published. Normally, investigative bodies used to terminate criminal proceedings due to the death of the guilty party. For instance, the investigation of the workers' demonstration shooting in Novocherkassk was terminated in 1994, while a well-known criminal case of the Katyn massacre of Polish prisoners of war was terminated in 2004. Afterwards, the practice of initiating criminal proceedings following the detection of buried victims of political repressions died out, too.[9]

To terminate a criminal case due to the death of the persons who had committed crimes, the investigator had to indicate those people in the resolution and describe their unlawful acts. This way, even after the death of those involved in political repressions the state could formally establish the circumstances of their offences. However, publishing resolutions on terminating criminal proceedings of political repressions was not stipulated by law. As a result, the facts found during the investigation stayed unknown to the public and are still often controversial. In some cases, such as the Katyn massacre, the resolutions on

5 Г. И. Богуш, Г. А. Есаков, В. Н. Русинова, *Международные преступления: модель имплементации в российское уголовное законодательство*, Москва: Проспект, 2017, 6–7.

6 Petrov, 91.

7 В.Филичкин, Репрессии на Южном Урале: правда или вымысел? *Полит* 74, 20. 1. 2014; https://www.polit74.ru/comments/detail.php?ID=39787; Мемориальное кладбище "Пивовариха". Виртуальный музей ГУЛАГа; http://www.gulagmuseum.org/showObject.do?object=126753&language=1; The place of execution and burials in the town of Kursk (Solyanka area). Necropolis of Terror and Gulag. The Card index of burials and memorial places (Место расстрелов и захоронений в городе Курск (урочище Солянка). Некрополь террора и ГУЛАГа. Картотека захоронений и памятных мест); http://www.mapofmemory.org/46-01;

8 А. Черкасов, Крот истории, in *Polit.ru*, 3. 9. 2004; http://polit.ru/article/2004/09/03/khaibakh/

9 И. Смирнова, Расстрел Великих князей: дело положено под сукно, in СвободнаяПресса, 16. 2. 2010; http://svpressa.ru/society/article/21258/; http://tayga.info/120423.

case termination were even classified due to the availability of the documents being state secrets in the materials of these cases.

The judicial assessment of Soviet political repressions in post-Soviet Russia was limited merely to the recharacterization of the actions committed by those OGPU-NKVD-MGB officers, who had been repressed in Stalin's and Khrushchev's times. As stated above, they were convicted of various counterrevolutionary crimes. The adoption of the Rehabilitation Law gave an opportunity to their relatives to apply for the quashing of the sentences in those cases. Rehabilitation was denied to such OGPU-NKVD-MGB leaders as Genrikh Yagoda, Nikolay Yezhov, Viktor Abakumov, Lavrenty Beria and a number of other senior officials of these bodies.[10] For these cases the law provided for judicial review of the reasons for the denial. Russian courts recognized rehabilitation denials as valid. However, pursuant to some published court rulings in cases of rehabilitation denial, the subsumption of wrongful acts was changed from counterrevolutionary crimes to the abuse of power (or excess of authority), entailing severe consequences, heavily aggravated, according to article 193-17-b of the RSFSR Criminal Code of 1926. In particular, Abakumov was postmortem recognized by the RF Supreme Court as guilty that he and MGB officials subordinate to him "for a prolonged period of time systematically abused power, which was expressed in framing up criminal cases and applying illegal ways of physical coercion during the investigation", and entailed heavily aggravated effects – "prosecution of many innocent citizens".[11]

The practice of changing Soviet court sentences postmortem, was, in fact, a compromise between the need for rehabilitation of purged officials of the Soviet secret police (due to groundless accusations of counterrevolutionary crimes against them) and the impossibility of denying their responsibility for abuse of power during repressions.

