International conference

Crimes of the Communist Regimes

an assessment by historians and legal experts

proceedings

The conference took place

at the Main Hall of the Senate of the Parliament of the Czech Republic
(24–25 February 2010), and
at the Office of the Government of the Czech Republic
(26 February 2010)

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Jiří Liška, Vice-chairman of the Senate, Parliament of the Czech Republic and the Office of the Government of the Czech Republic

and organized by

the Institute for the Study of Totalitarian Regimes

together with partner institutions from the working group on the Platform of European Memory and Conscience

under the kind patronage of

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Dear and esteemed readers,

I am pleased to be able to present to you this rare book – the proceedings of a conference which was organized by my predecessor in office and the founder of the Institute for the Study of Totalitarian Regimes, Pavel Žáček.

The conference "The Crimes of the Communist Regimes" was convened in response to calls formulated, in particular, in the following documents:

the Resolution of the Parliamentary assembly of the Council of Europe on the Need for International Condemnation of the Crimes of Totalitarian Communist Regimes of 25 January 2006;

the Prague Declaration on European Conscience and Communism of 3 June 2008;

and the Resolution of the European Parliament on European Conscience and Totalitarianism of 2 April 2009.

The conference was made possible through cooperation with our partner institutions and organisations in the working group on the Platform of European Memory and Conscience. Its aim was to try and create an overview of the crimes committed by the communist regimes behind the Iron Curtain, to assess them from a legal point of view and to search for possible suggestions on how to deal with these crimes today. Correspondingly, the three conference days were entitled "The crimes committed", "The justice (to be) done" and "The solution".

On the first day of the conference, partner institutions presented reports summarising the types of crimes committed by the communist dictatorship in their country and the prosecution of these crimes after 1989. It was unambiguously ascertained that many of the crimes committed by the various communist regimes classify as crimes against humanity as defined by international law since 1945. The second day's contributions concentrated on the prosecution of criminals and the consequences of the hitherto unsatisfactory justice. On the third day, ways to address the crimes of communism on a broader scale were examined, including existing models of international justice.

The event took place under the illustrious patronage of personalities active in the field of coming to terms with the legacy of totalitarianism in Europe. It was attended by many distinguished speakers and guests. Mr Jiří Liška, Vice-chairman of the Senate, the upper house of Parliament of the Czech Republic, hosted the deliberations on the first two days. It was a special honour for the conference and its participants that the discussions of the final day took place under the auspices of the Prime minister of the Czech Republic Mr Jan Fischer at the Office of the Government of the Czech Republic. The conference

concluded in a "roundtable discussion" among the panelists of all three days and in the adoption of a Declaration on Crimes of Communism on 26 February 2010.

The accompanying events of the conference included an evening with jazz standards by the Milan Svoboda Jazz Quartet at the Czech Museum of Music, a screening of the film "Zhivi" (The Living) on the Holodomor by Ukrainian director Sergiy Bukovsky at the Polish Institute and the opening of the exhibition "Common Denominator: Death" on the exhumations of victims of the Securitate by the Romanian Institute for the Investigation of Crimes of Communism as a part of the MENE TEKEL festival.

In the proceedings, we have compiled the presentations of all conference speakers, including manuscripts which were not delivered personally, the exception being one or two cases in which the authors did not submit a text for publication. Mr Joachim Gauck who was expected as a speaker in Session VII. on Day 2, unfortunately could not come to the conference. The presentations and speaker biographies reflect the state of knowledge and matters at the time of the conference, i.e. February 2010. The original written contributions were subjected to minimal language editing. For those interested, the conference website www.crimesofcommunism.eu contains the complete voice recordings of all the sessions including the final roundtable discussion, the transcript of which has been omitted from this book.

To conclude, it is my sincere wish that this publication inspire further efforts which will lead to a full disclosure of the crimes of communism, to the opening of all archives harbouring information on them, to the identification of perpetrators, to the recognition and commemoration of all victims of communism as well as of all the citizens who resisted and fought against it.

It is my wish that justice for the crimes of communism also be attained. That will foster reconciliation within post-communist societies as well as a deeper understanding and strengthened European integration across the former East-West divide.

Finally, I wish that a worldwide condemnation of communism be achieved and that mankind never reinvent any form of totalitarianism again.

Daniel Herman, director
Institute for the Study of Totalitarian Regimes
August 2011

A word of greeting to the conference from the European Commission

Last year's twentieth anniversary of the fall of the Iron Curtain brought with it much reflection and many memories and analyses – not only of twenty years of freedom, but also of the preceding communist period. Last year also saw the elapsing of five years since the expansion of the European Union by ten new member states, eight of them with a communist past. The EU thus broadened not only geographically, but also enriched itself with the experiences of these acceding states, including their experiences with the crimes of communist regimes. These do not constitute a lifeless history; they carry lessons with them. Those who have gone through such experiences tend to be more sensitive to certain phenomena in society – ones which may at first appear innocent. For this reason, it is so important not only to not forget about these experiences, but also to work with them and share them with those who eluded them, whether because they were born on the "right" side of the Iron Curtain or born after its fall. The European Union is conscious of the values of memory and remembrance. A part of the Europe for Citizens programme is dedicated to to the recollection of victims of not just Nazism, but also of Stalinism. Reflection on the past is essential for an understanding of what is happening here and now. The Representation of the European Commission in the Czech Republic therefore gladly supports the conference "Crimes of the Communist Regimes" recognizing the importance of remembering our own history and that of our neighbours, so that we do not forget that freedom, democracy and human rights are not matters of course. It is necessary to continuously fight for them, even when externally it may seem that they have been won for good.

European Commission Representation in the Czech Republic
February 2010

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Day 1 ►►►
The crimes committed

Opening

Jiří Liška, Czech Republic
Pavel Žáček, Czech Republic

Inaugural address

Harry Wu, USA

JIŘÍ LIŠKA ► Vice-chairman of the Senate, Parliament of the Czech Republic

Jiří Liška has been active in politics since 1990 (e.g. deputy of the People's chamber of the Federal assembly). He is a member of the Civic Democratic Party. In 1994–2002, he acted as mayor of the town of Jičín, becoming a Senator in 1996. Since 2004, he has been vice-chairman of the Senate. His main focus in office is on coming to terms with the communist past; he is, for example, co-author of the Act on the Institute for the Study of Totalitarian Regimes and of the proposed Act on anti-communist resistance.

PAVEL ŽÁČEK ► Director, Institute for the Study of Totalitarian Regimes, Czech Republic

Dr Žáček graduated from the Faculty of Social Sciences, Charles University. In 1993, he was employed by the Office for the Documentation and Investigation of the Crimes of Communism (ÚDV). In 1999–2006, he was a senior researcher at the Institute of Contemporary History, at the Czech Academy of Sciences. In 2004–2006, he was editor-in-chief of the quarterly *Pamäť národa* ("Nation's memory"), Nation's Memory Institute, Slovakia. In November 2006, he became head of the Security Service Archives section of the Ministry of the Interior of the Czech Republic, and in July 2007, government commissioner for the establishment of the Institute for the Study of Totalitarian Regimes and the Security Services Archive. On January 1, 2008, he became the first director of the Institute for the Study of Totalitarian Regimes.

HARRY WU ► Human rights activist, director, Laogai Research Foundation, Washington, D.C., USA

Harry Wu was incarcerated as a political prisoner for 19 years in the Laogai – China's brutal system of forced-labor camps. After his release in 1979, he relocated to the US and founded the Laogai Research Foundation, a not-for-profit organization committed to investigating and exposing the Laogai and other human rights abuses in China. Wu returned to China several times on undercover missions to document these abuses, but was rearrested in 1995 and sentenced to 15 years in prison. Thanks to international pressure, however, Wu was returned to the US, where he continues his struggle for human rights and democracy in China.

JIŘÍ LIŠKA ► Vice-chairman of the Senate of the Parliament of the Czech Republic

Ladies and gentlemen; dear, distinguished guests,

I would like to welcome you as warmly as possible to the historical rooms of the Senate of the Czech Republic for the international conference called the Crimes of the Communist Regimes. I met a number of you in this place nearly two years ago at the European Conscience and Communism conference. The event gave rise to the Prague Declaration, which formulated basic demands aimed at ensuring European states actually deal with the ideology that brought the world so much suffering.

Today's proceedings are the fulfilment of one of the calls of this declaration, namely to organise an international conference on the crimes committed by communist totalitarian regimes. It is an honour for me and I am proud of the fact that Prague has been the venue for both these important meetings, and that our Czech Senate has once again taken on the role of organiser.

A necessary part of reflecting on communism as an ideology and practice must comprise understanding and describing all the evil it caused and committed. All of its crimes. If our legal awareness is not to be completely disturbed and our faith in justice completely undermined, we expect that the crime will be linked with the apprehension and naming of the culprit, as well as his repentance and punishment.

Unfortunately, twenty years after the fall of communism we have to state that this has only been achieved in a few isolated cases. Naturally, this has had a harsh impact on all of our society. On the one hand, there is disillusionment and a lack of trust in democratic institutions; on the other hand there is the ever-growing audacity of both former communists and their present-day successors. In this way, a dangerous precedent has been set in that a crime can go unpunished when sufficient power is wielded to protect the culprit.

This unfortunate situation is not only down to the reluctance or inadequacy of post-communist states and their political representatives, but also the very nature of the totalitarian regime, which denounced the principle of personal freedom, and therefore personal responsibility as well. Among other things, the total claim on a person and all areas of his life resulted in his being socially controlled in the communist system or so bound up with it in one way or another that it was not possible to escape the state. The regime very skilfully arranged matters so that everyone became complicit in order for everyone to contribute to the operation of this regime in at least some way. The upshot of this is clear: the feeling of guilt and failure is widespread. And this is also why a majority consensus to thoroughly put right injustices and punish the culprits cannot be found in most post-communist countries.

We can also add in other factors that complicate the search for justice: the greatest terror and violence, which embodied the actual parameters of crimes against humanity, was linked to the establishment and consolidation of communist power. This was a long time ago, and many witnesses, victims and even perpetrators are no longer alive. The new democratic establishments resisted the introduction of retroactive laws, i.e. they did not punish evil that occurred in accordance with communist legislation even though these were bad and immoral laws. An entire generation grew up under communism and its way of thinking was substantially deformed by this.

To this situation we can also add the fact that in society there are still many people who were directly connected with the communist regime. This includes many politicians, who for various reasons do not want and are impeding a just and faithful coming to terms with the communist period of totalitarianism. Consequently, we cannot be surprised at the current unsatisfactory situation.

I am not saying that punishing culprits in the wake of a totalitarian regime cannot be achieved. Nonetheless, I think we have to admit that totalitarianism by its very nature, whereby it is a crime against society and morality as a whole, and not only a crime in some of its manifestations, provides a stubborn obstacle to righting wrongs and the establishment of justice. At least this is the case "from inside" countries that have emerged from totalitarianism.

Well, it has been possible to come to terms with another totalitarian ideology of the last century, Nazism. One factor that had a crucial influence on this process, at least in its early stages, was that it was led "from the outside" – from the authority of the victorious allies. But even in this instance, there is no doubt that not all criminals were found and punished. Nonetheless, the most essential thing was achieved: National Socialism as an ideology and practice was completely rejected all over the world. Propagating it or questioning the veracity of its crimes has become a criminal offence. It is still a matter of speculation as to how de-Nazification would have proceeded in Germany, if the Germans themselves had been in charge of it after losing the war.

The results of coming to terms with communism, which does not lag behind Nazism and in many ways surpasses it with respect to its impact on humanity, is pretty grievous when this comparison is made. If we take the statement that "History is written by the victors" not as an ironic commentary on the objectivity of history, but as an acknowledgment of who the actual winner was, then in post-communist Europe and to a considerable extent in the West, it was reform communists who won the Cold War along with their thesis, which at random goes something like this: communism is the right idea, but it was seized upon by the wrong people. Yes, mistakes were made, but these occurred at a time of understandable revolutionary fervour. The Soviet Union was a similar imperialist superpower like the United States. We cannot look at communism in black and white terms, it brought many good things. To be

a communist was an expression of idealism, not a moral failure or, if you like, a failure of reason. And so on and so forth, until we reach the point where anti-communism (unlike anti-Nazism) has become an incorrect word, and envy, class hatred and denial of personal property can still operate in contemporary European politics.

The seductiveness and compelling appeal of communist ideology and generally all desires to change and rectify the world regardless of what it costs is simply stronger and more enduring than it appeared twenty years ago. Too many people have devoted their lives to it for them to renounce it all today. It is our duty, responsibility and obligation, not only to the millions of victims of communist totalitarianism, but also to our free and democratic future (which is now perhaps even more important) to continue returning to our recent past and, as in the case of Nazism, to draw attention to the wholly specific and undeniable outcomes of this endeavour to build paradise on earth, i.e. the millions of dead, tortured and imprisoned, the incitement of military conflicts, the devastated countryside and economic exploitation of countries, but also the daily moral decay that communist led us into. It is only the practice of this idea – again just like Nazism – which completely reveals the criminal, evil in man based on the initial postulates and concepts of communist ideology.

Ladies and gentlemen, I would not like to live to see historians one day describe our time as an incredibly blind repetition of the same mistakes. Consequently, we should do everything to ensure that we recognise these mistakes, that we give testimony on them and renounce them. Therefore, we must speak about the crimes of communism. Not only for the sake of yesterday, but primarily for the sake of today and tomorrow.

In conclusion, please allow me to express my great thanks to the Institute for the Study of Totalitarian Regimes, which is the organiser of this conference on the Crimes of the Communist Regimes. I would also specifically like to thank Pavel Žáček, not only for this three-day meeting, but also for all his work in recent years. Without Pavel Žáček, the Institute would not have been established and I am very saddened that Pavel Žáček has ceased to be its director. Despite this, I am convinced that the Institute will rightly be associated with him for a long time. Pave Žáček, thank you!

Thank you for your attention.

PAVEL ŽÁČEK ▸ Director, Institute for the Study of Totalitarian Regimes

Dear Mr Chairman, Your Excellency, Madam Chairwoman of the Confederation of Political Prisoners, esteemed ladies and gentlemen,

I am honoured and proud to welcome you all here in this august setting to an international event jointly hosted by the Senate of the Parliament of the Czech Republic, the Office of the Government of the Czech Republic and our Institute. From the perspective of the Institute for the Study of Totalitarian Regimes, The Crimes of Communism conference is the largest and most prestigious event of this crisis-ridden year. Our institution has only existed for two years, but it has nonetheless arrived on the Czech and international scene at a very propitious time.

As one mainstay of the Czech Republic's presidency of the Council of Europe, and in cooperation with the Czech government, we were able to initiate the establishment of a Platform of European Memory and Conscience in Brussels. This is such a necessary institution, whose long-term task will be to bring the western and eastern parts of Europe together in accessing our common totalitarian or authoritarian past.

Examining and uncovering communist crimes is an integral part of our common endeavour. It is part of our civilising mission. It is a duty to the hecatombs of dead victims of communist totalitarian regimes all over the world. We cannot slacken in this activity until the last names of communist victims and the circumstance of their deaths have been revealed or until the last perpetrator has been discovered. We must continue with this mission regardless of whether anyone tries to belittle this difficult task with words like "politicisation" or "the need not to open old wounds for the sake of the future".

Following this difficult route as diligently as possible is the only thing that will help us to unequivocally restore the rule of law as well as confidence in the reconstruction of a free and democratic establishment, which is capable of ensuring the protection of human rights, and the personal integrity of all citizens, even in the face of the impending challenges of the future, among other things.

The topicality of the issue that this conference deals with it also borne out by the sad request I would now like to make of you; namely, to observe two minutes silence in honour of a recent victim of the communist regime in Cuba, the political prisoner Orlando Zapata who has died in jail.

I would to thank you for the fact that together we have been able to observe a silent commemoration of yesterday's victim of a communist regime. I think I can now declare this conference open.

HARRY WU ▸ Director, Laogai Research Foundation

Ladies and gentlemen; dear, distinguished guests,

Good Morning. I would like to thank The Institute for the Study of Totalitarian Regimes for holding this important conference, and in particular I would like to thank the organizers for bringing together such an incredible group of people. It is an immense honor to stand before you this morning in the hall of the Czech Senate to speak to you on this subject, about which we are all too familiar: crimes against humanity committed by Communist regimes. Despite the decades of tyranny and oppression which have accompanied Communist regimes the world over, the healing process has yet to begin for millions of victims of Communism. Today, I would like to shed some light on the Chinese Communist Party, and how the brutal practices of this regime have forever altered not only my life, but the lives of hundreds of millions of Chinese since 1949. I also hope to remind you that for the Chinese, the brutality of Communism is anything but history.

My own story is one of millions, and so many others were not fortunate enough to survive to share their own stories. I was born into a wealthy family in Shanghai, China, in 1937. My youth was one of comfort and relative peace considering the turbulent events of those years of Japanese occupation and civil war. For the majority of Chinese, however, these years were our Petrograd Bread Riots, with chaos teeming in every corner. Our family was initially grateful when the Communists came to power in China. They brought with them a sense of stability China had not seen in years. But, before long, things began to change.

One night in 1952, my father did not come home. For the next month, our servants set his same place at the dinner table every night, and my stepmother refused to touch her food, visibly disturbed by his absence. He finally came home, and my family and I were shocked to learn upon his return that he had been detained by the Communist government and interrogated daily. Officials had asked my father to bear false witness against his manager, saying that he had embezzled from the bank. My father had nobly refused. However, his manager was sentenced to 5 years in prison even without my father's testimony. Eventually, my father was reassigned to teach English at a local middle school, and our lifestyle changed significantly.

In 1955, I traveled to Beijing to begin my studies in Geology at one of Beijing's most prestigious universities. My father's advice to me before I left was to not participate in politics. When I arrived at university, however, as the son of a former banker and a baptized Catholic, I was constantly told I needed to "raise my level of political awareness". In 1957, Mao began what is known as the One Hundred Flowers campaign. The espoused purpose of this campaign was to improve the Party through criticism. In reality, it was to flush out potential troublemakers for the regime. In our required

political classes, the pressure to participate was increasing, and I could sense that there was a catch. I found excuses to hold back and not participate. But, by May 2nd, I was told I had to attend the next political meeting; this was not optional. As soon as the meeting began, I was singled out and told to provide criticisms of the Party. I was told it was simply because the Party wished to improve itself. Finally, I spoke out. I listed many criticisms: those among us with "bad" class background were treated more harshly by Party members; the 1955 campaign to eliminate counterrevolutionaries had been too harsh and had targeted innocent people; and the Party should not have supported the 1956 Soviet invasion of Hungary. In all, I listed ten points, and left the meeting relieved, feeling I could no longer be accused of shirking my duty to the party. Some months later, another meeting was called. Harry Wu was the subject of this meeting. I was told the thoughts I had voiced at the May 2nd meeting were "poisonous". After many failed attempts to defend myself, I was told to write a self-criticism.

When I returned to school the following fall, the political climate had only gotten worse. I was quickly labeled a Counterrevolutionary Rightist and my "crimes" were displayed on a public banner for all to see. At the top, my name was crossed out with a large red X. I was placed under constant surveillance on campus. Then, on April 27, 1960, I was summoned to a meeting to "criticize" myself. Each of my classmates denounced me in their turn, and then at the end of the meeting, I was sentenced to re-education through labor in China's Laogai. I was 23 years old. The following 19 years were a hell for which I have few words to describe. While I was within the confines of the Laogai, but the evil I endured was not limited to the Laogai camps; all of China was driven to chaos and economic disaster by the CCP.

Mao Zedong had forced upon China a relatively orthodox form of communism, with its emphasis on not just state-ownership but also "class struggle". The implementation of this class struggle, particularly in the early years of CCP rule, may be termed CLASSICIDE, or the intentional extermination of an entire class. According to the CCP's revolutionary theory, society is composed of different classes of people, and is basically composed of two major groups, the exploiting class and the exploited class. The CCP believes that classes and class struggle are the revolutionary force for promoting social development. The Party praises itself as the party of the proletariat, composed of the vanguard of the worker and peasant class, and engages in a class struggle throughout all of society to annihilate the exploiting class and to carry out the "Socialist Revolution". Around the time of 1949, there were around 10 to 15 million members of the landlord and rich peasant classes nationwide. At the end of the 1970s when the Cultural Revolution had ended, only 10–15% of these millions of people had managed to survive. My own family is part of this statistic: my sister fled the country; my mother was driven to suicide by the constant fear and endless humiliation; one brother had been exiled to work in a remote border region; another brother had been so brutally beaten that he sustained permanent brain injuries, and some

years later he was beaten to death by the police. And my family fared better than many; we were urban capitalists and were subjected to near-constant torment, whereas many rural landowners and their families were executed en masse by roving mobs of peasants.

A key instrument in this class struggle was the Laogai system. Hitler had his concentration camps, Stalin had his gulag, and the Chinese Communist Party had the Laogai. The People's Republic of China established the Laogai system with assistance from the Soviet Union in the 1950s. Modeled on the gulag, the Laogai was simultaneously a tool for the political reform of society's "bad elements" and an engine for driving economic growth in a Communist nation. Since its inception, China's Laogai have imprisoned between 40–50 million Chinese. I was but one of those millions. I spent 19 years in the Laogai, and in those 19 years, I witnessed the suffering of scores, the deaths of many, and the tyrannical actions of those driven by dogma. This was Communism. This was the reality of China, my home, under Communist rule.

In 1974, I was able to return home to Shanghai for the first time in 17 years. My family and I spoke little of the trials we had suffered. What was the use? There was no way we could reverse the course of history. The suffering of my family, however, is just one example of the far-reaching crimes against humanity committed by the Chinese Communist regime. The killing began with the violent land reform policies implemented in the late 1940s before the Party even consolidated power. By the CCP's own admission almost a million were killed and a million were jailed for being members of the privileged classes in those early years. This prejudice against class was not merely determined by wealth, it was also determined by politics. The terms "counterrevolutionary" and "rotten elements" were liberally applied to those whose political views did not march in lock-step with the Party's. The suffering continued with the Hundred Flowers Movement and the subsequent Anti-Rightist Campaign. By encouraging intellectuals to speak their minds, the Party ensnared them in a trap of political persecution. Official government figures from the period state that 2 million persons who had been targeted in were serving sentences for their crimes in the Laogai, but the accurate numbers are in truth probably much higher. Soon after, 30 million starved to death as a result of the misguided collectivization and agricultural polices of the Great Leap Forward. Tens of millions were persecuted during the Cultural Revolution. The early 1980s brought further crackdowns on intellectuals who participated in the Democracy Wall Movement, and in its most infamous display of persecution, the CCP ordered tanks to crush protestors from all walks of life in the streets surrounding Tiananmen Square on 4 June 1989. No one has ever been held to account for these atrocities. There has been no effort to truly document to scale and scope of the tragedies China suffered due to the brutal policies of the CCP, nor have the victims been allowed to speak publicly of their experiences. Even today, despite the improved image of the CCP regime, the repression continues, as evidenced by the 3–5 million Chinese who continue to suffer in the Laogai.

In 1988, I became a visiting scholar at Stanford University and began researching China's Laogai system. In 1991, I traveled back to China for the first time to collect evidence of the continuing existence of this system, a system China's leaders hoped the world would forget. I slipped back into the prisons, sometimes posing as a prisoner, others as a businessman looking to buy products, and I filmed everything I saw with a concealed camera. I saw gaunt men doing hard labor. I saw prisoners standing naked in vats of chemicals. I saw them handling battery acid with no gloves. I saw myself. I spoke with prison officials who bragged about the products they made for export to the United States and Europe. When I returned to the US, I reported these findings to the US Congress and the international media.

In 1993 and 1994, I again returned to China to research the Laogai. I documented products being sold, the factories that produced them, the organs being harvested from executed prisoners for profit, and other heinous abuses which stemmed from the Laogai system. These camps continue to thrive, manufacturing products for export and ruining the lives of those who dare to take a stand against the Communist regime. On 4 February, the Laogai Research Foundation released a report documenting 120 instances of on-line advertising in foreign languages by Laogai Enterprises with the intent to export. A tool of repression, these camps, and the torture and abuse that occur daily within their walls, serve as a painful reminder that after three decades of international trade, scholastic exchanges, and political negotiations, China isn't a free nation.

The current Communist government would have you forget that these atrocities continue. In 1994, they changed the names of these camps from Laogai to jianyu. Whereas Laogai translates to re-education through labor, jianyu simply translates to prison. By blurring the distinction between these two entities, the government hopes the rest of the world will believe these camps are analogous to a Western prison system. My 19 years of experience in the Laogai, my Foundation's continued documentation of these camps, and the stories of other survivors tell us otherwise.

While the continued existence of China's Laogai as a means of persecution is undoubtedly an egregious violation of human rights, it is certainly not the only atrocity committed by the regime. Today in China, freedom of religion is non-existent. Roman Catholicism is illegal. Corruption is rampant, yet citizens have no legal recourse when officials confiscate their land, issue them bogus fines, or intimidate them into silence with brute force. A woman is not free to give birth when she chooses, and she and her husband must obtain permission from the government to do so, or face forced abortions and sterilization if they do not. Freedom of expression may be listed nominally as a right in China's own constitution, but journalists, lawyers, petitioners, activists, and ordinary citizens are routinely jailed for speaking out. Arbitrary detention is not only common, it is institutionalized in the form of Laojiao, or re-education-through-labor, a segment of the Laogai in which anyone can be imprisoned by the police at any time

without charge or trial. Not only does China execute more prisoners than every other country combined, my organization's research indicates the government is profiting from the macabre trade of the organs of these executed prisoners. These and other continued affronts to basic human dignity are cause for alarm and censure in the international community.

We are here this week to examine the legacy of Communist crimes against humanity. To the political officials, scholars, and victims of abuses who participate in these dialogues, I would urge you to remember that this legacy is on-going. In countries such as China, North Korea, and Vietnam, the abuses continue and the battle for freedom from tyranny is not over. We know that Khrushchev seriously condemned the actions of Stalin in 1956, and rule of Andropov and Brezhnev brought another era in Soviet rule, ending in 1991. Since Mao's death in 1976, we have yet to hear the Chinese Communist Party condemn his actions. China's new leadership will not, and cannot, change the existing political system. The economic system in China today is a form of capitalism, but the authoritarian political system that defined Communism for those of us who have suffered under it, exported by the Soviet Union all these years ago, is not history. It is reality. A reality to which we must bear witness on behalf of those who cannot. Thank you very much for your attention, and I look forward to participating in the conference.

Session I.
Communist Crimes and Crimes against Humanity

Naděžda Kavalírová, Czech Republic
Martin Mejstřík, Czech Republic
Dainius Žalimas, Lithuania

Host: Jiří Liška, Vice-chairman of the Senate, Parliament of the Czech Republic

NADĚŽDA KAVALÍROVÁ ► Chairwoman, Confederation of Political Prisoners of the Czech Republic, Chairwoman, Council of the Institute for the Study of Totalitarian Regimes, Czech Republic

Dr Kavalírová was born in 1923. After the communist takeover in 1948, she was banned from university education for political reasons and worked as a nurse. In 1956, she was arrested and sentenced to five years imprisonment after a staged trial. She was relased on parole in 1959 and worked in manual professions. Between 1968 and 1984, she was employed at the Ministry of Labour and Social Affairs of the Czech Republic. In 1991–1994, she worked at the Department of Compensations of the Ministry of Justice of the Czech Republic. Since 1990, she has been active in the Confederation of Political Prisoners of the Czech Republic, holding at first the position of vice-chairwoman and since 2003, chairwoman of the organization.

MARTIN MEJSTŘÍK ► Student leader of the Velvet Revolution, former senator, Parliament of the Czech Republic (2002–2008)

Martin Mejstřík graduated from the Theatre Faculty of the Academy of Performing Arts in Prague. He was a co-organizer of the student demonstration on 17 November 1989, leader of the student strike and founding member of the Civic Forum. In the 1990s, he worked as a journalist and was active in local politics. In 1998–2010, he was elected as a member of the local council in Prague 1 and served as a senator of the of the Parliament of the Czech Republic in the years 2002–2008. His main topic is coming to terms with communism; he is co-author of the Act on the Institute for the Study of Totalitarian regimes. He launched legislative initiatives to ban the propagation of communism and its symbols and was member of the Senate Commission on the assessment of the constitutionality of the Communist Party of Bohemia and Moravia.

DAINIUS ŽALIMAS ► Associate professor, head of the Institute of International and European Union Law, Faculty of Law, Vilnius University, Lithuania

Since 2005, Dr Žalimas is a member of the Permanent court of arbitration. His main specialisations are public international law, law of international organizations,

diplomatic and consular law. He is the author of six books on the restoration of Lithuania's independence and the legal continuity of the Republic of Lithuania, law of international organizations and diplomatic law. He also published a number of scientific and popular articles. Dr Žalimas regularly participates in drafting national legislation and provides legal expertise to various national institutions.

NADĚŽDA KAVALÍROVÁ ▸ Chairwoman, Confederation of Political Prisoners of the Czech Republic, Chairwoman, Council of the Institute for the Study of Totalitarian Regimes

Mr Vice-President of the Senate of the Czech Republic, esteemed guests from near and far, and dear friends,

on behalf of the Confederation of Political Prisoners of the Czech Republic (*Konfederace politických vězňů České republiky*), I would like to express my thanks for the invitation to the International Conference on the "Crimes of the Communist Regimes", which is being held during the fourth annual Mene Tekel International Festival against totalitarianism.

Your conference set itself the goal of publishing and using the accounts of historians and lawyers on an international platform to demonstrate the criminality of an ideology that deeply affected all human activities as well as the fate of people who would not submit to the sole ideologies in these countries that suffered as a result of falling for the false allure of a wonderful future.

In accordance with the programme, you will hear the truth about the past as well as a lot of information on how countries came to terms, or are coming to terms, with this issue. You will also hear details of the results ensuing for states where Institutes of Memory have been established. (Simply as an example, this includes Germany, Poland and Slovakia.) You will also hear about how other post-communist countries intend to deal with this issue.

A so-called "step forward" was taken in our country. From the very outset, the Memory Institute, which was not very fortuitously renamed the Institute for the Study of Totalitarian Regimes, had to face destructive targeted campaigns from those who fear the truth about the past. The Institute had far-reaching medium and long-term plans connected with resolutions by the Parliamentary Assembly of the Council of Europe in 2006, the Prague Declaration of 2008, and a European Parliament Resolution from 2009.

Among other things, the determination of the current director and his collaborators involved the preservation of archive records, or fragments haphazardly stored in the Security Services Archive, so that nobody could destroy them. This conceals a veritable Pandora's Box whose contents document crimes against humanity that are comparable with the crimes of the Nazis, because they are more monstrous and only lack the use of gas chambers.

Demonstrating the criminality of communism, even though an attempt was made to mask this "ism" with a "human face" is a difficult task that takes a very long time.

Will the Institute have enough determination for this under new management? Will it succeed in saving the archived past even if, god forbid, the "government of the Czech

people" were to be taken over by someone who is interested in keeping silent about what has happened before now?

Our society stands before a problem and there is no lawyer, historian, parliamentarian and deputy better equipped, or no man for whom we have so much to be thankful for, than Dr. Göran Lindblad, a Swede and Member of the Parliamentary Assembly of the European Parliament who is a guest of this international meeting. We would like to welcome him among us.

We ourselves have to deal with this issue in our country. All of you who are involved with this issue should do your moral duty. You should map out and communicate the truth. Set up a moral tribunal. Expose the crimes of communism and their perpetrators. And pillory all those who are both dead and alive who participated in the genocide of the 20th century in the name of Bolshevik ideology. No statute of limitations can apply to crimes against humanity.

Thank you for paying attention.

MARTIN MEJSTŘÍK ► former student leader of the Velvet Revolution, former senator, Parliament of the Czech Republic

Mr Vice-chairman, Madam Chairwoman, ladies and gentlemen,

I have been given the honour of presenting a text by a professor emeritus at the University of Hawaii, Rudolph Joseph Rummel, who unfortunately could not attend our conference for health reasons. In the second part of this presentation I will take the liberty of appending some of my own words. So now let's take:

"*Worse than the Black Death – Marxism.*" (I would like to draw attention to the fact that I am abridging this paper and I hope that its full version will be reproduced by the organisers and made available to you):

"As murder is a concept involving individual killing in domestic society, democide is murder by government, and includes genocide, massacres, politicide, atrocities, assassinations, extrajudicial executions, and so on. Focusing on this democide, rather than the genocide, which just one of its components, uncovers the true dimensions of the Red Plague that afflicted humanity, even in the life of many readers.

I am able to give some conservative figures on what is an unrivaled communist hecatomb, and to compare this to overall world totals.

Mao's China was the greatest megamurderer of all time, apparently killing near 73,000,000 people up to 1987, but mainly from 1949 through the Cultural Revolution, which alone may have seen over 1,000,000 murdered.

The Soviet Union was second, with a democide near 62,000,000. Stalin himself was responsible for almost 43,000,000. Most of the Soviet deaths, perhaps around 39,000,000 are due to lethal forced labor in gulag and transit thereto.

Then there are the lesser megamurderers, such as North Korea and Tito's Yugoslavia.

The deadliest of all communist countries and indeed, in the last century by far, has been Cambodia under the Khmer Rouge. Pol Pot and his henchmen likely slaughtered some 2,000,000 Cambodians from April 1975 through December 1978 out of a population of around 7,000,000. This is an annual rate of over 8 percent of the population murdered, or odds of an average Cambodian surviving Pol Pot's rule of slightly over 2 to 1.

How can we explain all of this killing? It is a marriage of an absolutist ideology with absolute power. Communists knew the truth, absolutely. They knew through Marxism what would produce the greatest human welfare and happiness. That power, the dictatorship of the proletariat, must be used to tear down the old feudal or capitalist order to rebuild society and culture to realize this utopia. Nothing must hinder its achievement. Government – the Communist Party – was thus above any law.

Constructing this utopia was to be characterized as a war on poverty, exploitation, imperialism, and inequality. Thus, as in a real war, people were killed for the greater good. The necessary enemy casualties were the clergy, bourgeoisie, capitalists, wreckers, counter-revolutionaries, rightists, tyrants, rich, landlords, and noncombatants that unfortunately got caught in the battle.

The irony of this is that communism in practice, even after decades of total control, failed to improve the lot of the average person. Their living conditions usually worsened after the revolution. It is not by chance that the greatest famines have occurred under communism within the Soviet Union and in China. In total almost 55,000,000 people perished in various communist famines and associated diseases, a little over 10,000,000 of them from democidal famine. It is as though the total population of Turkey, Iran, or Thailand had been completely wiped out. Some 35,000,000 refugees have fled communist countries – as though Argentina or Columbia had been emptied of all their people.

But communists cannot admit error. After all, their knowledge is scientific, based on historical materialism, an understanding of the dialectical process in nature and human society, and a materialist (thus realistic) view of nature. Marx had shown empirically where society has been and why, and he and his interpreters proved that a communist end was its destiny. No one could prevent this.

After all, did not Marx, Lenin, Stalin, or Mao say that… In other words, communism was a fanatical religion. It had its revealed text and chief interpreters. It had its priests with their ritualistic prose with all the answers. It had a heaven, and the proper behavior to reach it. It had its appeal to faith. And it had its crusade against nonbelievers.

Communism has been the most grandiose social engineering experiment of all time. It was an utterly disastrous failure which resulted in the aforementioned deaths of men, women, and children, not to mention the nearly 30,000,000 of those who died in its often aggressive wars and the rebellions it provoked. But there is a larger lesson to be learned from this horrendous sacrifice to one ideology. The more power the center has to impose the beliefs of an ideological or religious elite or impose the whims of a dictator, the more likely human lives are to be sacrificed. This is but one reason, but perhaps the most important one, for fostering democratic freedom and assuring a democratic peace.

Oh, yes, our academic and intellectual Marxists today are getting a free ride. They get a certain respect by mouthing rhetoric about improving the lot of the worker and the poor, their utopian pretensions. But whenever empowered, Marxism has failed utterly, as has fascism. Marxists deserve no respect, no tolerance. They should be treated as though they wish a return of the Red Plague, which they do.

The next time you are lectured by Marxists, or almost the equivalent, leftist zealots, ask them to justify the murders of well over a hundred million in the last century, as well as the misery created for many hundreds of millions more by their absolutist faith." That's what Rudolph Rummel had to say on the subject.

I would like to recall that in Professor Rummel's summary, the average estimate given was that communism currently has 150 million innocent human victims on its conscience.

Two years ago, we organised this conference for the first time – it was called *European Conscience and Communism*. Václav Havel spoke at its launch and I will quote his words:

"The ideology of Nazism was based on obscure theories and obscure theories induced disgust or ridicule in respectable and educated circles. Communism was in contrast based on an ideology that enjoyed a certain credibility and appeared to be sounder, since it had scholarly roots consisting of Marx and Engels's analyses. The strong inclination of the intellectuals towards the left and communism – it took many of them a long time to sober up – and the class of so-called café communists, all this was possible precisely because it was not only an obscure ideology. The consequences were all the worse". That's what Václav Havel had to say.

The *insidiousness* of communism is inherent in its ostensibly pious goals. On so many occasions during my skirmishes with communists, I have heard them say: *"Why, we are talking about nothing other than a socially just society... after all, you cannot tell us we are not allowed dream!"* That's something we certainly can't do, but there are dreams and then there are dreams.

Czechoslovakia of the 1920s – they say that at that time we were one of the most democratic countries in Europe. We were a young democracy. During the state-building efforts of our president Tomáš Garrigue Masaryk, we were inspired by the constitution of the United States of America, but here on the old continent we somehow intuitively gravitated towards France. And we did this not only in terms foreign policy, military issues and defence, but also in cultural matters.

Sweet France! Noble and nonchalant! Flirtatious!
Sweet France! Intellectual and revolutionary! Avant-garde!
The place where equality – unity – fraternity apply!

An entire generation of Czech intellectuals and artists grew up in Paris… In 1920, these people established an avant-garde group. They wanted to demolish the old. They wanted to serve the poor, the degraded and the suffering… They declared war on the palaces in the name of proletarian art. They called themselves **Devětsil**… This word has several meanings in Czech. On the one hand it means "devět sil" – nine forces. That is clear. We are more than one force! But devětsil is also the butterbur plant, which traditionally announces the advent of spring. It flowers in places where cold and snow are departing

(i.e. death in pre-Christian mythology). And what's more, it grows in poor soil, in waste dumps, in ditches, in loam, on fallow land, along enclosures and factory walls, beside the roads and tracks, which the bourgeoisie and the rich ride along on their cars…

It is fragile, but full of force.
Devětsil.

The art theorist Karel Teige, the poet Jaroslav Seifert, the writer Vladislav Vančura, and the artist Adolf Hoffmeister became the founders of this avant-garde collective. Thus, if we overlook Catholic artists, its members essentially comprised the entire Czech cultural elite! Poets and writers, architects, musicians, artists, photographers, theorists, literary scholars, directors, actors… How one cannot understand these people! How one can misunderstand them!

Tempestuous discussions took place about communism, a new order, a new man, and an avant-garde art, not just in Prague cafés. A different Czech writer – Karel Čapek – also took part in one such debate, as one of the few who was not a member of Devětsil. In 1924, in the magazine *Přítomnost ("The Presence")*, he published an essay titled *Why Am I Not A Communist?* I will quote the following:

"It would be easier for me if I was. I would live under the impression that I was contributing in the most intrepid way to the righting of the world. I would believe that I was standing on the side of the poor against the rich, on the side of the hungry against the moneybags. I would know what to think about, what to hate and what to scorn.

Instead, I am like someone naked in thorns; with bare hand, no doctrine uncovered, feelings of my own powerlessness against the world and frequently no idea how to protect my own conscience. If my heart is on the side of the poor, then why on earth am I not a communist? Because my heart is on the side of the poor.

I have seen poverty so poignant and unspeakable that it made everything I am taste bitter to me. Wherever I have been, I have run from palaces and museums to look at the life of the poor in the humiliating role of the helpless spectator.

It is not enough to see and it is not enough to sympathise. I should live their life, but I am afraid of death.

This miserable, inhumane poverty is not borne on the shield of any party. In those terrible slums, where there is not even a nail to hang things or a dirty cloth for bedding, communism screams from a safe distance: the social order is to blame for this! In two years, in 20 years, the flag of revolution will unfurl and then we'll see!

And what is meant by saying in two months, in 20 years? How can you so carelessly accept that one is supposed to live with another two months of cold, another two weeks,

or another two days? A bourgeoisie that is unable or unwilling to help is alien to me. But communism, which instead of aid brings the flag of revolution, is equally strange.The last word of communism is to rule rather than rescue. Its great motto is power not succour.

Poverty, hunger, unemployment are not an unbearable source of pain and shame, but a reservoir of dark forces, a festering mass, of rage and anger. "The social order is to blame for this!"

No, we are all to blame for everything, regardless of whether we stand aloof from human poverty with our hands in our pockets or the flag of revolution in our hands..." That is what Karel Čapek had to say in his essay "Why Am I Not A Communist?"

In the same year in which Čapek wrote this essay, i.e. 1924, Lenin's Bolsheviks seized power in Russia and began the first purges inside the communist (or rather the social democratic) movement. It is to the credit of Czech intellectuals that many of them left the Communist Party as a result of this development, and cracks gradually began to appear in Devětsil as well. Its most important figures left it in 1924 – the poet Jaroslav Seifert and the theorist Karel Teige. What was the fate of the three artists I have cited?

The eminent humanist and visionary Karel Čapek was worn down by Czech fascists. His brother, Josef, an excellent painter, was subsequently murdered by German Nazis.

Karel Teige – this multifaceted personality, tempestuous theoretician and flag bearer for new revolutionary art distanced himself from communism even before the war broke out. After 1948, when Czechoslovak communists seized power, he fell into disfavour and he committed suicide in 1951.

The poet and writer Jaroslav Seifert never bowed to communist power. In 1984, this former champion of new, communist art was prevented by the communists from accepting a Nobel Prize. They simply confiscated his passport. His funeral in 1986 became one of the first silent demonstrations by an anti-communist citizenry that was beginning to wake up.

With their experience of that time, and the poverty that existed in the world back then, is it any wonder that our interwar avant garde were snared by the allure of communism, albeit for just a few years? Is it any wonder that our grandmothers and grandfathers, who were genuinely poor, needy and impoverished people, believed the apostles of a classless society that was finally fair and just?

Yes – as Václav Havel recalls – it was an ideology that enjoyed a certain credibility. Moreover, the younger generation was also attracted by its romantic emphasis on revolution, on a rapid, fundamental and permanent change – for the better, naturally, as everyone believed…

After 40 years of attempts to definitively implement this ideal, those of us who lived through communism take a much soberer view of the matter. Almost a century has

passed since the Russian Revolution. This experiment has left tens and tens of millions of innocent, defenceless human victims in its wake.

Have Western European intellectuals also emerged with a more sober mindset from this horrific, utopian, communist "dream"? How many more victims are still needed?

And now for one more quotation:

"Those who yield to evil open the doors for far greater crimes to come. Everyone who has lived under a totalitarian regime (…) has an obligation to put their experience into words and to share it with the lucky ones who escaped it. (…) Europe in its entirety – not a divided Europe – also gave this world both the criminal regimes discussed above – Nazism and communism It thus bears a special and greater responsibility for the freedom of man."