REASONS FOR REJECTING CRIMINAL PROSECUTION OF COMMUNIST REGIME CRIMES

It appears that the key reason for rejecting the prosecution of the living perpetrators of political repressions in post-Soviet Russia was the lack of political will in the new state leadership and weak social demand for restoring justice by means of criminal justice. The latter may be explained, inter alia, by the mistrust in the impartiality of the former Soviet judges who kept their positions after the fall of the Soviet power.[12] President Yeltsin's Government decided to be limited to the trial of the persons involved in the defeated coup attempt of the GKChP in August 1991. These people included high Soviet officials, who tried to prevent dismantling the CPSU power and the USSR disintegration. However, even this trial, which began in 1993, was not completed due to amnesty passed by the State Duma at the beginning of the next year. In addition, a kind of *ersatz* criminal justice for the Communist crimes in the USSR was the so called "CPSU process" – a trial in the Constitutional Court regarding the Constitution compliance of President Yeltsin's decrees, by which the Communist Party was actually dismissed. Under this trial the court was offered to verify the compliance with the Constitution of the very CPSU. During the long court hearings dozens of witnesses were interrogated and various secret documents were studied regarding the activities of the Communist Party highest bodies. Nevertheless, this trial did not come up to the expectations of those who wanted it to become the *Russian Nuremberg*. In its ruling, the Constitutional Court, though on the whole recognizing the President's decrees on the dissolution of the Communist Party compliant with the Constitution, rejected settling the issue of the CPSU constitutionality, which was the essential hope for recognizing the crimes committed by the Party leaders. The description given by the Russian Constitutional Court to the power of the Communist Party in Russia fitted three sentences: "For a long period of time the country was reigned by the regime of unlimited, violence-based power of a clique of Communist functionaries, united in the Political Bureau of the CPSU Central Committee headed by the General Secretary of the CPSU Central Committee. <...> The materials of the case, including evidence provided by witnesses, confirm that the CPSU leading units were initiators, whereas local units were frequently vehicles of the repressive policy towards millions of Soviet people, in particular, towards deported peoples. It lasted for decades". Later the president of the Constitutional Court Valery Zorkin substantiated this cautious decision by the need to find a social compromise.[13]

LEGAL BARRIERS FOR CRIMINAL PROSECUTION

When explaining the rejection of criminal prosecution for political repressions, Russian officials referred to the lack of legal grounds for it. For example, in response to the application submitted by the relatives of Polish prisoners of war killed in 1940 to the European Court of Human Rights regarding inefficient investigation of the circumstances of their deaths, the Russian government declared that the investigation of the Katyn criminal case had been carried out "in breach of the criminal procedure requirements, for political reasons, as a goodwill gesture to the Polish authorities", since the limitation period under 193-17-b of the RSFSR Criminal Code for the aggravated power abuse was 10 years and, in addition, the Soviet NKVD officers involved in the execution had died before the investigation began.[14]

Indeed, under the Russian law criminal proceedings are allowed only against a living person. If a suspect of a crime dies, the criminal case may not be initiated, and a criminal case initiated earlier is subject to termination. The exception is provided for considering the issue of rehabilitating the deceased who were criminally prosecuted.

Even if the suspect of a crime is alive, he or she may be kept safe from justice by the limitation period for criminal prosecution. Its expiry is the basis for refusal to initiate a criminal case. The maximum limitation period under the RSFSR Criminal Code of 1960 was 10 years. Thus, the government lost an opportunity to

10 There were also exceptions. For example, Pavel Sudoplatov, a senior official of the state security and the organizer of extra-judiciary killings, convicted in 1958 of high treason as an "accomplice of traitor Beria and his closest cohorts", was rehabilitated in 1992 by the RF Chief Military Prosecutor's Office.

11 Quotation according to the text of the RF Supreme Court Presidium Resolution dated December 17, 1997, placed in the GARANT legal system.

12 See: Ilya Nuzov, "The Role of Political Elite in Transitional Justice in Russia: From False 'Nurembergs' to Failed Desovietization", in *U. C. Davis Journal of International Law & Policy*, 2014, 20 (2), 304.

13 Имеем Право. Интервью с Валерием Зорькиным, in Российская газета No. 4210, 31. 10. 2006; https://rg.ru/2006/10/31/zorkin-ks.html

14 European Court of Human Rights. Judgment (GC) of 21. 10. 2013. *Janowiec and Others v. Russia*. Appl. nos. 55508/07 and 29520/09. §§ 109, 111; http://hudoc.echr.coe.int/eng?i=001-127684.

criminally prosecute most of the crimes, accompanying political repressions, as early as in the Soviet times and the early 1990s.