Again, that was what Václav Havel had to say on the subject two years ago.

Does Europe have a memory? And does it only have a memory, or also a conscience?

We are here in order to help give Europe its memory and conscience back.

We are here in order to prevent our children becoming intoxicated by visions of easy communist solutions.

Dr Rudolph Rummel has mentioned the scientific knowledge of communists "based on historical materialism". I don't know whether this was meant to be ironic, but probably not. Even Václav Havel, in all seriousness, recalls that communist ideology is based "on scholarly roots consisting of Marx and Engels's analyses". Perhaps it is based on [such things]… But it isn't. After all the experiences with global communism, it would be a good thing if we were to finally exclaim: The emperor has no clothes!

For god's sake – what scientific knowledge? Is it possible to consider something that looks promising on a theoretical level to be scientific if it is tragic in practice and has repeatedly failed many times? Can something that is absolutely incapable of life in practice be regarded as scientific?!

Did the Nazis and Hitler not also have their own "scientists" as well as "scholarly roots and analyses"?!

Communism is treated a little bit like a naughty child, whose parents have not been much use, but which is otherwise charming and adorable. Learned debates take place about Marx, Lenin, Mao Zedong and others at universities and in academic discourse, as if these people did not have millions and millions of dead, innocent civilians and unimaginable human suffering on their conscience.

With this sort of application, is it not also possible to discuss Nazi "scholarly analyses and fundamentals" on such an academic-looking level? And if we can't discuss Nazi ones, how is it possible for us to discuss communist ones?

This is the post-communist era. Communists feel that things are beginning to slip away from them. Consequently, in recent months, they have come up with new arguments: "Don't tar us all with the same brush! No, no, there are other types of communism besides Stalinist communism!"

It is a well conceived trap, but ultimately they themselves are snared by it. What then is communism exactly? What resources does it wish to use to achieve its goals?

An inexorable class war, as predicted by Marx, Engels and Lenin?
Overthrowing the existing order?
The establishment of a proletarian dictatorship?
The abolition of private property?

If the communists align themselves with even one of the aforementioned postulates, this "philosophy" runs counter to basic human rights and it may no longer have any place in a democratic society. And it makes no difference whether they profess to follow Marx, Lenin, Trotsky, Mao Zedong, Fidel Castro or even the communism with a human face of Alexander Dubček.

Of course, if they claim to be democratic and say that they have abandoned Marxist-Leninist postulates, then what exactly do communists amount to?

Ladies and gentlemen, I have come to the end of my talk. I will try and summarise the tasks that lie before us:

1) A clear definition of communism is needed.
2) Communism needs to be condemned in the same way as Nazism. Communism is not a philosophy. It is a criminal ideology and we must treat it as such.
3) We must get communist ideology out of our universities. It the same way in which we are not willing to relativise the criminality of Nazism, we cannot permit any relativisation of the criminality of communism.
4) Communist crimes against humanity need to be condemned by an international tribunal in the same way that in which the Nazis were condemned in Nuremberg.
5) A Platform of European Memory and Conscience needs to be established on an EU level.
6) Communist parties must be banned in the European Union in the same way in which Nazi and neo-Nazi parties are banned.

7) In deference to the immense human suffering that was endured, Europe must build a memorial to the victims of international communism in a manner similar to that which the United States has already established in Washington D.C. I would symbolically choose Paris as the place for the construction of a European memorial.

The road ahead is long, the goal is clear.

May God bless us!

Thank you.

DAINIUS ŽALIMAS ► Head of the Institute of International and European Union Law, Faculty of Law, Vilnius University

Crimes committed by the communist regimes from the standpoint of international legislation: Lithuanian case study

I appreciate very much the initiative to organise the conference on the issue concerning the crimes committed by the communist regimes. It is my pleasure to give an introduction to the basic legal aspects of the mentioned issue together with the special presentation of the legal analysis of the Lithuanian case. International crimes such as crimes against humanity, genocide and war crimes inevitably have to be dealt within the international legal context. They concern not only national measures to implement the justice but also depend on the efforts put forward by the international community to condemn them publicly and create sufficient international legal basis for the effective persecution.

Let me first of all go through the general introduction into the notion of the international crimes and specifically crimes against humanity, war crimes and genocide; secondly, I will address historical facts and legal instruments relevant in assessing crimes of the communist regimes; thirdly, I will analyse Lithuanian case as an illustration how the crimes of the occupation communist regime are dealt with in our national legal system; and finally, I will touch briefly the existing EU legislation related with a crime of genocide, crimes against humanity and war crimes and highlight the need for equal treatment of these crimes irrespective of their perpetrators (equal treatment of the crimes committed by Nazi and Soviet regimes).

1. The definition and classification of international crimes

International crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs).[1] They are international criminal law normative proscriptions whose violation is likely to affect international peace and security of humankind or is contrary to fundamental humanitarian values, or which is product of state action or a state-favouring policy.[2] From other international violations they are most distinguished by the fact that their commission often cannot occur without

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1 Cassese, A. *International Criminal Law*. New York: Oxford University Press. 2003. P. 23.

2 Bassiouni, C. M. *Introduction to International Criminal Law. New York:* Transnational Publishers, Inc. (2003). P. 121.

state action or state-favouring policy.[3] International crimes are expected to have certain common features[4] such as:

a) they are violations of international customary rules;
b) these rules intended to protect values considered important by the whole international community and consequently binding all States and individuals. Such values first of all are fundamental human rights, such as right to life, dignity, legal personality and freedom, prohibition of torture and inhuman treatment, etc.;[5]
c) furthermore there is a universal interest in repressing these crimes;
d) finally, if the perpetrator has acted in an official capacity, the State on whose behalf he has performed the prohibited act is barred from claiming enjoyment of immunity.

Under this definition such international crimes as war crimes, crimes against humanity, genocide, torture (distinct from torture as one of the categories of war crimes or crimes against humanity, e.g. torture not of a large scale or not systematic, or committed by private persons), aggression and some extreme forms of terrorism (serious acts of State-sponsored or-tolerated international terrorism)[6] can be listed.[7] However, classical examples of international crimes giving rise to individual criminal responsibility are genocide, crimes against humanity and war crimes (these categories of international crimes also fall into the jurisdiction of the International Criminal Court and they are also defined in the 1998 Rome Statute of this Court, one of the most recent international legal instruments defining international crimes).

Thus crimes against humanity, genocide and war crimes together with crime of aggression are considered to be the most serious crimes for the international community as a whole. These crimes are defined by the 1998 Rome Statute of the International Criminal Court (ICC), the 1949 Geneva conventions and their Additional Protocols of 1977, the statutes of the ad hoc international criminal tribunals (the Statute

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3 Ibid. P. 121

4 According to: Op. cit. Cassese, A. P. 23.

5 Fundamental values of international community are laid down and protected by a number of international instruments, among which the most important are the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1950 European Convention on Human Rights, the two 1966 UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; also prohibiting conduct that is detrimental to the fundamental values of international community – the 1948 Convention on Genocide, the 1949 Geneva Conventions on the protection of victims of armed conflicts and their three Additional Protocols, the 1984 Convention against Torture, the 1968 Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and other.

6 Ibid. P. 24.

7 Bassiouni, C. M. also enlists such additional crimes as mercenarism, slavery, unlawful human experimentation. See: op.cit. Bassiouni, C. M. P. 121.

of Nuremberg International Military Tribunal, Statutes of the International criminal tribunal for the former Yugoslavia and International criminal tribunal for Rwanda). Despite expectations to have the ICC as the international judicial institution implementing justice for the most starveling of it, the ICC does not give opportunity to seek justice for the crimes committed by the communist regimes since it has limited *ratione temporis* jurisdiction (only crimes committed after the Rome Statute entered into force (1 July 2002) may be investigated by the ICC). Therefore it still remains a matter of national process and relies upon good will and initiative shown by the international community to condemn crimes of the communist regimes publicly and create legal and institutional basis to try for them.

Since WWII crimes against humanity have been repeatedly recognised in international instruments as a part of international law, with considerable consistency in their definition.[8] The notion of the crimes against humanity covers actions that share a set of common features:

1) they constitute a serious attack on life and human dignity or grave humiliation or degradation of one or more human beings;
2) they are a part either of governmental policy, or of a widespread or systematic practice of atrocities tolerated, condoned, or acquiesced in by government or *de facto* authority;
3) it does not matter either they have been committed during the situation of war or peace;
4) the victims of the crime may be civilians (according to Art. 7 of the Rome Statute of International Criminal Court, only civilians) or at least persons not longer qualified as combatants,[9] e.g. persons no longer taking part in hostilities or enemy combatants.[10]

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8 Dixon R. in: Triffterer, O. (ed.) (1999). *Commentary on the Rome Statute of the International Criminal Court.* Baden-Baden: Nomos Verlagsgesellshaft. P. 122. The relevant provisions include Art. 6 (c) of the 1946 Nuremberg Charter, Art. II para. 1 (c) of the Allied Control Council Law No. 10, Art. 5 (c) of the Tokyo Charter, principle VI (c) of the 1950 Nuremberg principles; Art. 10 of the Draft code of Offences against Peace and Security of Mankind of 1954; the 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity, adopted by G.A. Resolution 2391 (XXIII) of 26 Nov. 1968, Art. 1(b); the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the G.A. Res. 3068 (XXVIII), 30 Nov. 1973; Art. 5 of the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 3 of the 1994 Statute of the International Criminal Tribunal for Rwanda; Art. 18 of the 1996 Draft Code of Crimes against Peace and Security of Mankind; Art. 7 of the Rome Statute of the ICC (1998).

9 Zahar, A. Sluiter, G. *International Criminal Law.* A Critical Introduction. Oxford: Oxford University Press, 2008, p. 208.

10 Op. cit. Cassese, A. P. 64

Art. 7 of the ICC Statute provides a list of crimes against humanity. The most important and relevant to qualify the acts of the communist regimes are the following crimes:

1) murder;
2) extermination;
3) enslavement;
4) deportation or forcible transfer of population;
5) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
6) torture;
7) rape and other sexual violence;
8) persecution against any group on political, racial, national, ethnic, cultural, religious grounds;
9) enforced disappearance of persons.

Most often the crimes against humanity have the following elements:[11]

1) the perpetrator killed or injured, or done serious harm to one or more persons;
2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population;
3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. The last two elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

Thus the key element of the crimes against humanity distinguishing them from ordinary crimes (e.g. murder, torture, rape, deprivation of liberty) is their *massive and systematic character*, i.e. they have to be committed as a part of widespread campaign of violence against civilian population that may be also called as a general criminal context (a single act of violence committed by a concrete individual can be regarded as a crime

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11 The ICC Elements of Crimes: http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

against humanity if it takes place in the relevant context when there are a lot of other persons committing similar acts against civilians as a part of the same campaign[12]).

War crimes are serious violations of customary or, whenever applicable, treaty rules belonging to the corpus of the international humanitarian law of armed conflict (does not matter whether it is an international or non international).[13]

As the Appeals Chamber of the ICTY stated in the *Tadic* case (Interlocutory Appeal

(a) war crimes must consist of "a serious" infringement of an international rule and "must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim";
(b) the rule violated must either belong to the corpus of customary law or be part an applicable treaty;
(c) "the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule." Thus a war crime may be shortly defined as any serious violation of international humanitarian law.[14]

The most relevant crimes to qualify the acts of the communist regimes are:

1) wilful killing;
2) torture or inhuman treatment;
3) wilfully causing great suffering, or serious injury to body or health;
4 extensive destruction and appropriation of property;
5) compelling a protected person to serve in the forces of a hostile Power;
6) wilful deprivation of the rights of a prisoner of war or other protected person to fair and regular trial;
7) intentional attacks against the civilian population;
8) intentional attacks against civilian objects;
9) killing or wounding a combatant who has surrendered;
10) the transfer by the Occupying Power of parts of its own civilian population into the occupied territory;
11) intentional attacks against buildings dedicated to religion, education, art, science or historic monuments, hospitals;
12) pillaging a town or place;
13) rape and sexual violence;
14) employment of weapons prohibited by international law.

12 Bonafè B. I. T*he Relationship between State and Individual Responsibility for International Crimes.* Leiden, Martinus Nijhoff Publishers, 2009. P. 99-104. 13

13 Op. cit. Cassese, A. P. 47.

14 Op. cit. Zahar, A. Sluiter, G. P. 110-111.

Most often war crimes have the following elements:[15]

1) the perpetrator killed or inflicted severe physical or mental damage upon one or more persons;
2) such person or persons were protected under one or more of the Geneva Conventions or their Additional Protocols;
3) the perpetrator was aware of the factual circumstances that established that protected status;
4) the conduct took place in the context of and was associated with an armed conflict;
5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Thus the *distinctive feature of war crimes* is that they have to be committed against protected persons in time of war (armed conflict). Also contrary to the crimes against humanity, war crimes may be isolated acts (one single act of violence) not necessarily done in a broader criminal context (i.e. not of massive and systematic character).

Genocide, understood as the intentional killing, destruction or extermination of groups or members of a group as such, was first envisaged as a sub-category of crimes against humanity. Genocide acquired autonomous significance as a specific crime in 1948 when UN GA adopted the Genocide Convention.

Most often genocides, as a crime, has the following four elements:[16]

1) the perpetrator killed or seriously injured one or more persons;
2) such person or persons belonged to a particular national, ethnical, racial or religious group;
3) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such;
4) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was a conduct that could itself effect such destruction.

Thus the characteristic feature of genocide distinguishing it from other crimes against humanity is presence of genocidal intent, i.e. an intent to destroy, in whole or in part,

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15 The ICC Elements of Crimes: http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf

16 The ICC Elements of Crimes: http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

a certain protected group of people. This intent can be also seen from a broader criminal context (general criminal context) when a number of acts directed against a protected group are committed in pursuing common genocidal plan or by perpetrators sharing the same genocidal intent.[17]

Genocide under its formal definition by the 1948 Convention covers only acts directed against a national, ethnical, racial or religious group, i.e. it does not include political and social groups. Initially both latter groups had been considered to fall into the scope of the definition of genocide. However, for political reasons (mainly due to strong opposition from the Soviet Union and its satellites) these groups were excluded from conventional definition. That causes the main problem to qualify the crimes committed by the communist regimes as genocide, because they most often have been directed at elimination of political opposition (the so-called counter-revolutionary groups and elements) and property owners. Although some States (e.g. Estonia. Lithuania, France) adheres to the broader concept of genocide, while in some States the communist crimes have been also directed against national groups (the so called nationalists or separatists), the crimes of the communist regimes nevertheless are rarely addressed as genocide. Though the scale of these crimes and numbers of victims are no less shocking than in the instances of a classical meaning of genocide (e.g. crimes of the Nazi regime or genocidal acts in the former Yugoslavia).

2. Crimes committed by the Communist Regimes

Obviously the violent and repressive acts of the communist regimes often meet the above mentioned criteria to qualify them, in accordance to the relevant circumstances and the context, either as crimes against humanity (e.g. massive killings, torture and persecutions, deportations) or as war crimes (when committed in time of armed conflict or occupation, e.g. attacks on civilian population and civilian objects, rape and sexual violence,[18] pillage, wilful killing of members of the resistance and deprivation of appropriate fair trial guarantees, etc.), or even as genocide in its broadened or even conventional meaning (e.g. the context, massive and systematic character of the Soviet repressions in Caucasus[19] and the occupied Baltic States allow to qualify these acts as acts directed to eliminate in whole or at least in part certain national, ethnic and religious groups).

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17 *Op. cit. Bonafè B. I. P. 131-136.*

18 *E.g. the Soviet armed had practised that kind of massive sexual violence against the local civilian population of the occupied Eastern Prussia (Konigsberg region) at the end of the WWII.*

19 *E.g. repressions, including deportation of the whole nation, against Chechen and Ingush people. We may speak also about genocide of the local population of the Eastern Prussia (Konigsberg region).*

The facts about the communist crimes speak for themselves. For instance, the Special Rapporteur on the PACE Draft Resolution on the need to condemn the crimes of the communist regimes provided the following impressive numbers of the victims of the communist regimes:[20] in the former Soviet Union – 20 million people, in China – 65 million, Vietnam – 1 million, North Korea – 2 million, Cambodia – 2 million, Eastern Europe (excluding the Soviet Union) – 1 million. The Holodomor in Ukraine of 1930s when the Soviet totalitarian regime deliberately implemented special measures to create artificially the situation of a large scale famine that resulted in loss of up to 5 millions of Ukrainians, mostly peasants who had not been favourable to the regime. More than 300.000 citizens of the Republic of Estonia – almost a third of its then population – were affected by arrests, mass murder, deportation and other acts of repression. As a result of Soviet occupation, Estonia permanently lost at least 200,000 people or 20% of its population. Even today, there are less Estonians in Estonia than before WWII.[21] Up to a million Lithuanians (also around one third of population) were affected by the Soviet occupation, while Lithuania lost around one fifth of its population due to the Soviet repressions, deportations and exodus. Bearing in mind the historical experience of other Central European countries, such as the Czech Republic, Slovakia, Hungary, Poland, Latvia, Bulgaria, Romania, I do not think that in Europe any serious doubt may be casted on the very fact whether crimes against humanity and war crimes and, in some instances, crime of genocide had been committed by communist totalitarian regimes, in particular by the Soviet Union.

Actually I do not think that there is any doubt whether the communist regimes had committed crimes against humanity, war crimes and even genocide. Their commission has been acknowledged on various occasions by different European organisations. The main problems is not sufficient or not sufficiently consolidated will of States to condemn these crimes and the extreme communist ideology justifying their commission with the same strength as the crimes and ideology of the Nazi regime has been already condemned.

For instance, on 28 November 2008 the Member States of the European Union in the special declaration related with the EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law have expressly acknowledged the crimes committed by totalitarian regimes by deploring them. However the crimes committed by the communist regimes were not covered by that Framework Decision (which is binding on the Member

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20 Doc. 10765. The 16 December 2005 Report of the Political Affairs Committee on need for international condemnation of crimes of totalitarian communist regimes: http://assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10765.htm

21 http://www.communistcrimes.org/en/Database/Estonia/Historical-Introduction.

States) with regard to prohibition of public condoning, denial and gross trivialisation of genocide, crimes against humanity and war crimes.

2.1 Non-binding acts of European institutions regarding the crimes of communist regimes.

The most influential European parliamentary institutions have issues a number of non-binding political resolutions directly concerning the crimes committed by the communist regimes. *From the standpoint of international law these acts can be considered as subsidiary tools or sources to interpret relevant rules of international law, to assess the crimes committed by communist regimes as meeting international legal criteria of crimes against humanity, war crimes and even genocide. Ultimately they also express the authoritative opinion regarding qualification of the crimes committed by the communist regimes as well as the measures to be taken by European States with regard to these crimes (their investigation and condemnation, raising public awareness about these crimes, commemoration and remembrance of the victims, etc.).*

First of all I would like to mention the recent resolution of the European Parliament on European Conscience and Totalitarianism[22] adopted on 2 April 2009. This Resolution inter alia acknowledged that "millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe"; the European Parliament noted the specific historical experience of the Central European States by stating "the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both Communism and Nazism". The European Parliament also condemned "strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes". That means, as I mentioned already, that there is no question or doubts about the very fact of commission by the communist regimes of crimes against humanity, war crimes or, in some instances, even genocide. Furthermore the European Parliament underlined the importance of remembrance of the past, reconciliation, research, teaching and public awareness about the crimes committed of the communist regimes.

Secondly, I would also like to mention two important resolutions of the other authoritative and wider European institution – the Parliamentary Assembly of the Council of Europe**.** The first resolution is more of general character, – the 27 June 1996 Resolution 1096 (1996) on Measures to Dismantle the Heritage of Former Communist

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22 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0213+0+DOC+XML+V0//EN.

Totalitarian Regimes[23] as apart the prosecution of the crimes it recommends a number of other measures to deal with the legacy of the communist regimes. As follows from the text of the Resolution, the fact of the crimes committed by the communist regimes is beyond the question; the Parliamentary Assembly is only concerned that justice should be done "without seeking revenge" in a manner compatible with democracy and rule of law, and the prosecution of individual crimes should go hand-in-hand with the rehabilitation of the victims.

With regard the crimes committed by the communist regimes, this resolution was further continued by *the 25 January 2006 Resolution No. 1481(2006) on the Need for International Condemnation of Crimes of Totalitarian Communist Regimes,*[24] which is, to my mind, the most comprehensive resolution on the matter. The Parliamentary Assembly not only condemned the crimes committed by totalitarian communist regimes. It also noted that the totalitarian communist regimes "without exception, (were) characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism". Thus most of the violations noted fall into the category of crimes against humanity or war crimes, if committed in relation with the armed conflict. Furthermore the Parliamentary Assembly also noted that the crimes of the communist regimes "were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the "elimination" of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes". This important passage can be understood as recognition, at least to some extent, of the genocidal intent of the communist regimes to eliminate a certain group of people (it was expressly stated in the Explanatory Memorandum included into the 16 December 2005 Report of the Political Affairs Committee on the Draft Resolution[25] that "the important feature of communist crimes has been repression directed against *whole categories of innocent people* whose only 'crime' was being members of these categories. In this way, in the name of ideology, the regimes have murdered tens of millions of rich peasants (kulaks),

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23 http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1096.htm.

24 http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1481.htm.

25 http://assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10765.htm.

nobles, bourgeois, Cossacks, Ukrainians and other groups"). Therefore the Resolution can substantiate the claim that at least in respect of some national and ethnic group the crimes of the communist regimes could amount to genocide, as well as we can find additional arguments to broaden the traditional legal concept of genocide so as to include elimination of social and political groups.

The Resolution furthermore expresses concerns about poor public awareness about the crimes of the communist regimes, calls for the clear position of the international community on the past that would pave the way to further reconciliation; awareness of history and moral satisfaction of the victims are indicated among the further measures to be taken.

The last resolution I would like to mention is *the Resolution of the OSCE Parliamentary Assembly on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century,*[26] which was adopted on 3 July 2009 by the annual session of the Assembly in Vilnius. In line with the above mentioned EP and PACE resolutions this Resolution expressly acknowledged the crimes of the communist regimes by noting that "in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about *genocide, violations of human rights and freedoms, war crimes and crimes against humanity*"; it also stressed the need to raise public awareness about the totalitarian legacy, to open archives and to facilitate reconciliation based on truth and remembrance. All totalitarian rule from whatever ideological background was declared unacceptable and incompatible with the values of the widest European organization.

The basis for international condemnation of the crimes of the communist regimes could be *the universal validity of the Nuremberg principles* (the customary international law principles recognised in the Statute of the Nuremberg International Military Tribunal and the jurisprudence of this Tribunal). The universal validity of these principles has already been recognized by *the European Court of Human Rights.* The Court emphasized the universal validity of the Nuremberg principles in its decision on admissibility of 17 January 2006 in the case of *Kolk* and *Kislyiy v*. Estonia and in the decision on admissibility of 24 January 2006 in the case *Penart v.* Estonia stating that "responsibility for crimes against humanity cannot be limited only to the nationals

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26 http://www.oscepa.org/images/stories/documents/activities/1.Annual%20Session/2009_Vilnius/Final_Vilnius_Declaration_ENG.pdf.

of certain countries and solely to acts committed within the specific time frame of the Second World War".[27] The Court also noted that the Nuremberg principles and their universal validity were perfectly known to the Soviet Union, which was the founder of the Nuremberg Tribunal and the original member of the United Nations.

3. The case of Lithuania

The specific feature of the communist crimes committed in the Baltic States is that they are attributable not only to the totalitarian communist regime but also to a foreign State (the Soviet Union), i.e. this regime had been the regime of foreign occupation as well. That follows from the fact that in 1940 the Soviet aggression was committed against the Baltic States, as one of the consequences of the Molotov-Ribbentrop Pact of 1939. For instance, the acts of the Soviet Union are to be treated as act of aggression falling within the definition of aggression stipulated in the 1933 Convention between Lithuanian and the Soviet Union on the Definition of Aggression, which was based on the provisions of the Briand-Kellogg Pact and was equivalent in essence to the multilateral London Convention on the Definition of Aggression. This was an invasion by the armed forces, without a declaration of war, of the territory of another State. The occupation and annexation of the territory of Lithuania was a continuation of the aggression.[28]

The repressions of the Soviet occupation totalitarian regime followed immediately as Lithuanian society had not consented to the occupation and annexation of Lithuania. As mentioned, the Soviet occupation directly affected around one third of Lithuanian population and one fifth of the population was lost. For instance, during the first Soviet

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27 Extracts from these Court decisions: "The Court notes that deportation of the civilian population was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945 (Article 6 (c)). Although the Nuremberg Tribunal was established for trying the major war criminals of the European Axis countries for the offences they had committed before or during the Second World War, the Court notes that the universal validity of the principles concerning crimes against humanity was subsequently confirmed by, inter alia, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission. Accordingly, responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War. In this context the Court would emphasise that it is expressly stated in Article I (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace…

It is noteworthy in this context that the Soviet Union was a party to the London Agreement of 8 August 1945 by which the Nuremberg Charter was enacted. Moreover, on 11 December 1946 the United Nations General Assembly affirmed the principles of international law recognised by the Charter. As the Soviet Union was a member State of the United Nations, it cannot be claimed that these principles were unknown to the Soviet authorities."

28 *Crimes of the Soviet Totalitarian Regime in Lithuania*. Vilnius: Solidarity, 2008. P. 6.

occupation in 1940–1941, approximately 30,000 people became victims of the Soviet terror. Out of this number, over 1 000 were killed in Lithuania and nearly 20 thousand were deported to the GULAG camps. At the beginning of the second Soviet occupation, in 1944–1956, around 120,000 people had been deported from Lithuania, more than 20,000 members of the Resistance and a similar number of civilian population had been killed, around 180,000 people had been imprisoned, more than 100,000 people had been recruited to the Soviet armed forces, nearly 450,000 people had left the country before the second Soviet occupation.[29] Massive repressions had been carried out not only against the members of the Resistance and other politically unfavourable people, but also against their families, children and close relatives.

Thus the following crimes against humanity and war crimes committed by the Soviet regime can be mentioned: massive killings and torture of the population and the members of the Resistance denying for the latter category guarantees provided for combatants and prisoners of war by international law, massive deportations of the civilian population, massive arrests, deprivation of liberty and other persecutions on political grounds, forced mobilisation and recruitment to the occupation armed forces.

In assessing the Soviet crimes it is necessary to realise that the Soviet repressions were neither incidental nor chaotic. The repressions were not simply savage treatment of the enemies of the regime but a part of a systematic totalitarian policy. As the Lithuanian example illustrates, the goal of this policy was to destroy a political nation (nowadays we usually call it a "civil society") – a social structure that was the basis of existence of the national State. It is evident that in Lithuania most brutal repressions had been carried out against the most active part of the political Nation having the greatest survival and resistance potential: State officials, officers, public figures, intelligentsia and the academic community, most influential clergymen, etc. All waves of violence had been directed against the most active part of society, which was capable of uniting fellow citizens for concerted action and resistance.

It is also important to evaluate the nature of repressions, which clearly reveals their ultimate goal. Political prisoners and deportees were moved to severe-climate and scarcely populated, and frequently even completely uninhabited locations thus achieving their complete isolation. They were usually able to communicate only with people of the same fate. Moreover, all of them faced a continuous increased threat to life and health, which was determined by deplorable living conditions. These circumstances enable to reveal the aims of the Soviets towards such people. A considerable number of them died still on their way to concentration camps, whereas those who survived were surrendered

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29 Figures from: *Crimes of the Soviet Totalitarian Regime in Lithuania*. Vilnius: Solidarity, 2008.

to be killed by nature, diseases and starvation, and when the required result was not achieved – hard labour had to contribute to the same effect. They were not to return to their political nation and recover their former influence. One of the most striking proofs of this is the extermination of the people held in prisons and camps, which started following the German attack on the Soviet Union in June 1941.

Therefore the crimes committed in Lithuania by the Soviet occupation totalitarian regime can be treated not only as usual crimes against humanity or war crimes. Beyond any reasonable doubt, these were politically arranged, motivated and systematically committed crimes involving the whole totalitarian apparatus of the USSR: starting from the Communist ideology and ending with allocation of special state funds. It can be firmly stated that these crimes were a composite part of the Soviet policy that was actually criminal in nature. Factual circumstances allow making the presumption that the totality of crimes committed by the USSR occupation authorities against the Lithuanian Nation might amount to the crime of genocide as defined by the 1948 Genocide Convention. It is stipulated in this Convention that genocide can be understood as massive killing and torture of the members of the certain group as well as deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. While factual circumstances evidence that the goal of the occupants was to destroy the most important part of the Nation.

3.1 Lithuanian legal instruments and case law

The first national law defining a crime of genocide (the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania) was adopted on 9 April 1992. Currently a crime of genocide, crimes against humanity and war crimes are included into one section of the 2000 Criminal Code now in force (Section XV "Crimes against Humanity and War Crimes").

Lithuanian laws provide for a retroactive effect and inapplicability of any statutory limitations for a crime of genocide, crimes against humanity and most of war crimes. These laws relied on the universally recognised exception known already from the Nuremberg trial that allowed applying retroactively legal responsibility for international crimes, in particular crimes against humanity and war crimes. Lithuanian laws are also based *on the universality of the Nuremberg principles* (principles of international criminal law) in providing that criminal responsibility has to be applied to all the perpetrators of genocide, crimes against humanity and war crimes, irrespective of what regime has been behind them, i.e. both the perpetrators of the Nazi and the Soviet crimes have to be punished (as provided by Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania, "killing or torturing of people of Lithuania, deportation of its inhabitants committed by the Nazi Germany and at the time of occupation and

annexation (of the country) by the USSR, bear the characteristics of the crime of genocide provided for in the norms of international law").

Another characteristic feature of Lithuanian legislation is that Lithuania adheres to the broader definition of a crime of genocide that also covers acts directed against social and political groups. Both the Appeal Court of Lithuania and the Supreme Court of Lithuania have confirmed that Lithuanian legislation has indeed supplemented the definition of genocide provided by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) by adding political and social groups.[30] However, this supplement is seen as adequate to the specific situation and experience of Lithuania; it is understood to be in compliance with the Genocide Convention and formulated taking into account the legislation of some other countries. As the Appeal Court has noted, "this supplement is reasonable and reflecting the reality. First of all, although the Convention does not contain provisions on possible broader interpretation of the definition of genocide, it does not contain any prohibition of such an interpretation either. Furthermore, the definition of genocide is broadened in the criminal codes of some other countries".[31] The Appeal Court proceeded on defining a political group[32] and noting that destruction of such a group by the same token can be understood as destruction of a national or ethnical or other group covered by the Convention to which that political group belongs (in particular taking into account the realities and experience of Lithuania): "a political group means the people related by common political attitudes and convictions, therefore intent to destroy such a group would also mean genocide, as there is an intent to destroy a part of people. The Chamber (of the Court) also takes notice that attribution in the Judgment (of the court of first instance[33]) of Lithuanian guerrillas (partisans), that is the participants of the armed Resistance against the occupation, to the concrete "political" group is in essence conditional and not entirely correct. After all, members of this group by the same token had represented Lithuanian people, as the national group. The Soviet genocide had been carried out namely by the criteria of nationality and ethnicity of the population. All of that leads to the conclusion that Lithuanian guerrillas (partisans) can

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30 The case of *Žukaitienė* and *Vasiliauskas*: the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas* and the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*.

31 The 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of Žukaitienė and Vasiliauskas.

32 In the *Navickas* case (the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*) the Appeal Court noted that a political group is a certain group of people related by common political attitudes and convictions, thereby confirming the definition provided in the *Žukaitienė* and *Vasiliauskas* case.

33 The 4 February 2004 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-62 of *Žukaitienė* and *Vasiliauskas*.

be attributed not only to a political, but also to a national and ethnical group, i.e. to the groups named by the (Genocide) Convention itself".[34]

The Supreme Court has continued reasoning of the Appeal Court stating that "by acceding to the (Genocide) Convention the Republic of Lithuania assumed the commitment to punish for the acts aiming at destruction in whole or in part of any national, ethnical, racial or religious group and to prevent those acts. However, the accession to the Convention does not deprive the State of its right to define the acts considered to be crimes and to prohibit those acts. Moreover, under Article 5 of the Convention "the Contracting Parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3". This provision has been implemented in the Republic of Lithuania by adopting the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania (the 9 April 1992 Law No. I-2477), by which Lithuania adhered to the Convention. The definition of genocide provided by Art. 1 of this Law was in compliance with that provided by Art. 2 of the Convention. By the same token, adhering to the Convention the Supreme Council of the Republic of Lithuania specified that "killing or torturing of people of Lithuania, deportation of its inhabitants committed by the Nazi Germany and at the time of occupation and annexation (of the country) by the USSR, bear the characteristics of the crime of genocide provided for in the norms of international law" (Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania)… It is obvious that the supplement of the elements of the crime of genocide by the acts aiming at physical destruction of all or a part of people belonging to a certain social or political group is nothing more but realisation of the provisions of Art. 2 of the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania".[35]

The last characteristic feature of the legal situation in Lithuania as regards perpetrators of the crimes of the Soviet totalitarian regime is related with the criminal acts committed during the January–August 1991 Soviet aggression against Lithuania (i.e. killing of the defenders of Lithuanian independence and attempts to overthrow the independence and the legitimate government). As these crimes had been committed during aggression

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34 The 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*.

35 The 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*.

and the attempts to re-occupy Lithuania had been made,[36] they could be qualified as war crimes (e.g. targeting at civilians and civilian objects, killing and seriously injuring the persons protected by international humanitarian law – non-combatants and civilian population[37]). However, in practice these crimes were qualified as ordinary crimes against persons (a murder under aggravating circumstances – the murder of more than one person and the persons performing official State or social duties) and the crimes against the State (establishment of and active participation in anti-State organisations and public incitement to overthrow the sovereignty and the legitimate government of Lithuania). Such a practice can be explained partly by the absence of provisions on aggression, war crimes and crimes against humanity in the Criminal Code then in force (in 1991 when the crimes in question were committed), partly by reluctance of investigating authorities and the courts to go further in legal qualification of the criminal acts when the ordinary crimes can be easily proven. Three convicts sentenced in the *January 13th* case applied to the European Court of Human Rights challenging their sentence on the grounds that it allegedly was in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular with the principle *nullum crimen sine lege*[38]

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36 *See* more about the January–August 1991 Soviet aggression against the Republic of Lithuania: Žalimas D. The *Soviet Aggression against Lithuania in January 1991: International Legal Aspects. // Baltic Yearbook of International Law*, 2006, vol. 6, p. 293-343.

37 In the January 13th case it was established that the Soviet armed forces assisted by local collaborators (the local branch of the Communist Party of the Soviet Union and the affiliated organisations) had attacked a number of civilian objects, including premises of national radio and television and other mass media and the TV tower in Vilnius; 13 civilians peacefully protesting against the attacks had been killed at night of 13 January 1991 nearby the TV tower and hundreds of peaceful defenders of Lithuanian independence had been injured). The aim of the attacks was to overthrow the independence and the legitimate government of the Republic of Lithuania and to install the puppet communist regime in the country (see the *January 13th* case: the 23 August 1999 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-2(1999) of the *January 13th*, the 20 February 2001 Judgment of the Appeal Court in the case No. 1A-43(2001) of the *January 13th* and the 28 December 2001 Judgment of the Supreme Court of Lithuania in the case No. 2K-595/2001 of the January 13th). In the *Medininkai* case it was established that at night of 31 August 1991 the armed OMON squad subordinate to the USSR command (the OMON had been the USSR paramilitary militia squads for special operations) attacked Lithuanian customs check point at the border with Belarus. Without meeting any resistance from the side of unarmed Lithuanian officials (as the OMON attacks on Lithuanian customs check points had been frequent at that time, however usually ending with destruction of the check point facility without murdering the officials on duty), the USSR OMON squad had killed 6 Lithuanian police and customs officials, one customs official had been seriously injured and survived, however remained disabled for life.

38 The applicants tried to challenge the very date and legality of the restoration of the independence of Lithuania by claiming that their attempts to restore the Soviet rule in Lithuania had been allegedly legal as they had acted as the Soviet citizens against the anti-Soviet Lithuanian government and they had been allegedly entitled to pursue their activities until the Soviet Union recognized the independent Lithuania on 6 September 1991. Therefore they claimed also that until this date the Criminal Code of the Republic of Lithuania had not been applicable with regard of their activities.

(there is no crime without a law defining it at the time of its commission), the freedoms of expression and associations. However in the case of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania*[39] the Court rejected all the claims regarding alleged breaches of the Convention for the Protection of Human Rights and Fundamental Freedoms, whereby confirming legality of the sentence in the *January 13th case*[40] (the Court also accepted the legitimacy of the restoration of Lithuanian independence and the elected Lithuanian authorities).

Although many types of crimes had been committed by the Soviet occupation regime in Lithuania and against the population of Lithuania, so far only the perpetrators of the acts of genocide and some crimes against humanity and war crimes (deportation and killing of civilians) were brought to justice. According to the data, available from the Prosecutor General's Office of the Republic of Lithuania, as from 1990–2008 around 230 investigations have been started on the Soviet crimes against humanity (including acts of genocide) and war crimes. However, due to a very long time (more than 50 years) passed since the commission of the most crimes these investigations faced a number of practical difficulties compelling to discontinue most of the legal investigations (most of the perpetrators of the crimes and witnesses are already dead, unknown, out of reach for Lithuanian authorities or of bad health condition, more often it was impossible to find evidence sufficient for criminal prosecution). Therefore the investigations were not productive in terms of prosecution and trial as they resulted in a quite small number of prosecutions: only 20 persons have been charged with crimes against humanity (including acts of genocide) and war crimes (29 according to other sources).

Most of the perpetrators whose cases had been completed were tried for genocide, while some – for crimes against humanity (deportations) and war crimes (killing of civilians).

Most cases of genocide are related with acts of killing guerrillas (partisans) and applicability of the definition of genocide to those acts. In Lithuanian jurisprudence guerrillas are understood as a political group belonging to a broader national and ethnical group (Lithuanians), therefore an intent to destroy such a group is perceived as an intent to commit genocide both under national law (that includes political groups into the scope of the definition of genocide) and international law (that in this context

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39 The 19 February 2008 Judgment of the European Court of Human Rights in the case of *Kuolelis, Bartoševičius and Burokevičius v. Lithuania* (applications Nos. 74357/01, 26764/02 and 27434/02).

40 The Court found that "the applicants were convicted for crimes which were sufficiently clear and foreseeable under the laws of the re-established Republic of Lithuania". The Court also considered that "the consequences of failure to comply with those laws were adequately predictable, not only with the assistance of legal advice, but also as a matter of common sense. Moreover, the third applicant was convicted of complicity in aggravated murder and causing bodily harm, crimes consistently prohibited throughout the whole period in question".

expressly mentions only national and ethnical groups against which the genocide can be directed). The Soviet authorities had indeed declared openly their intent to eliminate guerrillas, as such, and even established special military units of destroyers (*istrebitels*) for this purpose, therefore it was not difficult for Lithuanian court to establish a genocidal intent.

The first issue arising out of Lithuanian case-law is the definition of a group against which genocide is directed. The guerrillas (partisans) are understood as a political group consisting of the participants of the armed Resistance against the Soviet occupation, i.e. those who refused to comply with the Soviet occupation regime and therefore conducted an organised armed fight against this regime for the liberation of the country.[41]

In one case the defendant was found guilty for the act of genocide directed against other political group than the guerrillas: in the *Raslanas* case it was "a separate political group of persons having convictions contrary to the policy of the Soviet occupation authorities".[42] The convict had organised and conducted himself (together with the Soviet military unit) the elimination of a part of that group – 76 unarmed civilians – political prisoners and detainees accused of the so-called counterrevolutionary crimes.[43] Therefore the court qualified this act as the elimination of "a part of civilian unarmed inhabitants of Lithuania belonging to a separate political group".[44] Once the defendants were found guilty of the act of genocide directed against a wider national and ethnical group of Lithuanians:[45] killing, shooting and burning of one Lithuanian family (two women – mother-in-law and daughter-in-law (the latter had been visibly pregnant), a six months old child and a man – the head of the family) was qualified as the act aiming at physical destruction of a part of Lithuanian population due to a general criminal context of that act and the then official capacity of the perpetrators of that act.

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41 The 21 October 2001 Judgment of the Panevėžys Regional Court of Lithuania in the case No. 1-81-09 of *Šilinis*, the 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis*, *Tamošiūnas and Lapinskas*, the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*, the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Juškauskas*, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*, the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

42 The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 11-2 of *Raslanas*.

43 They had been savagely killed in the Rainiai forest (therefore this case also has its unofficial title of the *Rainiai* case) at the outbreak of the Nazi-Soviet war on 24 June 1941: the victims had not only been shot and quickly buried, but before shooting they had been also tortured by using axes, knives, bayonets and other tools.

44 The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 11-2 of *Raslanas*.

45 The case of *Kurakinas, Bartaševičius and Šakalys*: the 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas, Bartaševičius and Šakalys* and the 13 February 1998 Judgment of the Appeal Court of Lithuania in the case No. 1A-5 of *Kurakinas, Bartaševičius and Šakalys.*

The second important issue arising out of Lithuanian case-law is the determination of a genocidal intent, i.e. the intent to destroy in whole or in part the political, national and ethnical group in question. To establish such an intent of the accused the element of the general criminal context plays a key and pivotal role: the genocidal intent can be always established in connection to the existence of a genocidal campaign, i.e. the genocidal intent of a person is substantially inferred from the surrounding general criminal context[46] (e.g. conduct of other persons, sharing with them the genocidal intent, existence of a genocidal plan, membership of the accused in any organisation having such a plan, aims, purposes and the activities of a joint criminal enterprise (a criminal organisation) in which the accused participated). For instance, membership and active participation in the activities of the special units aiming at destruction of a certain group of Lithuanian population and in such a way implementing the policy of the Soviet occupation authorities directed against Lithuanian population was regarded as a sufficient prove of the genocidal intent of the individual on trial (e.g. in the Kurakinas, Bartaševičius and Šakalys case the genocidal intent of the convicts was derived from their service in the Soviet units of destroyers (istrebitels) which had the purpose to eliminate "adversary elements" inter alia following from their official title of "destroyers battalions" and had carried out massive killings of Lithuanians and their families[47]). Collaboration with and aiding and aiding and abetting to the repressive structures aiming at the destruction of a part of Lithuanian population forming a separate political group was also regarded as sharing the genocidal intent and a sufficient proof for establishing the genocidal intent for the purposes of individual criminal responsibility (for instance, being a secret agent or an agent-stormtrooper of the Soviet repressive structures (the special security services) with the task to report about the activities of the guerrillas (partisans) or even to eliminate the guerrillas[48] was regarded a sufficient proof of being aware of and sharing the

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46 See, e.g.: Bonafè B. I. *The Relationship between State and Individual Responsibility for International Crimes*. Leiden, Martinus Nijhoff Publishers, 2009, p. 131-136, 144-145.

47 The 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas, Bartaševičius* and *Šakalys*.

48 That had been the task of agents-stormtroopers. They had been recruited by the Soviet security structures from the captured guerrillas (partisans) with the task to establish contacts with the active guerrillas and to kill or capture them or assist in killing or capturing them. The agents-stormtroopers had performed their tasks in secret, i.e. had been masked as true guerrillas concealing the fact of their capture and had practised deception in performing their tasks.

genocidal intent[49]). In the *Juškauskas* case[50] the court noted that all operations aiming at elimination of the guerrillas and their supporters had been carefully planned in advance drafting the concrete plans and assigning the concrete persons to implement those plans (the existence of such a plan was also considered as a proof of genocidal intent).

However, only membership and participation in the organisation aiming at destruction of a certain group of people cannot be regarded as a sufficient proof to find the defendants guilty of the act of genocide if their participation in that act cannot be sufficiently substantiated. For instance, in the *Preikšaitis, Tamošiūnas* and *Lapinskas* case the court of first instance stated that it was not sufficient to base the indictment only upon writings, the copies of writings, not signed or signed by other persons, the reports of the classified agents or the agents-stormtroopers with alias; in determining criminal responsibility of the individuals concerned this kind of evidence could be used insofar it is confirmed by other data, such as testimonies of the defendants, the victims, the witnesses and other materials. The court concluded that the conviction cannot be based only upon presumptions and guesses or only upon the fact of service in the then repressive structures.[51] The Appeal Court has also confirmed that only individual criminal responsibility can be applied for commission of the concrete acts of genocide, therefore individuals cannot be convicted only for their service in the repressive structures.[52]

The third important issue arising out of Lithuanian case-law on genocide is the concrete acts attributable to the crime of genocide. In general Lithuania courts followed the practice that even single act of an individual can amount to genocide if it is a part of a

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49 The 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis*, *Tamošiūnas* and *Lapinskas*, the 4 February 2004 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-62 of *Žukaitienė* and *Vasiliauskas*, the 21 September 2004 Judgment of the Appeal Court of Lithuania in the case No. 1A-392 of *Žukaitienė* and *Vasiliauskas*, the 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of Žukaitienė and Vasiliauskas, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of Juškauskas, the 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*, the 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

50 The 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Juškauskas*.

51 The 4 June 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-14 of *Preikšaitis*, *Tamošiūnas* and *Lapinskas*.

52 The 20 November 2002 Judgment of the Appeal Court of Lithuania in the case No. 1A-340 of *Preikšaitis*, *Tamošiūnas* and *Lapinskas*.

broader genocidal context – the genocidal campaign.[53] For instance, in the *Navickas* case the Appeal Court noted that the crime of genocide is regarded as committed by a person if it is established that he or she has performed at least one of the acts attributable to genocide (organisation, direction or participation in acts attributable to genocide); however, the crime of genocide may also consist of a series of criminal acts united by the same intent to destroy a certain group of people.[54] The Court *inter alia* has stated that, as a crime of genocide is directed against not a separate individual but rather against a certain group of people attempting on security of the mankind, "the acts of genocide are continuing for a certain time, often in a large territory even not in within a single State, therefore they have to be seen not as separate isolated acts but rather as a process encompassing the latter acts. It follows thence that a person committing the genocide performs not several criminal acts but rather is continuing them realising the same intent"[55] (therefore several acts of genocide committed by the same person have to be assessed not as a few crimes of genocide but rather as the one continuous crime).

As follows from the case-law, to convict a person it is sufficient to establish his or her active participation in the act of genocide, while it is less important whether the person himself or herself killed a member of the targeted group, i.e. it is sufficient that he or she was among those committing the act in question.[56] The person may be held responsible for either organisation or direction (two forms of complicity) or active participation in the act of genocide, or a combination of these roles.[57] For instance, in the *Raslanas* case the defendant was found guilty both for organisation and direction and participation in killing of 76 political prisoners.[58] In the *Kurakinas, Bartaševičius* and *Šakalys* case the defendants were found guilty for direction and participation in the killing of Lithuanian family.[59] Meanwhile active participation in the act of genocide may comprise not only direct participation in or execution of the act concerned (killing the guerrillas), but also aiding as one of the form of complicity: e.g. ensuring intelligence, organisation and

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53 If the acts aiming at destruction of a certain group are performed at the collective level as a systematic and organized campaign, then in this context a person can be held responsible for a single act or for a murder of a single person committed as a part of that campaign. See: Bonafè B. I. *The Relationship between State and Individual Responsibility for International Crimes*. Leiden, Martinus Nijhoff Publishers, 2009, p. 104-108, 117-118.

54 The 9 January 2009 Judgment of the Appeal Court of Lithuania in the case No. 1A-21/2009 of *Navickas*.

55 Ibid.

56 The 25 January 2008 Judgment of the Kaunas Regional Court of Lithuania in the case No. 1-20-401/08 of *Navickas*.

57 Art. 99 of the Criminal Code of the Republic of Lithuania.

58 The 5 April 2001 Judgment of the Šiauliai Regional Court of Lithuania in the case No. 11-2 of *Raslanas*.

59 The 21 January 1997 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-9 of *Kurakinas, Bartaševičius* and *Šakalys*.

execution of the operation against the guerrillas or reporting and assisting in finding the guerrillas.[60]

In a few cases of crimes against humanity (deportation) a direct and active participation of the convicts in deportation of civilians was established:[61] the convicts being the officials of the Soviet repressive structures (the representatives of the security services) had carried out the Soviet decree on deportation of "kulaks" (they had taken the families subject to deportation from their homes and had transferred them to other Soviet officials at a railway station from which those families had been transported to the remote regions of the Soviet Union). However, in the *Misiūnas* case the role of the convict was treated as a secondary one as, in the opinion of the court, he had committed the crime due to service subordination and the difficulty to choose a way of right conduct thereto; therefore that was regarded as an extenuating circumstance.[62] Nevertheless execution of an order to carry out the deportation has never been treated as a circumstance excusing from responsibility, as such orders are regarded as the manifestly illegal activity of the occupying State.[63] As regards criminal intent to commit the deportation as a crime against humanity, it was derived from the general criminal context (awareness of waves of the deportations already committed and the aims of the repressive structure the convict had been serving for).[64]

In the only case of war crimes (killing of civilians)[65] the courts had the possibility to elaborate the concept and regulation of war crimes. The Appeal Court has defined war crimes as "intentional dangerous deeds violating two main objects:

1) universally recognised rules and customs of warfare and
2) universally recognised order of treatment of civilians, prisoners of war and other protected persons… The necessary objective element for war crimes is the time of their commission, namely a war, international armed conflict or occupation (annexation)".[66] The Court noted that this element, taken together

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60 The 22 February 2005 Judgment of the Supreme Court of Lithuania in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas*

61 The 30 December 2002 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-119 of Misiūnas; the 15 February 2005 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-91 of Vilčinskas.

62 The 26 March 2003 Judgment of the Appeal Court of Lithuania in the case No. 1A-109 of *Misiūnas*.

63 The 15 February 2005 Judgment of the Vilnius Regional Court of Lithuania in the case No. 1-91 of *Vilčinskas*.

64 The 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas*.

65 The *Baranauskas* case: the 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas* and the 19 March 2002 Judgment of the Supreme Court of Lithuania in the case No. 2K-S-2.2.3 of *Baranauskas*. Deportation of civilians was also incriminated to the convict in that case.

66 The 13 December 2001 Judgment of the Appeal Court of Lithuania in the case No. 1A-498 of *Baranauskas*.

> with the victims (the civilian population of the occupied territory) and the perpetrator (a serviceman of the military repressive structure), is decisive in making distinction between a war crime and an ordinary crime (a murder). The Supreme Court has further confirmed that the provisions of the Criminal Code defining war crimes are not blank and are sufficiently clear to try suspects as all the main elements of those crimes (criminal acts, their object and time) are defined, while a final conclusion on incriminated crimes belongs to the exclusive competence of judiciary.[67]

In this historical and legal context, when national law had accepted the broader definition of genocide, quite late incorporated definitions of crimes against humanity and war crimes (that happened only in 1998) while the special law on responsibility for the genocide against the population of Lithuania had qualified the Soviet crimes as genocide, national courts often had little choice but to try for genocide those who committed these crimes.[68] However, now one case (*Vasiliauskas v. Lithuania*) is pending before the European Court of Human Rights where the applicant complains to be a victim of breach of Art. 7 of the Convention for the Protection of human Rights and Fundamental Freedoms (*nullum crimen sine lege* principle) questioning the compatibility of such national jurisprudence with the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[69]

To sum it up, as it is evident at least from Lithuanian example, persecution of individual perpetrators of the crimes committed by the Soviet occupation regime, is unlikely to bring impressive results and be effective, mostly due to a long time lapsed since the commission of the crimes in question. Therefore the emphasis could be made on the need of general

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67 The 19 March 2002 Judgment of the Supreme Court of Lithuania in the case No. 2K-S-2.2.3 of *Baranauskas*.

68 E.g. in its 22 February 2005 Judgment in the case No. 2K-158/2005 of *Žukaitienė* and *Vasiliauskas* the Supreme Court of Lithuania rejected arguments that the definition of genocide should be understood in the narrower sense according to the 1948 Convention on Genocide. The Court stated that accession of Lithuania to the Convention has not deprived the State of its right to interpret the Convention and to define what acts had to be treated as criminal and falling within the concept of genocide; the Court also reminded that current definition of genocide under Art. 99 of the Criminal Code includes acts against social and political groups since it is implementing evaluation of the crimes of the Soviet occupation regime provided already in 1992 by the Law on Responsibility for the Genocide Perpetrated against the Population of Lithuania.

69 According to the data provided by the Agent of the Government of the Republic of Lithuania in the European Court of Human Rights Ms. Elvyra Baltutytė, the applicant claims to have been convicted for acts not punishable neither under national law of that time nor under international law, as the Lithuanian laws defining genocide are allegedly too broad and therefore not compatible with the 1948 Convention on Genocide to the extent they cover social and political groups.

condemnation of the communist crimes, persecution of those who are attempting to condone, justify, deny or grossly trivialise those crimes. To my mind these are the closest ways to achieve minimal moral satisfaction for the victims of these crimes as well as to ensure appropriate level of protection of their dignity. For this purpose first of all we could try to use the EU policies and legislation.

3.2 EU legislation and the need for equal treatment of Nazi and Soviet crimes

So far, the only binding legal instrument related to the crimes committed by totalitarian regimes is the EU Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law[70] (hereinafter – the Framework Decision). It seeks to approximate criminal legislation in the field of combating racism and xenophobia. *Inter alia* it imposes the obligation on Member States to establish criminal responsibility for public condoning, denial and gross trivialisation of crimes of genocide, crimes against humanity and war crimes, including crimes defined in Article 6 of the Charter of the Nuremberg International Military Tribunal, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin (para. 1(d) of Article 1 of the Framework Decision). Thus one can state that by the Framework Decision all crimes of genocide, crimes against humanity and war crimes committed by the Nazi regime before and during the World War II have been condemned at the European level as all the EU countries are committed not to tolerate public condoning, denial and gross trivialisation of those crimes and equally protect dignity of their victims. However, the Framework Decision does not cover crimes committed by the Soviet totalitarian regime that had brought no less harm and sufferings to a large part of Europe.

That has been acknowledged in the Statement of the EU Member States adopted together with the Framework Decision. The EU Council declared that the Framework Decision was limited to crimes committed on the grounds of race, colour, religion, descent or national or ethnic origin, i.e. it did not cover crimes committed by totalitarian regimes on other grounds, including political convictions and social status. However, the Council found it necessary to deplore all these crimes and instructed the Commission to examine whether an additional instrument is needed to cover the crimes of genocide, crimes against humanity and war crimes committed by totalitarian regimes and directed against persons defined by reference to criteria other than race, colour, religion, descent and national or ethnic origin.

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70 OJ L 328, 6.12.2008, p. 55–58.

I would like to provide several arguments why *there is such a need to have the legal instrument covering all the crimes committed by totalitarian regimes, including the communist regimes. The first argument* is the need for the same moral and legal assessment and condemnation of all the crimes of genocide, crimes against humanity and war crimes notwithstanding which regime is responsible for these crimes, who are their perpetrators and what kind of ideology stands behind them. If the criminal acts committed by different totalitarian regimes are qualified in the same way under international law, obviously they deserve the same condemnation. I can recall that in this regard the Parliamentary Assembly of the Council of Europe has already stressed the need of moral assessment and condemnation of the crimes committed by communist totalitarian regimes and called for the clear position of the international community on the tragic past.

The second argument is the need for prevention of genocide, crimes against humanity and war crimes. Among other measures persecution of those who are trying to deny or justify these crimes ensures their condemnation and prevention. Meanwhile the Framework Decision has created a paradoxical situation when crimes committed by the Nazi regime seem to be more condemned than the same crimes committed by the Soviet regime. Therefore it is essential to apply the same legal standards for denial and justification of the crimes committed by the communist totalitarian regimes. Otherwise those who are glorifying these regimes and their crimes may be given a wrong signal regarding their activities.[71]

The third argument is already mentioned universality of the Nuremberg principles, as recognized by the European Court of Human Rights. That implies *inter alia* that the same legal standards have to be applied in dealing with the Nazi and the Soviet crimes. Consequently, public condoning, denial and gross trivialisation of the latter crimes should not be tolerated as well.

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71 For instance, today we are facing increasing attempts from some neighbouring countries to glorify the Soviet past, to justify and deny the Soviet aggression against the Baltic States as well as their subsequent occupation, to deny crimes of genocide, crimes against humanity and war crimes committed by the Soviet Union. I can provide one striking example showing how similar are these attempts to the arguments of the Nazi criminals presented during the Nuremberg Tribunal proceedings to justify aggressions against the foreign States. Nowadays Russia is trying to justify and deny the Soviet aggression against the Baltic States on the ground of their alleged consent with military invasion and subsequent annexation. Meanwhile the Nazi criminals tried to justify aggression against and annexation of Austria, Czechoslovakia and many other countries by their alleged consent or even desire to unite with Germany. However, the Nuremberg Tribunal considered this kind of arguments (in particular, those justifying the Anschluss of Austria) to be "really immaterial for the facts plainly prove that the methods employed to achieve the object were those of an aggressor. The ultimate factor was the armed might of Germany ready to be used if any resistance was encountered". Apparently the same can be said about Russian arguments justifying and denying aggression against the Baltic States.

The fourth argument is the need to protect dignity of the victims of the gravest international crimes. Applying on *mutatis mutandis* basis the reasoning of the Hungarian Constitutional Court (the May 9, 2000 Decision on constitutionality of prohibition of the Nazi and the Soviet symbols) we can also underline the need to protect the dignity of communities suffered from repressions of communist totalitarian regimes. In line with this reasoning both public use of totalitarian symbols and public justification or denial of totalitarian crimes may be regarded as offensive to dignity of members of any group suffered from repressions. Meanwhile the Framework Decision might lead to deplorable discrimination between victims of different totalitarian regimes. This situation would not be in line with the already mentioned Resolution No. 1481 (2006) of Parliamentary Assembly of the Council of Europe, which states *inter alia* that "those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings". Any kind of discrimination between the victims of different totalitarian regimes is unacceptable in a democratic society; it is not compatible with the European values either.

Finally, what kind of additional instrument is needed to fix the situation. I think the best way here is to amend the current Framework Decision which purpose is to combat racism and xenophobia. We can try to reinterpret a concept of xenophobia[72] so as it could denominate any hatred or persecution of different people. Thus the concept of xenophobia may include not only crimes against persons defined by reference to race, colour, religion, descent or national or ethnic origin, but also the same crimes committed on the grounds of different political convictions or social status. To support this kind of reasoning I can recall that some international documents (e.g. the 2001 Durban Declaration and Programme of Action) have already broadened traditional concept of xenophobia by adding related intolerance on such grounds as political or other convictions and social status. *The basis for such reinterpretation could be the 'double legacy of dictatorship' borne a large part of the European Union, i.e. the specific historical experience of the Central European countries, as acknowledged by the European Parliament in its 2 April 2009 Resolution on European Conscience and Totalitarianism (as well as recognition in that Resolution of Nazism, Stalinism and fascist and Communist regimes as a common European legacy).*

Let me conclude that as broad as possible condemnation of the crimes committed by the communist regimes would promote the idea of international justice that has to be fundamental for international law. This would also help the victims of these crimes

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72 The word "xenophobia" consists of two Greek words, i.e. xenos that means "alien" and phobos that means "fear", therefore the original meaning of xenophobia is a fear, hostility and hatred of anything alien.

and their relatives to achieve at least moral satisfaction as well as ensure that similar crimes of totalitarian regimes would never happen again.

Thank you for your attention paid.

Annexe 1.
European Parliament Resolution of 2 April 2009
on European Conscience and Totalitarianism

The European Parliament,

– having regard to the United Nations Universal Declaration of Human Rights,
– having regard to United Nations General Assembly Resolution 260(III)A of 9 December 1948 on genocide,
– having regard to Articles 6 and 7 of the Treaty on European Union,
– having regard to the Charter of Fundamental Rights of the European Union,
– having regard to Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law,
– having regard to Resolution 1481 of the Parliamentary Assembly of the Council of Europe of 25 January 2006 on the need for international condemnation of the crimes of totalitarian Communist regimes,
– having regard to its declaration of 23 September 2008 on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism,
– having regard to its many previous resolutions on democracy and respect for fundamental rights and freedoms, including that of 12 May 2005 on the 60th anniversary of the end of the Second World War in Europe on 8 May 1945, that of 23 October 2008 on the commemoration of the Holodomor, and that of 15 January 2009 on Srebrenica,
– having regard to the Truth and Justice Commissions established in various parts of the world, which have helped those who have lived under numerous former authoritarian and totalitarian regimes to overcome their differences and achieve reconciliation,
– having regard to the statements made by its President and the political groups on 4 July 2006, 70 years after General Franco's coup d'état in Spain,
– having regard to Rule 103(4) of its Rules of Procedure,

A. whereas historians agree that fully objective interpretations of historical facts are not possible and objective historical narratives do not exist; whereas, nevertheless, professional historians use scientific tools to study the past, and try to be as impartial as possible,

B. whereas no political body or political party has a monopoly on interpreting history, and such bodies and parties cannot claim to be objective,
C. whereas official political interpretations of historical facts should not be imposed by means of majority decisions of parliaments; whereas a parliament cannot legislate on the past,
D. whereas a core objective of the European integration process is to ensure respect for fundamental rights and the rule of law in the future, and whereas appropriate mechanisms for achieving this goal have been provided for in Articles 6 and 7 of the Treaty on European Union,
E. whereas misinterpretations of history can fuel exclusivist policies and thereby incite hatred and racism,
F. whereas the memories of Europe's tragic past must be kept alive in order to honour the victims, condemn the perpetrators and lay the foundations for reconciliation based on truth and remembrance,
G. whereas millions of victims were deported, imprisoned, tortured and murdered by totalitarian and authoritarian regimes during the 20th century in Europe; whereas the uniqueness of the Holocaust must nevertheless be acknowledged,
H. whereas the dominant historical experience of Western Europe was Nazism, and whereas Central and Eastern European countries have experienced both communism and Nazism; whereas understanding has to be promoted in relation to the double legacy of dictatorship borne by these countries,
I. whereas from the outset European integration has been a response to the suffering inflicted by two world wars and the Nazi tyranny that led to the Holocaust and to the expansion of totalitarian and undemocratic communist regimes in Central and Eastern Europe, as well as a way of overcoming deep divisions and hostility in Europe through cooperation and integration and of ending war and securing democracy in Europe,
J. whereas the process of European integration has been successful and has now led to a European Union that encompasses the countries of Central and Eastern Europe which lived under Communist regimes from the end of World War II until the early 1990s, and whereas the earlier accessions of Greece, Spain and Portugal, which suffered under long-lasting fascist regimes, helped secure democracy in the south of Europe,
K. whereas Europe will not be united unless it is able to form a common view of its history, recognises Nazism, Stalinism and fascist and communist regimes as a common legacy and brings about an honest and thorough debate on their crimes in the past century,
L. whereas in 2009 a reunited Europe will celebrate the 20th anniversary of the collapse of the communist dictatorships in Central and Eastern Europe and the

fall of the Berlin Wall, which should provide both an opportunity to enhance awareness of the past and recognise the role of democratic citizens initiatives, and an incentive to strengthen feelings of togetherness and cohesion,

M. whereas it is also important to remember those who actively opposed totalitarian rule and who should take their place in the consciousness of Europeans as the heroes of the totalitarian age because of their dedication, faithfulness to ideals, honour and courage,

N. whereas from the perspective of the victims it is immaterial which regime deprived them of their liberty or tortured or murdered them for whatever reason.

1. Expresses respect for all victims of totalitarian and undemocratic regimes in Europe and pays tribute to those who fought against tyranny and oppression;
2. Renews its commitment to a peaceful and prosperous Europe founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights;
3. Underlines the importance of keeping the memories of the past alive, because there can be no reconciliation without truth and remembrance; reconfirms its united stand against all totalitarian rule from whatever ideological background;
4. Recalls that the most recent crimes against humanity and acts of genocide in Europe were still taking place in July 1995 and that constant vigilance is needed to fight undemocratic, xenophobic, authoritarian and totalitarian ideas and tendencies;
5. Underlines that, in order to strengthen European awareness of crimes committed by totalitarian and undemocratic regimes, documentation of, and accounts testifying to, Europe's troubled past must be supported, as there can be no reconciliation without remembrance;
6. Regrets that, 20 years after the collapse of the communist dictatorships in Central and Eastern Europe, access to documents that are of personal relevance or needed for scientific research is still unduly restricted in some Member States; calls for a genuine effort in all Member States towards opening up archives, including those of the former internal security services, secret police and intelligence agencies, although steps must be taken to ensure that this process is not abused for political purposes;
7. Condemns strongly and unequivocally all crimes against humanity and the massive human rights violations committed by all totalitarian and authoritarian regimes; extends to the victims of these crimes and their family members its sympathy, understanding and recognition of their suffering;
8. Declares that European integration as a model of peace and reconciliation represents a free choice by the peoples of Europe to commit to a shared future,

and that the European Union has a particular responsibility to promote and safeguard democracy, respect for human rights and the rule of law, both inside and outside the European Union;

9. Calls on the Commission and the Member States to make further efforts to strengthen the teaching of European history and to underline the historic achievement of European integration and the stark contrast between the tragic past and the peaceful and democratic social order in today's European Union;
10. Believes that appropriate preservation of historical memory, a comprehensive reassessment of European history and Europe-wide recognition of all historical aspects of modern Europe will strengthen European integration;
11. Calls in this connection on the Council and the Commission to support and defend the activities of non-governmental organisations, such as Memorial in the Russian Federation, that are actively engaged in researching and collecting documents related to the crimes committed during the Stalinist period;
12. Reiterates its consistent support for strengthened international justice;
13. Calls for the establishment of a Platform of European Memory and Conscience to provide support for networking and cooperation among national research institutes specialising in the subject of totalitarian history, and for the creation of a pan-European documentation centre/memorial for the victims of all totalitarian regimes;
14. Calls for a strengthening of the existing relevant financial instruments with a view to providing support for professional historical research on the issues outlined above;
15. Calls for the proclamation of 23 August as a Europe-wide Day of Remembrance for the victims of all totalitarian and authoritarian regimes, to be commemorated with dignity and impartiality;
16. Is convinced that the ultimate goal of disclosure and assessment of the crimes committed by the Communist totalitarian regimes is reconciliation, which can be achieved by admitting responsibility, asking for forgiveness and fostering moral renewal;
17. Instructs its president to forward this resolution to the Council, the Commission, the parliaments of the Member States, the governments and parliaments of the candidate countries, the governments and parliaments of the countries associated with the European Union, and the governments and parliaments of the members of the Council of Europe.

Annexe 2.
COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY RESOLUTION 1096 (1996) on Measures to Dismantle the Heritage of Former Communist Totalitarian Systems

1. The heritage of former communist totalitarian systems is not an easy one to handle. On an institutional level this heritage includes (over)centralisation, the militarisation of civilian institutions, bureaucratisation, monopolisation, and over-regulation; on the level of society, it reaches from collectivism and conformism to blind obedience and other totalitarian thought patterns. To re-establish a civilised, liberal state under the rule of law on this basis is difficult – this is why the old structures and thought patterns have to be dismantled and overcome.
2. The goals of this transition process are clear: to create pluralist democracies, based on the rule of law and respect for human rights and diversity. The principles of subsidiarity, freedom of choice, equality of chances, economic pluralism and transparency of the decision-making process all have a role to play in this process. The separation of powers, freedom of the media, protection of private property and the development of a civil society are some of the means which could be used to attain these goals, as are decentralization, demilitarization, demonopolization and debureaucratization.
3. The dangers of a failed transition process are manifold. At best, oligarchy will reign instead of democracy, corruption instead of the rule of law, and organised crime instead of human rights. At worst, the result could be the "velvet restoration" of a totalitarian regime, if not a violent overthrow of the fledgling democracy. In that worst case, the new undemocratic regime of a bigger country can present also an international danger for its weaker neighbours. The key to peaceful coexistence and a successful transition process lies in striking the delicate balance of providing justice without seeking revenge.
4. Thus a democratic state based on the rule of law must, in dismantling the heritage of former communist totalitarian systems, apply the procedural means of such a state. It cannot apply any other means, since it would then be no better than the totalitarian regime which is to be dismantled. A democratic state based on the rule of law has sufficient means at its disposal to ensure that the cause of justice is served and the guilty are punished – it cannot, and should not, however, cater to the desire for revenge instead of justice. It must instead respect human rights and fundamental freedoms, such as the right to due process and the right to be heard, and it must apply them even to those people who, when they were in power, did not apply them themselves. A state based on the rule of law can also defend itself against a resurgence of the communist totalitarian

threat, since it has ample means at its disposal which do not conflict with human rights and the rule of law, and are based upon the use of both criminal justice and administrative measures.

5. The Assembly recommends that member states dismantle the heritage of former communist totalitarian regimes by restructuring the old legal and institutional systems, a process which should be based on the principle(s) of:
   i. demilitarisation, to ensure that the militarisation of essentially civilian institutions, such as the existence of military prison administration or troops of the Ministry of the Interior, which is typical of communist totalitarian systems, comes to an end;
   ii. decentralisation, especially at local and regional levels and within state institutions;
   iii. demonopolisation and privatisation, which are central to the construction of some kind of a market economy and of a pluralist society;
   iv. debureaucratisation, which should reduce communist totalitarian over-regulation and transfer the power from the bureaucrats back to the citizens.

6 This process must include a transformation of mentalities (a transformation of hearts and minds) whose main goal should be to eliminate the fear of responsibility, and to eliminate as well the disrespect for diversity, extreme nationalism, intolerance, racism and xenophobia, which are part of the heritage of the old regimes. All of these should be replaced by democratic values such as tolerance, respect for diversity, subsidiarity and accountability for one's actions.

7. The Assembly also recommends that criminal acts committed by individuals during the communist totalitarian regime be prosecuted and punished under the standard criminal code. If the criminal code provides for a statute of limitations for some crimes, this can be extended, since it is only a procedural, not a substantive matter. Passing and applying retroactive criminal laws is, however, not permitted. On the other hand, the trial and punishment of any person for any act or omission which at the time when it was committed did not constitute a criminal offence according to national law, but which was considered criminal according to the general principles of law recognised by civilised nations, is permitted. Moreover, where a person clearly acted in violation of human rights, the claim of having acted under orders excludes neither illegality nor individual guilt.

8. The Assembly recommends that the prosecution of individual crimes go hand-in-hand with the rehabilitation of people convicted of "crimes" which in a civilised society do not constitute criminal acts, and of those who were unjustly sentenced. Material compensation should also be awarded to these victims of totalitarian justice, and should not be (much) lower than the compensation accorded to those unjustly sentenced for crimes under the standard penal code in force.

9. The Assembly welcomes the opening of secret service files for public examination in some former communist totalitarian countries. It advises all countries concerned to enable the persons affected to examine, upon their request, the files kept on them by the former secret services.
10. Furthermore, the Assembly advises that property, including that of the churches, which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners in integrum, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Claims and conflicts relating to individual cases of property restitution should be decided by the courts.
11. Concerning the treatment of persons who did not commit any crimes that can be prosecuted in accordance with paragraph 7, but who nevertheless held high positions in the former totalitarian communist regimes and supported them, the Assembly notes that some states have found it necessary to introduce administrative measures, such as lustration or decommunisation laws. The aim of these measures is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles, as they have shown no commitment to or belief in them in the past and have no interest or motivation to make the transition to them now.
12. The Assembly stresses that, in general, these measures can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case – this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right of defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed. Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty – this is the task of prosecutors using criminal law – but to protect the newly emerged democracy.
13. The Assembly thus suggests that it be ensured that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law, and focus on threats to fundamental human rights and the democratisation process. Please see the "Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law" as a reference text.

14. Furthermore, the Assembly recommends that employees discharged from their position on the basis of lustration laws should not in principle lose their previously accrued financial rights. In exceptional cases, where the ruling elite of the former regime awarded itself pension rights higher than those of the ordinary population, these should be reduced to the ordinary level.
15. The Assembly recommends that the authorities of the countries concerned verify that their laws, regulations and procedures comply with the principles contained in this resolution, and revise them, if necessary. This would help to avoid complaints on these procedures lodged with the control mechanisms of the Council of Europe under the European Convention on Human Rights, the Committee of Ministers' monitoring procedure, or the Assembly's monitoring procedure under Order No. 508 (1995) on the honouring of obligations and commitments by member states.
16. Finally, the best guarantee for the dismantlement of former communist totalitarian systems are the profound political, legal and economic reforms in the respective countries, leading to the formation of an authentic democratic mentality and political culture. The Assembly calls, therefore, on all consolidated democracies to step up their aid and assistance to emerging democracies in Europe, in particular as far as the support for the development of a civil society is concerned.

27 June 1996

Annex 3.
COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY RESOLUTION 1481 (2006) Need for International Condemnation of Crimes of Totalitarian Communist Regimes

1. The Parliamentary Assembly refers to its Resolution 1096 (1996) on measures to dismantle the heritage of the former communist totalitarian systems.
2. The totalitarian communist regimes which ruled in central and eastern Europe in the last century, and which are still in power in several countries in the world, have been, without exception, characterised by massive violations of human rights. The violations have differed depending on the culture, country and the historical period and have included individual and collective assassinations and executions, death in concentration camps, starvation, deportations, torture, slave labour and other forms of mass physical terror, persecution on ethnic or religious grounds, violation of freedom of conscience, thought and expression, of freedom of the press, and also lack of political pluralism.

3. The crimes were justified in the name of the class struggle theory and the principle of dictatorship of the proletariat. The interpretation of both principles legitimised the "elimination" of people who were considered harmful to the construction of a new society and, as such, enemies of the totalitarian communist regimes. A vast number of victims in every country concerned were its own nationals. It was the case particularly of the peoples of the former USSR who by far outnumbered other peoples in terms of the number of victims.
4. The Assembly recognises that, in spite of the crimes of totalitarian communist regimes, some European communist parties have made contributions to achieving democracy.
5. The fall of totalitarian communist regimes in central and Eastern Europe has not been followed in all cases by an international investigation of the crimes committed by them. Moreover, the authors of these crimes have not been brought to trial by the international community, as was the case with the horrible crimes committed by National Socialism (Nazism).
6. Consequently, public awareness of crimes committed by totalitarian communist regimes is very poor. Communist parties are legal and active in some countries, even if in some cases they have not distanced themselves from the crimes committed by totalitarian communist regimes in the past.
7. The Assembly is convinced that the awareness of history is one of the preconditions for avoiding similar crimes in the future. Furthermore, moral assessment and condemnation of crimes committed play an important role in the education of young generations. The clear position of the international community on the past may be a reference for their future actions.
8. Moreover, the Assembly believes that those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings.
9. Totalitarian communist regimes are still active in some countries of the world and crimes continue to be committed. National interest perceptions should not prevent countries from adequate criticism of current totalitarian communist regimes. The Assembly strongly condemns all those violations of human rights.
10. The debates and condemnations which have taken place so far at national level in some Council of Europe member states cannot give dispensation to the international community from taking a clear position on the crimes committed by the totalitarian communist regimes. It has a moral obligation to do so without any further delay.
11. The Council of Europe is well placed for such a debate at international level. All former European communist countries, with the exception of Belarus, are

now members, and the protection of human rights and the rule of law are basic values for which it stands.

12. Therefore, the Assembly strongly condemns the massive human rights violations committed by the totalitarian communist regimes and expresses sympathy, understanding and recognition to the victims of these crimes.
13. Furthermore, it calls on all communist or post-communist parties in its member states which have not yet done so to reassess the history of communism and their own past, clearly distance themselves from the crimes committed by totalitarian communist regimes and condemn them without any ambiguity.
14. The Assembly believes that this clear position of the international community will pave the way to further reconciliation. Furthermore, it will hopefully encourage historians throughout the world to continue their research aimed at the determination and objective verification of what took place.

5 January 2006

Annexe 4.
OSCE Parliamentary Assembly resolution on divided Europe reunited: Promoting human rights and Civil Liberties in the OSCE region in the 21st century

1. Recalling the United Nations Universal Declaration of Human Rights, the Helsinki Final Act and the European Charter of Fundamental Rights,
2. Taking into account the developments that have taken place in the OSCE area in the 20 years since the fall of the Berlin Wall and the Iron Curtain,
3. Noting that in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about genocide, violations of human rights and freedoms, war crimes and crimes against humanity,
4. Acknowledging the uniqueness of the Holocaust, reminding participating States of its impact and the continued acts of anti-Semitism occurring throughout the 56-nation OSCE region, and strongly encouraging the vigorous implementation of the resolutions on anti-Semitism adopted unanimously by the OSCE Parliamentary Assembly since the 2002 Annual Session in Berlin,
5. Reminding the OSCE participating States of their commitment "to clearly and unequivocally condemn totalitarianism" (1990 Copenhagen Document),
6. Recalling that awareness of history helps to prevent the recurrence of similar crimes in the future, and that an honest and thorough debate on history will facilitate reconciliation based on truth and remembrance,
7. Aware that the transition from communist dictatorships to democracy cannot

take place in one day, and that it also has to take into account the historical and cultural backgrounds of the countries concerned,

8. Emphasising, however, that it is the obligation of governments and all sectors of society to strive tirelessly towards achieving a truly democratic system that fully respects human rights, without making differences in political culture and tradition a pretext for the non-implementation of commitments,
9. Deploring that in many countries, including some with long-standing democratic traditions, civil liberties are in renewed danger, often because of measures taken to counter so-called "new threats",
10. Recalling the initiative of the European Parliament to proclaim 23 August, when the Ribbentrop–Molotov Pact was signed 70 years ago, as a Europe-wide Day of Remembrance for Victims of Stalinism and Nazism, in order to preserve the memory of the victims of mass deportations and exterminations,

The OSCE Parliamentary Assembly:

11. Reconfirms its united stand against all totalitarian rule from whatever ideological background;
12. Calls on participating States to honour and implement all commitments undertaken in good faith;
13. Urges the participating States:
    a. to continue research into and raise public awareness of the totalitarian legacy;
    b. to develop and improve educational tools, programmes and activities, most notably for younger generations, on totalitarian history, human dignity, human rights and fundamental freedoms, pluralism, democracy and tolerance;
    c. to promote and support activities of NGOs which are engaged in areas of research and raising public awareness about crimes committed by totalitarian regimes;
14. Requests governments and parliaments of participating States to ensure that any governmental structures and patterns of behaviour that resist full democratisation or perpetuate, or embellish, or seek a return to, or extend into the future, totalitarian rule are fully dismantled;
15. Further requests governments and parliaments of participating States to fully dismantle all structures and patterns of behaviour that have their roots in abusing human rights;
16. Reiterates its call upon all participating States to open their historical and political archives;
17. Expresses deep concern at the glorification of the totalitarian regimes, including the holding of public demonstrations glorifying the Nazi or Stalinist past, as well as the possible spread and strengthening of various extremist movements and groups, including neo-Nazis and skinheads;

18. Calls upon participating States to pursue policies against xenophobia and aggressive nationalism and take more effective measures to combat these phenomena;
19. Asks for a greater respect in all participating States for human rights and civil liberties, even in difficult times of terrorist threats, economic crisis, ecological disasters and mass migration.

3 July 2009, Vilnius

Session II.
Crimes committed by communist regimes in the former Soviet Union, the new EU member states, Germany and the Balkans – studies of individual states I

Nikita V. Petrov, Russia
Toomas Hiio, Estonia
Valters Nollendorfs, Latvia
Emanuelis Zingeris, Lithuania
Ihor Yukhnovskyi, Ukraine[1]
Volodymyr Viatrovych, Ukraine[2]

Host: Alexandr Vondra, senator, Parliament of the Czech Republic, former dissident, former Deputy prime minister for European affairs, Czech Republic

▸▸▸

1,2 Could not attend the conference in person.

NIKITA VASILYEVICH PETROV ▸ Deputy chairman of the Council at the "Memorial" research, information-sharing and educational centre

Nikita V. Petrov was awarded his doctorate in 2008 from the University of Amsterdam's Faculty of Humanities. In 1990, he gained access to state archives in order to work on Soviet State Security and became deputy chairman of the Board of Memorial's Scientific research centre. In 1991, he was named expert to the Commission of the Supreme Soviet of the Russian Federation on the archives of the Communist Party of the Soviet Union and the KGB. In 1992, he was named expert to the Constitutional Court on the "CPSU Affair". Petrov publishes and lectures on the history of Soviet terror and trials of German war captives in the USSR.

TOOMAS HIIO ▸ Member of the board, Institute of Historical Memory, and research director, Estonian War Museum

Toomas Hiio studied history at the University of Tartu and at the University of Helsinki, Finland. In 1993–1994, he was deputy head of the University of Tartu and the Estonian Historical Archives' research project "Album Academicum Universitatis Tartuensis, 1918–1944." Hiio was general archivist of the University of Tartu and a historian at the chancery of the University of Tartu. He served as advisor to Lennart Meri, president of the Republic of Estonia in 1998–2001, and former president of Estonia in 2001–2003. He additionally acted as executive secretary of the Estonian International Commission for the Investigation of Crimes against Humanity (1999–2008).

VALTERS NOLLENDORFS ▸ Director of external affairs, Museum of the Occupation of Latvia 1940-1991

Valters Nollendorfs, Ph.D., Professor Emeritus of German at the University of Wisconsin – Madison, is currently director of external affairs of the Museum of the Occupation of Latvia in Riga. He is a member of the president's commission of historians of Latvia, a foreign member of the Latvian Academy of Sciences and a senior advisor to the Association for the Advancement of Baltic Studies. He has published extensively on German and Latvian literature, German and Baltic studies, academic reform and Latvian history.

EMANUELIS ZINGERIS ► Chairman, International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania

Emanuelis Zingeris is a member of the Seimas, the parliament of the Republic of Lithuania. He was an active member of the "Sajudis" movement for Lithuanian independence, being a member of the state committee negotiating relations between Lithuania and the Soviet Union (1990–1991) and a signatory to the Act of Independence. In 1992, 1996 and 2004, he was elected to the Seimas. He is also chairman of the Seimas Group on Inter-Parliamentary Relations with Israel and of the Seimas Group on Inter-Parliamentary Relations with the USA. Mr Zingeris is a recipient of several awards and distinctions.

IHOR YUKHNOVSKYI ► Director, Institute of National Remembrance

Born in 1925, Ihor Yukhnovskyi participated in World War II. In 1951, he became the head of the Theoretical Physics Department at Lviv University and from then on continued to hold leading positions in the field of physics at the Academy of Sciences. In 1990, he was elected a member of Parliament of the Ukrainian SSR, becoming the leader of the first opposition party. He was one of the authors of the Act of Declaration of Independence of Ukraine. Ihor Yukhnovskyi is member of the Presidium of the Academy of Sciences of Ukraine. In 2005, he was awarded the title Hero of Ukraine. In 2006, he was appointed director of the Institute of National Remembrance.

VOLODYMYR VIATROVYCH ► Director, Branch State Archive of the Security Service of Ukraine

Dr Viatrovych studied at the Faculty of History at the Ivan Franko National University of Lviv and holds a Ph.D. in history. In 2002–2008, he was the director of the research centre of the Liberation movement, *www.cdvr.org*. He was an academic consultant in the international project "Ukraine Remembers, the World Acknowledges" on the recognition of Holodomor 1932–1933 as genocide. His research interests are the Ukrainian liberation movement in 1920–1950 and the policy of national memory. He is author of a number of publications.

Crimes of the Soviet regime: Legal assessment and punishment of the guilty ones

Political changes that took place in the USSR in August 1991, when the power of the CPSU collapsed, opened access to archives that had been completely secret before. They also made it possible to collect and analyze evidence of the criminal nature of the soviet system. In the first place, these are documents about the "Great Terror" of 1937–1938 and documents that show how Stalin and the top Politburo figures organized mass killings of hundreds of thousands of people. These documents and statistics of repression had been kept secret from the public even during "perestroika" (1987–1991). Stalin's crimes seemed to be exposed in those years, and a special commission of Politburo studied the history of repression. To date, efforts of Society Memorial and International Foundation "Democracy" have resulted in the publication of many documents about the soviet terror and mass violation of human rights. For example, the "Democracy" Foundation established by Alexander Yakovlev published more than 50 volumes of documentary collections. Society Memorial released a CD "Stalin's Shooting Lists". It includes materials about how Stalin and his closest aides issued death sentences as they took up the role of the judiciary bodies. Another CD released by Memorial contains a database about repressions in the USSR. It includes more than 2.6 million names of the repressed. Thus, we now have the documentary basis for making a legal assessment of the soviet crimes. Important documents are published, such as regulations about repressions, implementation reports, and the total statistics of repressions.

But the communist past has never stood trial in my country. However, decrees issued by the Russian President Boris Yeltsin in August 1991 (about a ban on the CPSU and about archives of the CPSU and KGB) created the prerequisites for the Constitutional Court proceedings on the "CPSU case".

But this process was not targeted specifically at trying the crimes of the soviet regime. The Communist Party of RSFSR filed a lawsuit saying that Yeltsin's decree which stopped the activity of the CPSU and CPRF was unconstitutional, and representatives of the President filed a counter-lawsuit asking to rule the CPSU as an unconstitutional organization. These lawsuits were bound together, and the trial began in July 1992. Society Memorial had drawn up an expert opinion for the court and attached many documents as evidence of numerous crimes of the communist party that had been ruling in the USSR (from Lenin to Gorbachev) and crimes committed by Stalin himself. It proved that the Communist Party was not a nongovernmental organization but a special power mechanism. It grossly violated the constitutional norms in its work and acted as the substitute of executive,

legislative and judiciary branches. Extensive evidence was provided to support each of these arguments.

Regretfully, the Constitutional Court did not set the task of deciding whether the omnipower of the Communist Party had been criminal. Yet, the court decision which was pronounced on November 1992 confirmed Yeltsin's decree banning the Communist Party, and stated explicitly, "The country had for a long time been ruled by a regime of unlimited violence-based power of a small group of communist functionaries united as the Politburo of the CPSU Central Committee headed by the General Secretary of the CPSU Central Committee."