The only exception to the limitation period for criminal prosecution is for the crimes which may be punished by the death penalty or life imprisonment. According to part 4 article 78 of the RF Criminal Code the issue of applying a limitation period for such crimes is to be settled by the court. It means that the time that has passed since the offence is not an obstacle to initiating a criminal case and carrying out investigation. Out of political repressions related crimes only aggravated murders can be referred to this category.[15]

The scope of political repressions, to which the above murder-related limitation exception applies, depends on the criminal and legal assessment of the "state coercion by means of putting to death", if the terms of the law on rehabilitation is used. According to the rules of subsumption of crimes used by the Soviet courts, the abuse of power, related to killing, must be assessed cumulatively.[16] For example, this kind of assessment was given to the extra-judicial killing of the residents of the settlement of Khaibakh by Soviet troops during the Chechen deportation in 1944. At the initiation of the criminal case upon this fact[17] the prosecutor of the Urus-Martan district, Chechen-Ingush Autonomous SSR, having inspected the scene of the crime and having questioned its witness, found sufficient elements of the crimes, specified in part 2 article 136 and article 193-17-b of the RSFSR Criminal Code of 1926 – that is heavily aggravated murder and power abuse (or excess of authority) by a Red Army (or equivalent bodies) commander.

It is to be noted that capital punishment, provided for the aggravated abuse of power and excess of authority under article 193-17-b of the 1926 Criminal Code was later (in the 1960 Criminal Code) replaced by a period of imprisonment from 3 to 10 years (article 260-b). Therefore, this crime is indeed subject to the 10-year limitation period. In other words, even the most cruel and massive Stalin period repressions, not related to willful murder, stayed out of reach of the Russian law enforcement system.

Statutory limitations could be overridden if international law were applied as the grounds for criminal prosecution. As mentioned before, many episodes of the Soviet political repressions correspond to the elements of the crimes against humanity. Limitation periods do not apply to crimes against humanity by virtue of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, ratified by the Soviet Union in 1969.

For instance, in Estonia the officers of the Ministry of Internal Affairs and the Ministry of State Security, involved in deportation from Estonian SSR in 1949 and fighting against anti-Soviet resistance ("forest brothers") in 1953–54, were convicted of crimes against humanity. In Latvia the Minister of State Security of the Latvian SSR Alfons Noviks was found guilty of crimes against humanity. He was accused of organizing deportation and prisoners' torture.[18] Similar crimes were committed at that time in other parts of the Soviet Union as well.

The European Court of Human Rights found in two decisions[19] that criminal prosecution for crimes against humanity, committed by Soviet officials in Estonia in the late 40s – early 50s, does not contradict the principle of *nullum crimen, nulla poena sine lege* established in article 7 of the European Convention on Human Rights. Nevertheless, according to Antonio Cassese's opinion, the arguments of the European Convention on Human Rights in these orders were erroneous: the court did not take into account that in the late 1940s international law implied a compulsory link between crimes against humanity and an armed conflict (in the case of Estonia, this link was available, since deportation in 1949 was a direct consequence of the USSR aggression against Estonia in 1940). The prohibition of crimes against humanity in peace time first appeared only in the late 60s in the international law.[20] This reason is of high importance for the issue of assessment of Soviet political repressions as crimes against humanity since they were normally unrelated to armed conflicts. By accepting Cassese's viewpoint, international law provides legal grounds for criminal prosecution of the repressions committed only in the 1970–80s. It seems that out of the repressive practices of the period only punitive psychiatry can meet the criteria of the crimes against humanity – it was a widely spread way of fighting against the dissidents of the time.

The above mentioned opportunities of criminal prosecution under international law, have not been of practical significance in Russia, since crimes against humanity have not been implemented in the Russian criminal law.

LESSONS LEARNT AND RECOMMENDATIONS

Assessing the opportunities of criminal prosecution, which the Russian Government had in the early 1990s, it is to be admitted that they were in any case limited by the period that had passed from the time of completion of the most large-scale political repressions. In Latvia, Lithuania and Estonia, where from the first years of independence, attempts were made to investigate and prosecute Stalin's repressions, investigation bodies managed to bring to court criminal cases only regarding lower rank perpetrators of the repressive policy, whereas its organizers and higher rank perpetrators (with few exceptions) were relieved from liability due to their death. Apparently, the Russian society was not ready to put the blame for the regime crimes upon common people, who "just carried out orders" and were already quite elderly. On the other hand, after Stalin's death, political repressions were of a much lower scale and mainly referred to a very limited stratum of dissident intelligentsia. The scarce victims of the repressions of that time, even gaining certain power and influence on the rise of democratization,

15 Aggravated murder under article 102 of the RSFSR Criminal Code of 1960 (i.e., in particular, killing two and more people or the one collusively committed by a group of people) and the murder, committed by a military, heavily aggravated, under part 2 article 137 of the RSFSR Criminal Code of 1926.

16 Resolution of the Plenum of the USSR Supreme Court dated March 30, 1990 N 4 "On judicial practices in the cases of the abuse of power or office, authority or misconduct, negligence and forgery in public office".