However, we still do not have a court decision about the criminal nature of the communist regime that had been ruling in the USSR. But the list of crimes committed over the years of the soviet regime since 1917 is impressive. It includes many cases and takes up many pages. This is why I will give just the most serious and relevant crimes of the communist regime as examples:

1. Organization of the so-called "Red Terror": a decree issued by the soviet government on 5 September 1918 introduced the practice of taking hostages and extrajudicial punishment. Concentration camps were organized for the "socially alien" groups and political opponents.
2. Mass-scale repressions against peasants: "de-kulakization", deportations, arrests and killings by decisions of OGPU troikas in 1930–1931.
3. Stalin and Politburo of AUCP(B) Central Committee organized massive confiscations of grain for the state granaries and for import; as a result, from 7 to 12 million peopled died of famine in 1932–1933.
4. Mass arrests and killings during the so-called "kulak" operation of NKVD: a series of Politburo decisions and NKVD Executive Order No. 00447 dated 30 July 1937 about killings in accordance with the pre-established quotas, with cases tried by NKVD troikas. July 1937 – November 1938 (767,397 people were arrested and 386,798 of them were shot).
5. Mass arrests and killings on the ground of ethnic origin during the so-called "ethnic operations" of NKVD (German, Polish, Kharbinian, Latvian and other operations). July 1937 – November 1938 (about 350,000 people were arrested and 250,000 of them were shot).
6. Mass arrests and killings of Mongolia's citizens by the soviet NKVD in 1937–1938 (about 25,000 people were arrested and about 20,000 of them were shot).
7. Repressions against families of people who had been sentenced for "betrayal of Motherland". The passage of laws and regulations in 1929, 1934 and 1937 about punishment of the soviet people who had left the USSR without permission and who had been sentenced for "betrayal of Motherland". Over 18,000 women were

arrested in 1937–1938 as "traitors of motherland family members", and 25,000 children were put in NKVD orphanages.

8. Killings and sentencing in accordance with the "shooting lists" when the measure of punishment was set not by the judiciary bodies but by Stalin himself and his closest aides in Politburo. In February 1937–October 1938 Stalin, Molotov, Voroshilov, Kaganovich, Zhdanov, Mikoyan and others sentenced 44,000 people included in 383 lists; 39,000 of them were sentenced to be shot.
9. Stalin permitted NKVD to use methods of physical pressure on the arrested, i.e. tortures. A telegram signed by Stalin on 10 February 1939 confirmed the "legality" of this practice that was accepted in 1937. In later years Stalin continued to give instructions about using tortures, e.g. during the "Doctors' Plot" of 1952–1953.
10. Signing of the "Non-Aggression Pact" with Germany and a secret protocol that delimited the spheres of interests of the USSR and the Third Reich. According to this secret protocol, the USSR began annexing the neighboring territories. As Hitler's ally, it crushed the sovereignty of Poland, launched a war with Finland, and occupied Lithuania, Latvia, Estonia and Bessarabia. As a result, the USSR was accused by the international community of pursuing an aggressive expansionist policy and expelled from the League of Nations. August 1939–summer of 1940.
11. Stalin and Politburo of AUCP(B) Central Committee authorized mass deportations of civilians on the ground of "class" (i.e. property) origin and ethnic origin:
    - Deportation of Polish citizens from West Ukraine and Byelorussia in 1939–1940.
    - Deportations from the Baltic republics and Moldavia in May and June 1941.
    - Deportation of ethnic Germans, Kalmyks, Chechens, Ingushes, Karachais, Crimean Tatars and other ethnic groups in 1941–1945.
    - Deportation of "kulaks" from the Baltic republics and Moldavia in 1949.
12. Mass killing of the Polish POW officers and civilians by a decision of Politburo of AUCP(B) Central Committee dated 5 March 1940 – the "Katyn case." NKVD shot 21,857 Polish officers and civilians in the spring of 1940.
13. Stalin authorized killings of prison inmates in the fall of 1941 without court trials – in Orel, Moscow and Kuibyshev prisons.
14. Acts of individual terror authorized by Stalin himself – secret political assassinations by the state security services in the USSR and abroad:
    - Murder of the USSR's ex-plenipotentiary in China Bovkun-Luganets and his wife in Georgia (1939);

- Murder of Trotsky in Mexico (1940);
- Murder of Polish engineer Samet in Ulianovsk (1946);
- Murder of People's Artist Solomon Mikhoels, director of the State Jewish Theatre in Minsk (1948), and many other similar assassinations.

15. On Stalin's instructions MGB officers organized show trials in Hungary, Bulgaria and Czechoslovakia in 1949–1952.

If we look at all these repressive campaigns in the context of the USSR Constitution that was in effect since 1936, their anti-constitutional and criminal nature becomes obvious. The Constitution (Article 127) declared that "citizens of the USSR are guaranteed inviolability of the person. No person may be placed under arrest except by decision of a court or with the sanction of a procurator." Article 128: "The inviolability of the homes of citizens and privacy of correspondence are protected by law." Article 125 guaranteed freedom of speech, freedom of the press, freedom of assembly, including the holding of mass meetings; and freedom of street processions and demonstrations. Several articles dealt with the organization of the state. Article 30 said, "The highest organ of state authority of the USSR is the Supreme Soviet of the USSR". Article 32 explicitly stated that "the legislative power of the USSR is exercised exclusively by the Supreme Soviet of the USSR" According to Article 102, "In the USSR justice is administered by the Supreme Court of the USSR, the Supreme Courts of the Union Republics, the Territorial and the Regional courts, the courts of the Autonomous Republics and the Autonomous Regions, the Area courts, the special courts of the USSR established by decision of the Supreme Soviet of the USSR, and the People's Courts." Article 111 said. "In all courts of the USSR cases are heard in public, unless otherwise provided for by law, and the accused is guaranteed the right to be defended by Counsel." As Article 112 pointed out, "Judges are independent and subject only to the law". Article 123 guaranteed "equality of citizens of the USSR, irrespective of their nationality or race" and warned that "any direct or indirect restriction of the rights" or "any establishment of direct or indirect privileges for citizens on account of their race or nationality is punishable by law". It is absolutely obvious that the Communist Party's omnipower violated the constitutional norms. The practice of establishing extrajudiciary bodies that acted on behalf of state security ("special council", "troikas" and others) opposed the Constitution, too. Deportations of the entire ethnic groups at Stalin's order also trampled the Constitution that guaranteed the equality of nations.

Furthermore, the policy of Stalinist terror runs contrary to the accepted international laws. The shooting of Polish POWs in 1940 is direct violation of the 1907 Hague Convention and is treated as a war crime. Post-war repressions on political grounds violate the Universal Declaration of Human Rights adopted on 10 December 1948.

Several of Stalin's criminal laws were invalidated after his death (for example, the law dated 1 December 1934 about simplified judicial procedures). The most odious heads

of state security bodies were punished (Lavrenty Beria, Vsevolod Merkulov, Viktor Abakumov and their closest aides). But the process of punishing Stalinist criminals was limited and inconsistent. According to my information, 59 top-level chekists were sentenced in 1953–1959 "for violation of law", and 26 of them were shot. Besides, 3 arrested chekists died during investigation, and several people were arrested but their cases were closed. Administrative punishments (such as deprivation of the rank of general, dismissal from the state security bodies) and expulsion from the communist party were the most common punishments for the "violators of law."

It can be said that those Stalin's crimes that went beyond the Marxist-Leninist doctrine were criticized and condemned in the 1950s under Khrushchev. But forced labor as a fundamental postulate of this doctrine was not condemned. Furthermore, crimes that ensued from the earlier prevailing practices continued: political assassinations abroad (they demonstrate the gangster methods of the soviet intelligence service); and persecution of all forms of disagreement with the soviet regime. Unconstitutional forms of punishment were used in some cases. For example, Academician Andrei Sakharov was subject to restriction of freedom and exiled to Gorky for an uncertain period in 1980. This was done in violation of law. The practice of coercing people of liberal professions to take up employment and persecuting them remained in force. The most vivid example is the decree issued by the Supreme Soviet of the RSFSR on 4 May 1961 entitled "On Strengthening the Struggle with Persons Avoiding Socially Useful Work and Leading an Anti-Social, Parasitic Way of Life." During its term, from 1961 until 1965, 70,000 people fell victims of this decree: they were deported from large cities and forced to work.

Responsibility of KGB officers for persecuting citizens on political grounds in the 1950–1980s should be considered. The practice of sentencing people under article 70 and 190 of the criminal code (for "anti-soviet propaganda") was gross violation of rule of law. It ran contrary to the soviet Constitution and international legislation (Universal Declaration of Human Rights). It was also contrary to the criminal code requirements (neither the "intent to undermine" the soviet regime nor the "calumnious" nature of the indictees' activity were proven).

Most of the abovementioned crimes committed by the soviet regime certainly fall in the category of crimes against humanity. According to the international laws, they are not subject to statutory limitations. I mean the UN Resolutions dated 28 July 1965 and 5 August 1966 about punishment of war criminals and people who committed crimes against humanity; the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity which was adopted on 26 November 1968 and became effective on 11 November 1970; and Resolution of the UN General Assembly dated 3 December 1973, "Principles of International Co-Operation in the Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity".

However, the position of Russia today is such that it does not admit the possibility of court prosecution of the former functionaries of the USSR [communist] party and state security who were guilty of mass violation of human rights or committed crimes against law in the soviet period. Moreover, efforts are being taken to dampen such trials in the former soviet republics that have regained their sovereignty. The Kremlin initiated several loud propaganda campaigns of protest when Baltic republics began proceedings against one or another soviet functionary who had been a perpetrator of mass repression in Stalin's era.

Conclusion: We need to make a legal assessment of the soviet past, hold a court trial of criminal cases and punish the guilty ones. It is important not only to pass a ruling about the criminal nature of the soviet system. It is also important that the principle of inevitability of punishment triumphs.

Nikita V. Petrov

About the crimes committed by the totalitarian regimes in Estonia

The independence of the Republic of Estonia was proclaimed exactly today 92 years ago. Today is Independence Day in Estonia. Estonia lost its independence in 1940 according to the secret protocol of the non-aggression agreement between the Communist Soviet Union and Nazi Germany and did not regain it after the end of the WWII. The occupation and annexation of the Baltic States was never recognised by the United States of America and other Western countries. Estonian diplomatic representations were active in the United States and the United Kingdom for the duration of the Cold War. Estonian passports issued by these representations were accepted as valid travel documents in many Western countries.

The restoration of the Republic of Estonia was accepted by most countries in 1991 and 1992. Estonian citizens have accepted the legal continuity of Estonian statehood in respect to citizenship policy as well as property issues. So you can understand, ladies and gentlemen, why the celebration of Independence Day is more important for Estonians than the celebration of the anniversary of the collapse of the Soviet Union in August 1991, although it actually finalised the restoration of Estonian independence.

This introduction is necessary only due to the sentence in the description of our panel in the conference programme: "Crimes committed by communist governments against their own citizens in the 20th century". In the case of the Baltic States, the situation was more complicated, but otherwise also easier. The communist government in Estonia was not our own government. The Baltic States were governed from Moscow. We did not elect our local rulers. They were selected for us.

During the long period of German and Soviet occupations, there were a number of Estonian citizens who participated in crimes against humanity against their fellow countrymen. Nobody can deny it. Another aspect here is connected to the circumstance that the two different totalitarian empires occupied Estonia. People who collaborated with the Soviet authorities in 1940–1941 were punished by the German authorities during 1941–1944, and people who collaborated with the Germans were punished by the Soviet authorities after the Soviet Union had taken over Estonia once again in the autumn of 1944. In terms of the legal definitions of crimes against humanity it seems simple – people who committed crimes against humanity were guilty. Yet neither the Soviet Union nor Nazi Germany were regimes based on the rule of law. People were punished for their communist activities or pro-Soviet attitudes by the German authorities, and for collaboration with the German authorities by the Soviets. Of course, an additional reason for punishment during

the Soviet occupation was social belonging. People and their family members who were treated as bourgeois nationalists or capitalists or wealthy farmers, not to mention former civil servants, military officers and policemen of the Republic of Estonia, belonged by definition to the category subject to punishment.

Only a small part of both the German and the Soviet political repressions intersected with real justice, but this intersection existed. A number of the people who were punished during the German occupation did actually participate in crimes against humanity committed according to the orders of the Soviet communist authorities during the first year of Soviet occupation in 1940–1941. Similarly, a number of people who participated in Nazi crimes against humanity were among those who were sentenced by the Soviet authorities after 1944. One of the subjects of our historical research has been to establish the real perpetrators regardless of whether or not they have already been punished by one or another occupying power. One of the tasks of the Estonian Security Police has been to find perpetrators who were still alive and bring them to justice. The only common ground here could be the definitions of international law concerning crimes against humanity, war crimes and genocide. Historians use them as a framework and courts use them because these articles are part of Estonian legislation.

Usually human losses are used in measuring the crimes committed by totalitarian regimes. Politicians often argue using different figures concerning victims. Often these figures are uncorroborated. Why this is so could be the topic of a special conference. Ladies and gentlemen, the purpose of this table [see appendix] is to present the state of research concerning Estonian human losses and suffering caused by the political repressions but also the aggressive politics of the totalitarian regimes. We should, however, bear in mind that human losses and suffering are only part of the negative consequences of totalitarian rule. Economic and social backwardness, the moral deterioration of society, and so on also belong to this category.

Speaking about communist crimes in general, the question of who was responsible arises. (I would like to be more precise here and use the term "crimes committed by communist regimes" because there are no specific communist crimes defined outside of crimes against humanity, war crimes and genocide.)

The legal position is clear: the perpetrators and their superiors who gave the orders are guilty. Many criminal cases in this respect have already been considered in national courts as well as in the European Court of Human Rights. Yet how should at least the moral responsibility be defined of persons in the governing bodies, for example members of the central committees of the ruling communist parties or various local committees? How should the moral responsibility of the members of communist

parties be defined in general? In terms of the crimes of the communist regimes, did these people also have any connection to these crimes?

There are no statutory limitations for crimes against humanity in international law. In the case of Estonia, the last crimes against humanity were committed in the 1950s. After the death of Stalin, most of the survivors of political repressions were released and allowed to return to Estonia from Soviet prison camps or from places of deportation and banishment.

Nevertheless, the death of Stalin did not mean that the violation of general human rights also ceased. The Soviet regime as such was a repressive system and human rights were violated at each level of society.

Violation of human rights 20 years ago is not an issue that can be treated by the justice system today. Thus it can only be an object of moral condemnation. Some people benefited from membership in the Communist Party or simply from sincere cooperation with the communist authorities at the expense of people who did not do so. Some people used the human rights violations committed by the authorities for their own good. However, even this explanation is too simplified. The Soviet occupation lasted 50 years and during this time, new generations grew up that had never seen any other way of living. We cannot expect ordinary workers and peasants living in a repressive system with censorship and limited foreign contacts to make correct decisions on historical, moral and philosophical grounds. This is the task of elites. This was the reason why Soviet repressions were always directed against the national elites.

The Communist Party embodied a component of a secret society or brotherhood throughout its existence. Members of the governing bodies of the party and of the Central Committees were not elected, but chosen by the tiny leadership of the party and only then formally elected. Indeed, faithfulness and loyalty were required even just to become a regular party member. Thus it is not surprising that out of about 100 000 members in the Estonian branch of the Soviet Communist Party in the 1980s, only less than half were ethnic Estonians. By saying so I hopefully do not come across as being too nationalist. Soviet statistics and therefore party membership statistics as well simply were divided up according to ethnic groups. The Russian-speaking part of the population in the union republics at least was in favour, especially after the Soviet Constitution of 1977 established the conception of the Soviet nation.

If we consider possible moral condemnation, we also need to consider public opinion. In the case of Estonia: yes, half of the members of the Communist Party in Estonia were not Estonian. They or at least their parents came or were brought from the Soviet Union to Estonia after WWII to build up a communist society. Yet the other half was composed of our own people. There were few individuals among them who really believed the communist ideas. Joining the party was mostly a much more pragmatic decision. We

cannot forget that the Soviet Communist Party was not a party in the general sense. In the single party system, the party was an integral part of the totalitarian or at least non-democratic regime. Party membership was required even to become a Professor at a university or the principal of a school. Sometimes the decision to join the party was even made under social pressure. For example, there were cases where a school's teachers asked somebody from among themselves to join the party and become the school principal in order to avoid having the authorities appoint somebody to this position.

I also have a personal experience in this respect. In the autumn of 1987 when faculty party committee members recruited new members for the party, the argument was used that young Estonian students were needed, otherwise the party in Estonia would ultimately be taken over by the Russians. In 1987, it was already simple to just refuse such an offer. Several years earlier, however, declining an offer to join the party could lead to unpleasant consequences. At least the refusal was noted in the person's file. There was a file on everybody. Everybody knew it.

So, the general condemnation of all former members of the Communist Party could not be a very popular idea in Estonia today. Practically everybody has a relative or friend, or simply someone they respect who is a former party member. The usual way of thinking is that yes, all the communists were bad but my uncle – although he was also a party member – he is a good man, he did not do anything bad.

Yes, it is funny, but the ultimate purpose of overcoming the past is a better future. It is simple in this respect concerning the victims and perpetrators. We have to commemorate the victims of totalitarian regimes who were killed or who are dead. We have to tell our people and especially our children about their sufferings. We have to support the survivors who lost their best years in the prison camps, in deportations or even those who due to their political beliefs were hampered in their working life.
The judicial system has to bring the perpetrators to justice.

Civilised societies do not fight against monuments, but civilised societies also do not commemorate dead perpetrators on public expense. And so on.

The more difficult task is overcoming the consequences of the communist past in everyday life, in politics, in governments and local governments, in business life, in universities, schools and so on. It is no secret that there are problems in this respect in all countries, which were previously under communist rule. Unjust and immoral regimes influenced everyone who lived in that period, even the best of them. We see the undemocratic way of thinking, we see the toadyism, lying, use of unfair methods, particularly corruption, etc. Of course, such things are also not unknown in the old democracies. Social scientists, for example, say that corruption is connected to the habits and traditions of a nation and there is a correlation with the religion of the majority of the population. Yet all these things were amplified during totalitarian and

undemocratic communist reign. Such methods were an integral part of procedures in our countries only 25 years ago.

It has been used to say, that nobody has not seen the dead body of communism. Even when considering the membership of the contemporary political elites of former communist countries, member states of the European Union, both on the national level as well as on the local government level, we can see many Sauls who became Pauls years ago already, and a number of individuals who are still on their way to Damascus. Yet there are also many whose values have remained unchanged, and some of them have devoted followers even among people who were still in kindergarten when the communist system collapsed.

Toomas Hiio

Population losses of Estonia since 1939. Estonian citizens and residents

1 March 1934	**Population census** Estonians 88.1%, Russians, 8.2%, Germans 1.5%, Swedes 0,7%, Latvians 0.5%, Jews 0.4%	**1,126,413**
1 Jan 1939	**Estimated population**	**1,134,000**
23 Aug 1939	*Soviet-German non-agression agreement*	
From Oct 1939	**Resettlement of Baltic Germans (Umsiedlung)**	**~ 21,000**
17 June 1940	Occupation of Estonia by the Soviet Union	
June 1940 –Sept 1941	**Soviet political arrests** More than 300 were sentenced and shot in Estonia. Remaining prisoners were transferred to the USSR prison camps. Shootings continued there; most of prisoners died in captivity, single survivors returned after 1956	**< 8,000**
14 June 1941	**Mass deportation** ~ 3000 men were sentenced and sent to the USSR prison camps, ~ 7000 men, women and children to the forced settlement. About 60% died (most of the men in the camps). Survivors returned after Stalin's death	**< 10,000**

22 June 1941	Germany attacked the Soviet Union. Battles in Estonia from 7 July to 21 October	
July – Oct 1941	**Civilians killed during the Soviet State Security raids and by the retreating Red Army units** Without "normal" war casualties	**~ 2,000**
July – Aug 1941	**Mobilisation to the Red Army** (1941–1942 in forced labour units where ca 25% died; 1942–1945 Red Army Estonian Rifle Corps, up to 10,000 killed in action or were sentenced by the Soviet State Security. Survivors returned in 1945)	**< 33,000**
July – Aug 1941	**Evacuation to the Soviet Union** Soviet activists and their families and members of NKVD destruction battalions, but also technical specialists, Jews a.o. Men were conscripted to the Estonian Rifle Corps since 1942. Majority of the evacuees returned after 1944	**~ 25,000**
1 December 1941	**Population registered by German occupying authorities**	**999,884**
Summer 1941–Autumn 1944		*German occupation*
1941–1944	**Executed according to the orders of German State Security forces** ~ 6000 ethnic Estonians, ~ 1000 Jews, ~ 1000 others; Without people who were brought to the camps in Estonia from other countries	**~ 8,000**
1941–1944	**Political prisoners in Estonia and in the German concentration camps**	**several thousand**
1941–1945	**Estonians in the German Armed Forces** Eastern battalions, police battalions, Waffen-SS-Division, border defence regiments, air force units, auxiliary forces; mostly mobilised in 1943–1944, but also volunteers in 1941–1942; 10,000–15,000 killed in action	**~70,000**
1943–1944	**Evacuation of Estonian-Swedes to Sweden**	**~ 7,000**

autumn 1944	**Escape or evacuation from Estonia** (up to 25,000 to Sweden, other to Germany and Finland)	**~ 70,000**
Autumn 1944	*Red Army conquered Estonia from the German Forces*	
autumn 1944 –spring 1945	**Mobilisation to the Red Army Estonian Rifle Corps** Many those among them who served earlier in German units. Part of them were demobilised in 1945, but thousands were forced to remain in labour battalions until the 1950s	**~ 20,000**
November 1944	**Population registered by the Soviet authorities**	**< 900,000**
1944–1950	**Killed by the Soviet State Security during armed resistance**	**~ 2,000**
1942–1956	**Soviet political arrests** (1942–44 in the Red Army and Soviet rear). Prisoners were mostly transferred to the GULAG; ca 900 of them were sentenced to death and more than 4,500 died in captivity. Others were released and returned after Stalin's death	**~ 36,000**
15 August 1945	**Deportation of the individuals of German nationality**	**407**
25 March 1949	**Mass deportation**	**> 20,000**
May 1950	**Deportation of Estonians and Latvians from Pskov oblast (from areas which up to 1944 belonged to Estonia and Latvia)**	**1,563**
1 April 1951	**Deportation of Jehovah's Witnesses**	**281**

Mortality of the post-war deportees was more than 10%. Survivors returned since 1954

15 January 1959	**Population census** Estonians 74.6%, Russians 20.1%, Finns (Ingrians) 1.4%, Ukrainians 1.3%, Belorussians 0.9%.	**1,196,791**

Toomas Hiio

The crimes of communism in Latvia

> My mother had three wishes: returning to Latvia, seeing her brothers and our family and having a flat. All of these wishes have been fulfilled. But even today my mother wakes from a dreadful dream. Again it is night and someone is knocking at the door. Strange men enter and order her to get ready. The deportation nightmare begins, and my mother in despair thinks: "The last time it was a dream. Now it's real." On waking she gazes long into the empty night until she calms down and understands: she is home again. In Latvia.[1]

I have chosen these last lines in Sandra Kalniete's book *With Dance Shoes in Siberian Snows*, a book that has been translated into 11 languages, to remind ourselves that the term "crimes against humanity" as a legal abstraction, last defined in Article 7 of the 1998 Rome Statute, is woefully inadequate in terms of fully grasping the human tragedy and its lingering aftermath for which the original crime is only a starting point. The statute concentrates on the perpetrators and their culpability. Any culture of memory must be much more inclusive and never leave sight of the victims and survivors as the direct carriers and inheritors of the memory. It must not only deal with the crime but the entire context in which the crime was perpetrated and even more – the lingering political, social, moral and psychological after-effects. The crime is with us as long as the nightmare persists in the psyches of its victims.

Sandra Kalniete's book deals with the family that she never had and that was long hidden from her. She never knew her grandfathers, both of whom died in Gulag prison camps and whose deaths were concealed from their families for a long time. She never knew her maternal grandmother, who died a forcibly resettled person in Siberia, some 6,000 kilometres from her native Latvia. Her mother, arrested by the Soviet regime on 14 June 1941 at the age of fourteen, was deported to Siberia on the night of a school dance in her dance shoes. Sandra was born of parents who were banished for life from their native country. Thus she, too, was destined not to be free. Even after the family was allowed to return to Latvia in 1957, it was discriminated against as were thousands of other families. Escaping from arrest in 1941, Sandra's uncles, the brothers of her mother, fled to the West at war's end. She was born and grew up in a family truncated and terrorised by the Soviet regime.

Sandra Kalniete signed the last lines of her book in Paris on 23 August 2001, the 62. anniversary of the infamous Hitler–Stalin Pact of 1939, clearly a crime against

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1 Sandra Kalniete, *With Dance Shoes in Siberian Snows*, transl. Margita Gailīte (Riga, Latvijas Okupācijas muzeja biedrība, 2006) 319.

peace. The book's narrative opens on that day in August 1939 still in independent Latvia. Thus Kalniete sets the international political scene and context for Latvia, whose nightmare included three foreign occupations and three occupation regime changes within five years 1940–1945, as well as a devastating war, which involved some 200,000 young Latvian men on both warring sides, neither of which wanted to see a free Latvia. The crimes committed on Latvian soil and against citizens of the Republic of Latvia were committed by both Soviet and Nazi regimes under conditions of military occupation and jurisdiction, or – the presence of substantial foreign military forces that could have established full control at any time. There was no sovereign Latvian government, only proxies of the occupying regimes, that could have either ordered or prevented these crimes, which include crimes against humanity and genocide. Both regimes used persuasion, coercion, blackmail, and other means to exact collaboration from the local population and, what is worse – involve members of the local population in their crimes against other members. Mass deportations to Siberia, executions and the Holocaust would not have been possible without such involvement. The existing social value system was brutally destroyed. Violations of human rights under these circumstances were almost negligible offenses. After war's end, the victorious Communist regime persisted for forty five years.

The presence of Soviet military forces in Latvia was all-pervasive and constituted a threat until the re-establishment of independence in 1991. Therefore, certain Communist crimes in Latvia can be classified as war crimes, especially taking into account the fact that Soviet military forces were involved in many of the crimes, such as deportations and military actions against resistance fighters.[2]

Although there is some scholarly difference of opinion about the applicability of the term "occupation" to the extended period of Soviet rule after the defeat of Nazi Germany in 1945, in two declarations the Saeima (Parliament) of the Republic of Latvia

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2 It is important to stress that communist crimes against humanity in the territory of Latvia were carried out under conditions of an illegal takeover by threat of military force and massive military occupation of the sovereign Republic of Latvia by the USSR on 17 June 1940. This takeover and the subsequent incorporation into the USSR was as direct a result of the agreements in the Secret Protocols of the Hitler–Stalin Past of 23 August 1939 in contravention of the Kellog-Briand Pact of 1928. It also blatantly contravened earlier treaties and agreements between the sovereign Republic of Latvia and the USSR, which specifically recognised the sovereignty of the Republic of Latvia and provided for peaceful settlement of disagreements, in particular, the Peace Treaty between the Republic of Latvia and the Russian Socialist Federative Republic of 11 August 1920, as well as the Non-Aggression Treaty of 5 February 1932 and the Mutual Assistance Treaty of 5 October 1939 between the Republic of Latvia and the USSR, both of which refer to the Peace Treaty and its sovereignty clause in Article II: "[…] Russia recognises without objection the independence and sovereignty of the Latvian State and forever renounces all sovereign rights held by Russia in relation to the Latvian nation and land […]" Most of the international community never recognised the occupation and the incorporation *de iure*. (Inesis Feldmanis: http://www.mfa.gov.lv/en/latvia/history/occupation-aspects, accessed 6 Feb. 2010).

has defined Latvia as an occupied country from 17 June 1940 to 21 August 1991 and accused the Soviet Union of various crimes.[3]

Soon after regaining independence, the Republic of Latvia established a Centre for the Documentation of the Consequences of Totalitarianism charged with historical research and a special Prosecutor General's Office for Investigation of the Crimes of Totalitarian Regimes.

The major crimes committed by the Communist occupation regime in Latvia are:

A mass deportation of at least 15,424 persons on 14 June 1941[4] – ordered in Moscow – executed in Latvian SSR with the involvement of local cadres. For the sake of comparison Latvia's pre World War II population was in round figures 2,000,000. It was an operation directed against the political, economic, military, social and cultural elites of independent Latvia. Men like Sandra Kalniete's grandfather were separated from their families and sent to Gulag hard labour prison camps to be tried by special tribunals on the basis of Article 58 the Criminal Code of the Russian SFSR for "Counter-Revolutionary Crimes" applied retroactively. Only about 1/5 survived. The families, like that of Sandra Kalniete's grandmother and mother, were sent to forced settlement areas in Siberia under harsh conditions.

A mass deportation of more than 42,125 persons on 25 March 1949,[5] ordered in Moscow, executed by local authorities in the Latvian SSR. It was an operation directed specifically against the so-called "kulaks as a class" (9,115 families, 29,030 persons) and against "bandit supporters", i.e. families of national resistance fighters, the so-called Forest Brethren, and "nationalists" (4,311 families, 13,095 persons). They were sent to forced settlement areas primarily in the Amur, Omsk and Tomsk districts. They had

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3 The first was the 22 August 1996 Declaration on Latvia's Occupation, referring to the crimes committed by the regime, including mass deportations and other repressions, illegal confiscation of property, suppression of civil rights, cruelly punishing people engaged in armed or unarmed struggle for independence, instituting policies of mass migration into Latvia and threatening the nation with loss of identity (http://vip.latnet.lv/LPRA/deklaracija.html, accessed 10 Feb. 2010). The second declaration, on 12 May 2005, reaffirmed and expanded the first, by stating, in part that "the Latvian state condemns the USSR totalitarian communist occupation regime implemented in Latvia; the Latvian state condemns the actions of all those persons who participated in committing the crimes under the said regime; Latvia recognizes members of the national resistance movement as fighters for Latvia's freedom and honours them [...]" (http://vip.latnet.lv/lpra/dekl2005.htm, accessed 10 Feb. 2010) The second declaration also provided a basis for establishing a commission to calculate the losses suffered by Latvia as a result of the rule of the occupation regime.

4 [Latvijas Valsts arhīvs], *Aizvestie. 1941. gada 14. jūnijs* [The Deportees. 14 June 1941] (Rīga: Latvijas Valsts arhīvs, Nordik, 2001).

5 [Latvijas Valsts arhīvs], *Aizvestie. 1949. gada 25.marts* [The Deportees. 25 March 1949] (Rīga: Latvijas Valsts arhīvs, Nordik, 2007). Actually, the deportation took more than one day to complete. These are the numbers on recort and do not include 211 children born on the way, 513 people on the lists but deported later and 1422 Gulag inmates who were later reunited with their deported families.

to sign a form notifying them that they had been resettled for life without the right to return to Latvia. Sandra Kalniete's grandmother and father were deported to the Tomsk district as family members of a "bandit".

During the entire period of Soviet rule in Latvia, including the post-Stalinist period, people were subjected to political arrests and deportations, and their total number far exceeded those of the mass deportations. During the post-war era until Stalin's death in 1953, more than 70,000 were arrested, sentenced to Gulag prison camps or executed – in addition of those deported in 1949.[6] Adding the close to 25,000 victims of the first Soviet occupation 1940–41, including those deported, the total number of politically persecuted during the Stalin era alone approaches 150,000.[7]

The indirect consequences of these crimes are of a much longer and persistent nature. The terror and brutality of the first Soviet occupation made possible if not inevitable cooperation with the Latvians' historical enemies, the Germans. The cooperation with the Germans in turn made possible the accusation during the long Soviet occupation that non-Communist Latvians are fascists. The experiences during the first Soviet occupation were also directly responsible for about 120,000 Latvian wartime refugees, including a disproportional number of the educated elites, who stayed in the West. The three brothers of Sandra Kalniete's mother were among them. The large-scale enforced population shifts, including massive in-migration from Soviet Russia and other Soviet Republics were threatening to erase the titular Latvian nation's identity; even after regaining independence, they have left a deep imprint on social relationships and structures.[8] The involvement of Latvian nationals by both totalitarian occupation regimes in their crimes and co-optation in their governing and surveillance structures has left many unhealed contradictions and scars in the society.

Because the major crimes against humanity in the territory of Latvia were committed in the 1940s and 1950s, prosecution of these crimes has been rendered difficult, if not

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6 *Aizvestie. 1949. gada 25. marts* 12.

7 In 1999 a book was published listing 49,321 persons, whose names had been found in the card files of the KGB of the Latvian SSR after they had been taken over by Latvian authorities in 1991: Rudīte Vīksne and Kārlis Kangeris, eds., *No NKVD līdz KGB: politiskās prāvas Latvijā 1940–1986* [From the NKVD to the KGB: Political Court Cases in Latvia 1940–1986] (Rīga: Latvijas Vēstures institūta apgāds, 1999). It does not claim to be a complete listing of those persecuted by the regime. Thus Sandra Kalniete's paternal grandfather is included in the list; her maternal grandfather is not. It also does not account for countless cases of illegal surveillance, searches, interrogations and intimidation. The list also shows clearly that the regime continued political persecutions after Stalin's death, albeit at a reduced rate.

8 Jānis Riekstiņš, "Colonization and Russification of Latvia 1944–1953", *The Hidden and Forbidden History of Latvia under Soviet and Nazi Occupations 1940–1991,* ed. by Valters Nollendorfs and Erwin Oberländer, Symposium of the Commisssion of the Historians of Latvia 14 (Rīga: Institute of the History of Latvia, 2005) 228–241.

impossible. One of the major difficulties – in contrast to similar crimes committed by Nazi Germany – has been the lack of prosecution of these crimes at the highest level. There has been no equivalent of a Nuremberg Tribunal and only sporadic and reluctant admission of the Communist regime's criminal nature. Thus only the local executors could be charged and tried some fifty years later when many of the accused and potential witnesses were old, no longer accountable or had died. Documentary evidence was scant. Many KGB documents were transported to Russia and were not accessible to Latvian prosecutors.[9] For all intents and purposes, prosecutions against perpetrators of crimes against humanity have ceased.[10] While the prosecution has lagged and is obviously flagging in Latvia, historical research in the last ten years has made substantial progress toward illuminating the true nature of the Communist regime and its secrets.[11] The Latvian Historical Commission was established at the President's office in 1998.[12] Its original charge was to investigate "Crimes against Humanity Committed in the Territory

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9 Despite the difficulties, several persons were charged. The most notorious successful case was tried against Alfons Noviks, former Minister of State Security of the Latvian SSR, for signing most of the deportation orders of the 1949 mass deportation of over 42,000 persons. He was convicted for genocide in 1995 to life imprisonment and died in prison in 1996. A second case, against the former Commissar of State Security, Semion Shustin, who signed most of the 1941 deportation orders, could not be brought because he had disappeared in Russia and according to information received had died in the meanwhile. One case illustrates how the modern European judicial system can complicate convictions for crimes committed so long ago under very complicated historical circumstances. Latvian courts convicted Soviet partisan combatant Vasilijs Kononovs for a war crime committed in 1944 in German-held Latvian territory, for killing civilians who had allegedly supported Nazi occupation forces (http://vip.latnet.lv/lpra/konon28sept.htm, accessed 11 Feb. 2010). Kononovs appealed the case to the European Court of Human Rights, which decided that Kononovs' case had violated Article 7 of the European Convention on Human Rights, namely that the act did not violate laws in force at the time (http://vlex.com/vid/case-of-kononov-v-latvia-41727537, accessed 11 Feb. 2010).

10 Lustration laws have been proposed but never went beyond the initial stage of discussion and are fast losing any significance. Laws opening secret KGB files remaining in Latvia as well did not get past the discussion stage. They were either deemed political or, as the Centre for the Documentation of the Consequences of Totalitarianism pointed out, their incompleteness could lead to miscarriages of justice, since it could not be determined, which parts of the files were left behind by the KGB in August 1991 and why. Therefore only the persons whose files are available are allowed to view them. Also, by law information is released about membership in the KGB, since former KGB operatives are barred from holding political office in Latvia.

11 Research in the 1990s concentrated mainly on aspects of aspects of Latvia's loss of independence, its illegal occupation and the crimes committed under the aegis of the occupation regimes. Various aspects of collaboration, or perceived collaboration, especially during the Nazi German occupation, including the participation of Latvian nationals in the Holocaust, were not among the most important topics of research.

12 An English-language description: http://www.president.lv/pk/content/?cat_id=7&lng=en, accessed 10 Feb. 2010. At this time, some of the information had not been brought up to date.

of Latvia under Two Occupations, 1940–1956".[13] Later the charge was expanded to include the entire occupation period. The Commission concentrated, instead, on organising international conferences and sponsoring research projects, publishing conference proceedings and research reports, as well as collections of documents. To date, 25 volumes have been published, including the research of both Latvian and foreign historians.[14] A reasonable factual basis has been created and a historical consensus on many aspects of crimes committed under the occupation regimes has been reached.[15]

The Museum of the Occupation of Latvia, a non-governmental organisation, is the main institution of public history. Founded in 1993, it is only partly subsidised by the state. It attracts over 100,000 visitors a year, many of them foreigners, including many distinguished state guests. Its permanent exhibition is devoted to both Soviet and Nazi German occupations and is accessible in six languages. Its collections hold many unique documents, videotaped testimonials and artefacts. Its Education Programme reaches out to schools all over Latvia with its teacher seminars, travelling exhibitions and student activities. The Research Programme publishes a yearbook, and Museum scholars participate in national and international conferences and publications. With state support the Museum hopes to expand and renovate its present building in the centre of Riga to serve even better as a place of memory and commemoration.[16]

Six years ago, in 2004, Sandra Kalniete created a major political éclat. It was a month before ten East European states joined the European Union, including Latvia, whose Foreign Minister she was. In a short speech at the Leipzig Book Fair she proposed the task lying ahead for the expanded EU in terms of history and memory and dared to describe the Nazi and the Soviet Communist regimes as "equally criminal". She knew whereof she spoke both in personal and national terms. Her speech was denounced as an attempt to relativise Nazi crimes, which had long dominated West European memory culture. Much has changed in the intervening six years. Sandra Kalniete is a Deputy of the European Parliament and a patron of this conference. Slowly but surely

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13 The original charge included "the production of the final report on the theme". An interim report was published in 2001, but a final report never was formulated. See the interim report in English at http://www.president.lv/pk/content/?cat_id=1330, accessed 11 Feb. 2010.

14 http://www.president.lv/pk/content/?cat_id=2766, accessed 10 Feb. 2010.

15 Unfortunately, most of the research is available only in the Latvian language. Only one volume of research articles was published in English. (Nollendorfs, Valters and Erwin Oberländer, eds. *The Hidden and Forbidden History of Latvia during Soviet and Nazi Occupations 1940–1991: Selected Research of the Commission of the Historians of Latvia*. Symposium of the Commission of the Historians of Latvia 14. Riga: Institute of the History of Latvia Publishers, 2005). Although the Commission is international, its foreign members have been only marginally involved in its activities. Latvian historians have in general failed to establish a discourse with and participate in the current debates of western historians, no doubt mainly because of insufficient linguistic proficiency.

16 http://www.occupationmuseum.lv, accessed 15 Feb. 2010.

East European memory is emerging from the recesses behind the Iron Curtain and entering the consciousness space of Western Europe. But the nightmare persists. It will fade away only when the historical and memory gaps left by the long separation in Europe will be bridged and healed. Only then will the East be able to wake up and realise we are home again. In Europe.

Valters Nollendorfs

Basic information about the losses during the Soviet occupation in 1940–1941 and 1944–1953

1940–1941

Political arrests and repressions

People arrested after being accused of political crimes in 1940–1941 prior to the Great deportation of 14 June 1941	6,606

Number of political prisoners who were deported to the distant parts of the Soviet Union	3,565

Number of slaughtered military and civilian population by Soviets in the first days of Soviet – Nazi war (June 22–28, 1941)	1,100

Number of former political prisoners who returned back to Lithuania – 14%.

Most of political prisoners were subjected to "indispensable measures of interrogation" and experienced torture during interrogation. Physical and mental coercion in the system of NKVD and NKGB were concealed under the terms of "physical affect", "active interrogation" etc. Torture was sanctioned at the highest level. In 1937 the Central Committee of the All-Union Communist Party (Bolshevik) gave the official permit to apply measures of "physical affect".

Deportations of June 1941

Total number of deported people in 1941	17,500[1]

1 41% of them were children under the age of 16

The repressions were targeted not against a concrete person, but against individual groups of people:

1) employees of public institutions, teachers, intellectuals, politicians of Independent Lithuania, soldiers and other officers;
2) Catholic clergymen;
3) freedom fighters and members of underground organisations, including their families and supporters;
4) farmers and their families. The aim of the occupants was to build an obedient society based on totalitarian model and living in fear. They sought to destroy those social and political groups of people that were 'dangerous' for the new government and most probably could resist Lithuanian occupation and Sovietisation.

The largest group of the deportees found themselves in Altai Krai, from where they were moved to the Laptev Sea in 1942. Miserable conditions of life in exile were further aggravated by the climate with the temperatures below 0 °C eleven months per year. Almost all year round (11 months), the sea is frozen. This equals to life in the Arctic. Only a little more than 5 per cent of all the exiled there returned to Lithuania 15 or more years later.

1944–1953

Mass arrests and torture

Number of persons arrested and imprisoned	186,000
Number of people taken to the Soviet GULAG camps	142,579

Mass deportations of the population

The total number of deportees	118,000[2]

The total number of Lithuanian deportees who died in 1945–1958 is estimated at 20,000 including about 5,000 children. About 50,000 people lived in exile on 1 January, 1958 and never returned to Lithuania.

2 Including 32,000 children

Suppression of armed resistance

Number of partisans killed in combat actions	20,000
Number of partisans arrested, tortured and killed	1,500

Other groups

Number of men drafted by force to the Red Army in 1944–1945	108,378
Number of political emigrants who managed to escape from Soviet terror	490,000

Number of Lithuanian people directly affected by Communist terror and political repressions **in 1940–1953**	**About 1 million**[3]

Following 1953 (the year of Stalin's death), the Soviet occupational regime softened. However, people were still forced to live in constant fear feeling political and psychological terror, while the totalitarian regime with all its repressions acquired other forms but kept its criminal nature. Dissentients were persecuted by active KGB agents. This went on until 11 March, 1990 when Lithuania regained its independence.

Emanuelis Zingeris
and Rolandas Račinskas

3 Almost one third of the population

The crimes of the communist regime in Ukraine

According to the Gospel by St. John in the beginning was the Word and the Word all started. The same is observed in the social life of mankind. When we talk about the crimes of communism which people went through in the twentieth century and which should be condemned as crimes against humanity, we have to begin with the overview of the origins of communism.

Theoretical principles of the communist society were formulated in works by K. Marx, F. Engels, V. Ulyanov and others late in the nineteenth – early in the twentieth centuries. Their practical realization firstly took place during Russian Bolsheviks revolt in 1917. There was created acommunist state – The Union of Soviet Social Republics. This state existed 74 years and collapsed in the middle of 1991. Those years were the time of incredible sufferings of millions of people both in the USSR and in other countries all over the world. These events were especially tragic in Ukraine. Collapse of the USSR was an experimental proof of nonscientific and utopian nature of the basic principles of communism.