17 Черкасов, *Крот истории*.

18 Latvia Gives K.G.B. Aide A Life Term. New York Times, 14. 12. 1995. URL: http://www.nytimes.com/1995/12/14/world/latvia-gives-kgb-aide-a-life-term.html; On criminal prosecution for Communist regime crimes in the Baltic states see: Eva-Clarita Pettai, Vello Pettai, Transitional and Retrospective Justice in the Baltic States, Cambridge: Cambridge University Press, 2015

19 European court of human rights: Decision of 17. 1. 2006. Kolk and Lislyiy v. Estonia, appl. nos. 23052/04 and 24018/04; Decision of 24. 1. 2006. Penart v. Estonia. Appl. no. 14685/04.

20 Antonio Cassese, Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR. *Journal of International Criminal Justice*, 2006, 4 (2), 410–418.

could not or did not wish to demand punishment for their offenders. In particular, the rejection of prosecution against those involved in repressions was the official position of the Memorial society founded in 1989.[21]

However, the unsatisfied need of retribution for the unprecedented Communist regime crimes against its people is still present in the Russian society. In 2016, for example, this need was suddenly manifested in the heated debate on the Memorial published lists of NKVD members in 1935–1939 and the investigation by Denis Karogodin from Tomsk into the fate and killers of his great-grandfather, who died during the "Great Terror".

21 Paragraph 5 of the Resolution of the Foundation Conference of the All-Union Voluntary Historical and Educational Society "Memorial", January 29, 1989. Vyacheslav Igrunov's website; http://www.igrunov.ru/cat/vchk-cat-org/memor/hist/docum/vchk-cat-org-memor-docr-resol.html

SOURCES USED AND FURTHER READING

Богуш, Г. И., Есаков, Г. А., Русинова, В. Н., *Международные преступления: модель имплементации в российское уголовное законодательство*, Москва: Проспект, 2017

Cassese, Antonio, "Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: The Kolk and Kislyiy v. Estonia Case before the ECHR", in *Journal of International Criminal Justice*, 2006, 4 (2), 410–418

Cohen, Stephen F., *The Victim Returns: Survivors of the Gulag After Stalin*, London: I. B. Tauris, 2012

Черкасов, А., Крот истории, in *Polit.ru*, 3. 9. 2004; http://polit.ru/article/2004/09/03/khaibakh/

Филичкин, В., Репрессии на Южном Урале: правда или вымысел?, in *Полит74*, 20. 1. 2014; https://www.polit74.ru/comments/detail.php?ID=39787

Henderson, Jane, "Making a Drama out of a Crisis: The Russian Constitutional Court and the Case of the Communist Party of the Soviet Union", in *King's Law Journal*, 2008, 19 (3), 489–506

Имеем Право. Интервью с Валерием Зорькиным, in *Российская газета*, No. 4210), 31. 10. 2006; https://rg.ru/2006/10/31/zorkin-ks.html

Nuzov, Ilya, "The Role of Political Elite in Transitional Justice in Russia: From False 'Nurembergs' to Failed Desovietization", in *U. C. Davis Journal of International Law & Policy*, 2014, 20 (2), 273–321

Pettai, Eva-Clarita, Pettai, Vello, *Transitional and Retrospective Justice in the Baltic States*, Cambridge: Cambridge University Press, 2015

Petrov, Nikita V., Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones, in *Crimes of the Communist Regimes. An assessment by historians and legal experts. Proceedings of international conference*, Prague: Institute for the Study of Totalitarian Regimes, 2011, 87–92; https://www.ustrcr.cz/data/pdf/publikace/sborniky/crime/sbornik.pdf

Смирнова, И., Расстрел Великих князей: дело положено под сукно, in *Свободная Пресса*, 16. 2. 2010; http://svpressa.ru/society/article/21258/; http://tayga.info/120423

Toymentsev, Sergey, "Legal but Criminal: The Failure of the 'Russian Nuremberg' and the Paradoxes of Post-Soviet Memory", in *Comparative Literature Studies*, 2011, 48 (3), 296–319

WEBSITES

hudoc.echr.coe.int/eng?i=001-127684
www.gulagmuseum.org/showObject.do?object=126753&language=1
www.igrunov.ru/cat/vchk-cat-org/memor/hist/docum/vchk-cat-org-memor-docr-resol.html
www.mapofmemory.org/46-01
www.nytimes.com/1995/12/14/world/latvia-gives-kgb-aide-a-life-term.html