All the sufferings and millions of innocent victims became the demand to all the people that now live all over the world and especially to those societies where these principles of communism were officially established. We have to show to the world community the nature of these communist crimes and to condemn these principles in order to prevent the appearance of communism in any part of the Earth.

The origin, evolution and decay of totalitarian regimes in human societies have got both common and different features. Describing the most meaningful, we shall focus on the Utopianism of some major communist dogmas which had extremely tragic consequences at attempting to realize them, and which ultimately led to the collapse of communist regims.

Our report consists of two parts:
- faultiness of basic principles of communism;
- review of the main events in Ukrainian history during the totalitarian regime.

1. On the one hand, the communist tragedy for millions of people is connected with forcible expropriation of property. Communism denies private property as the basis for the existence of human society. The main mistake by V. Ulyanov-Lenin and a group of Bolsheviks in creating a new socialist state, the USSR, consisted in the statement of the possibility of the state optimization where all production systems and the land are nationalized, and a management of this state

is concentrated in one centre. Optimization of the system in which production and distribution is entirely nationalized requires supplying and implementing a large and endless number of orders. Accordingly, it requires huge, endless and futile expenditures of human energy and efforts. If the number of orders which are given to the society and are executed in every single society, exceeds a certain characteristic of a given society limit, so the energy, needed for the execution of a next order, will increase exponentially. If the Society remains isolated it will degrade.[1] Moreover, in such a management centre an infinite power is concentrated that leads to a dictatorship and voluntarism.

On the other hand, concentration of power may facilitate other, fantastically big missions to be carried out. But the evolution of such a system will follow the way of the reduction of an internal order and collapse.

2. The V. Ulyanov-Lenin's statement of the possibility of a communist society construction in a single country turned out to be wrong. This theory brings the country and the society to isolation from the outward world. Specifically, this concerned Russia in 1917. But inevitably there spontaneously grows an internal disorder in isolated and unbalanced system in all spheres of life. This is a literal formulation of the universal second law of thermodynamics. An isolated social system has to struggle constantly both against the internal chaos and the external influence which attempts to modify the illogical inner structure of Communist society. Finally, the quantity of energy exhausts and the system collapses.

3. Extremely tragic were practical consequences of applying Marxist-Leninist theory of surplus value. According to the statement by K. Marx, the source of surplus value is part of the worker's labour unpaid by capitalist. An abolishment of this injustice could be realized by bringing down capitalism and establishing proletarian dictatorship. We have lived through this terrible revolution that started in November 1917.

In fact the source of surplus value is the process of consuming the solar radiation information which falls onto the Earth. The energy, which is carried onto the Earth by

1 This follows from the fact that the quantity of additional energy (ΔE) needed for the fulfilment of new instructions (ΔN) depends not only on the number of new instructions but also on the quantity of energy that has already been spent for the fulfilment of the previous instructions ($\Delta E_N \sim \Delta E_N \Delta N$). Thus, the plot of energy expenditures has got the shape of an exponent from the number of instructions.

solar radiation, is equal to the energy which is emanated to the outer space from the Earth. Otherwise the Earth would heat up or freeze. The point is that the energy has a quality. So the quality of the solar radiation energy flow which falls onto the Earth is higher then the flow of the energy that emanates to the outer space from the Earth. It is due to the difference between this quality of the flows that the inevitable process of improvements takes place on the Earth. The quality of the energy is determined by the quantitative characteristic, i.e. entropy which gives an information measure. So the flow of solar radiation which falls onto the Earth carries more information than the flow of energy which emanates to the outer space from the Earth (although the quantities of the energy are equal). A huge amount of information remains on the Earth. This information turns out to be the source of all the improvements on the Earth, the source of surplus value.

We want to stress the radically different consequences which follow from these two different definitions of the principles of surplus values.

One of these two principles requires revolution, violence and hegemony of proletariats, the other one – the establishment of the balance between human activities and the environment, as the principle of a wise sufficiency in the life of society.[2]

Thus, the main statements of communism are utopian. They were implemented by Bolsheviks in Russian Empire in those peculiar circumstances of the 1917 Russian February revolution when chaos of power prevailed. There was post-war devastation, and millions of soldiers – former farmers and workers – were torn away from their families. In order to gain these masses of people over to Bolsheviks side, they cast a motto "Plunder those who have property!"

But soon these soldiers came back to their homes and families. And the families progress and live by the approved primordial life logic. Property and accumulation of some quantity of wealth is the economical basis for the family being and evolution. The utopian doctrine of communism does not correspond to the life logic and is immediately rejected by a society.

In order to practice this utopian doctrine, a compulsion and terror is needed. Terror – permanent, universal, physical, economical and psychological – indeed became the main mechanism of communist power.

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2 As a result of the photosynthesis reaction, the flow of the Sun's energy is localized on the Earth. This is a unique reaction: out of three components – carbon dioxide, water and quanta of Sun radiation – on the assumption of the green leaf (chlorophyll) presence, as a catalyst, there appears glucose and molecular oxygen. The information that is concentrated in the products of photosynthesis, in glucose and molecules of oxygen, is calculated as 250 trillions bytes per 1 gram-mol of glucose. And this information is distributed in numberless processes of living organisms.

Communists-Bolsheviks implemented another mechanism of their politics – purposeful famine. All the warehouses and foodstores were nationalized and the so-called "bread-cards" were introduced. This simple meant the food proportioning for the people. To Communists-Bolsheviks this gave an opportunity to establish an effective obedience and all-embracing horror of the nation. Purposeful famine became an instrument of the Bolsheviks political power.

The existence of peasant households and exchange relations were an obstacle on the way of "bread-card" implementation. As a result, V. Ulyanov-Lenin and his clique declared war on private peasant households.

From the beginning of Bolsheviks revolt in 1917, communism was inculcated under compulsion in Russian Empire.

The communism of Bolsheviks and Ukraine

Let us begin with an axiom: nation and its native territory establish the most stable natural equilibrium. This is related to the Ukrainian land and Ukrainians, Polish land and Polish, German land and Germans etcetera. Ukrainian land gives births to Ukrainians constantly and inevitably. After the Tatar devastation, being under Lithuanian, Polish and Moscowian Russian occupation, Ukrainians constantly aspired to independence. In different periods of history these aspirations were crowned with certain successes. But in our history we had more defeats than successes. And so, in the days of Russian February revolution in 1917 Ukrainians exploded with the proclamation of their own state – Ukrainian National Republic (UNR). Soon, however, it was suppressed by the army of Russian Bolsheviks.

After the overthrow of the Ukrainian National Republic in November 1920 the communist regime put in action all possible methods directed towards denationalization of Ukraine in order to suppress the desire of Ukrainians to set up an independent state and thus it was unified as a simple administrative-territorial unit of the Union of Soviet Socialist Republics (USSR).

Until 1927 the agriculture of Ukraine used to be a farmstead economy. Every village consisted of 15–30 farmsteads (khutors). Commodity-money relations were prevailing there.

1927 was the year when Bolshevikss began an attack on Ukrainian peasants. Population of Ukraine was 80% peasants. Among these peasants 90% were ethnic Ukrainians. Ukrainian peasants were the base of a great traditional Ukrainian folk culture.

Repressions began with the elimination of the most successful, hard-working, and nationally conscious peasant households. Bolsheviks humiliatingly called them the

"kulaks" meaning "fists". This crime against humanity in Ukrainian SSR was conducted actually in 1919–1922, 1926–1929, and after annexation of Western Ukraine to the USSR in 1939–1941. Just in 1920, eighteen relocation centres were equipped in the Ukrainian provinces. For one year not less than 25 thousand persons got through them. These elimination actions were conducted by special detachments of GPU (punitive police). In 1930, fifty thousand families were evicted to the North regions. Other families of rich peasants were evicted from their households to wretched lands. By estimates of Prof. S. Kulchitsky between 1928 and 1930 about 352 thousands peasant households were destroyed in Ukraine. If we multiply this reliable figure by the average number of people in a family (5–6 persons), we will get no less than 1,760,000 persons that were subjected to repressions, were deprived of their land, property and all political rights. A significant fact is that a part of population that was deported for a term of 5–10 years, came back to their villages.

On 5 August 1937 a repression operation against the former "kulaks", who had come back, started. Those peasants were divided into two categories: those, that were to be shot by the sentence of "three" (three persons – chairman of the region, public prosecutor of the region, 1st secretary of the regional committee of the party – had the absolute right to give the judgement of death penalty), and those, who were sent to the concentration camps or prisons for a term of 8–10 years. In the first category about 8,000 persons were killed and more than 20,000 persons from the second category were sent to concentration camps.

The number of victims of the next stage of dispossession of kulaks which took place this time in Western Ukraine, was connected with the liquidation of national liberation movement, liquidation of the Ukrainian Greek-Catholic church, defeat of insurgents of the Ukrainian Insurgent Army (UPA) and repressions against their families. From the official data, 500,000 people were subjected to repressions and 153,000 of them were killed. Thus the after-effect of dispossessions of kulaks was the elimination of 2,397,000 people.

Then in 1929 collectivization began. The state abolished hundreds of thousands of farmsteads (khutors). Almost all means of production and draught animals of the farmers had been collectivized by 1931.Churches were closed and plundered. Clergymen were subjected to repression.

Political proceedings were instituted against Ukrainian intelligentsia. Most of them were shot. In state collective farms the poorest neglectful farmers gave orders to their subjects. As a result, labour productivity decreased catastrophically. The amount of obligatory grain deliveries became exhausting for farmers. In the villages of Ukraine in 1931 famine set in. For those who were not able to commit the state grain procurements, the regime allotted enormous fines in the form of supplying meat. These supplies of

meat 15 times exceeded the quantity of grain deliveries that were to be done. The great number of uprisings in Ukraine went on continuously.

From Russian federation, special groups of people were sent to suppress these uprisings. All Ukrainian villages were under special searches. The aim was to find any food and to confiscate it. In Ukraine there reigned self-will, denunciations, thefts, murders. In this apocalypse that lasted already 5 years, we can distinguish the time of real genocide – winter 1932 and winter–spring 1933.

Early in January 1933 Y. Stalin addressed the Ukrainian farmers with a threat: you must hand over the grain (already non-existent). The Stalin's appeal was a signal – take away all food from the people: kidney bean, potato, and beet. From the end of January 1933 the purposeful murder by famine of Ukrainian ethnical peasants was accomplished.

Any information concerning the famine was forbidden. This ban was even maintained on the entries in the Acts of Civil State. The government officially did not want to accept any help from the outside. If we assume that the increment of population in Ukraine should correspond with the average increment of population in the Soviet Union that the increment of population in Ukraine, from 1926–1937, should correspond to an average increment in the USSR was about 16% (in Russia it was 28%), then the losses of Ukrainians in the USSR were more than 10 million people.

Today the Ukrainian Institute of National Memory has commenced a National Book of Memory in the name of remembering the victims of purposeful famine (Holodomor) in 1932–1933. It consists of 18 volumes comprising 23,000 pages. This book contains information from 18 Ukrainian regions.

In autumn 2009 the Ukrainian Institute of National Memory appealed to the Security Service of Ukraine with a request to initiate a criminal proceeding for the murder by purposeful famine of millions of people in 1932–1933. Ukrainian parliamentaries, a number of leaders of public organizations and individual citizens also appealed to Security Service of Ukraine.

Considering different statements and reports about the crime of genocide, which were based on the materials of verifying the circumstances of mass destruction of people in Ukraine in 1932–1933, the Security Service of Ukraine started a criminal case by the fact of realizing the purposeful famine in Ukraine in 1932–1933, i.e. by corpus delicti that is found in part 1, article 442, Criminal code of Ukraine.

Court of Appeal in Kyiv from 13 January 2010 tried a criminal case, the action being brought by the Security Service of Ukraine, and within the framework of complete observance of all of rules and norms of the legal proceeding the jury decreed that pre-trial investigation had established undeniable proofs stating that in 1932–1933 J. V. Stalin, V. M. Molotov, L. M. Kaganovich, P. P. Postishev, S. V. Kosior, V. Y. Chubar

and M. M. Khataevich organized and accomplished the act of genocide in Ukraine, having caused the living conditions aimed at physical elimination of a part of the Ukrainian national group, utilizing the following mechanisms and methods for this purpose:

- establishing for Ukraine an obligatory plan of state grain procurements to such a high level that it could not be actually executed, and even if executed – only by violent repressions and due to complete confiscation of grain, seminal supplies and foodstuff from the peasants;
- blacklisting of districts, settlements, collective farms, villages. It means that armed GPU units and special brigades isolated entire districts from the outside world, all the food and seed reserves were taken away, trade and import of any goods were prohibited;
- isolating of Ukrainian territory by the special armed detachments, military units and militia;
- restricting of free movement for peasants with the purpose of food searching and prohibition of correspondence;
- establishing of "fines in natural produce";
- fulfilling of permanent searches with the confiscation of grain, seminal supplies, foodstuff, property, clothes;
- intensifying the criminal repression measures, that include shooting those persons, who maintained resistance during the confiscation of grain, meat, potato, sunflower and other foodstuff.

According to the conclusions made by the judicial scientific-demographic assessment body of the Institute of Demography and Social Studies of the National Academy of Sciences of Ukraine from 30 November 2009 – 3, 941,000 people perished in Ukraine as a result of genocide, out of these: during February–December, 1932 – 205,000, in 1933 – 3,598,000, and in the first half of 1934 –138,000. *The average age of a person born in 1932–1933 was 5 years for females and 3 years for males.*

It is well-proven that the parameters of purposeful famine (Holodomor) in 1932–1933 in Ukraine meet the requirements of UNO Convention from December 1948 on the Prevention and Punishment for the crimes of Genocide.

The organ of pre-trial investigation – the Security Service of Ukraine with all completeness and comprehensiveness had set the particular intent by J. V. Stalin (Dzhugashvili), V. M. Molotov (Skryabin), L. M. Kaganovich, P. P. Postishev, S.V. Kosior, V. Y. Chubar and M. M. Khataevicha to eliminate precisely a part of the Ukrainian (rather than any other) national group and it is objectively well-proven that this intention was precisely related to a part of the Ukrainian national group proper.

As it was mentioned by a famous English historian Norman Davies in his well-known history of Europe – the aim of purposeful and artificial famine (Holodomor) in Ukraine implemented by Stalin was to "annihilate Ukrainian nation". Davies classified purposeful of famine (Holodomor) as "genocide act of state politics" and considered it to be the unique phenomenon in the history of the twentieth century.

Ukrainian intelligentsia was also exterminated. During 1932–1937, 71 Ukrainian writers were repressed by Communist regime. More than 650,000 people were repressed. Annihilation of Ukrainian intelligentsia took place even after these crimes against humanity. In 1939–1940 "State Political Directorate" (GPU) and its' republican branches arrested more than 62,000 people. Terror got hold of every layer of urban and rural population. In nineteen thirties terror became one of the main forms of government policy in Ukraine.

Terror by famine and mass repressions of Ukrainian intelligentsia caused a catastrophic disaster of the foundations of social and humanitarian life of Ukrainian nation as well as dealt a severe blow to the genetic code of the nation.

1930 became the year of mass destruction of churches and imprisonment of priests. The main blow of Communist regime was directed towards the Ukrainian Orthodox Church which was established in 1920. During 1926–1929 in Ukraine there were imprisoned 5 hierarchs of the Ukrainian Autocephalous Orthodox Church. In general 34 episcopes and 2,000 priests were killed during the Stalin's regime. Later on political repressions were extended against Ukrainian Greek-Catholic Church. It was outlawed. In 1946–1948, 48 Greek-Catholic monasteries with 1010 priests were closed.

The ruling communist clique of the former USSR bears obvious responsibility for the beginning of the WWII. The pact by Molotov-Ribbentrop gave a way to the occupation of Western Ukraine by Red army. This occupation was accompanied by a violent implementation of Communist regulations and by mass repressions. Terror was widely utilized as a tool of "sovetization" in Western Ukraine. On the captured territories, during 1939–1941, there were conducted three special operations of mass deportation of "hostile class groups". These were mainly Poles and Ukrainians. During this period over 10% of population were jailed, there were deportations (318,000 families were deported, which makes 1,173,170 persons), executions, physical and psychological terror. The American historian Jan Gross managed to calculate that due to the repressions on the territory of Western Ukraine there had perished 3–4 times more local population than on the territory of Poland occupied by Germans which was twice larger. Social and political institutions, cultural establishments, which had longstanding and illustrious traditions and held in high esteem among the Ukrainians, were under total elimination.

Over 150,000 German settlers were evicted to Germany from the territory of East Galicia, Volyn and North Bukovina. 200,000 Romanians were sent to Romania. Meanwhile,

several tens of thousands of Jews were deported from the occupied Polish territories and Romania to the soviet territory.

Ukraine suffered a fatal destruction and elimination during the WWII. During three years. Ukraine was the territory on which two totalitarian regimes were fighting to get the upper hand over each other.

Soviet troops that were retreating under the pressure of the German army, resorted to the tactics of "scorched earth": they blew up not only industrial installations which could become useful to the invaders but also destroyed the supplies of food, burned crops, poisoned drinking-water, which doomed hundreds of thousands of people to death from starvation. Hydro-power station on the Dniper was blown up. The center of Kyiv was ruined, hundreds of temples were destroyed all over all Ukraine. The Bolsheviks agents demolished the sacred thing of Ukraine – cathedral of Dormition of Virgin Mary in the Kiev-Pechersk Lavra.

Organs of internal affairs NKVD, that did not wish to evacuate the prisoners in the period of 22–29 of June 1941 resorted the mass elimination of people in Lviv, Sambir, Stanislav, Rivne, Lutsk and other cities. Just in the Lutsk prison there were shot 3,000, and in Kirovograd 12,000 persons. In Kyiv, Lviv and Kharkiv prisons were burned down together with prisoners. By different estimations, the number of prisoners tortured to death in prisons of Western Ukraine was from 15,000 to 40,000 persons.

The USSR did not join the Geneva Convention of 1907 and 1929, which regulated the legal status of prisoners in the years of war. Moreover, the government of the USSR did not support the initiative of the Red Cross organization directed towards humanitarian aid to the soviet prisoners of war and assisting the postal communication with them through neutral countries. Orders by Stalin from August 16, 1941 № 270 and from July 28, 1942 № 227 instructed about obligatory repressions against soldiers, that were in German captivity and against their families in the USSR. About 1,800,000 captives that were able to survive in the German camps perished in the Stalin camps in post-war time.

The human victims of Ukraine during the World War Two are terrifying. By the end of 1945 its population diminished by 13,600,000 persons.

Officially the World War Two was completed on 2 September 1945. But in Ukraine it had many years of continuation in heroic resistance of the Ukrainian Rebel Army against Stalin's regime. UPA arose in 1943 and firstly struggled against nazi and communist regimes. From 1944 it battled against the soviet army and units of NKVD. In 1944 over 57,000 rebels were killed, and over 50,000 were captured (data from the soviet archival sources). In the years that followed the scale of military operations was gradually slackened, UPA had been forced to resort to the guerrilla-underground methods of fighting. From 1945 to 1953 the rebels carried out almost 14,500 military operations.

During these operations until 1956 UPA lost over 155,000 people dead. Almost 104,000 were arrested for nationalistic activities and 88,000 were convicted, 203,000 persons were deported from Western Ukraine. On a fracture of 1940th–1950th Ukrainians were the fifth part of all of prisoners of Soviet Gulag (a network of penitentiary concentration camps in the Far North of Russia).

During the World War Two there was an epoch-making event in the history of all mankind and the Earth: explosion of nuclear bombs in the cities of Hiroshima and Nagasaki. The war between great powers had stopped once and for all. The United Nations had been founded. Since then the Communist terror has moved on into the plane of ideology and crimes of local character.

After the end of World War Two, the Communist authorities struck the next Stalin's blow against Ukraine. A total withdrawal of bread in 1946–1947 for the third time led to mass starvation from which more than 1 million people died.

In 1946 in the Moscow press there was a massive campaign of criticizing the Ukrainian humanitarian scholars and their studies. In 1947 Stalin's associate Lazar Kaganovych became head of the Communist Party (Bolsheviks) of Ukraine (CP(b)U) for the second time. He had immediately urged a struggle against "the Ukrainian bourgeois nationalism" which had stopped during the war. All in all, between 1946 and 1951 there were adopted 12 most destructive ideological decrees that had lay ideologically-legal grounds for an onslaught on all the layers of Ukrainian intelligentsia. The ideological attack of the authorities reached almost all the well-known Ukrainian writers, poets, artists, composers, cinematographers, actors, journalists and even architects. At schools, pupils were forced to tear the pages containing the criticized works off the textbooks, and to cover up the portraits of their authors with ink. The formerly planned editions were withdrawn from publishing schedules, printing fonts were deliberately scattered, new editions were destroyed. Censorship bodies obliged the librarians to withdraw 1,100,000 copies of "politically harmful" books from the open allocations. The number of publishing houses was reduced, editorial boards of magazines and newspapers were changed, the number of censorship clerks increased. In the late forties, 200 out of 240 members of the Ukrainian Writers' Union were subjected to repressions. The Communist regime deliberately and purposefully limited a person's inner life within the scope of the official ideology. The party exercised a complete control over a person. Cultural life fell under a strict regulation. The ideological monopoly meant, first of all, the monopoly for information.

Demographic and migratory processes were extremely significant in Russification of Ukraine in the twentieth century. On the one hand, as it was mentioned above, both the Russian pre-revolutionary and Bolsheviks authorities worked hard in order to disperse and physically destroy the Ukrainian ethnos, on the other hand, they vigorously stimulated the resettlement of ethnic Russians to Ukraine. About 2,000,000

Russians moved to Ukraine in the period from the end of the twentieth century up to the beginning of the World War I (WWI). This process intensified during the Communist regime. In 1939 in Ukraine there lived 4,000,000 Russians (12%), in 1959 – 7,000,000 (16%), in 1989 – 11,400,000 (22.1%).

Especial deformation has undergone the demographic situation in eastern and southern areas, which became a place for pensioners resettling from the Far East and the Far North, as well as a place for settling the Soviet army reserve officers. Since 1959 the total amount of ethnic Ukrainians in Ukraine has grown by 16.4%, while Russians – by 60%.

Conclusion

The Soviet Union has disintegrated. Disintegration signs originally appeared in 1960s. Practice is an indicator of the theory validity. Practice of the USSR construction has proved non-viability of the communism theory.

Thus, the Marxism-Leninism-Stalinism "doctrine" turned out to be an unscientific doctrine. This "doctrine" belongs to the sort of sectarian ones. And the communist party that completely professes the principles laying in the construction of the USSR, cannot be considered to be a party, but rather is, a sect.

There were different sects in the history of mankind. They gathered groups of people. They established, quite frequently, extremely severe rules of mutual relations between the members of a sect and finally collapsed.

The Communist Bolsheviks sect has done a lot of harm to the people of the former USSR. The number of human victims in the USSR exceeded the number of victims that the mankind of the world has suffered throughout the history of its existence.

It is necessary to understand and realize all the harm caused by communism in order to prevent such a misfortune in future.

Therefore, in each country, especially in Ukraine the process of the society differentiation, into extremely rich and extremely poor is fraught with grave consequences. This process of impoverishment can be halted, first of all, by joint actions of the authorities and the society.

We should build a society, specifically Ukrainian society of a predominant middle class. Uncontrolled development of oligarchic structures in the country automatically generates an antipode – communism. Therefore, the only way towards a reasonable, sustainable commonwealth is to provide beneficial political and economic conditions for the revival in Ukraine and in all other countries of a prevailing middle class. Revival and comprehensive support – that is what is necessary.

Thus the main issue of our conference should be a consolidation of the nations in order to set up an international tribunal over the communism crimes as it has been made over the nazism. We should also find out who is really guilty in committing

such severe crimes of communism. It could be those who had provoked Bolsheviks Communist revolt and had introduced communism principles. We should be able to figure it out by being well-informed through: legislation and true history.

And to prevent such events in future, it is necessary to severely ban legitimization of the parties professing a criminal Communist ideology.

Most important for, each country is to provide such conditions when the middle class of the country determines its national, political and economic development.

Ihor Yukhnovskyi

Conviction of Communist regime crimes in Ukraine

Ukraine is one of the countries which suffered most from the communist regime crimes. Millions of the Ukrainians had been repressed by the communist regime since 1918 when Ukraine was occupied by Bolshevik's troops till 1991 when at last it gained independence. Ukraine became an experimental ground for communists where they perfected scenarios of seizure of power and repressions against dissidents. Later, after 1939 these scenarios were used in the Baltic States, and since 1945 – in Central and Eastern European States. A well-known lawyer, the author of term Genocide and one of the authors of Convention On Condemnation of Genocides Rafael Lemkin called the communists policy in Ukraine *a classical sample of Soviet Genocide*[1] with the following stages: repressions against intelligentsia, liquidation of Ukrainian national church, subduing of the main layers of Ukrainian people – peasants who were violently hit by artificial famine. The last step was the dispersion of the Ukrainians by means of deportation and colonization of their lands by the representatives of other nations. Lemkin saw in communist actions a clear-cut consistent plan aimed at elimination of Ukrainian nation. Apparently this plan was not similar to *final solution of Jewish problem* by the Nazi and did not provide for Holocaust of all the Ukrainians. However, according to Rafael Lemkin the realization of this plan would have meant that *Ukraine would perish just as if all the Ukrainians were killed because it would lose the part of the nation which preserved and developed its culture, belief, unifying ideas which paved the way for it and gave a soul to it i.e. made it not just population but a nation.*[2]

The communists did not manage to fulfill this plan. Because of strong internal opposition of enslaved nations and external pressure by foreign democracies, the Soviet Union began to decay and at last collapsed. In the second half of 1980s the weakening of communist authority and the strengthening of national democratic movements raised public discussion of communist regime crimes. The revealing mass graves of political repressions victims made this issue urgent in Ukraine. There were a lot of such hidden cemeteries in city parks, at factories or on highways. They were eventually discovered before but Soviet Union punitive bodies managed to stop the dissemination of such information. In new socio-political situation the KGB could not continue to conceal it that was why this organization started to search for mass graves and to investigate under which circumstances they appeared. The first criminal cases concerning the crimes of communism were launched that time.

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1 Lemkin R. Soviet Genocide in Ukraine – Kyiv, 2009. – P. 37

2 I. q. – P. 41

One of the first cases was connected with the district Bykivnia near Kyiv city. The mass graves were found long ago. But all commissions created by the Soviet government claimed until 1980s that buried there Soviet war prisoners were shot by the Germans. However many facts and evidences of eyewitnesses denied this version and called it the burial place of Stalin repressions' victims. Therefore, the national and democratic organizations such as Memorial and the Movement demanded the additional investigation of the case from the government. At last, on 5 December 1988 the Prosecutor's Office of the Ukrainian Soviet Socialistic Republic launched the criminal case and created the investigative group. As a result the interrogation of 250 witnesses, analysis of 60 archival cases and 7 expertises were conducted. The most important conclusion of the investigative group was that the burial place compromised the repressed by the Soviet power in 1937–1941.[3] But these conclusions did not become the reason for further examination of communist power crimes. Moreover, in six months, in May 1989, the criminal case was closed because the leaders of the People's Commissariat of Internal Affairs responsible for the repressions at that moment were dead and the period for making responsible expired. It is significant that there were no attempts to refer the case to wider context of communist regime crimes and to use the international principles of law on Genocide or crimes against humanity ratified by the Soviet government. The same happened with the other cases – the government under the public pressure launched the criminal case on 14 August 1989 concerning revealing of burial places in Dem'yaniv laz near Ivano-Frankivs'k city[4] and on 22 March 1990 concerning revealing of Polish officers' burial places in woodland park near Kharkiv city. The case on Dem'yaniv laz was under way but finally was closed in 1996.[5]

Generally, the defeat of national and democratic camp at Presidential elections in Ukraine in December 1991 resulted into gradual reduction of informational campaigns aimed at communist crimes coverage. It is not strange as the new power in Ukraine was the reformed communist nomenclature. When the political disorder provoked by the opening of archives, investigation of communist power crimes and disclosure of personal files was in Central and Eastern Europe, there was almost absolute public tranquility in Ukraine.

The disclosure of truth concerning Soviet totalitarian regime was continued by separate public initiatives (the society of former political prisoners and research organizations such as Memorial). Their initiatives had no influence on political situation in the country where the registration of the Communist Party of Ukraine (forbidden 2 years ago) was renewed in 1993. But they were not going to cease their

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3 Memory of Bykivnya. Documents and materials. – Kyiv, 2000. - p. 64–71

4 R. Krutsyk. Dem'yaniv Laz. Genocide of Halychyna. - Kyiv, 2009. - p. 103

5 I. q. – p. 167

activities and on 21 March 1996 the Society of Political Prisoners and the Repressed, the Association of Holodomor Researchers in Ukraine and Memorial Society established The Ukrainian National Committee on organization of international trial over the Soviet Union Communist Party for totalitarian regime crimes (Nurenberg-2).[6] At the initial stage, this Committee had rather good political support of 68 members of the Ukrainian parliament, which however failed to capitalize in a certain success.

In 1999 anticommunist rhetoric was adopted by incumbent, at that time, Ukrainian president Leonid Kuchma, a major competitor of whom was the representative of the Communist Party of Ukraine Petro Symonenko. For Presidential support a Public Anti-communist Congress took place in L'viv at the end of 1999. However it didn't have any legal or political effect. After completion of the elections the anticommunist rhetoric of the power disappeared again.

However, *The Anti-communist Congress* and *The International Public Tribunal*, aimed at international conviction of Communism[7] took place outside Ukraine in Vilnius in March 2000 on the initiative of many public and political forces. The Ukrainian delegation also took part in the events and prepared well-grounded document *The indictment of the international public criminal case on the accusation of the Soviet Union Communist Party in committing crimes on the territory of Ukraine and against the Ukrainians*.[8] One of the key moments of this document was the accusation of the communist power in the commitment of Genocide crime against the Ukrainians in the form of Holodomor. However, neither the document itself, nor the whole Congress and the process didn't become known in Ukraine. The authorities didn't react on public appeals with the demand to initiate the criminal case investigation on the Genocide in Ukraine in 1932–1933.[9]

The situation has changed just after 2004 revolutionary events and changes of power in Ukraine. The new leadership of the state started to refuse from the totalitarian past and to condemn the communist regime crimes. The archives of the USSR punitive and repressive system began to open during independence for the first time. In January 2009 the President Viktor Yushchenko issued a special Decree on declassification and disclosure of documents connected with Holodomor, political repressions and Ukrainian liberation movement. Following the Decree it was conducted a great work aimed at the disclosure and access to the documents classified before, which elucidate communist regime crimes in Ukraine.

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6 L. Lukianenko Nurnberg-2. – Kiev, 2001. – P. 16

7 Anti-communist Congress and Tribunal Proceedings. – Vilnius, 2002.

8 L. Lukianenko Nurnberg-2. – Kyiv, 2001. – P. 37–85

9 I. q. – P. 26–27, 33.

All these facts gave an opportunity to raise a question about the necessity to launch a criminal case on Holodomor. The group of public activists and MPs appealed to the Security Service about it. On 22 May 2009 the Security Service of Ukraine launched a criminal case on committing Genocide in Ukraine in 1932–1933 on the grounds laid out in Part 1, Article 442 *Genocide* of the Criminal Code of Ukraine.[10] From that time the investigative group of 150 investigators has started the large-scale work in all Ukrainian regions.

The investigation collected the materials that were parts of 330 volumes of the criminal case. There are 3 186 death registration acts folios of 1932–1933, more than 5,000 archival documents of the Bolshevist party and other public institutions, video-tape recordings of witnesses' memories among the documents of the case. During the investigation 1,890 witnesses were interrogated, 24 forensic medical examinations were carried out. The psychological, scientific and demographic, comprehensive historical and legal examinations were also conducted. The investigation found that the Communist leaders of that time, in particular Yosyp Stalin, Viacheslav Molotov, Lazar Kahanovych, Pavlo Postyshev, Stanislav Kosior, Vlas Chubar' and Mendel' Khataievych were the organizers of the crime. According to the investigative materials the mentioned individuals used the repressive apparatus of communist totalitarian regime in Ukraine in peacetime, made a decision and artificially created living conditions aimed at partial physical extermination of the Ukrainian national group, using the following mechanisms and methods:

- the development of the corn-storage plan for Ukraine up to the level that wouldn't be fulfilled. But if this plan was fulfilled – it was made only by forcible way, using repressions and at the expense of complete confiscation of seed and corn stores of peasants;
- including districts, populated areas, collective farms, village councils to the "black lists", i.e. blocking them with military forces, ban on leaving these territories by population, absolute confiscation of food, and ban on trade;
- the isolation of Ukrainian territory by specially armed detachments, military and police units;
- the limit of free movement of peasantry out of Ukraine to look for food and ban on correspondence;
- the installment of *fines paid in kind*;
- carrying out constant searches with the confiscation of seed and corn stores, belongings, clothes, all food;

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10 The resolution on launching of the criminal case and beginning of its pre-trial investigation// Holodomor 1932–1933 in Ukraine. The materials of the criminal case # 475. – Kyiv, 2010. – C. 1-3.

– strengthening the measures of criminal repression, including military execution of the persons, who resisted the confiscation of seed, meat, potatoes, sunflowers, etc.

The documents of Ukrainian, Polish, German and Italian archives were added to the materials of the case. The facts of Holodomor in 1932–1933 in Ukraine are confirmed by 857 mass burial places of Genocide victims, revealed during the investigation. According to forensic, scientific and demographic expertise conclusion of M. W. Ptukha Demography and Social Research Institute of the National Academy of Sciences of Ukraine 3,941,000 persons perished in the result of Genocide in Ukraine. Taking into account the cumulative losses Ukraine lost 10,063,000 persons.

On 31 December 2009 the Security Service of Ukraine forwarded the criminal case to the Kyiv Court of Appeal for the judicial trial under the legislation in effect. The trial of the criminal case upon the fact of Holodomor organization in 1932–1933 in Ukraine was completed on January 13, 2010. Under the international and national legislation in effect, the court condemned J. V. Stalin, V. V. Molotov, L. M. Kahanovych, P. P. Postyshev, S. V. Kosior, V. Y. Chubar and M. M. Khataievych for crime against Humanity. According to the UN Convention *On the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* dated November 26, 1968 (ratified by Ukraine on 25 March 1969) this crime doesn't have time limitation. Taking into consideration that the accused are dead, the criminal case was closed by the court, according to Point 8 Part 1 Article 6 of the Code of Criminal Procedure of Ukraine i.e. under non-rehabilitative grounds. On 21 January 2010 the decision of the Court of Appeal came into effect. Thereby Ukraine implemented its international obligations to take measures on the prevention and punishment of the crime of Genocide following the UN Convention *On the Prevention and Punishment of the Crime of Genocide* dated 9 December 1948. Therefore, statement of the fact of crime by the court became the most important juridical result of the trial. The court indicated the mechanisms of its realization and classified it juridically as the Crime of Genocide.[11]

Hereby at last Ukraine got the first legal precedent of the communist power crime conviction. We expect, that there will be other cases, and the activity of Ukrainian law-enforcement agencies and the public, coordinated with other international initiatives, will result in the international tribunal, that will help to give an exact legal assessment of the Communist regimes and their crimes.

Volodymyr Viatrovych

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11 Kyiv Court of Appeal. The Resolution. 13. 01. 2010//Holodomor of 1932–1933 in Ukraine. Materials of the Criminal case # 475 – p. 5–52.

Session III.
Crimes committed by communist regimes in the former Soviet Union, the new EU member states, Germany and the Balkans – studies of individual states II

Zianon Pazniak, Belarus[1]
Władysław Bułhak, Poland
Ľubomír Morbacher, Slovakia[2]
János M. Rainer, Hungary
Hans Altendorf, Germany

Host: Zuzana Vittvarová, member of the board, association Enemy's daughters, Czech Republic

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1,2 Could not attend the conference in person.

ZIANON PAZNIAK ► Former leader of the Belarusian opposition, USA

Dr Pazniak studied fine arts and worked as an archaeologist. In 1988, he published his research on alleged NKVD mass executions of 250,000 people in the forest of Kurapaty near Minsk. He is a leader of the Belarusian national revival movement. As a deputy of the Belarusian Parliament (1990–1996), he was involved in conducting public investigations of the Chernobyl accident and proclaiming the Declaration of Independence of Belarus in 1991. He left Belarus in 1996 and was granted political asylum in the USA. He is a member of the PEN-Center.

WŁADYSŁAW BUŁHAK ► head of the Division of Research, Expertise, Documentation and Library Holdings at the Public Education Office, Institute of National Remembrance

Władysław Bułhak graduated in history from Warsaw University, earning his Ph.D. in 1998. He was a doctoral candidate at the Institute of History of the Polish Academy of Science. He worked as an expert at the Centre for Eastern Studies, Warsaw, and at the Ministry of Foreign Affairs. He has published on various aspects of Polish-Russian (Soviet) relations in the 19th and 20th centuries, and on the intelligence and counter-intelligence of the Polish Home Army (1939–1945). His research in progress is on Polish communist civilian intelligence.

ĽUBOMÍR MORBACHER ► Nation's Memory Institute

Ľubomír Morbacher graduated from the Faculty of Education of Comenius University in Bratislava. Since 2003 he has been working at the Nation's Memory Institute in Bratislava. His interests are the personal and organizational reconstruction of individual territorial units of the State Security forces active in Slovakia during the so-called "normalization" era and the documentation of their activity. He has also collaborated on the documentation of cases of civilians killed on the Slovak-Austrian section of the Iron Curtain in the years 1948–1989 and on the criminal charges raised with the General Prosecutor of the Slovak Republic in these cases in 2008.

JÁNOS M. RAINER ▸ Director, Institute for the History of the 1956 Hungarian Revolution

János M. Rainer is a historian, director of the 1956 Institute, professor at Eszterházy Károly College (Eger) and lecturer at Budapest University of Theater and Film Arts. He published the book *"Imre Nagy. Political Biography 1896–1953"* Vol. 1 and 2, which appeared in 2006 in Polish, German, Russian and English translations. With György Litván and János M. Bak, he co-authored *"The Hungarian Revolution of 1956. Reform, Revolt and Repression 1953–1963"* which also appeared in German, English and Japanese. Along with Csaba Békés and Malcolm Byrne, Rainer compiled, edited and introduced *"The 1956 Hungarian Revolution: A History in Documents."* In 2002, he received the Academy Prize of the Hungarian Academy of Sciences.

HANS ALTENDORF ▸ Director, Federal Commissioner for the Records of the State Security Service of the Former GDR

Hans Altendorf studied law, education science, political science, German language and literature. He entered higher public service in Hamburg in 1980. From 1993, he was Senate Director in the Department of Schools, Youth and Education. Since September 2001, he has been the Acting Director and Representative of the Federal Commissioner for the Records of the State Security Service of the Fomer GDR (BStU).

Belarus, Ukraine, Eastern Europe – a space stricken by genocide

The totalitarian regimes which ruled in Russia and Germany in the 20th century left millions of civilian victims in their wake. In Germany people died in concentration camps and partly also at work camps. In the Soviet Union, they died in forests, in the cellars of the NKVD (People's Commissariat for Internal Affairs), or in specially adapted ancient Belarusian forts and chateaux. These mass murders were top secret and this genocide was unknown until 1988. Officially the Soviet authorities only spoke about the gulags, though the gulags existed as a system of work camps. The question arises – where did the millions of victims disappear to? Russian communism was based on the NKVD and on lies, though that chalice of lies overflowed in the 1980's and communism collapsed. Nevertheless, to this day it has not been possible to establish the number murdered by the USSR – figures from five to 70 or more million have been put forward.

However, another issue is of greater importance. Not only during the communist-Soviet occupation (until Stalin's death in 1953) but also during the German-fascist occupation, Belarus and the whole of eastern Europe (not including Russia) was a territory stricken by mass murder. Both occupiers carried out all manner of atrocities, including genocide. The West has also begun to examine this issue. Timothy Snyder has shown that the epicentre of the mass murders committed in the middle of the 20th century was in Belarus, Ukraine and Poland. Hitler and Stalin wanted to eradicate the local population in order to implement their supra-national plans.

During WWII, the Germans murdered one Russian civilian in 25. In Ukraine and Poland it was one in 10, and in Belarus one in five. The Soviet communists came out with another figure after the war – "one in four" – as they also included Belarusians killed by Russian communists even before the war (victims from the 1917–1941 period). This leads us to a horrifying number – roughly half the population of our country.

Timothy Snyder demonstrates this statistic with the following words: "The German occupiers let Soviet prisoners of war starve to death, they exterminated the Jews, and they shot civilians during operations against partisans. Belarus therefore became the place with the highest death rate in the world. Half of the population of Soviet Belarus was exterminated or violently expelled during the Second World War. It is not possible to say something like this of any other European country."

In this connection Marc Mazower suggests that during the period in question Europe became a "dark continent". In his view, Ukraine and Belarus turned into the "heart of darkness" – one gigantic graveyard.

By contrast with the Germans, the Russians succeeded in keeping testimonies and evidence about the genocide in Belarus and Ukraine secret. Their actions were concealed behind the term "Stalinist repression", the gulag, or the "cult of Stalin". In 1988, however, the conspiracy of silence was broken. Kurapaty and later Bykivna near Kiev were discovered. Newspapers published information on the Ukrainian famine and on the slaughter in Belarus. More than 10 places around Minsk, and one spot actually in the capital, are known to have witnessed the shooting of Belarusians by Russians. It is one big grave, a city built on human bones, the symbol of our history.

This tragedy lived on in the memory of a generation. I have investigated those places of suffering – in Minsk, Kurapaty, Loshica, and elsewhere – and have made many noteworthy discoveries. Above all I wished to find witnesses and speak to them, because time flies and these people are dying out.

All the witnesses said that NKVD cars drove to towns and villages nightly and people were arrested. Tatiana Matusevich remembered how one night a NKVD van arrived in her village and 25 people were arrested. The people had nowhere to run because these vans were everywhere. Witnesses said that adults went to bed fully dressed because the NKVD might come for them.

Most people did not understand why the murders were taking place. All the witnesses who lived in the area of Kurapaty agreed that people had been shot nightly from 1937 until 23 June 1941. They heard people scream: Why? What have I done?

This is proof of the fact that the killings were extrajudicial. In the best cases the authorities announced a verdict without court proceedings. It was like a conveyor belt of murder.

Halina Zhukov from Minsk told me how her parents were arrested one night. The next morning she went to the NKVD headquarters to find out what had happened to them. Thousand of people – among them many children, her peers – were waiting in the corridors and courtyard. She queued for several days, sleeping on the floor, in order to speak to an investigator. The investigator told everybody the same thing, without even glancing at a list of arrestees: Ten years without the right to correspondence. Later Mrs. Zhukov learned that her parents had been executed at Kurapaty. The investigator had lied to her, as he had lied to others, because all of those detained had been shot dead. The murderers lied to relatives and people were unaware of what had really happened. The machinery of killing was working at full steam.

The authorities sometimes held trials in the form of what were known as trojkas – groups of three party functionaries entrusted by the party leadership with the right to issue the death penalty and other punishments.

Belarusians have been unable to find a rational explanation for these events. Nadjezda Mikulich (a teacher who lived near Kurapaty) described to me an NKVD raid on her native village of Malaya Sliva near the town of Slutsk. Her parents and a

number of others – farmers and teachers – were arrested. Among them was a woman of 60 named Marylya Spak who was illiterate and deaf. She lived in great poverty and her home was a cellar. The Russians tortured her in a cruel and inventive fashion, pouring sand down her throat and demanding that she confess. In the end she died of a blow to the head.

The Belarusians who survived were unable to come up with any explanation for the actions of the NKVD officers. These Belarusians generally identified with the Soviets. They did not regard them as an occupying force and were therefore willing to believe communist propaganda. They believed the lies about the fight against "enemies of the people", "agent saboteurs" and "Trotskyite spies". Behind this veil the Russian occupiers carried out the genocide of the Belrussian population. When the German fascists murdered Jews, the Jewish victims at least knew the reason they were being executed – for being Jews. The Germans told them. When NKVD officers killed Belarusians the victims did not know the reason. They asked their executioners: Why? Our nation has never understood the meaning of this slaughter. The murderers have either kept silent or spoken about "enemies of the people" and "spies".

The Russian communists prepared thoroughly for the genocide in Belarus. Everything went according to plan and under the supervision of Moscow. It was no secret that Moscow authorised the liquidation or arrest of "enemies of the people" in all of Belarus´s administrative regions. Every ministry had its own "gulag department" tasked with sending a planned number of people to the gulag with the purpose of building up the Soviet economy. The number of victims was kept secret and the precise plans were known only to Moscow and the leadership of the NKVD. Prosecutors, investigators and judges who did not hand down the requisite number of death penalties themselves faced death by shooting. It was like a conveyor belt of murder. The NKVD minister of the Belarusian Soviet Republic, Alexei Nasedkin, who led the political slaughter in 1938, was arrested a year later and sentenced to death, a common practice of the Stalinist USSR The prominent prisoner Nasedkin wrote that he had the task of phoning Moscow every day to report on the number of "enemies of the people" shot dead. Every region had its own individual daily plan. Every leader at town, district and village level and every leader of a Communist Party organisation obtained a plan as to how many "enemies of the people" to provide every day, week and year. A witness from the village of Tsna (near Kurapaty) told me that the local mayor Tshimoch Batsyan was unable to fulfil the set quota. As punishment, NKVD officers took him off to Kurapaty, stood him in front of a ditch and pointed their pistols at him. They shouted at him: Deliver enemies of the people to us!

In 1988, we carried out archaeological excavations in Kurapaty. Analysis of the samples we found confirmed that the killings had been extrajudicial. We were able to demonstrate that the graves were dug at the end of the 1940s. Many bones were

removed, which confirmed one of the testimonies. Russian NKVD officers were aware of what they were perpetrating in Belarus and tried to cover their tracks – in vain.

These executions had not been legally justified and had not been preceded by court trials. In principle this had not even been possible, because of the number of people shot dead. Therefore the authorities only put forward the mere illusion of legal formality, so people were murdered in essence by political methods known only to the Moscow leadership. It is possible that the perpetrators of these murders were convinced that they were fulfilling the will of the party and liquidating "enemies of the people". We also spoke to such people. They were ordinary murderers, the scum of society. By these actions the Soviet authorities contravened a basic right – the right to life and personal integrity, which, by the way, was enshrined in article 127 of "Stalin's constitution".

Questions arise. Why did the occupiers liquidate the Belarusian nation? And what methods did they employ to do so? The roots of that policy reach deep into the history of our country. Belarusian society was situated between the East on one side (the Mongolian-Russian side) and the West on the other (the German side). The concurrence of the expansive forces, which acquired its final form at the end of the 18th century, determined the battle on both sides. The two sides later clashed head on, a fight which flowed into two world wars. Belarus – the former Grand Duchy of Lithuania – was destroyed by those two expansions.

Hitler's fascists had two plans as to how to exterminate the populations of Belarus, Ukraine, Poland, the Czech Republic and Slovakia. The first was the "final solution of the Jewish question" – the liquidation of the Jews. The second plan, which had two parts, included the liquidation and Germanization of the Slavs. The first, the so-called Hunger Plan, was to kill 30 million people in Belarus, Ukraine and Eastern Europe through a famine brought about by the Germans. The second phase that was due to follow was the General Plan East, under which the Eastern European territories were to have been colonised. During its realisation 50 million people were to have been murdered.

The Russian communists' plan for Belarus and Ukraine looked similar, with the difference that they had beaten the Germans to it. They had begun to put this policy into effect in the 1930s. In the case of Ukraine, this involved a special famine plan. After the decimation of the Ukrainian population the territory was to be settled by Russians. The Russian communists organised a Great Famine in which according to Western figures up to three million Ukrainians died. Ukrainian researchers put the number of victims at 10 million.

In Belarus the Russian communists tried a model that had been applied by the Russian tsars in the 17th century – the physical liquidation of the population and the Russification of those Belarusians who survived. The aim of this policy was the unconditional destruction of Belarusian culture, Belarusian historical memory and

Belarusian education. Afterwards the population of Russian Eurasia was to occupy the territory and the social structures left after the removal of the Belarusians. By the way, Lukashenko's occupying regime follows this policy in the form of the Russification of Belarus, with its supporters openly speaking about the destruction of Belarusian culture.

So-called Stalinist repression was aimed at the very existence of Belarus and Ukraine. Soviet policy has on its conscience six or seven times as many victims in Belarus and Ukraine as in Russia.

So why is Russian communism dangerous even today, when it apparently no longer exists? The danger remains current because the repressive force of Russian communism, which made possible a policy of genocide, is now disposed of by Russian state power. This repressive power controls the entire society and practices a similar or identical policy, including foreign policy. This includes the internal occupation of our country and Russian support for the pro-Russian and anti-Belarusian Lukashenko regime, which relies on the KGB. Russian "KGBism" is also attempting to establish this model in Ukraine, the Caucuses and other parts of the world.

Russian "KGBism" is defined by the absolute power of the KGB in Russia, where it represents the main political force. We can characterise the KGB as a kind of super-party which is at the same time a state structure in the hands of which all power is concentrated and which rules the entire society. The ideology and methodology of this super-party is communism, even though Russians do not use that word. That super-party is reviving the Stalin cult, the cult of the NKVD and Soviet history. This super-party is evolving and acts through a symbiosis of communist and fascist principles. We have seen the infiltration of fascist forms into Russia communist ideology. This is a process founded on the demands and interests of Russian imperialism.

The danger of totalitarianism remains current and the world should work together to oppose this ideology. Eastern European society has to fight off the metastasis of communism. It finally has to be acknowledged that the policy which the Soviet Union exercised from the 1920s to the 1950s in Eastern Europe amounted to political genocide. Belarus and Ukraine became its first victims, the victims of a crime against humanity.

Zianon Pazniak

The following report applies to the execution of tasks performed by the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, related to the prosecution of communist, Nazi and war crimes, crimes against the humanity as well as those against peace.

The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation was called into being by the passing of a parliamentary act of 18 December 1998.

The preamble to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation indicated the foundations and leading principles this legal document was supposed to satisfy in regard to the injustices suffered under the totalitarian regimes:

The leading principles include:

- remembering about the multitude of victims, losses and damages suffered by the Polish Nation during WWII and after its end,
- patriotic traditions of the Polish Nation's fight against the oppressors, Nazis and communists,
- civil actions aimed at the independence of the Polish Nation and executed in defense of freedom and human dignity,
- the obligation to prosecute crimes against peace, humanity, as well as war crimes,
- the duty of the state to satisfy all those harmed by the law violating the human rights.

In the preamble, the legislator expressed its wish for no illegal actions of the state against the citizens to be kept confidential or become forgotten.

The prosecuting attorneys of the Commission for the Prosecution of Crimes against the Polish Nation have conducted investigations in regard to the crimes committed on ethnic Poles or Polish citizens of other nationalities (those crimes are not subject to the statute of limitations), as well as those committed by the communists from 17 September 1939 until 31 July 1990.

According to the Act, the provisions of the Code of Penal Procedure shall be used by the prosecuting attorneys of the National Institute of Remembrance and other prosecuting entities in order to conduct their investigations. At the same time, it was made possible for the Institute prosecuting attorneys to be fully involved in the prosecution of crimes specified in the Act, and kept out from the general prosecuting structures of the state. Moreover, the organizational setting within the structure of the Institute of National Remembrance ruled out the existence of any extra-subject influences.

The new statutory regulations made it possible for the Institute prosecutors to conduct their investigations all by themselves. The investigations in which the crime perpetrators have been defined are concluded with indictments sent to the relevant courts. The other investigations end with process decisions in the form of legal proceeding discontinuations. The Act has made it possible for the prosecutors of the of National Remembrance to be fully independent in collecting evidence, including archive materials, which rendered significant influence on bringing to justice the people guilty of committing the crimes specified in the Act.

1. Types of crimes prosecuted by the investigators of the Institute of National Remembrance

The objective scope of the Institute tasks as regards the prosecution of crimes has been defined in article 1, item 1, letter "a" of the Act on the Institute of National Remembrance.

The scope covers illegal deeds committed on ethnic Poles or Polish citizens of other nationalities from 1 September 1939 until 31 July 1990, which concern:

- Nazi crimes,
- communist crimes,
- other crimes constituting crimes against peace, humanity or war crimes.

In particular, I would like to focus on presenting the crimes prosecuted by the lawyers of the Commission for the Prosecution of Crimes against the Polish Nation.

1.1 Communist crimes

The legislator has defined the notion of a communist crime in article 2, paragraph 1, stating that communist crimes are deeds committed by the public servants of the communist state from 17 September 1939 until 31 July 1990, which had involved the use of repression or other forms of human rights violation towards individuals or groups, constituting crimes pursuant to the Polish penal laws applicable during that period.

Therefore, for a deed to be viewed in terms of a communist crime the following elements making up the objective and subject-matter scope of the "communist crime" notion have to be fulfilled:

- the deed was committed by a communist state public servant,
- the deed was committed within the period between 17 September 1939 and 31 July 1990
- the deed involved the use of repression or other forms of human rights violation

towards individuals or groups, or it was committed in relation to the usage thereof,
- the deed constituted a crime pursuant to Polish penal laws applicable at that time.

Even though the act does not say so specifically, the arbitration practice and legal literature suggest that communist crimes may be committed only on purpose. That is why the definition mentions "the use of repression", indicating that the perpetrator acts with a direct and well-aimed intent.

The abovementioned conditions specified by the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation do not introduce any new generic crimes. They do specify, however, the criteria to be met by the crimes defined previously by the legal sources, such as: Penal Codes and other acts containing penal provisions, so that communist crime features may be attributed to them.

In article 2, paragraph 2, the notion of a public servant has been clearly defined. It is, thus, a public functionary and a person protected as a public servant, in particular a state functionary and a person working on a managerial position in a communist party statutory body.

Article 39, item 2 of the act of 18 October 2006 on disclosing information in regard to the documents of the state security bodies from the period of 1944–190, as well as the contents of these documents, amending article 2, par. 1 of the IPN Act, has expanded the objective scope of communist crimes by adding the behaviors consisting of prohibited deeds specified in art. 187, 193 or 194 of the Penal Code of 1932, or art. 265 par.1. art. 266 section 1, 2 or 4 or art. 267 of the Penal Code of 1969, committed against the documents as understood by article 3, par. 1 and 3 of the act of 18 October 2006, having harmed the persons the said documents refer to.

It is a particular type of a communist crime, covering offenses against documents, showing the features of deeds mentioned in art. 187 of the Polish Penal Code of 1932 and art. 265, section 1 of the Polish Penal Code of 1969 (forging or remaking of a document in order to use it as an authentic one or using it as an authentic document), article 193 of the Polish Penal Code of 1932 and art. 267 of the Penal Code of 1969 (obtaining a certification of untruth by false pretences by a public functionary or another person authorized to issue a document or the use of such a certification), article 194 of the Penal Code of 1932 (filling out the form with somebody else's signature contrary to the will of the signing party or the use of such a document), and article 266, section 1, 2, and 4 of the Polish Penal Code of 1969 (certification of untruth in a document by a public functionary or another person authorized to issue a document [section 1], the use of a document described in section 1 (section 2), commitment of offenses described in section 1 or 2 in order to obtain material gains (section 4).

Any deed in such a form must show all the features of a communist crime, which means it has to be committed on purpose, by a public servant in the period between 17 September 1939 and 31 July 1990.

As shown above, only a deed showing the features of an offense defined by the Polish penal laws applicable at that time may be treated in terms of a communist crime. Analyzing the notion of "offense" used by the legislator, it should be concluded that communist crimes involve both real crimes and misdemeanors. They are called crimes because of a high degree of damage to the society, resulting from the fact that "they were committed as part of the improper functioning of state bodies".

At the moment, the Regional Commission of Prosecuting Crimes against the Polish Nation are conducting approximately 700 communist crime investigations.

1.2 Nazi crimes

It seems necessary and legitimate to present the definition and investigation methods pertaining to the Nazi crimes in order to show the material and legal aspects of them and talk about the subject matter and areas in which the prosecutors of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation operate.

The definition of a Nazi crime has not been included in the Act on the Institute of National Remembrance. In general, it should be understood in terms of crimes such as: war crimes, and crimes against peace and humanity committed during WWII by the functionaries of the German state and persons cooperating with them in the interest of the German state or its ally. They are punishable on the basis of the relevant provisions of the Penal Code and the Decree of 31 August of the Penal Code, as well as article 1, item 1 of the Decree of 31 August 1944 on the degrees of punishment for Nazi criminals guilty of killing and torturing civilians and captives. A Nazi crime does not have to be interpreted on the basis of the Polish Penal Code, i.e. constitute a deed punishable by imprisonment of at least three years or a more severe sentence.

The tasks of the prosecutors working for the Commission for the Prosecution of Crimes against the Polish Nation (one Main and 11 Regional Branches set up on 1 August 2000) include the prosecution of Nazi and communist crimes, as well as other offenses making up war crimes and crimes against peace and humanity – committed between 1 September 1939 and 30 July 1990. The prosecutors of the Commission are fully authorized to act as public prosecutors in penal proceedings, including those falling under the competences of military courts – both at the level of preliminary proceedings and court ones. It refers to the prosecution of all the crimes – be it communist, against peace and humanity, or war crimes.

The act obliges the prosecutors from the Commission to clear up all the circumstances under which the analyzed crimes had been committed, even in case of specifying the negative feature of the proceedings, i.e. death of the perpetrators. The Polish state will never stop conducting its investigations in regard to the Nazi crimes. The multitude of victims and losses incurred during WWII makes it a strict obligation to specify the aggrieved parties and collect as much data as possible with reference to each, single crime.

Coming to a conclusion that the crime perpetrator is dead does not result in an immediate ending of penal proceedings through discontinuation, the way it is done in general courts. The Commission prosecutors are obliged to continue their work. The proceedings are terminated after the circumstances of a given case have been thoroughly analyzed.

Due to the nature of examined crimes, the investigations are conducted on the personal basis. Therefore, almost all the actions are performed personally by the prosecutor. Only minor tasks may be contracted to the Police.

In the period between August 2000 and June 2009 the Commission prosecutors conducted and concluded 2,116 investigations relating to Nazi crimes. Those were often complicated, multi-plot cases, arousing much social interest, for example: the investigation into the killing of Polish citizens of Jewish nationality perpetrated on 10 July 1941 in Jedwabne.

All in all, 14,359 witnesses were interviewed during the abovementioned period for the purpose of this category of proceedings. There are about 300 Nazi crime investigations being carried out at the moment. The number hardly ever gets smaller, as decisions are made to initiate the subsequent proceedings.

As the crimes were committed a very long time age, there are specific consequences for the conducted investigations. It is often necessary to spend much time laboriously looking for documents issued a few dozen years ago and people who witnessed what had been happening. The advanced age of the witnesses, the condition of their health, and the long distances from their homes frequently make it necessary for the prosecutors to give up the idea of calling them to appear in the office and go to visit them themselves.

Repeatedly, the conducted investigations lead to important conclusions. The circumstances of Nazi crimes committed in an annihilation center in Chełm Ner have been analyzed by the Poznań Branch of the Commission. The legal proceedings revealed one of the living perpetrators of those crimes. He was arrested on 3 November 2000. Henryk M. was charged with the following accusation: in the period between 8 December 1941 and 7 April 1943, in the abovementioned annihilation center, acting in cooperation with other persons, he took part in genocide committed on Jews and other nationalities. He would beat up the prisoners, take away their belongings (valuables, clothes, personal items), lead the people sentenced to death to gas chamber

cars. What he did was classified as a crime specified in article 1, item 1 of the Decree of 31 August 1944.

The Regional Court in Poznań found the accused guilty as charged and sentenced him – on 6 July 2001 – to 8 years in prison.

The Supreme Court dismissed the last resort appeal instituted by the defense counsel, maintaining the abovementioned sentence.

The investigators' actions often lead to finding Nazi crime perpetrators who leave abroad. Such was the case in an investigation conducted by the Commission Branch in Lublin – regarding Nazi crimes committed on Poles and Jews from July, 1941 until 23 July 1943 in Majdanek by the members of the Lublin concentration camp team. The prosecutors found out that one of the camp guards had still been alive and resided in Austria. On 21 May 2007 the prosecutor of the Lublin Commission announced his decision to press charges against that person.

On 20 June 2007, the Polish authorities sent a motion for international legal help to be offered by the justice bodies of the Republic of Austria. The Austrians were asked to provide information on whether there were any criminal proceedings conducted against the person in question, to send over a photograph of the suspect from the period during which the alleged crime was perpetrated, provide the current residence address and some other details. The Austrians sent the relevant materials in December 2008, informing, at the same time, the Polish parties that the suspect had died on 16 February 2008. The official confirmation of the suspect's death made the prosecutors discontinue the proceedings on 31 December 2008.

The case is a good example of successful execution of legal proceedings within the framework of international cooperation of prosecutors.

A similar investigation – revealing Nazi crime perpetrators after a few dozen years – was conducted by the Lublin Commission in regard to the killings of Jews perpetrated in Trawniki (a Nazi work camp) near Lublin by the representatives of the German occupation authorities.

It was found out that Josias K., a member of the Sachsenhausen concentration camp, had taken part in one of the extermination campaigns organized in Trawniki. After the war, the German emigrated to USA. Applying for an American citizenship, he held back the facts related to his SS membership and service in Nazi concentration camps, Upon discovering the war past of Josias K, the US government filed suit against him and applied for his naturalization to be revoked (as it had been obtained illegally). The suit was successful and Josias' naturalization was cancelled by the competent American court on 23 February 2006. Josias K. was subsequently deported to Austria.

On 19 December 2008, the Lublin Commission sent a motion to the legal authorities of Austria, asking them to check whether they had discovered any facts pertaining to the participation of the person in question in Nazi crimes committed on the territory of

occupied Poland. The answer was clear: there were no legal proceedings conducted in Austria against the suspect. The Austrians said it was not possible for them to prosecute Josias K. due to the statute of limitations in regard to war crimes. Therefore – in accordance with local laws – any extradition motion would have to be dismissed.

In the pursuit of completing the investigation evidence, a motion was sent to the US court authorities on 19 March 2009 for sending over to Poland the copies of Josias K's interrogation protocols, his declarations and proceeding letters drawn up during the procedure of revoking his American citizenship.

The structures of the Commission for the Prosecution of Crimes against the Polish Nation cooperate closely with international institutions dealing with Nazi crimes. Legal help is offered to foreign offices dealing with WWII crimes. For example in 2001 the prosecutors working for the Commission Branch in Białystok assisted the employees of the section dealing with crimes against humanity and war crimes in the Ministry of Justice of Canada. They were looking for evidence materials and witnesses to the actions of Ukrainian guards in the Białystok Ghetto. At the end of 2009, the same commission worked on the motion sent by the German prosecutors from Munich in regard to providing legal help on crimes committed by Ivan Demianiuk, a guard in Treblinka concentration camp.

At the moment, the Regional Commissions of Prosecuting Crimes against the Polish Nation are conducting approximately 300 communist crime investigations.

1.3 Crimes Against Humanity, Peace; War Crimes

Crimes against humanity have been defined in article 3 of the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. In particular, these are the crimes of genocide as understood by the Convention on the Prevention and Punishment of the Crime of Genocide passed on 9 December 1948, as well as other serious persecutions related to being part of a certain ethnic, political, social, national or religious group, if they were conducted, inspired or tolerated by public servants.

On the basis of investigating activities conducted by the Institute of National Remembrance, the investigations are carried out more than 50 years from the moment the crimes were committed, which make the IPN prosecutors realize, all the difficulties aside, they are racing against time. The specification of a circle of people to be interrogated as part of the investigations is most of the time preceded by a laborious search of archive documents which are often not accessible to the state bodies of the Republic of Poland. Such a situation renders great influence on the way the investigations are conducted and their results.

As a matter of fact, the main objective of each investigation – pursuant to the requirements of the 18 December 1998 Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation – is not only to find the perpetrators of the crimes, but also to clear up the circumstances under which they were committed, in particular to find out who the aggrieved parties (i.e. the victims and their legal successors) were. It should be underlined that the investigators dealing with the killings of a few dozen Polish citizens – men, women and children living in Wołyń (formerly belonging to Poland) in the 1940s – interrogated more than 1,000 witnesses. Over 5,000 (the number still rising) victims and witnesses were interviewed as part of investigations on genocide, conducted by the Wrocław Commission.

The main task of the investigators is to provide legal assessment of those events. This assessment is therefore crucial not only from the criminal but also historical viewpoint.

Historically speaking, the notion of genocide was first shaped by international laws. Only later was it adopted by internal laws of individual countries.

The term "Genocide" was described and identified for the first time in a peace treaty with Turkey in 1920 (Ex facto ius aritur – law stems from a fact). It stipulated the liability of people responsible for exterminating thousands of Armenians in Turkey between 1914 and 1915. As a scientific concept, the term was defined by Rafał Lemkin, a Polish professor from the University of Lvov in 1944.

Generally, it should be stated that the notion of crime against humanity appeared in the legal language as a consequence of crimes committed during WWII and the resulting necessity to pass judgment on German war criminals. During Nuremberg Trials the crime of genocide was frequently identified with crimes against humanity. The two terms were used interchangeably. The analyzed term was used in the indictment placed before the Judges of the Nuremberg Tribunal passing judgments on the German war criminals.

The fact was extremely important for the development of International Public Penal Law. As a result, the UN General Assembly passed its Convention on the Prevention and Punishment of the Crime of Genocide in 1948.

The Convention, passed by the UN General Assembly on 9 December 1948 (ratified by the Republic of Poland with an Act of 18 July 1950 in articles I and II) defined the notion of the crime of genocide as a punishable deed. At the same time, it was indicated in articles III and IV that genocide constitutes crime in terms of international laws, and the persons responsible for committing it will be punished regardless of whether they are constitutionally liable government members, public functionaries or private persons.

Pursuant to the provisions of the Convention (article II), genocide shall be understood as any of the following deeds, perpetrated with the intent of destroying the whole or part of national, ethnic, racial and religious groups, particularly:

- murder of group members,
- damaging body or psychic balance of group members,

- deliberate creation of life conditions for group members, supposed to bring about their complete or partial physical destruction,
- use of means aiming at holding back births within the group,
- forced transfer of group members' children to another group.

Pursuant to article III, committing genocide, acting in collusion in order to commit genocide, direct and public abetting others in committing genocide, attempts to commit genocide, and complicity in genocide are all punishable.

As for the Polish law and the way the Commission prosecutors use the provisions, the crime of genocide should be qualified on the basis of article 118 of the Penal Code which accepted the provisions of the Convention, in relation to article 3 of the Act on the Institute of National Remembrance.

Another step in the direction of successful prosecution of perpetrators of crimes against humanity was made by the UN General Assembly when on 26 November 1968 its passed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Poland ratified that Convention on 29 January 1969.

The Convention introduced a principle according to which war crimes and crimes against humanity shall not be subject to statutory limitations, regardless of the date on which they were committed, (article I). The Convention provisions must be observed both by the members of state authorities and private persons who participated in the commitment of crime as perpetrators or partners, or directly abetted others in committing any of those crimes, or took part in a plot aimed at committing them, regardless of the state of execution, as well as by the representatives of the state authorities who tolerated the crime commitment (article II).

The principle of non-applicability of statutory limitations to war crimes and crimes against humanity was accepted by the Polish law in article 109 of the Polish Penal Code of 1969 and art. As of now, it stems from article 105, section 1 of the Polish Penal Code of 1997. The principle was repeated in article 4, paragraph 1 of the Act on the Institute of National Remembrance, but the provision under analysis extended it to cover also crimes against peace.

In the provisions of the Polish penal law, war crimes are covered by articles 119 (violence caused by national, ethnical, racial, political, or religious affiliation [or lack thereof] of the aggrieved party, 120 (use of means of mass destruction), 121 (creation or sales of means of mass destruction or means of combat prohibited by internal or international laws), 122 (attack on objects protected by international laws or use of prohibited means of combat), 123 (killing POWs, civilians or other groups of persons protected by international laws, as well as seriously injuring them or initiating in their regard actions forbidden by international laws), 124 (other cases of human rights

violation), 125 (destruction of cultural goods), and 126 (lawless use of protective signs) of the Penal Code.

Crimes against peace, understood as starting or conducting invading wars, preparing for such wars or public urging to commence an invading war have been regulated in article 117 of the Penal Code.

At the moment, the Regional Commissions of Prosecuting Crimes against the Polish Nation are conducting approximately 40 investigations on war crimes, crimes against peace, and crimes against humanity.

2. Crime assessment in view of international legislation, particularly with regards to crimes against humanity

The prosecution of crimes investigated by the prosecutors working for the Commission for the Prosecution of Crimes against the Polish Nation may be difficult due to differences in internal laws of individual countries.

It should be borne in mind that one of the principles binding in the international legal turnover with regards to penal cases is the right of the summoned state to refuse legal help if the deed under investigation does not constitute an offense pursuant to the laws of that state. Therefore, it is possible that legal help will be refused not only in regard to communist crimes, but also Nazi crimes which are, at the same time, war crimes or crimes against humanity.

One source of limitations within the scope under analysis is formed by the provisions of Article V of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and Article IV of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which obliged the signing countries to adapt their internal laws to the Convention provisions. In other words, the provisions were not supposed to be incorporated into internal laws directly and in their entirety, but only after the publication of relevant internal laws which – de facto – determined the scope in which the Convention norms should be used. A good example is the abovementioned case of Josias K., a citizen of Austria. Similar problems can be observed in our relations with Germany the internal legal provisions of which – out of crimes committed during the war – allow only for investigating murders understood in terms of homicides in the qualified form.

On the other hand, one of the issues that make things easier is the fact that Poland ratified the European Convention on Mutual Assistance in Criminal Matters on 9 January 1996. The Convention implements serious facilitations with regards to the legal turnover, such as the possibility to get in direct touch with the legal authorities of the signing countries.

Further facilitations within the scope of the legal turnover with foreign countries resulted from Poland joining the EU and accepting the provisions of the Executive Convention to the Schengen Treaty of 14 July 1985. The fact that Poland had accepted European regulations bore fruit in the form of a series of regulations adapting our internal laws to EU norms being implemented into the Polish Code of Penal Procedure. It made the contacts between legal authorities of EU states even easier (chapters 65a, 65b, 66a–66e).

Chapter 65a calls for special attention. It is concerned with a EU member state applying to another EU state for the transfer of a prosecuted person, based on a European warrant of arrest. These regulations make bringing to Poland and putting before the court of a criminal residing on the territory of an EU state much easier, regardless of his/her current citizenship. The prosecutors working for the Commission for the Prosecution of Crimes against the Polish Nation have used these norms more than once.

3. Punishability of Persons Guilty of Crimes Committed Before 1989

Between 2000 and 2009 the Regional Commissions for the Prosecution of Crimes against the Polish Nation conducted, all in all 9,218 cases: 6456 in regard to communist crimes, 2,404 in regard to Nazi crimes, and 357 in regard to crimes against peace, against humanity or war crimes. 8,004 were completed within the abovementioned period.

The prosecutors of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation sent 257 indictments to courts – related to communist crime cases. The indictments referred to the total of 403 defendants. There were two indictments regarding Nazi crimes.

Until 1 July 2009, the courts of the Republic of Poland tried 164 cases concluded with sending of the indictments – with regards to 268 defendants, out of whom:

- 23 were acquitted, 128 sentenced,
- 77 were made subject to the amnesty act,
- 33 people benefitted from discontinuation of the proceedings, based on article 17 section 1, items 1-6 of the Polish Code of Penal Procedure,
- 7 persons benefited from the completion of proceedings in a different manner.

The prosecutors working for the Regional Commissions for the Prosecution of Crimes against the Polish Nation interrogated the total of 65,450 persons as witnesses.

Orders on submission of charges were issued to 591 suspects.

Between 2000–2009 the prosecutors of the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation drew up 830 motions for the international legal help. In 20 cases, they personally took part in the

investigating procedures conducted outside Poland and executed 23 motions for the legal help from other countries.

The most symbolic achievement of the investigators from the Institute of National Remembrance is the prosecutor's indictment against Wojciech Jaruzelski for introducing martial law in Poland in 1981. Another is laying charges against the communist state functionaries with regards to murdering Catholic priests and committing other crimes during martial law.

Władysław Bułhak

At the beginning of the 1990s, on the basis of Act No. 119/1990 of the Collection of Laws (Coll.), on judicial rehabilitation, courts in Czechoslovakia rehabilitated more than 220,000 people who had been convicted in political trials in the years 1948–1989. It is an undisputed fact that the Czechoslovak Republic, where the Communist Party seized power in February 1948, executed hundreds of innocent people. Hundreds more were killed at the border attempting to escape to the West, and it subjected hundreds of thousands of its own citizens to extra-judicial persecution in addition to the most severe deprivation of personal liberty, which has already been mentioned.

As a result of its own political evolution after the break-up of Czechoslovakia and due to the unpreparedness and unwillingness of state bodies, the Slovak Republic has lagged behind in terms of the process of criminal redress. First and foremost, in the Czech Republic, an Office for the Documentation and Investigation of the Crimes of Communism was established as part of the Police of the Czech Republic. It was also known in the media as "Benda's Office" after its first director Dr. Václav Benda, a former exponent of dissent and signatory of Charter 77. It is possible to talk about the failure of this office to fulfil its original ambitions, as it originally wanted to prosecute the highest-ranking representatives of this regime, but it is also not possible to overlook the fact that by 2007 it had conducted 800 investigations and it had secured unconditional sentences for nine people as well as suspended sentences for 22 others.

To this day in the Slovak Republic, not one communist criminal has been given an unconditional prison sentence. It is a common feature of both countries which were established with the break-up of Czechoslovakia that the organs of power and the judicial apparatus were constructed and formed at the time of the communist totalitarian regime. It is only with great difficulty that one can see many former members of the Communist Party, who abided by party directives for years and who are now working as prosecutors and independent judges of a democratic state, as a guarantee of coming to terms with the communist past.

The only person to be "punished" in Slovakia was the former First Deputy Minister of the Interior of the Czechoslovak Socialist Republic and the last head of State Security before November 1989, Alojz Lorenc. In 1992, he was convicted by a Czech court in Tábor and given an unconditional sentence of four years' imprisonment for the crime of abusing the authority of a public official in the form of complicity. He was convicted for establishing and organising the preventive isolation of opponents of the communist regime in cells after having them pre-emptively arrested from 1988 to 1989. After the break-up of Czechoslovakia, he was able as a Slovak citizen to refuse to serve his sentence, which he duly did. Out of the original 300 aggrieved parties, only 11 people remained in the Slovak investigation file. The trial dragged on practically

from 1989 until the Military District Court in Bratislava decided on a suspended sentence of 15 months with 3 years probation in 2001. Following an appeal by Lorenc as well as by the military prosecutor, the Military High Court in Trenčín upheld this sentence in April 2002.

Besides other important tasks, Act No. 553/2002 Coll., as amended, (the Nation's Memory Act), which gave rise to the Nation's Memory Institute, imposes an obligation on the Nation's Memory Institute in Section 8, letter d) to initiate criminal prosecutions of crimes and criminal offences pursuant to Section 1 in cooperation with the Prosecutor-General of the Slovak Republic.

In May 2008, the Nation's Memory Institute filed a complaint with the Slovak Prosecutor-General's office in connection with the killing of 42 civilians at the Slovak-Austrian section of the state border in the 1948–1989, because we believe that these were crimes against humanity. In an appendix to this submission, we also presented a list of 246 victims of the Iron Curtain from the Bohemian and Moravian sections of the border with Germany and Austria.

The civilians who were killed at the border by being shot, electrocuted in electric-wire fences, blown-up by booby-trap mines, torn apart by police and army dogs, and other interventions by members of the National Security Corps or the Border Guards had tried to escape from the territory of the Czechoslovak Republic, later the Czechoslovak Socialist Republic, where their basic human rights and freedoms had been breached, to a territory with a democratic form of government.

Under the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968, Decree No. 53/1974), the Czechoslovak Socialist Republic undertook to ensure that no statute of limitations would apply to crimes against humanity regardless of whether they were committed during a time of war or in peacetime, as defined in the Statute of the Nuremberg international tribunal, dated 8 August 1945. A treaty on the prosecution and punishment of the major war criminals of the European Axis countries and the Statute of the International Military Tribunal were in the Collection of Laws and Regulations under number 164 from the year 1947. The definition of crimes against humanity pursuant to the Statute of the Nuremberg international tribunal was not an ex post facto legal concept in relation to the perpetrators of these crimes even before the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, because they were part of the Czechoslovak legal order from 1947.

Immediately upon receiving the complaint in 2008, the response of the Slovak Prosecutor-General, Dobroslav Trnka, was negative. In the media, he said that these deeds should not be dealt with by the Slovak authorities active in criminal proceedings, but only by historians and legal theorists.

Despite this, and after the publication of some drastic details of individual occurrences in the media, the Slovak authorities active in criminal proceedings began processing almost all of these cases and it launched criminal proceedings in this matter.

Unofficially, we have received material via investigative reporters from the national Sme daily, which was formulated by the Prosecutor-General's office as a directive for individual local prosecutors dealing with cases that were being investigated at our instigation.

Form these instructions it follows that the killing of civilians on the Slovak-Austrian border in the years 1948 to 1989 should not be regarded as crimes against humanity. Among other things, they state legal arguments that cast doubt on the international Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and its preamble, which states that no statute of limitations shall apply to crimes against humanity regardless of the date of their commission. The instructions also state that the assessment of a crime as a crime against humanity required a certain level of scale and intensity of action, similar to that which ensued from the decision-making activity of the international tribunal for the former Yugoslavia, for example. In this context, this raises the question for us: If at least 288 civilians were killed by the totalitarian regime at the former Czechoslovak border from 1948 to 1989, how many more would still have to be killed before there was a sufficient "quantity"? The last important piece of information from these instructions for local prosecutors is the directive that investigators legally classify the crimes as offences like the abuse of the authority of a public official, for example. Ultimately, this meant that these deeds would be statute-barred.

We have every reason to believe that the criminal complaint of the Nation's Memory Institute has been left hanging in a vacuum and that the crimes which were committed by the Border Guards of communist Czechoslovakia will never be punished by Slovak courts despite the fact that criminal prosecutions have been launched in individual cases.

This concerns nothing less than our historical memory, but it also primarily concerns a legal state and for us to be able to someday stand before our forebears without having to hang our heads in shame for keeping silent and not calling things by their proper name.

Ľubomír Morbacher

The Crimes of the communist regime in Hungary, national report

Introduction – the communist regime in Hungary

The expression communist regime refers in this report to the Soviet-type system of rule installed in Hungary after WWII, which persisted until the democratic transformation of 1989–90. Historians attach various terms to this system and this period, and there are a number of incompatible frames for discussing events associated with them. János Kornai, for example, calls it *the socialist system* and lists as its most general attributes a one-party political system, a monopoly for Marxist-Leninist political ideology, predominance of state or quasi-state ownership, bureaucratic coordination, and a centralized command economy. In the 1950s the Soviet-type system (following Hannah Arendt, Zbigniew Brzezinski and Carl Friedrich) was frequently classed among *the totalitarian systems*, with chiliastic ideology, a single mass party headed by the dictator, state terror, a monopoly of mass communications, and a centralized planned economy as its main attributes. These translate into institutions and/or patterns of conduct. The institutions altered little over the history of the Soviet-type systems, but there was much change in their methods of working, social embeddedness, interactions, approach to the subjugated, social autonomies and individual strategies. But there also exists a concept of the Soviet-type system – particularly that of the post-Stalinist period – *as latent pluralism*, exemplified by the Western revisionism that flourished in the 1960s. Others see continuity with the efforts of the Russians (or the Chinese in an Asian variant) *to build* and *maintain an empire*. A few claim it to be an alternative to the West European/Atlantic form of *modernity*, or a kind of *catch-up modernization dictatorship* that reflects that.

Communists Party of Hungary was founded in December 1918 in Budapest by a few radical left-wing socialists and some prisoners of war returned from Soviet Russia, then undergoing Bolshevization. A few months later the party came to power in conjunction with the Social Democrats and set about the Bolshevik project of changing society. This first Hungarian communist attempt to build a system was clearly and consciously modelled on an outside pattern – Russia since 1917 – and seen also as part of a world revolutionary process. An important self-image aspect of the subsequent conservative authoritarian system, which described itself as *counter-revolutionary*, was its efforts to take stock of the crimes of the communist experiment and exact judicial or other revenge for them. Both were focused on the state terror of the Soviet system in Hungary and the victims of it.

Hungary, defeated in the WWII, came in 1944–45 under Soviet military occupation. The second Soviet-style system was installed in 1947–50 and patterned on the Soviet

Union that had developed under Joseph Stalin at the end of the 1920s. This system began to show political strains in 1952 and signs of political crisis in the following year. Attempts were made in Hungary after Stalin's death in 1953 to relieve the economic and social tensions by corrective means, but with little success, although the state terror was lessened substantially for a couple of years. After the corrective course under Imre Nagy had failed in 1955, the crisis within the system worsened. It seemed for two brief weeks beginning on 23 October 1956 that it would fall to a political revolution or at least alter radically, but the attempt to change the system failed and the Hungarian Revolution was crushed by Soviet military intervention.

Hungary was to remain part of the Soviet empire for more than three further decades. But the feature specific in the region to Hungarian history was that albeit short break of continuity in the Soviet political model. The old institutions were reorganized quite rapidly after 1956. Implementation of the Soviet-type communist project restarted or continued. The social psychological effect of the defeat in 1956 allowed János Kádár to be more successful than Mátyás Rákosi had been in the early 1950s, for he completed the nationalization of the Hungarian economy and society more quickly and with relatively less social upheaval and violence (notably the collectivization of agriculture in 1959–61). The "success" soon precipitated a crisis again, although it was not so deep as the one in 1952–3. The Kádár leadership trusted, as Nagy had done in 1953, to corrections and reforms – with Soviet compliance, if not under direct Soviet orders. The Hungarian economic reform of 1968 – better prepared and drawing on the experience of 1953 and 1956 – was successfully introduced, although the Soviet support for it had ceased by then. For almost concurrently, the Czechoslovak attempt at reform was ended by Soviet military intervention, as the Hungarian Revolution had been in 1956. The cautious Hungarian reform continued for some years before succumbing to Soviet political intervention.

The Hungarian leadership again set about reforms at the end of the 1970s, but these could not put the country back on a catch-up path. The aim was more to preserve and consolidate the living-standard gains made with great sacrifices in the first two stages of the Kádár period. Nonetheless, Hungary by the mid-1980s showed worsening signs of mainly economic crisis. This Hungarian crisis was part of a general crisis affecting the Soviet Union and its European allies. The late Kádárite leaders again sought change and met with no obstruction from Gorbachev's Soviet leadership. The experiments failed completely even to alleviate the worsening crisis. Nor did it help when Kádár himself, ageing and increasingly stubborn, was removed. Most post-Kádár Hungarian communist politicians saw no other solution than to accept the proposals of the political opposition that formed in the 1980s, for a peaceful, but radical change of *system*. They did so for their political survival, too. That change of system in 1989–90 ended the Kádár period and the four-decade history of the Soviet-type system in Hungary.

1. Types of illegality committed by Hungary's communist regime

1.1 Depriving Hungarian society of political rights

As mentioned, Hungary came under Soviet military occupation at the end of WWII. On 9 October, 1944 W. Churchill and J. V. Stalin made an informal agreement on a "percentage" partition of South-Eastern Europe. Hungary was placed in the Soviet sphere of influence under the declared and implicit agreements of the anti-fascist Allies (Tehran, Yalta, Potsdam). The United States, Soviet Union and United Kingdom ostensibly agreed at the end of the war on a new Europe to consist of democratic, independent states. It was also declared ceremonially in Yalta. But concurrently the Western Allies recognized the Soviet Union's military and security requirements.

The Soviet great-power policy was fashioned by Stalin as the victorious military commander and head of a world power. He was aware presumably of the tensions present and soon apparent in the anti-fascist alliance system. He saw a further clash with the West as inevitable, but feared it as well. The two main factors behind Soviet foreign policy were its border security and world revolutionary mission, but temporarily, priority was given to the first. He sought to install in the neighbouring occupied countries of East Central Europe friendly regimes that would be subservient to him militarily. He did not wish for a full communist takeover for tactical reasons, but he pressed for a share of political power for the local communist parties. Outside pressure was clearly the decisive factor in Hungary's transformation after 1945. The activity of the minor Communist Party working on the project of Sovietization was also determining. As for the radical transformation of the pre-war regime and society, it came about with the active cooperation of masses from local people. It must clearly be assumed from that cooperation that the postwar system of "people's democracy" held a measure of legitimacy for numerous groups, at least up to a certain point in its history.

The provisional political system after the war was laid down partly by the armistice, which banned the functioning of fascist, Nazi and other such parties. Best placed in the new system was the Communist Party of Hungary (CPH), with 38% of the seats in the Provisional National Assembly of December 1944, the next strongest being the Independent Smallholders' Party with 25%. Alongside the two communist ministers there were at least two other clandestine CPH members in the government. The communists held sway over the organization of the police and the political state security departments from the very beginning. They used the means of terror against the alleged enemies of the democratic transition, provided with help to the Soviet occupation forces to deportations. Charecteristically enough on 1 February 1948 an amnesty was guaranteed for those who

"committed crimes either in disgust of the anti-humanitarian deeds of the former regime, or thinking so to serve the case of democracy".

The main political issues of reorganization (land reform, mining, transport, war crimes) were all central to the hyperactive the communists and settled in line with their ideas. As the communists intended, no conservative or Christian democratic party could stand in the first general elections. It was agreed that the parties of the Independent Front would continue their grand coalition, but stand for election separately. The result was an absolute majority for the Independent Smallholders' Party (ISP, 57%) and a vote of 16.9% for the communists.

Despite its absolute majority, the ISP filled only the premiership and a majority of ministerial portfolios. Soviet intervention ensured that the key post of interior minister (in charge of public administration and the police) went to a communist. The communist leaders saw the elections as a grave defeat. Ignoring the will of the people as expressed in the ballot box, they set to changing the political situation by extra-parliamentary means, notably:

- holding informal inter-party agreements (inter-party meetings) that did not reflect the relative strengths in Parliament;
- planting trusted communists in all the allied parties;
- holding strikes, mass demonstrations and provocations from the spring of 1946, with the support of the Social Democratic and National Peasants' parties (the "Left-Wing Bloc"), to put pressure on the ISP, several conservative members of which were expelled from it;
- rigidly opposing proposals from the ISP to develop the democratic system further – no local government elections were held, the question of representing peasant rights was shelved, and there was no "proportioning" of central or local administrative appointments in line with the election results;
- paying prime attention to ensuring the HCP dominant positions in interior matters, so that it was possible in the summer of 1946 to issue an order dissolving all civil associations, including most religious associations;
- influencing the "people's tribunals" introduced under the 1946 act in defence of the republic, turning them into a fearful weapon against any manifestations that were branded as "reactionary", so outlawing in practice all alternative thinking and paving the way for conspiracy trials on trumped-up evidence to begin in 1946–47.

In December 1946, discovery of a relatively insignificant secret political body, the "Hungarian Community", gave the communist-led interior apparatus a pretext for delivering a decisive blow to the ISP. Interior Minister László Rajk, György Pálffy, the head of military security, and Gábor Péter, head of the State Security Department, used confessions forced out of arrested politicians and old army officers to arrest several

centrist members of Parliament. Then the Soviet military police arrested Béla Kovács, secretary general of the ISP, and carried him out of the country. On 30 May Prime Minister Ferenc Nagy, then in Switzerland, was forced to resign under threats of being implicated in the ostensible conspiracy should he return to Hungary. Emigration was chosen at the same time by another prominent ISP leader, Béla Varga, who was speaker of Parliament. In practice, the ISP fell apart and the premiership passed to Lajos Dinnyés, who had been cooperating with the communists.

Further general elections took place in August 1947, in which openly opposition parties could also stand against the coalition. The communist leaders set about influencing the elections, flouting several times the valid electoral laws, which had narrowed the franchise on political grounds in any case. Any who had played the smallest part in politics before the war were deprived of the vote. Furthermore:

- Communist-influenced registration committees left off the electoral roll further hundreds of thousands of voters branded as reactionaries.
- Plain electoral fraud occurred (communist voting brigades voted several times in different places using false voting lists).
- The coalition won the elections, with the communists (22%) as its largest component, but the opposition obtained 40%.
- In November 1947, the opposition Hungarian Independence Party led by Zoltán Pfeiffer was dissolved and its seats in Parliament abolished. The communist press and leadership accused them falsely of using false nomination papers in the elections.

The next move by the communist leadership, early in 1948, was to apply "salami tactics" (to use a phrase of Rákosi's) on the Social Democratic Party (SDP). The CPH issued slogans calling for a merger of the two parties and began a campaign to win over SDP members, with crypto-communists and sympathizers planted in the SDP taking part. A wave of transfers began at branch level. In February 1948, the fellow travellers in the SDP (notably György Marosán) removed from the party the so-called right wingers, who opposed the merger (Anna Kéthly, Gyula Kelemen, Antal Bán and others). They also agreed to a "cleansing" of the membership, so that only 240,000 out of over 700,000 SDP members joined the merged party.

The last significant opposition party, the Democratic People's Party, announced its dissolution early in 1949, influenced by the Mindszenty trial (discussed later). Its leader, István Barankovics escaped abroad.

The assumption of power by the communist replaced the "fake" 1947–9 coalition, in which the CPH and then the Hungarian Workers' Party (HWP) had hegemony, by a monolithic political and power structure. The Parliament elected in 1947 met decreasingly often until it was dissolved in the spring of 1949. The ballot papers for the

parliamentary elections held on 15 May 1949 no longer showed parties. Voters could vote only for a list, styled the People's Front. For the first time, the poll was almost complete (96%) and the People's Front got 96.2% of the votes. The press spoke of "victory", but the poll showed only that the voters had no stake in the voting, but thought it wiser to join in than to stay away. The new Parliament met only three or four times a year for a few days at a time, to "debate" briefly prospective legislation prepared in the upper echelons of the HWP and pass it unanimously. On 18 August 1949, Parliament adopted a new Constitution, which declared Hungary to be a people's republic in which "all power belongs to the working people." Though the text proclaimed a string of basic democratic rights (of assembly, freedom of speech, freedom of worship), the institutional safeguards for these were lacking. The same held for the codified welfare rights (e.g. the right to work and to recreation). The post of president of the republic was replaced by a Presidential Council, whose powers remained essentially symbolic, but included the right to issue decrees with the force of legislation. The Constitution said nothing of the controlling role of lawful statehood. This foreshadowed the practice of more than four decades whereby many of the rights enshrined in the law failed to apply in daily life. The transformation of the political structure in 1949–50 concluded with a Soviet-type transformation of public administration. A plain ministerial order was enough to replace the 25 counties that had existed since Trianon by 19, of more uniform size and population. The same applied to incorporating into Budapest several adjacent towns and villages, some of them urban and built up to the boundary, but others still rural and agricultural in character. The Councils Act of May 1950 reorganized local government along Soviet lines, replacing the term local government assembly with "council" (analogous to "soviet"). The council elections that took place in October 1950 were the first since 1945, except in Budapest, where local government elections had been held in October 1945.

As the new state structures were introduced after 1949, so were party organizations at every territorial and industrial level, producing a so-called party-state. For all the major decisions were prepared and discussed in party organizations, while the state bodies were largely confined to carrying them out or to lower-level decision-making. Nor was the party omnipotent only in matters of the state. Formally independent institutions such as local government, the economy, the press, and the whole vertical organization of education and research were brought under party control in the same way.

It was not by chance that restoring free political association and free elections were among the main public demands in 1956. The demand for political association and political debate was also apparent in the period leading up to the revolution. Then active party politics burst out during the few days of freedom, and the government formed on October 30 was a four-party coalition like the one in 1945. The revolutionary conditions spawned spontaneous, directly elected bodies – revolutionary committees (in villages

and towns) and workers' councils (in workplaces, typically factories) – in which party delegates appeared ubiquitously. Such party and revolutionary organizations persisted for several weeks after the military defeat of the revolution, still struggling for the aims of the uprising, above all democratic rights. Significantly, no government statement precluding all forms of multi-party system was issued until early January 1957, when the open political opposition was broken by state terror.

Except in the few days of the 1956 Revolution, Hungarian society had no chance in the forty years that followed the communist takeover to express its political opinion or will. The country had a one-party system up to the democratic transformation of 1989–90, though the former coalition parties were never formally banned. Nor was there any political articulation or control over the party and its associate organizations. The only discernible signs of some latent pluralism related to specific issues on which ad hoc lobbies of leaders might appear. The declarations of political rights in the Constitution remained on paper. The communist system discriminated throughout against those expressing opposition or even critical opinions; strong campaigns of state terror were employed against them in some periods (1947–53, 1955–56, 1957–63 – see Points 1.i., 1.j. and 1.k), but terror methods were used against them even in more consolidated periods (1953–55, 1963–89). Only at the end of the 1980s would the authorities become relatively tolerant of political rights being expressed and promoted. However, it was typical that the Hungarian communists should continue to exclude the possibility of a multi-party system until the end of February. Legislation had been passed before the 1985 elections requiring there to be at least two candidates in each constituency, but only those who endorsed the programme of the Patriotic People's Front (a satellite of the communist party) could be nominated. Trickery was used to impede nominations of opposition candidates. Even after February 1989, there was still talk of retaining the "historically developed leading role" of the communist party.

1.2 Denial of freedom of the press and information

The armistice agreement obliged the new Hungarian government to ban the publication of fascist books, newspapers and periodicals and seize those in circulation. The press was overseen formally by the government (the Prime Minister's Office). Although freedom of the press was assured under Act II/1946 on the Republic, no private person could obtain a permit or paper to produce a periodical. (The state's monopolistic distribution of the paper quota was governed by the four-party coalition agreement.) Prior censorship of the Hungarian press was carried out by the Allied Control Commission, but this (and the censorship) ceased formally after ratification of the peace treaty. The issue of permits for press products and the supervision of them soon came under the control of the one ruling party. So many dailies, weeklies and

periodicals that ceased to appear in 1948–49 were simply being denied paper. Officially there was no prior censorship in Hungary in the communist period. The press was controlled on one hand by leading party bodies, notably the Agitation and Propaganda Department of the Central Committee. In 1954 the government set up an information office with a directing and informing purpose. Book publishing was handled by the cultural section (department) of the party and supervised partly by the minister responsible for culture and his apparatus, by means that included guidelines and staffing policy. Longer-term guidelines consisted of ideological precepts, immediate ones of long, medium and short-term campaign tasks. Editors and publishing executives belonged to the central or middle-ranking *nomenklatura*, personally responsible for seeing that their institutions obeyed the guidelines. In the press this meant everything from news reports to commentaries, even notes and the sports column. The directing system's essence was informality. There were informal rules and oral instructions on what and how much might be written, and what had to and had not to be covered. In the later 1960s came the institution of weekly or fortnightly editor-in-chiefs' meetings, when officials in charge from the party centre would evaluate the press and telecommunications and give instructions for the period ahead.

This relatively workable system sought largely to avoid open conflict and direct prohibitions. There was a list of authors who were not be published and a system of temporary silencing, but these were not written down, even internally. The virtual bans depended much on the momentary situation. Should taboo subjects or undesirable approaches still appear the press – through the independence, boldness, ignorance or negligence of certain leaders – the authorities did not hesitate to use force or prohibition. This might in practice affect anything – a published edition of a paper, magazine or book, or the job of an editor-in-chief or a complete editorial staff. There were several examples of this over the forty years. An issue of the *Irodalmi Újság*, weekly paper of the Writers' Union, was seized in the autumn of 1955, sparking a petition to the party leadership by some fifty intellectuals, taking unprecedented action in favour of literary and artistic freedom. At the end of November 1956, after the revolution was crushed, the staff of the central party daily, *Népszabadság*, went on strike when the party leadership banned an article that took issue with Pravda in Moscow. In January 1957 the government dissolved the Journalists' Union. Nor were the populist writers allowed a paper of their own in the consolidated Kádár period, let alone the political opposition that began to form in the late 1970s. Publishers held back manuscripts even by such well-known, approved writers as Gyula Illyés. The editors of *Mozgó Világ*, which had given scope to some authors associated with the democratic opposition, were dismissed twice (in 1981 and again in 1983, when the whole staff was purged in an unprecedented manner). Similar treatment was meted out in 1982 and 1986 to *Tiszatáj*, by then seen as the organ of the populists.

So the system of censorship and supervision involved a series of legal infringements in the communist period. The state failed to provide the public with information – indeed it deliberately withheld some of it. There was no freedom of opinion in the press. News from abroad was screened on political grounds. Foreign radio broadcasts – notably from Radio Free Europe – were jammed. But the informality of the regulation proved paradoxically to be an advantage in the period of loosening. In the last third of the 1980s, notably in 1989, the Hungarian press could regain its freedom without having to confront party-state "regulations" or similar institutions.

1.3 Restriction of rights in the civil sphere

As mentioned in Section 1.a, the communist-led Ministry of the Interior dissolved in summer 1946 most of Hungary's social, religious, professional and other civil associations (altogether 1500 societies and organizations). Most societies that had their permits restored were then dissolved in 1948–49, after which there was practically no scope for self-organization. On the contrary, the state used unprecedented force in 1949–53 (and again for a few years after 1956) to suppress every form of social cohesion (qualifying them as political – see later.) The remaining cultural, artistic, trade-union, sports and educational associations were transformed in 1948–49, as persons committed to the communist party-state were inserted into their committees. The civil sphere became a system of transmission for the party-state, assisting in conveying to people the aims of the party leadership at the time, in executing them, and monitoring those subjected to them. These social organizations incorporated into the monolithic system also performed – in a limited sense – tasks of reconnection. This can be described summarily as the nationalization of society.

1.4 Infringement of freedom of worship

Integral to communist ideology was a material, anti-religious conviction, combined in Bolshevik political practice with an aggressively anti-clerical policy. On taking power, the Hungarian communist party came into conflict mainly with the Catholic Church, the largest in the country, headed after WWII by the charismatic, politically conservative and rigidly anti-communist primate and archbishop of Esztergom, Cardinal József Mindszenty. All the churches had been relieved of their landholdings without compensation under the 1945 land reform. The next attack was on the church schools, which made up almost half the elementary and secondary schools in the country. With a few exceptions, these were all nationalized in June 1948. That Christmas, Mindszenty was arrested, as the last significant political force to resist the monolith of communist power. The cardinal was placed on trial in February 1949, following the

scenario of the Moscow show trials, and sentenced to life imprisonment. In August 1950, all Catholic religious orders but a couple of teaching orders were dissolved. In 1951, József Grősz, archbishop of Kalocsa, was also arrested and given a long prison sentence. A succession of other clerical arrests and convictions followed. This "struggle against clerical reaction" was a consistent campaign by the Stalinist regime, from 1949 to 1953. The rhetoric decreased under the Imre Nagy government, but there was little change in the anti-church stance of local authorities. Almost 500 priests and members of religious orders were interned or arrested between 1945 and 1956.

In the summer of 1949 religious education ceased or became optional in what was now a state school system. The proportion of school students opting for it was still 20–25% in the early years, but fell to a minimal level by the 1960s. Far more joined in religious instruction in churches, though the authorities tried to restrict it by administrative means.

In 1951, the government set up the State Office for Church Affairs to perform administrative tasks to do with the churches, the most important being supervision and initiation of appointments and dismissals within them. Alongside the office's informers there was deep penetration by the state security services. Intimidation was used to make the clergy of the various churches swear allegiance to the Constitution by 1951. Some then became involved in the People's Front or the peace movement. The churches were obliged to refrain from criticizing the communist system, policies or ideology, and to curb their confessional, evangelistic and pastoral activities.

Church activity increased again during the 1956 Revolution. Cardinal Mindszenty was freed and became a key political figure again, if only for a few days, before taking refuge in the US Embassy in Budapest when the revolution was crushed. The Kádár regime launched a new campaign, mainly against the Catholic church, in 1960–61. Over 200 clergy and members of monastic orders were interned or given prison sentences between 1956 and the last group trial of churchmen in 1965. Then came some normalization of state–church relations, or rather relations with the church hierarchy, especially after Mindszenty left Hungary in 1971. This did not mean the authorities were not putting pressure on the clergy, whose activity was notable (especially the pastoral and teaching work done by the younger generation). Church leaders frequently cooperated with state organizations. The hierarchy, for instance, were prompted to criticize some forms of grassroots activity (the basis-community movement, conscientious objectors to military service, etc.) No clergy of the main churches were jailed after 1971, but discrimination against activists in minor churches and custodial sentences for conscientious objectors continued till the mid-1980s.

1.5 Infringement of employment rights

One aspect of class policy under the communist system was discrimination against members of the so-called former ruling classes. Having deprived them of their property, the system also sought to curb their income and restrict their careers. From 1948–49, attempts were made to oust former members of the aristocracy, haute bourgeoisie and upper middle classes from white-collar jobs, regardless of how they performed. The main area of removal was education, except where expertise or possibly international reputation made them indispensable. The regime also sought to prevent the old intelligentsia from reproducing itself through its offspring: measures introduced at the beginning of the 1950s restricted access to universities and colleges for those not of worker or poor-peasant origin.

Meanwhile masses of those of worker and peasant origin who were admitted to higher education lacked the necessary previous education, due to the easier, so-called specialist matriculation system introduced. Many students failed to complete even these simplified courses. Meanwhile the offspring of the old middle and upper classes felt most in those years that there was no future for them. Discrimination on grounds of origin officially ceased in 1962. The children of former "class enemies" then had equal access to higher education in principle, but in practice positive discrimination in favour of worker and peasant children went on, joined by preference for the offspring of the *nomenklatura* (holders of various political honours and medals). This meant that equal opportunity and freedom of career choice were still questionable, especially as only 7–8% of the requisite age group were admitted to higher education under the communist system.

It was still the practice in the Kádár period to forbid the employment of political enemies and oppositionists. By then intellectual critics of the system were not usually arrested (the jailing of the writer György Konrád and the sociologist Iván Szelényi for a few days in 1974 over the essay in Marxist historical sociology, *The Intellectual on the Road to Class Power*, caused a great stir), but in some cases they were forced to leave the country. The practice of Berufsverbot subsisted in Hungary until the end of the 1980s.

1.6 Infringement of the right to freedom of movement

The issue of passports after 1945 passed into the hands of the communist-controlled Ministry of the Interior and its organizations of state protection and security. It was restricted or tied to monetary payments that were illegal in many cases. Up to 1949, about 10,000 persons left Hungary legally, of their own free will (the majority of them Hungarian Jewish survivors). Meanwhile almost ten times as many left illegally over the same period. Almost the only passports for travel abroad issued from the end of

the 1940s to the end of the 1950s were for official travel, which translated into a few thousand frontier crossings a year.

The situation did not change essentially after 1953, although a few thousand migrants left legally for Israel in 1954–55. After the defeat of the 1956 Revolution, almost 200,000 Hungarians fled in three months, of whom 90% did not return. The Kádár regime changed its passport policy in the early 1960s. Initially there were no restrictions on applying for a so-called tourist passport for Western countries, but from the end of the decade it could only be once in three years, with a so-called visitor passport available in alternate years. European socialist countries could be visited without restriction using a separate passport, but visits to the Soviet Union were only possible in state-organized tourist groups, not as individuals.

This relative freedom to travel was not based on a right to freedom of movement. There was no right to a passport in Hungary. Any citizen might *apply* for one. Then the state security authorities would decide according to several criteria. Passports were not issued to the regime's actual or assumed critics or its actual opponents in general. Passport confiscation was a routine political penalty. The practice remained until the advent of a uniform "world passport" in 1988. Emigration practice was similar. It was only possible to remain abroad for an extended period by state-controlled means (on a work permit negotiated by the state). There were no legal terms for leaving the country for good. An average of 2000 people a year emigrated legally between the end of the 1950s and 1989, most after procedures that could take years, leaving their property behind, and in the economically inactive period of their lives. In the same period, 2000–3000 people a year left illegally, mainly on visitor or tourist passports.

1.7 Crimes against privacy and human dignity

In principle the state security bodies under the communist regime should have been combating ("deterring") alien or domestic persons or groups that endangered state security and social order. In fact the secret-police arsenal was turned, before and during the takeover, on the communists' political opponents, and the organization, to some extent at least, operated as a party police force. It enjoyed wide independence between the takeover and 1956. Its surveillance extended to almost the whole of society. The secretly gathered information was stored, systemized and utilized in proceedings against the potential and real opponents of the communist system. The operation of the state security organizations was not subject to civil (democratic political) or judicial supervision. Nor was there party control, as there was over other state bodies, for they were largely directed up to 1953 by Mátyás Rákosi, the party general secretary (and prime minister).

The situation did not change after 1956: state security operations were never governed by open, identifiable measures. If there were such, they remained secret. The party's function of direction and control worked better: the aims of the service were laid down mainly in party resolutions (though not public either) and it could only investigate in certain fields with prior consent from party organizations. Yet the private sphere of citizens was still invaded regularly and on a mass scale up to the end of the period. The data secretly gathered was used to intrude into people's lives, record and interfere in their careers, and monitor their personal relations.

The number of persons on the secret-service files (on whom data had been gathered by various means) changed as follows:

1953	1,200,000
1956	550,000
1957	650,000
1963	246,659
c. 1970	up to 200,000
c. 1980	up to 185,000
1989	164,000

These included the number of persons considered to be a threat, on whom data was actively and continually gathered:

1961	6,115
1962	5,824
1968	6,206
1971	3,400
1982	2,582
1985	2,225

All this was done by the official state security staff (whose numbers varied around 5,000 in the period) and their network (secret, non-professional assistants). The latter (known inaccurately and colloquially as informers or agents) numbered around 30,000 in the early 1950s and about 10,000 after 1956, fewer in the 1970s and 1980s.

1.8 Infringements of property and business rights

The Hungarian state was obliged under the armistice agreement to compensate those who had suffered losses by legislation based on origin (the Jewish Laws). It was also obliged to respect the rights to acquire property and do business. The 1945 land

reform (first as a government order and later as legislation, was designed to correct injustices in Hungarian society that had arisen down the ages. All democratic and non-democratic political forces at the time agreed with the redistribution of land. But there were no broad social or professional debate on its principles or how to carry it out. Land ownership was placed in historical and political categories. The property of some (war criminals, the churches, members of Hungary's German community) had their land confiscated, while others (noble or peasant landowners) were promised compensation). However, this compensation had not materialized by the democratic transformation.

Restriction of private property did not end with the land reform. The new National Assembly elected in 1947 passed legislation nationalizing the large banks and introduced central economic planning, although the three-year plan did not yet consist of compulsory performance quotas "disaggregated" to the level of individual firms.

In March 1948 came sudden nationalization, sidestepping Parliament and the government, of all domestically owned industrial firms employing over 100 people. (Firms in foreign ownership were excluded.) Thereafter the twin constraints of state ownership and state regulation left very little room for private business. The Budapest Stock Exchange was closed. From then Hungary's could be considered a state economy. At the end of 1949, all industrial workshops with over ten employees were nationalized, along with several that were smaller ones. Thereafter the economic and social spheres outside agriculture were wholly under state and one-party control.

Communist General Secretary Mátyás Rákosi announced the start of agricultural collectivization in August 1948. The smallholder peasantry, the country's most populous social group after 1945, bore almost unbearable burdens of taxation and produce levies, causing many to leave their farms and join the ranks of unskilled manual labour in the towns. The richer peasantry were known by the Russian term *kulak*; kulak lists began to be kept after 1948, and Hungary's rural elite was broken and dispersed. The political intention behind the levies on individual farming was to force peasants with small or medium-sized holdings into collective farms, but the campaigns of collectivization that began in 1948 and became tougher in 1951–53 failed to achieve this. For one thing the supply obligations on the collectives were no less burdensome than those on peasant farmers had been. The campaigns had "low efficiency": by 1953, the cooperative sector still covered only 26 per cent of the farmland and involved rather than less than one-fifth of agricultural earners, while the individual farmers (68 per cent of the earners) still held 56 per cent of the farmland.

The corrective policies of Imre Nagy after 1953 lifted some of the burdens from individual peasant farmers. The kulak lists were abolished and the forcibly organized cooperatives were disbanded or allowed members to withdraw (although the terms for withdrawal were unfavourable, as leavers did not receive all the land or equipment

they had put in, but had to take back all the burdens). The majority of the agricultural collectives dissolved themselves spontaneously during the 1956 Revolution.

Prompted partly by the Soviets, the communist leaders opened a new political debate on collectivizing agriculture early in 1958. One camp urged rapid formation of cooperatives in one sweeping campaign, using force if needed and ignoring effects on living standards or production. This would have repeated the practice of the early 1950s, basing collectivization on the agricultural proletariat, the most "conscious" segment of the peasantry. The other camp wanted cooperatives too but sought a different route – a slow, cautious, gradual conversion that eschewed violence and at least held current level of production. The course Kádár put to the Central Committee in December 1958 was an attempt to synthesize the two. Small elements of private ownership (household cultivation) and enterprise (share-cropping) were to be built into the new cooperatives. The intention was to draw in, not shut out the middle peasants and even the formerly rich peasants who had remained in the villages. The old method of sending in functionaries and "worker activists" was employed, but care was taken to win over the best respected people in the village. The brief hopes of 1956 had vanished and rural society – also under the pressure of the memory of terror – was now resigned to change. Collectivization was completed by spring 1961, with about 95 per cent of the land being farmed by cooperatives or state farms. (The ownership transfer ensued in the mid-1960s.)

The system also limited the acquisition of property. It was no longer possible for private persons to buy or sell farmland after the collectivization of agriculture. Nor could other private property of a production nature be acquired. Small-scale industry and retail trading were hardly possible in 1949–53 due to high taxation and political pressure. Although conditions eased somewhat after 1953, it was possible to work only with family members or one to five employees. Much of the urban housing was nationalized in the early 1950s, especially in Budapest, including some family houses, although these were returned to private ownership after 1956. Private persons were confined up to the end of the Kádár period to owning one dwelling and one holiday home (although this was often circumvented by buying property in the name of other family members.) Curbs on the right to acquire property and do business remained until the 1989 change of system. In 1979, some forms of business association were permitted again (economic partnerships, intra-enterprise economic partnerships, small cooperatives, etc.), but not even these were allowed to amass private production capacities of much value or employ any large amount of outside labour.

1.9 State terror against society

The National Assembly passed legislation "in defence of the democratic system of state" in 1946 (Act VII). This threatened grave sanctions, but failed to define accurately

the system of state or the actions deemed damaging to it. Interpretation was left to police, prosecution and judicial bodies and services. It has been noted that the political police were from the outset under the direct control of the communist party, which made use of the flexible terms of the act to apply weapons of state terror against its opponents during its assumption of power. One of the prime early examples was the Hungarian Community conspiracy trial held at the turn of 1946 and 1947, in which 300 people were sentenced.

The takeover of power, rather than ending the state terror, increased its intensity. The political police took action against all resistance to the communist system, assumed or real, and all variant political opinion. Any non-official appearance in public or private life counted as suspect and therefore to be persecuted. The Rákosi leadership waged war on Hungarian society. Anyone in the early 1950s might become a target; no one could feel safe. However, there existed some socio-political criteria for identifying "enemies" and persecuting them particularly hard.

Among these were clergy and religious believers, especially those who did not conceal their outlook (see Section 1.d). The trials of Mindszenty in 1949, Evangelical Bishop Lajos Ordass in 1950 and Grősz in 1951 were the tip of an iceberg. Hundreds of priests and church activists were arrested, interned, or turned out of homes, posts and parishes in the early 1950s.

Also special targets were the pre-war aristocracy, political, business and military elite, and upper middle class. These were still persecuted even though their numbers had fallen sharply through the waves of emigration in 1945 and 1947–48 and they had been deprived of their wealth in the land reform and nationalization. They were also deprived of pension rights. In May 1951, a pre-war Interior Ministry order was used to deport almost 15,000 people from Budapest in a few days, most of them to remote villages, to be billeted on likewise persecuted rich peasants, while over 7000 of them did forced labour on work camps set up at Hortobágy.

The peasantry was still the largest social group in Hungary in the early 1950s. The illegality of the property-right infringements and exorbitant taxes and produce levies on them (see Section 1.h) were compounded by the state terror. Early in 1953 came an obligation to till the soil, with penalties for those who had left for the towns and factories to escape the pressures. But this attempt to tie people to the land, reminiscent of serfdom, failed, as masses of peasants had abandoned their land, which was not assuring them a livelihood. About 180,000 of them offered the state almost 1,800,000 cadastral *hold* (over 1 million hectares) in 1949–52, almost 1,000,000 *hold* of that being so-called kulak land. Those who pressed on with their farming could expect to clash with the state sooner or later. From 1951, the rules on produce deliveries began to include penalties "for the misdemeanour" (later crime) "of endangering public supplies", for which several hundred thousand peasants were prosecuted: 193,826 people were found guilty in 1948–56, over 120,000 of them in 1951–53.

Terror against peasantry induced several resistance activities in the countryside and small towns. Some local groups tried to organize regional and even nationwide organization (White Guard). Leaflets were distributed and arms were collected. State security organs infiltrated most of the resistance, liquidated them and participants were punished severely. A cautious estimate would be that the number of participants in Hungary in active, conscious resistance between 1945 and 1956 was at most about 4–5,000.

Communist doctrine dubbed the proletariat the new "ruling class", but this was just propaganda. (The industrial workers deemed most faithful to the party were "raised" and might become factory managers or even ministry officials, but these were a tiny minority, and these functionaries soon came to forget their background.) The working class lost the right to strike. The standard of living fell by 20 per cent 1949 and 1952. This led the workers to seek other ways to offset the deterioration in their conditions, but the state took draconian measures against these. Absentees or those failing to fulfil their enhanced production norms committed a "plan crime" (a crime against the targets of the state economic plan) if not an act of "sabotage". In 1951 came penalties for an arbitrary change of work place, effectively robbing workers of the last and oldest opportunity, to change jobs. Although tens of thousands were penalized over these years for "arbitrary termination" of their employment, secret statistics showed that the number of cases was several times higher.

The intelligentsia and the old middle class were suspect in any case under the Stalinist system, if not class enemies. The offspring of the old middle class especially could feel in these years that they had no future (see Sections 1.e and 1.f) They accounted for most of the attempts to defect abroad. They were the most inclined to join in sporadic acts of resistance. So large numbers of them ended up in prison or internment camps.

The communist leadership suffered successive purges from 1949. This internal settling of scores led to almost 100 executions in the political elite alone, some instigated by the Soviets. László Rajk (interior minister in 1946–8) had no disparate political views, but he came into conflict with Gábor Péter, commander of the State Protection Bureau (ÁVH), and Mihály Farkas, the defence minister. Rajk was accused of plotting an armed takeover, an anti-communist coup in Hungary, on behalf of the Americans and Yugoslavs. The indictment, written by Rákosi himself, was finalized with Stalin at the end of August 1949. Rajk admitted to the preposterous charges out of loyalty to his party or because he realized his position was hopeless. He was sentenced to death after a public "show" trial and executed in September 1949. The Rajk Case was a link of the chain of show trials in the Communist countries in 1949–52.

Several hundred communists and leading former social democrats were similarly arrested in the next few years, as were numerous generals and other senior army officers. In 1950, state terror reached the state security service itself, and in the early

days of 1953, Lieutenant General Gábor Péter, was arrested too. Meanwhile an anti-Semitic campaign aping the one in the Soviet Union swept through the elite about the turn of 1952 and 1953. Péter's arrest was just a prelude to a campaign in which many would have shared his fate had Stalin not died of a brain haemorrhage on 5 March 1953. However, the number of victims from the communist elite was dwarfed by the number from Hungarian society at large.

The state terror was much mitigated when the Imre Nagy government came to power in 1953. (On the state terror under Hungary's communist regime and data on the first mitigating measures, see Section 1.k.)

Even before the Soviet armed intervention that crushed the 1956 Revolution, a rival Hungarian regime under János Kádár had been put together in Moscow. Kádár promised in a statement on November 4 that no one would be harassed for "for having taken part in the events of recent times," but later that month KGB units sent to Hungary with the Soviet troops were arresting several thousand, of whom some (about a thousand) were deported to Soviet prisons in Subcarpathia. This move was reminiscent of 1945, and awkward for Kádár himself. So he moved rapidly to halt it. (The deportees were returned and many released as well.) The maintenance of order and the intimidation were taken over in mid-December by the Hungarian special forces and by the state security service, reorganized under the wing of the police.

At the beginning of December, the government declared martial law and introduced accelerated judicial proceedings. The arrests were continual, and protest demonstrations in several places were fired on by the special forces. The shooting incident in Salgótarján on December 8 claimed more than 50 lives and sparked a 48 hour general strike called by the Central Workers' Council. In response all territorial workers' councils were banned. The heads of the workers' councils were summoned to Parliament ostensibly for talks and then arrested. Internment was reintroduced. The first death sentences under the summary courts were carried out in mid-December on people who had been found with arms. On 12 January 1957 summary proceedings were extended to cover the crime of calling a strike.

Mass reprisals for the revolution ensued only when hardly a sign of resistance remained. In mid-February, a big show trial began at the Capital City Court, the accused being Ilona Tóth and accomplices, members of one of the Budapest resistance groups active after 4 November. The trial for "counter-revolutionary organization" was "spiced" with false evidence and a hair-raising tale of murder. In March 1957, Kádár agreed with the Soviet leadership on a visit to Moscow to speed up the reprisals. It was decided to continue the trials in closed court, a move in which mounting international protests presumably played a part. In April 1957, people's courts were instituted, and the mass arrests were extended from post-November 4 resisters to those who had played a part in the revolution itself, or even in "preparations" for it (the party opposition

movement). The mass revenge continued right up until spring 1959, when the first partial amnesty was declared.

Targets of state terror in the Rákosi period were drawn from the whole of society. The reprisals after 1956 had relatively precise targets. Three main groups can be distinguished:

- The first consisted of mainly unskilled urban workers, industrial apprentices and enlisted soldiers, aged 18–25 or younger, often on the peripheries of society, who had joined in the armed clashes or joined related rebel units. They received a numerical minority of the sentences, but were the ones most often brought before the martial-law and people's courts. They were treated the most severely and received the most death sentences.
- The next most numerous group consisted of members of the works workers' councils and local revolutionary committees. Most were workers, foremen, peasants, or in smaller numbers members of the intelligentsia (teachers), aged 28–35, enjoying local respect. They formed the self-organizing elite of the revolution. They were normally tried before regular courts and received lighter sentences.
- The third and smallest target group consisted of pre-1956 party-opposition intellectuals who identified with the democratic and national aims of the revolution and took part in the resistance after 4 November.

The machinery of oppression sought to identify and punish all who belonged to the first group. With the other two (especially the third) there was some "selectiveness", but not usually on grounds of principle.

The peak of revenge was the execution of Imre Nagy on June 16, 1958. The prime minister during the revolution had taken refuge in the Yugoslav Embassy in Budapest on 4 November 1956. On 22 November he and others were enticed out by a promise of free passage, but arrested and interned in Romania. On 14 April 1957, Nagy was arrested in Romania and taken to Budapest. Moscow was consulted during his examination and trial. The latter opened at the beginning of February 1958 but was suspended (at Soviet request) until 9–15 June 1958. Imre Nagy denied his guilt and refused to recognize the court. He did not seek a reprieve from his sentence of death. He, former Defence Minister Pál Maléter and the party-opposition journalist Miklós Gimes were executed at dawn on 16 June. (Of the others accused, former State Minister Géza Losonczy died in custody in December 1957, and the journalist József Szilágyi executed after a separate trial in April 1958.) Nagy and his associates were buried in unmarked graves, as were the other victims of post-1956 reprisals.

Two further amnesties were declared in 1960 and 1963. Although the latter was dubbed a "general" amnesty, it omitted some of those serving 56-related sentences (recidivists, or those convicted of "undefined numbers of attempted murders"). Political

trials continued to occur in Hungary in smaller numbers up to the end of the 1980s, usually for "incitement" (voicing views against the system, or sometimes just for telling a political joke).

After the post-1956 reprisals the state security concentrated on religious and nonconformist youth mainly. Generation subcultures were kept under surveillance. Lors of participants were punished or marginalized by administrative processes. Physical intimidation was used against young people quite frequently, especially during festivals, concerts, football matches etc. In the early sixties "Western" clothing, long hair, beards were enough to be beaten by the police units. Police cooperated with the Party militia (*munkásőrség*, "Workers' Guard") and the paramilitary organization of the Union of Communist Youth (*ifjú* gárda, "Youth Guard"). Several young people were imprisoned for taking part in spontaneous 15 March demonstrations in the 1970s. Custodial sentences were also given to those who refused military or armed service for reasons of conscience. Experience of the terror especially from the late forties to the early sixties was deeply imprinted in the consciousness of the Hungarian society and had a deterrent effect up to the late seventies.

1.10 Crimes against the penal system

As stated in Section 1.i, the terror inflicted on society and the vast majority of the criminal prosecutions were based on false charges. Most of the accused had not carried out any activity against the system. No one in a democratic lawful state may be victimized for their political opinions. Nor would the prevalent legislation in Hungary have given grounds for instituting such proceedings under normal circumstances.

The proceedings also broke the law in other ways, for the communist regime regularly and frequently broke its own regulations. The investigators in the political police were under no legal or institutional control, and used illegal, inhuman methods wholesale, especially in 1947–53 and 1956–63. There was no maximum duration for police detention. Years would often pass between arrest and sentencing. Suspects – especially in 1947–53 – were subject to brutal methods of torture: physical assault, denial of rest or sleep, starvation, etc. There is also evidence of consciousness-altering drugs being used. Further pressure was put on suspects by arresting their relatives and dependents (e.g. the mother of Cardinal Mindszenty). Suspects were denied legal representation. The prosecution stage was generally a formal one confined to repeating "findings" of the police investigation. The charges too were often drawn up by the political police – as happened with Imre Nagy and associates in 1958. When the trial began, prisoners were not allowed to choose a defence lawyer freely, only from a confidential list of lawyers deemed reliable by the regime. The "evidence" usually consisted exclusively of confessions obtained by force. If other evidence were used, most would be forged, as would parts of

the confessions. There was no question of judicial independence, except in a few cases. Sentencing was determined on political grounds (sometimes on direct instructions from party leaders) or in line with recommendations of the secret police. Trials were held in closed court, except for the prepared show trials. Nor could political prisoners meet their families even after final sentencing (or at most rarely and irregularly) or enjoy normal prisoner privileges. They were held under inhuman conditions and received inadequate medical or other care. Prisons were controlled by the state security up to 1953, at least those for political prisoners. The harsh political-prisoner regime eased somewhat after 1953 and more noticeably in the early 1960s (the mass regular physical abuse of prisoners, for instance, became rare), but some aspects remained until the change of system.

1.11 The dimensions of state terror

Full statistics of the state terror in Hungary have yet to be compiled. Its scale can only be conveyed through partial figures and occasional estimates.

- There were 42,679 convictions between 1946 and 1956 under the act on protection of the system of state, i.e. narrowly defined political crimes – accusations of incitement, illegal crossing of the frontier, espionage, disloyalty, treason, and misuse of firearms. (The figure excludes the 28,459 convicted in the same period for war crimes and crimes against the nation.) Breaking these down by periods:

Criminal courts	Military courts	
1946–9	5,861	-
1950–53	26,507	-
1953–6	5,527	-
1946–56	37,895	4784

- There were 193,826 convictions between 1948 and 1956 for misdemeanours or crimes against public supply:

1948–50	51,965
1951–3	120,200
1954–6	21,661

- Some 22,000 persons were expelled from their place of residence in 1951–53.
- Some 6,000 persons were held in custody (or interned) without charges being preferred in 1949–53. Most horrible was the Recsk internment camp in Northern Hungary, Mátra Hills. 300 of approximately 1,300 captives lost their lives here due to malnutrition and mistreatment in 1950–53.

- The scale of repression can be sensed in data on the 1953 package of the alleviating measures. A summary dated 18 November 1953 states, "The pardon measures affected almost 748,000 persons. There were 15,761 persons freed from prison (of almost 40,000 prisoners). Of over 5,000 persons held in internment camps (Recsk, Kistarcsa, Kazincbarcika and Tiszalök), 3,234 were released at the end of October but criminal charges were made against 659 (for political crimes). Prisoners of war of foreign citizenship held at the Tiszalök camp (about 1,200 persons) were mainly handed over to West Germany in late autumn. About 500 persons were released from police internment camps. Of those exiled to Hortobágy, 7,281 regained their freedom, and the orders assigning place of residence were lifted for 13,670 persons deported from Budapest and 1,194 banned from entering a provincial city. The fines of 427,000 persons were waived. The petty court proceedings against 230,000 persons were ended. The judicial proceedings or police or prosecution investigations against almost 29,000 persons were halted by the amnesty. The police supervision orders on 4,500 persons were lifted." Some estimate that up to 1953 a kind of legal action was taken against approximately 1,5 million Hungarian citizen. (Adult population of the country was about 5 million at that time.)
- After the defeat of the 1956 Revolution (from the end of 1956 to 1959) at least 35,000 persons were subjected to police/prosecution investigations on suspicion of political "crimes". A total of 26,621 persons were convicted of participation in the revolution. Another 13,000 were sent to the new internment camps (at Tököl and Kistarcsa) for longer or shorter periods.
- The number of persons convicted of political crimes dropped sharply at the beginning of the 1960s. According to a state security report filed in 1971, the numbers prosecuted for incitement in 1966–70 were:

1966	991
1967	529
1968	614
1969	425
1970	400

A summary of imprisonment in the 1960s for political reasons gives these figures:

No. starting sentence		No. freed	No. serving sentence
1971	135	130	387
1974	90	163	239
1975	94	148	184
1977	102	109	159

The figures show that a few hundred political prosecutions were initiated each year in the 1960s and 1970s (most for incitement). Over half ended presumably with a conviction, and about a hundred accused a year received a custodial sentence. The figures probably fell further in the 1980s, but civil rights organizations have noted that prosecutions for incitement still occurred in Hungary in 1988.

- As for the number of death sentences and executions for political motives (discounting war crimes and crimes against the people), the data available are as follows:

Sentenced to death by criminal courts and executed,1946–56	338
Sentenced to death by military courts and executed, 1946–56	147
Sentenced to death and executed for part in '56 Revolution, 1956–61	228

The number who died during criminal proceedings or due to acts of brutality in prison is not known precisely, but reached some hundreds over the whole period. Death sentences and executions still occurred in political cases in Hungary after 1961, mainly for spying. The total for these is in two figures.

2. The victims of the 1956 Revolution

State terror applied during the 1956 Revolution forms a special chapter in the history of illegalities committed by the Hungarian communist regime. On 23 October 1956, the special forces (without specific orders to do so) fired on people in Debrecen and Budapest demonstrating peacefully partly for reforms and partly for a change of system. This led already to fatalities and wounded. In Budapest, armed resistance formed spontaneously. On the night of 23–24 October the fight was joined on the regime's side by freshly arrived Soviet troops stationed in Hungary. It is not exactly known what part in Moscow's decision was played by the appeal from Ernő Gerő and the leaders of the Hungarian communist party and state, but there is no doubt that such an appeal was made and passed on to the Soviet leadership.

The Hungarian special forces and Soviet troops opened fire in several places in the days that followed. On 31 October, three days after the Budapest ceasefire, the Presidium of the Soviet communist party decided on further military intervention in the Hungarian Revolution. The new power centre in Moscow – the rival government of János Kádár – did not request the intervention, which was already underway when it formed. But it did so publicly and demonstrably when the chance came a couple of hours after the military action had been launched. There were several occasions after 4 November 1957 when Soviet or Hungarian troops fired on peaceful demonstrators.

Here are the main figures for victims of the armed fighting:

	Budapest	Provinces	Total
No. of wounded, Oct. 23–Dec. 31, 1956	16,700	2,526	19,226
No. of deaths, Oct. 23–Jan. 16, 1957, of which:	c. 2,045	c. 150	c. 2,652
Registered, exhumed, reported:	1945	c. 557	c. 2,502
Other:	c. 100	c. 50	c. 150

The statistics rest on contemporary death registers and cemetery records. In several cases, victims of fighting or volleys of fire were registered as natural deaths, so that the number of victims of firing was greater than recorded. About 350 persons fell victim to the firing of the state security force, Hungarian People's Army, Soviet Army, and Defence and Interior special forces between 23 October and 12 December 1956.

3. Assessment of the legal infringements committed under international law

The compiler of this report is a historian and the logic and terminology of the discussion is above all historical. Thus the word *crime* appears in the text with two meanings.

It refers on the one hand to the sum of *illegal acts, policies* and *behaviours* as determined in relation to universal human and civil rights such as those enjoyed under a democratic, lawful European state and the norms of democratic political practice. The illegal acts were committed in pursuit of the communist regime's ideology and the practical long or shorter-term objectives based on it. The regime developed its own legal (or semi-legal) conditions (legislation, regulations etc.) for this in some contexts and in others simply relied on illegal practices. Thus the illegality of these acts and policies was not always apparent at the time. Those who accepted communist ideology and shared the communist concept of the law held these practices and policies to be lawful in some cases and justifiable in others as furthering higher ends (even ultimately humane ones). However, there remained throughout the period in Hungary, and under the other Soviet-type regimes, people who condemned the system based on the norms of a democratic lawful state. Some of them who undertook to criticize the system, at considerable risk to themselves.

Secondly, the word *crime* is also used for acts that went against the communist system's own legal provisions and even principles, and yet were committed regularly, due to the system's operating logic. Communist regimes devised state constitutions, which assured the human and civil rights mentioned earlier, such as the right to human dignity, freedom of worship, the right of assembly, or the right to self-expression. But these rights were concurrently suppressed by a range of other legal provisions,

institutions and practices. Some state bodies committed during their operation flagrant legal infringements on a mass scale, over an extended period. This involved breaking valid laws and legal provisions. The most obvious example is the political police and the judicial and administrative practices bound up with it.

It would have been correct to distinguish the clearly the two uses of the term *crime* (*legal infringement*) throughout the report, but it would hardly have been possible. One basic attribute of the communist system was the freedom with which it treated its own legal provisions, its failure to respect them. For instance, the law prescribed what types and scale of private property should be nationalized, and similarly, what levies were to be made on private peasant farmers. Yet the executive organizations intentionally overstepped those limits on a mass scale. So it becomes hardly possible to distinguish the one interpretation from the other when considering infringements of the law.

The oft-mentioned flexibility and capability of revision found in communist regimes was always limited to crime in the second sense. Some regimes, including Hungary's, went as far as rehabilitation and compensation, but not consistently. On the contrary, the remedies were dispensed in a discriminatory manner over a narrow field, which amounted to a further legal infringement. Indeed, admission of the normative legal infringements entailed in the basic goals of the "communist project" and reparation for them remained out of the question until the change of system.

As to how the legal infringements of Hungary's communist regime can be defined in terms of international law, suffice to say this has been the subject of many years' debate in Hungary. (The main stages in the debate are considered in Part 3.) Common sense and healthy moral sensibility suggest that crimes against humanity were committed at least in the state terror against Hungarian society (and in 1956 as a special case of this). Directly responsible for those crimes were the state security staff, prosecutors and judges, indirectly the staff of state organizations overseeing and directing the apparatuses and institutions, and ultimately the political directors of the regime (members of leading bodies of the state party and the government). Insofar as '56 was (also) a civil war and the Soviet Union intervened in Hungary as a sovereign revolutionary country after 4 November 1956, the events qualify as war crimes and crimes against humanity.

Concurrently, common sense and healthy moral sensibility dictate that the peaceable change of system in 1989–90 had many advantages for Hungarian society. The Hungarian change of system was a coordinated transition. Precipitating the transformation was a legitimacy crisis, but the coordination was sustained and the force of law preserved. True, they were not sustained by the authority of institutional power but by cooperation between the forces inside and outside the institutions (the late-Kádárite communist regime and the political opposition). The rules of cooperation and a political script were agreed at a national round-table. The latter concerned the

introduction of a new system whose legitimacy precluded the legitimacy of the old. The script for the transition was passed by the old Parliament under the old legal system. These considerations provided strong arguments for preferring legal security over retroactive justice (retrospective compensation) on one hand. It did not even happen, but this situation cast doubt on moral legitimacy of the new democracy, on the other.

4. How the legal infringements have presented themselves in post-1989 Hungary

4.1 The role of the recent past in the Hungarian transition

Discourse about the recent past had an important role in Hungary's democratic transition. Society in Hungary had accepted the post-Stalinist system more readily than it had in similar countries. Society felt that Hungary had given it more freedom and scope than the other countries. The mood of society was better, although the indices of modernization could hardly any better than in the neighbouring countries. A turn came at the end of the 1970s. The economy had been growing very fast since the end of the 1950s and the standard of living improving even faster. Thereafter growth was first slowed by the crisis of the 1970s, then followed by stagnation, and by the early 1980s the living standard ceased to improve.

Yet this stagnation and deterioration of living conditions in Hungary did not cause mass discontent. There were no strikes as there were in Poland. There developed a political opposition, mainly among intellectuals, that many were aware of, but its activity was confined to one section of the intelligentsia. Other lines of dissidence were aimed mainly at informal dialogue with the authorities or confined to less politicized gestures (for instance in the arts field).

Two of the three basic factors behind Hungary's transition came from abroad; neither induced much activity in society. First, the exhaustion of Hungary's reform potential coincided world recession. There might have been a return to the 1968 reform, but Kádár opposed it. Broader-minded colleagues thought the socialist market economy was not the right response in any case. Secondly, Soviet reform produced a remarkable phenomenon: Gorbachev was hard to grasp or follow even for a Hungarian leadership that had led the way under the post-Stalinist system. The two factors produced uncertainty in the Hungarian elite. The doubts, revisionist inclinations and hesitation that set in spread even to the elite's view of the past.

Social dissatisfaction at home was only the third factor behind the transition. It was produced basically by the present, but brought to the surface the undiscussed past. For the inability to discuss the recent past also oppressed Hungary's Kádárite leaders. They were prompted by that and Gorbachev's example to free discussion of the past, but then found to their astonishment that the past consisted only of grievances – social, group

and individual. Nobody spoke of the relative advantages of Kádárism, all the more about Stalinism, the crushing of '56 and the ensuing reprisals, and about other, more particular, less emblematic injustices. Hungary's elite may have thought a few appeasing gestures would resolve the question of the past. The party and the government each set up in 1988 a committee of historians and jurists thought loyal to the regime. A kind of retrospective amnesty was planned, with a measure of compensation, such as searches for bodies of political victims executed and placed in unmarked graves, and respectable reburial of them. If that was their idea, the public disillusioned them. It was as if the great dead of '56, the executed Imre Nagy and associates, General Maléter and others, had come to life again. Stifling of the past gave way in the spring and summer of 1989 to ever more strident discourse. Pan-national rehabilitation was coupled with a kind of public trial. In the dock were János Kádár, his accomplices and his system. There was hardly a witness for the defence. Those who spoke up vied condemned them roundly, and most of the public stood around as supernumeraries.

The climax of the discourse came on 16 June 1989 at the solemn reburial of Nagy and associates. This was the psychological turning point of the Hungarian transition. Thereafter it was very hard to talk of "reform of socialism". Round-table talks on the transition began three days before the funeral. In the autumn the party shed its Kádárite name. Its leaders resigned themselves to defeat, which ensued in the spring of 1990, when the socialist successor party polled 11 per cent and the system-changing forces over 80.

But June 16 did not just see the funeral of a few men, or even of the waning Kádárite system. A reverent farewell was bid to the dead and one of relief to the system. But the past is not digested in a single gesture, however solemn. Hungary did not manage that either. This was seen clearly by one of the speakers, the opposition activist Imre Mécs, who received a death sentence after 1956, commuted to life imprisonment on appeal. He said on 16 June 1989, "This is the day for examining consciences, when all look at themselves: how have they lived for 32 years, how could they have lived like that? Without a break. Let the murderers, their accessories the passive murderers, the all-forgiving, the incapable, the resigned, the bowers of their heads to the yoke, the easygoing, the faint-hearted, the iniquitous characters, the despoilers of their native land, the traitors, the worthless, let them examine themselves. And let the "untainted' examine themselves! How could we endure all this for decades? What this people failed to do!" It seemed at that cathartic moment as if all understood and agreed with Mécs's moral imperative. But the moment passed and it soon emerged that the task of remembering would be much longer and more intricate than we thought twenty years ago.

Timothy Garton Ash examined in an essay in 1998 how countries turning from dictatorship to democracy have managed to deal with the past. He placed the procedures in two groups. One gives prime consideration to the sufferers and victims, including

matters of rehabilitation, compensation and/or restitution. The other group emphasizes the events, the actors and/or those responsible. Here the procedure affects the whole society, for it examines the social victims and also the question of participation (and responsibility). In this group belong the trials, the lustration proceedings, also the "ritual cleansing of facts", interrogations, courts, committees, and finally what Garton Ash called the "history lessons". The last two, apart from their prime importance, can be seen as social group therapy as well. The result is not just to clarify facts – even the truth – but "catharsis itself". History lessons can be defined as making the files of the old regime accessible for scholarly, journalistic or personal examination, i.e. readable and assessable, allowing them to be written, spoken or heard about. The following adopts this typology to examine the ways people in Hungary have tried in the last twenty years to confront the legal infringements of the communist system.

4.2 Rehabilitation

Rehabilitations were already being initiated by the last communist government. Parliament in 1989–90 passed four annulment acts:

- Act XXXVI/1989 on the 1956 Revolution (the term "uprising" was still used) annulled tied verdicts and was passed by the old communist-dominated Parliament. §1 annulled sentences for alleged political crimes between 23 October 1956 and 4 April 1963, including those for acts qualified as homicide committed in battle.
- Act XXVI/1990 (the so-called second annulment act) annulled unlawfully reached verdicts between 1945 and 1963; this too was passed by the old Parliament. The preamble stated: "The National Assembly recalls with sorrow that the Stalinist state authority set up in Hungary after the WWII – by robbing the country of its independence, making a mockery of humanity, justice and law – deprived hundreds of thousands of innocent citizens of their liberty and many of their lives. Those released from prisons and internment camps lived [thereafter] as outcasts in their own land. The pardons issued to those sentenced unlawfully were unequal to redressing the injuries as they pardoned crimes never committed."
- Act XI/1992 (the so-called third annulment act) annulling verdicts to do with certain alleged crimes against the state and public order between 1963 and 1989, was passed by the new democratically elected Parliament. The Kádárite amnesty of 1963 still left in force the measures that had allowed the verdicts of 1956–63 to be reached. Terms of such legislation conflicted with "the basic principles contained in the Constitution… they were contrary to the generally recognized principles and regulations on human rights… [and] to the moral system of values of society." The act annulled, among other things, the verdicts reached in alleged

cases of conspiracy, rebellion, incitement, injury to the community, illegal frontier crossing, rumour-mongering, and complicity in such.
- Act CXXX/2000 (the so-called fourth annulment act) annulled the measures providing the procedural basis for condemning the 1956 acts.

The Hungarian courts, through various initiatives, also annulled several post-1945 verdicts on war crimes and crimes against the people, and rehabilitated the former accused. However, there was no general re-examination or annulment of the cases on war crimes.

4.3 Compensation and restitution

After the first two annulment acts, the last communist government took the first measures for "material compensation" of the formerly accused. The period spent in prison was included in the qualifying years for pension purposes and all pension entitlements were increased by 500 forints, regardless of the period spent in custody. This caused outrage especially among those sentenced to five, ten or more years. An order then appeared in October 1989 granting pension increases graduated according to the time spent in custody.

The more complex questions of compensation remained for the democratic regime to resolve. These focused mainly on injuries to private property. It seemed hardly possible to arrange restitution to the original owners after so many decades (except in the case of some landed property). So the compensation was given not in kind, but in compensation coupons. Another constraint was the state's ability to pay. The legislature therefore applied a principle of partial compensation. Compensation was due only to individual persons – the property claims of institutions such as the churches were governed by a separate agreement with the state. The acts of property compensation were passed, for two separate periods and subjects.

- Act XXV/1991 allowed for compensation of those whose private property had suffered property damage after May 1, 1949 (after the end of the land registration process concomitant on the 1945 land reform). This act concerned mainly the lands of the peasantry. The damage had to be supported by public documents, after which values were established on a regressive scale. The amount of compensation was maximized. The compensation coupons awarded could be spent on farmland, shares in state-owned enterprises sold through privatization, dwellings, annuities, etc.
- Act XXIV/1992 likewise concerned damage to property, but for the period from 1 May 1939 (when the property stipulations of the Jewish Laws came into force)

until 8 June 1949. The act also provided partial material compensation for those deprived of their freedom for political reasons.

Those entitled to compensation mainly considered all this inadequate. It soon emerged during implementation that the compensation coupons issued were not covered by the fund of farmland or the tranches of privatization shares. The consequent legal wrangles meant that the compensation process took about ten years. Many of those not entitled to compensation felt that the whole of society had a right to some compensation for the drawbacks of communism.

4.4 Trials

In 1991, two government members of Parliament introduced a bill that would enable prosecutions for serious crimes committed between 1944 and 1990 not hitherto tried for political reasons. The bill would have enabled charges of treason and homicide for acts under the old regime to be brought without consideration for limitation legislation. It was passed by Parliament but not by the Constitutional Court, which cited infringements of the rule of law, legal security and legality. The basic guarantee of penal law is that the risk of unsuccessful prosecution is borne by the state. Limitation is an objective fact, a stated length of time.

The government drafted a new bill, passed by Parliament in 1993, to cover only crimes after the 1956 Revolution that qualified as war crimes and crimes against humanity and as such were not subject to limitation. The Constitutional Court found some of this unconstitutional (concerning war crimes) and some constitutional (in terms of crimes defined under the 1949 Geneva Conventions). Charges were then brought by the prosecution service against 28 persons concerned in the 1956 firing incidents, most of them army officers who gave orders to fire on unarmed civilians.

The proceedings were very protracted. First, the legal disputes continued over whether the Geneva Conventions were admissible. The act was eventually referred again to the Constitutional Court and annulled in 1996. But the proceedings continued based on international law. Secondly, the accused were mainly very elderly, secondary figures (the higher-ranking officers were dead). Amassing evidence after that length of time proved very difficult. The first final verdicts were not delivered until 1997, when three accused were found guilty and given enforceable custodial sentences of two to five years. Similar or even lighter sentences followed in other cases. In several the charges were dismissed for want of evidence.

The strangest case was concluded not long ago. In 2001, the Supreme Court sentenced the 72-year-old retired Lieutenant Colonel János Korbély (variously Korbely) to five years' imprisonment. Then a captain, he had commanded a detachment of

officers that had sought to retake from civilians the police station in the small West Hungarian town of Tata. When a civilian in the station yard reached for his handgun to hand it over, Korbély ordered his unit to fire and began to fire himself. Two men were killed, two others wounded. Korbély's crime was classed by the Supreme Court as multiple deliberate homicide and as such a crime against humanity. The sentence was carried out and Korbély conditionally released in 2005.

The case then came before the European Court of Human Rights in Strasbourg. The court examined whether a crime against humanity had really occurred, or whether it was a simple case of murder already subject to limitation. The argument focused on whether any of the insurgents shot could be classed as one who had "laid down his weapon." If so, his shooting was not simple homicide but a crime against humanity.

The Strasbourg court did not find it established that the insurgent had reached for his handgun because he wished to hand it over. On the contrary, he had kept the weapon concealed, and when it emerged that the weapon was on him, he did not signify a clear intention of handing it over, but entered into an "animated quarrel" with the applicant and "drew his gun with unknown intentions", according to the Strasbourg judgement. The grand chamber of the Strasbourg court found it had not been shown that Korbély's acts constituted a crime against humanity under international law.

4.5 Lustration

It was also proposed in Hungary after 1990 that people who had held functions under the communist regime should be subject to lustration. There were proposals for limitation of their rights (for example, their eligibility to stand for election). Bu the lustration act finally passed in 1994 did not provide for any real sanctions. A relatively narrow group of the political elite were examined as to whether they had cooperated as informers with the secret police in the communist period, whether they had been members of the Hungarian Nazi party before 1945 or the communist party's so-called Workers' Militia after 1956. The act extended cooperation with the state security services to include former party leaders who had regularly received secret-service reports. However, the documentation required to prove that a subject had acted as an informer was described so scrupulously that it was virtually impossible to establish this from the incomplete archive materials available. If this could be established, the subject was called upon privately to resign, and if he/she did so, the matter in principle remained secret. If not, it was publicized, but no further sanctions were prescribed. The lustration committees that sat between 1997 and 2005 examined over 8000 cases, but hardly more than one per cent were identified as informers, and still fewer were prepared to resign when confronted with their past. The socialist politician Gyula Horn (prime minister in 1994–98) had received secret-police reports as a leader of the state

party. The same applied to Péter Medgyessy (prime minister in 2002–2004), but in his case it turned out after his appointment that he had been an officer of the top secret staff of the state security organization in the 1970s. Both remained in office. The lustration act ceased to be in force in 2005.

4.6 Ritual cleansing

The model for "ritual cleansing" worldwide is the South Africa's Truth and Reconciliation Commission chaired by Archbishop Desmond Tutu. There were similar initiatives in Hungary. After the first free elections, the government in September 1990 put to Parliament a plan to establish a committee to examine political responsibility, under which 21 members of Parliament would have examined the responsibility borne by the leaders of the previous regime. The proposal was not substantively debated. A similar fate met a proposal in 1991–1992 by three members of Parliament to set up various parliamentary fact-finding commissions. The first president of the Hungarian Republic, Árpád Göncz, proposed establishing a Historical Fact-Finding Commission, but this did not ensue either and Parliament never discussed the proposal. Prime Minister József Antall set up a fact-finding commission to examine the firing incidents of 1956, but this set about examining archives without any ritual and presented a written report.

4.7 Historical lessons

The more workable way to enumerate the crimes in Hungary and clarify the question of who was responsible for what seems to be historical recognition. Recognition is a prior condition for access to the data and the sources. The want of freedom of speech was not the only reason why it was not possible to discuss the problems and crimes of the communist system before 1989. The most important archives and fonds on the history of the system were closed and the documents were kept secret.

For Hungary also underwent an "archive revolution" in 1989. The breaking of the information monopoly – an integral part of the communist dictatorship – was associated paradoxically with the last communist government, whose minister of culture, Ferenc Glatz, a former historian, issued in the autumn of 1989 a ministerial order freeing documents over 30 years old and making archive research a citizen's right. The state archives were opened and their example was followed by the party and military archives as well. But the order did not apply to source materials still held at their place of origin and not yet transferred to the archives. Two great bodies of records of this kind were held by the Foreign Ministry and the Interior Ministry. The former had transferred some of its records to the National Archives in previous years, but continued to place

research restrictions on them. These were steadily lifted in the 1990s, although some important documents remain closed today. The Interior Ministry, on the other hand, had released scarcely anything since 1945 and amassed a vast body of records. That was where the records of the state-security organizations were held and some of the records of political trials.

The new Hungarian Parliament passed several acts on archives and research in the early 1990s. First was an act on the protection of personal data in 1992. Availability was naturally limited, including one's political opinion or affiliation. The act referred to the present but it also affected cognition of the past. The data protection rules were amended by the 1995 archive act, so as to make available any personal data in a document available only 30 years after the person's death. This would have meant that practically the whole documentation of an over-politicized period – that of state socialism – would be closed to the public. All the documents concerned people and all the problems had political implications. However, the legislators left a gate open for research. "Professional researchers" were given the right to study even personal data. But what (or who) was a professional researcher? The act's definition was "a person who has a support/recommendation declaration by a professional research institution". The personal data protection act also made an important difference to research three years earlier. The general rule was that a personal data could be published only with the permission of the person in question. Researchers, however, could now do that without, "if [the publication of personal data] is needed for the presentation of results of research on historical events." So democratic legislation, not too democratically, created a virtual order of professional researchers. (In fact the order did not come into existence as nearly all kind of interested people could obtain a letter of recommendation from some institute.) The archive act also created a special practice of suspending the 30 year limit on all documents of the communist period up to 1989. (So the 30 year embargo applies only from 1990.)

Also passed in 1995 was a "State Secrecy Act", one paragraph of which cancelled all classification of archived documents up to 1980. As for documentation of the last ten years of socialism to 1989, the producing institutions – e.g. ministries – were given a right to keep secret certain papers for a certain time, to protect some continuing interests of the state. The deadline for this re-classification process expires this year.

The files of the former state security organs were a very special case. These were partly destroyed in 1989 (or earlier), partly taken over by the new national security organs in early 1990, and partly retained in the Ministry of Interior. The interior minister in 1995 set up a committee of historians and archivists to assess his ministry's records and make recommendations about what should happen to the documents. The committee proposed transferring some to archives, which was done. It also recommended that a special body should be set up to handle the state-security records, after the pattern of

the so-called Gauck Commission for the records of the Stasi in former East Germany. The researchers and specialists envisaged that the new office would at last unite all the state-security documents – those remaining at the Interior Ministry and the historical records transferred to the new services at the beginning of 1990. (The committee viewed the fact that they were held there as illegal and utilization of them as a threat to democracy.) The optimism was enhanced by the archive legislation passed in 1995 mentioned already. The so-called Historical Office (now the Historical Archives of the State Security Services) came into being in 1997, which made scientific research possible. But the legislature still fails to solve the problem of uniting the records or making some groups public (e.g. the list of state-security staff and agents).

At the turn of the millennium, the secret services slowly began to release the pre-1989 documents in their possession to the Historical Office. The problem of accessibility and publicity was exacerbated by successive exposures of secret informers (by historians, but also in the press and media). The Historical Office was reorganized in 2003 as the Historical Archives of the State Security Services and access conditions improved, with those once under surveillance gaining the right to know who had informed on them, and scholars getting relative freedom to study the documents. But no full list of the informant network appeared, despite a prime ministerial promise to publish one. Again the security services intervened to protect the continuity of the state, on grounds of immediate concern and protecting people still on the staff. Though some documents were embargoed for 30, 60 or even 90 years, others continued to arrive at the Archives and lead to further exposures, making further public scandals.

In 2007, the socialist/liberal government again set up a committee, this time expressly to take stock of the documents still held by the secret services. This was headed by János Kenedi, a prominent opposition activist in the Kádár period. The committee members went round all the successor institutions and looked into the documents, naturally after the names had been excised. A list of the *most* secret items (a somewhat circuitously named category created by the law) was seen only by Kenedi. The committee report pressed for further legislation on the documents (a "file act"). It emphasized that the victims of the secret service of a Soviet-style regime consisted not only of those under surveillance, but also of those kept on file. The *network* consisted not only of those formally recruited as agents, but also of those who cooperated occasionally. Their names were data of public interest that should be publicized. The committee found that destruction of documents had continued under democracy, right up to the mid-1990s. What had survived was a register on magnetic tapes, from which the dimensions of the network and its targets could be sensed. The committee recommended that these be printed out and published. So the Kenedi Report became a final assessment: only a fraction, at most a minority of the documents generated by Hungarian state security since 1945 had survived. Which

of the report's recommendations will be implemented still remains to be seen two years after the enquiry was completed.

It lies outside the scope of this report to review the Hungarian historiography in the last twenty years. But it has to be said that the recent past is a subject of particular importance to it. Very many basic documents have appeared in print, on the Internet, and in numerous publications and monographs. To sum up the Hungarian discourse on contemporary history and its institutional framework:

- The system of institutions dealing specially and professionally with Hungarian contemporary history has changed little since 1989. Only a handful of new bodies have emerged (the 1956 Institute, the Twentieth Century Institute, the House of Terror Museum). Although the significance of contemporary history in public discourse is obvious, the number of professionals in the field is far smaller comparatively than in the Czech Republic or Poland. On the other hand, it is still a plural institutional space – there is no single Hungarian Institute of National Memory.
- Hungary has seen plenty of history debates in the last twenty years, but no full-scale historians' debate has taken place either on communism or on its Hungarian version. There have been partial debates on specific questions, and several political and other public debates have been much influenced by historical or historicizing arguments.
- Strong political influence on historical discourse is probably not specific to Hungary, but antagonism between conservatives and socialists-cum-liberals seems to run deeper here. So the image of the recent past divides politically. No new historical canon has emerged, indeed the division extends to historians themselves, in their roles and in their institutions.

4.8 Information compensation

Information compensation is the name given in Hungary to a curious blend of compensation with historical lessons. Essentially, those the state security agencies observed may have access to the information collected, and to the names of the informers. Relatively few people have applied since 1997 to see these materials: 24,000 citizens since the end of 2009. Of those who have applied to see the materials held in the Historical Archives of the State Security Services, material has been found on only 40 per cent, 9,000. To those 9,000 have been handed almost half a million sheets of document. Rather more, about 600,000 photocopied sheets have been requested and received by research historians. Of around 200,000 persons who cooperated with the state security services over four-and-a-half decades, about 1000–1500 agents have been identified for certain. The question of publicizing these names is a fraught matter

under Hungary's regulations. Only a few hundred have actually been named publicly by journalists and historians. These cases almost always caused a scandal in the press. Many cases were then taken to court, with the named informers suing those who had exposed them and largely winning their cases.

János M. Rainer

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The significance of the opening of Stasi files for the legal processing of acts of injustice in the GDR

I would first like to thank the organizers for the fact they have, within a broad international framework, chosen as the theme of this conference "the crimes of Communist regimes". And thank you for the invitation from my agency, the Office of the Federal Commissioner Preserving the Records of the State Security Service of the former German Democratic Republic (BStU), which is a partner of the Institute for the Study of Totalitarian Regimes, the initiator of this conference. The co-operation between our institutions was confirmed by a joint agreement just a few months ago. I would like to emphasise one thing – to draw attention to the differing tasks which the law has given us. The German institute the BStU is tasked with dealing with the activities of the East German secret police. However, we are not an institute which uncovers the criminal acts of the East German dictatorship. A distinguished expert, former supreme state attorney Christoph Schaefgen, will inform you about the criminal prosecution of the injustices of the GDR in a presentation tomorrow.

My talk is intended to clear up one partial aspect – the significance of the Stasi files and their opening for the legal processing of acts of injustice in the GDR.

On 4 December 1989, that is nearly four weeks after the fall of the Berlin Wall, women from the initiative Frauen für Veränderung (Women for Change) from Erfurt in Thuringia decided to intervene in the destruction of Stasi files. It was known that the secret police had been destroying problematic documents since November. With the help of sympathisers, these women succeeded in transferring the administration of the district to their town and blocking all attempts to get at the documents. In the first days of December 1989, district and regional offices of the Stasi were seized around the whole country, a move which was repeated at their headquarters in Berlin on 15 January This occupation ended the history of East Germany's secret police, who had for decades been deployed against the state's own citizens. At the same time this date is significant in the context of the revolutions for freedom throughout Central and Eastern Europe – in no other former Eastern Bloc state (if we pass over the bloody clashes in Romania) were the revolutionary events of 1989–1990 oriented in such a targeted manner against the secret police. The issue of how to deal with the legacy of the Communist secret police was raised to the political level even during the revolution in Germany. Despite the marked opposition of the old Communist elite, and on the part of the old Federal Republic, the documents of the Stasi were not destroyed and were prepared for publication as early as 1990. Strong social pressure and a second

occupation of the Stasi headquarters were required to bring this about. It was followed by parliamentary approval of a law on the documents of the Stasi (Stasi-Unterlagen-Gesetz), which governed access to and the handling of previously secret documents of the East German Ministry of State Security. A relevant agency was also set up – the Office of the Federal Commissioner Preserving the Records of the State Security Service of the former German Democratic Republic (BStU) – whose director is speaking to you right now. Thanks to intervention that was timely in comparison with other former Eastern Bloc states, the greater part of the Stasi's documents was preserved, although in our case there are perceptible and painful gaps. To date these materials have been accessible to former victims, for historical research, for political enlightenment, and also for the legal processing of the problem of the East German Communist dictatorship. Thanks to citizen engagement, which in the period of 1989–1990 led to the fall of the GDR and the secret police, it was possible to preserve the greater part of the documents from destruction and to push through the opening of the archives. In this way one of the foundation stones of the criminal law prosecution of the crimes committed by the SED dictatorship was laid. The second peculiarity of the legal process is linked to a specific German circumstance, the division of the country into two parts. One part, the German Federal Republic, was able to look back in the period 1989–1990 on more than 40 years of freedom, democracy and a state of law; the other, the German Democratic Republic, had by contrast after 40 years of Communist dictatorship just undergone a successful revolution for freedom on German soil. The criminal processing of political despotism in the GDR took place soon after the reunification of the German states in the period 1990–2005 under conditions established by the Federal Republic and its long rule of law tradition. Thanks to this, a revolutionary upheaval was transformed into a process directed by state law and as a result there was no revolutionary settling of accounts with functionaries of the fallen regime. The treaty between both German states on the renewal of a unified Germany described the GDR as a "regime of SED party injustice". However, this did not mean that the parties, organisations and institutions of the GDR were in themselves regarded as unlawful or their functionaries the subject of criminal proceedings. On the contrary, both German states agreed not to introduce special measures allowing for the prosecution of crimes at the governmental level. That stipulation raises passions to this day. Victims wished to see the ministry of state security, for instance, classified as an illegal organisation and its employees generally classed as "perpetrators". However, this did not happen.

The only remaining means of dealing with the systematic injustice of the GDR was individual criminal law. The essence of that approach became the necessity of proving personal guilt. Only the personal responsibility of an individual was actionable, not a position within the framework of East German system as such. Criminal prosecution could be launched only if an act was criminal under the criminal code of the GDR and

the valid all-Germany criminal code. Exceptions were made only in the case of a serious breach of human rights, i.e., even if an act was pardoned by the law from the GDR era.

This also applies in cases of killing on the Inner German border: Although from the point of view of the GDR such murders were lawful, the constitutional principle of a ban on retroactive effect applies in this case, because it concerned the most serious criminal acts and a significant breach of generally acknowledged human rights.

However, this edict often meant that in many cases the *actus reus* of a criminal act which had deeply impacted the life of the victim could not be fulfilled. The expiry of the statute of limitations also played a role. One example stands in for all others: particularly in the 1970s and 1980s, the SED in co-operation with the secret police used what were called Zersetzungsmaßnahme (decomposition measures) against its enemies. These were carefully thought out and increasingly refined psychological methods, the aim of which was to destroy a given person, his social world, circle of friends, individual sense of security, physical and mental health, and whole personality. In most cases the perpetrators of these acts went unpunished, because an *actus reus* for this kind of criminal act did not exist in the criminal code of the GDR. The victims in such cases have found it hard to accept that the perpetrators have not been forced to bear criminal responsibility.

The 1991 law on Stasi documents states in its first article that such Ministry of State Security documents may be used for historical and political, but also legal purposes. Abundant use has been made of this possibility. The number of complaints relating to injustices has not been systematically recorded, though an estimated 100,000 people filed suits in the years 1989–1990 alone. In almost all of cases documents of the former Ministry of State Security from the archives of the federal commissioner were used to establish the truth.

If we divide all of these complaints into individual groups, the following overview of the most commonly prosecuted criminal acts emerges:

- perversion of justice,
- acts of violence on the Inner German border,
- criminal acts on the part of the state security,
- falsification of elections,
- harassment of the convicted,
- doping,
- abuse of office and corruption,
- financial crimes,
- denunciation.

At the start of the 1990s, the Central Investigative Group for Crimes Committed by the Government and Associations – Zentrale Ermittlungsgruppe für Regierungs

und Vereinigungskriminalität (ZERV) – was set up in Berlin on the basis of co-operation between the police and judicial bodies of the federal states. As I stated in my introduction, the federal commissioner for the Stasi documents does not have the authority to investigate and does not have the powers of a state attorney. It merely makes Stasi documents accessible to investigative bodies for the purposes of criminal prosecution and in this context also works closely with the ZERV group.

The enormous value of Stasi documents for the legal processing of unlawful actions is borne out by the fact that the Ministry of State Security was not only a repressive organ and the secret service of the governing party; it was also an investigative body, according to the GDR criminal code. Today we welcome the fact that from the end of the 1950s the East German judiciary handed over a great number of legal documents which had arisen in political trials to the state security for storage. These documents have been preserved to this day and can be used for clearing up questions and research. The archive of the federal commissioner includes over 10,000 legal documents. In connection with the legal and in our case above all criminal processing of acts of injustice in the GDR it is worth mentioning briefly two further aspects. First: sanctions for causing injustice on the part of the GDR do not fall under criminal law alone. Legislators explicitly envisage the possibility of social, respectively professional sanctions. The treaty on the unification of both German states included a provision in connection with the state administration that an employee may be dismissed if he has in the past worked for the Ministry of State Security of the GDR.

The law on Stasi documents includes a supplementation granting relevant institutions of the state administration, such as Parliament and the Church, the right to request information from the office for Stasi documents. Beyond criminal law processing, many employees of the state administration of the East German federal states (i.e., the former GDR) have undergone screening as to whether they collaborated with the Stasi. The BStU has to date received nearly 1.8 screening applications. However, what an employee does with the information acquired is his own affair. The contract of an employee proven to have collaborated with the Stasi can be but does not have to be dissolved.

Just as important as the legal processing of the injustices of the SED regime in order to establish lawfulness is a second aspect – alleviation of the suffering of victims. In a democracy such alleviation cannot be achieved by means of criminal prosecution alone. Acknowledging the victim's right to compensation and redress, to participation and the help of society, has to be fundamental. From the very beginning this represented a basic task of the BStU – making available relevant documents facilitating rehabilitation and the rectification of wrongs. In the 20 years of the office's existence, around 250,000 applications have been processed within the framework of claims for rehabilitation and recompense. In countless cases, these documents from the archive of the federal commissioner alone have helped bring about the successful conclusion of these claims.

This shows how important saving the documents of the East German state security really was.

Of the around 100,000 persons who have faced charges in court in connection with injustices committed in the GDR, only around 750 have been convicted, of whom 40 received jail terms. These figures illustrate how difficult it is to bring to book a dictatorship which has trampled on human rights if one is using the law of a state whose priority is proving individual guilt and which features a statute of limitation and a ban on retroactive effect. The truth about Communist dictatorship, which has reached the public thanks to trials and media reports, also belongs in a final evaluation. If the archives of the Stasi had not been opened, as citizens fought for, a great percentage of those trials would have taken place in very difficult conditions; some would not have taken place at all. And this is not to mention the distortions which victims were able to learn about in these documents, or the many rehabilitation proceedings which abrogated injustices suffered either materially or legally, or the information about dictatorship that we use as a deterrent to today's youth. None of this would have been possible without the use of Stasi documents.

Session IV.
Crimes committed by communist regimes in the former Soviet Union, the new EU member States, Germany and the Balkans – studies of individual states III

Andreja Valič, Slovenia
Marius Oprea, Romania
Vasil Kadrinov, Bulgaria
Marina Jelić, Serbia

Host: Zdeněk Křivka, member of the Confederation of Political Prisoners of the Czech Republic

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Andreja Valič is a historian and the director of the Study Centre for National Reconciliation in Ljubljana, Slovenia. She holds a BA and MA from the Faculty of Arts, and a doctorate from the Faculty of Social Sciences at the University of Ljubljana. She has been involved in many national and international projects on history and history education (history education curricula, expert projects, history textbook projects). Andreja Valič is the author of history textbooks and handbooks. In 2004–2008 she held the position of President of the Slovenian History Teachers' Association. She is the president of the school section of the Historical Association of Slovenia.

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In 2005–2008, Dr Marius Oprea served as the Romanian prime minister's counsellor on national security issues. In 1995–1997, he was senator Constantin Ticu Dumitrescu's counsellor in drawing up the law on the disclosure of the Securitate. Between 1998 and 2000, he was a counsellor within the Romanian presidency and also the head of the Communication Department. In 2004 and 2005, he wrote leading articles for the Ziua daily newspaper. Marius Oprea is also the author of more than one hundred articles referring to the history of the Securitate. He holds a Ph.D. in history from the University of Bucharest.

VASIL KADRINOV ► Director, Hannah Arendt Centre Sofia

In 1985, during his study of sociology at the University of Sofia, Vasil Kadrinov was imprisoned by the communist regime for one year for "agitation and propaganda against the People's Republic of Bulgaria and the Soviet Union". After 1989, he became a founding member of the Union of Democratic Forces, and has been an activist of civic campaigns for the opening of the communist archives and vetting with regard to former agents and collaborators of the totalitarian regime, for establishing an institute of national memory, and for the environment and public health protection. He has also served as an advisor to members of the Green parliamentary group in the European Parliament.

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Born in the city of Belgrade, in a now nonexistent state (SFRY – Socialist Federative Republic of Yugoslavia), Marina Jelić now lives in the same city but in another country, the Republic of Serbia. She graduated from the Faculty of Philosophy in Belgrade at the Department of Archaeology, and obtained an MA in demography at Belgrade University. From the beginning of the 1990s, she was as an activist in the anti-war movement in former SFRY. From 2000, she was an employee of the Center for Anti-War Action (now the Center for Peace and Democracy Development – CPDD). In 2008, she was elected by the governing board as the executive director of CPDD.

National report on the crimes of communism in Slovenia

1. The period of the communist take-over during the Occupation (1941–45)

For six centuries the Slovenian lands had been the part of the Austro-Hungarian Empire, which disintegrated after the WWI. According to the will of the Paris Peace Conference and the world super powers the majority of the Slovenian lands in 1918 entered the first Yugoslavia. The western part belonged to Italy and the west-northern part belonged to Austria. During the WWI in Slovenia (1941–1945) there were occupation, resistance, revolution, collaboration and the civil war. After the Axis attack on Yugoslavia on 6 April 1941, Slovenia was occupied by Italy, Germany and Hungary. After the Italian capitulation in September 1943, Germany added the Italian Slovenian territory into the Operational Zone Adriatic Littoral. After the German occupation of Hungary, the Third Reich occupied the whole of Slovenia. All three occupying countries had the same goal: to Italianize, Germanize and Hungarize the Slovenians and assimilate the occupied territories.

Communism in Yugoslavia, particularly in Slovenia, in contrast to communism in others eastern countries, came to power without the intervention of the Soviet army. This meant some kind of uniqueness in European space, so it is important to detail the very beginning of the Communists' usurpation of authority within the framework of their organizing resistance. The leadership of the Communist Party of Yugoslavia with Josip Broz Tito as a leader became extremely Stalinist before the WWII. In October 1940, at a conference in Zagreb, one of the communist leaders, the Slovenian Edvard Kardelj announced that, "…the communists start armed engagements with the occupier only if they see a chance for revolution".

At the end of April 1941 the Slovenian communists as a part of the Yugoslav communist organization, established the Anti-imperialist Front (PIF = Protiimperialistična fronta). PIF was renamed in to the Liberation Front (OF = Osvobodilna Fronta) after the German attack on the Soviet Union. In the Liberation Front there were also Christian Socialists, part of the Sokol (Falcon) pan-national gymnastic movement, groups of persons connected with culture and some other groups.

The beginnings of the Liberation Front (OF) are not accurately documented, in complete contrast to the tradition of the communists. First, on April 26 the "Anti-imperialistic Front" was founded, which in June 1941, following the German attack on the Soviet Union, was renamed the "Liberation Front". It was clear from the very beginning that the struggle for total control was more important to the communists than any struggle against the occupation.

It was decided in advance that they would fight against every group which planned resistance against the occupation. All the anti-communists would be destroyed later or (with pretended collaboration) compromised. The Communist Party (KPS) as an initiator of this formation had the leading role and was by no means willing to give up this role or share it. The members of the "Anti-imperialistic Front" and the Liberation Front never discussed equality of rights among collaborating groups or the appropriate division of tasks.

The German attack on The Soviet Union on 22 June 1941, provoked Yugoslav and Slovenian communists to start fighting against the occupation and to enact the Bolshevik revolution. As early as August 1941 the Security Intelligence Service (VOS) was established, which was directly subordinate to the Communist Party and rather arbitrarily executed collaborators, supposed collaborators and enemies of the Liberation Front and the communism.

By the end of the year 1941 one hundred people had lost their lives. They were shot because of alleged denunciation and betrayal. People were violently forced to join the Partisans not only in Ljubljana, but also in the country. The causes of growing violence, which greatly increased in this period, lay in the conviction of the Communist Party that the war would be decided in 1942. During the war four thousand civilians were killed by the Partisans. These were people, who represented ideological enemies for the Party. In Ljubljana in 1942, the VOS killed among many others the president of the Association of Industrialists, August Praprotnik, academicians Franc Župec and Jaroslav Kikelj and Professor Lambert Ehrlich. The last great actions in Ljubljana were the liquidations of the Ljubljana Police officer Kazimir Kukovič on 8 October 1942 and former ban (political leader of Dravska banovina) Marko Natlačen on October 13. They did not liquidate only opponents of OF and other organizations, but also allies. They obviously tried to prepare the ground for a later communist take over.

By the spring of 1942, partisans murdered several thousand civilians, prompting the anti-communists to start armed resistance, collaborating with the Italians and after Italy capitulated in September 1943, with the Germans. Even during the war, more than 12,000 people became victims to the civil war,[1] and including more than 15,000 killed

▸ ▸ ▸

1

Killed by	partisans	anticommunists
1941	115	
1942	1,980	328
1943	2,649	715
1944	2,453	2,587
1945	400	600
Together	**7,597**	**4,230**

Jože Dežman, *Communist repression and transitional justice in Slovenia*, in: Crimes Committed by Totalitarian Regimes, Slovenian Presidency of the Council of the European Union, Ljubljana 2008, 198–199.

civilians and prisoners of war after the end of WWII in the spring of 1945, there were more than 30,000 direct victims of the civil war.[2]

In the Italian occupied region a "liberated territory" was established in spring 1942, which extended to the suburbs of Ljubljana. Revolutionary violence in the liberated territory against peasants and fear of revolutionary victory led to the spontaneous formation of village guards and collaboration with the Italian occupiers. All this supported the establishment of Anti-Communist Units ("Milizia Volontaria Anticomunista"). The War of Liberation, therefore, was interwoven with civil conflict, which fatally divided the Slovene nation.

In spring 1942, representatives of pre-war parties united in a Slovene alliance. The common basis of these united parties with differing political principles was counter-revolution. At the end of 1941, the so-called programme London Points was published, which talked about united Slovenia as a part of Federal Yugoslavia, with the king at the head, and a democratic, socially more just political system as then in the previous, decayed country. In relations with the occupiers they continued the politics of waiting for the right moment for resistance. Because of their desires to thwart development of the revolution, they decided on military/police collaboration with the Italians and later also the Germans.[3]

On 16 September 1941, the Slovene National Liberation Committee (SNOO), announced the prevention of operations of all organisations and resistance groups outside the OF. This day marks the formal beginning of the civil war and decades of concealed communist guilt.

The provisions of 16 September 1941 were, at the second session of the Slovene National Liberation Committee on 1 November 1941, supplemented with another seven articles – on 21 December they finally added articles 8 and 9. These nine articles stood as the "nine Basic Articles" of the OF. They represented its programme, which was valid until the first Congress of the OF on July 1945 in Ljubljana. But the records of the VOS show that the mentioned decrees were not so important – they were a kind of alibi to prove that they were acting legally. The prior communists task was not the elimination of national traitors, but to lead people from the anti-communist side which represented a danger to their goals and to "social revolution". The guilt of individuals

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2

Killed by	partisans	anticommunists
1941–1945	<> 7,500	<> 4,500
After WWII	<>18,000	< 100
Together	**>25,000**	**> 4,500**

Jože Dežman, *Communist repression and transitional justice in Slovenia, Crimes committed by totalitarian regimes*, Slovenian Presidency of the Council of the European Union, Ljubljana 2008, 198-199.

3 Dieter Blumenwitz, *Okupacija in revolucija v Sloveniji (1941–1946)*, International study, Celovec/ Klagenfurt 2005.

did not play any part, but only if someone stood in the way of the goals set by the KPS. And the most important were people's beliefs that the liquidated person was guilty, because otherwise the danger that people would oppose the National Liberation movement could appear.[4]

At first the OF Supreme Plenum proclaimed itself the Slovenian National Liberation Committee with a decree. The decree included three articles, of which the second was the most important, because it justified the monopoly and supreme authority of the OF. Immediately there arises the question as to who the OF were, and its constitutive groups of power, that it could speak and act in the name of the nation? During the war, it was impossible to hold an election or referendum. The legal pre-war parties or their elected representatives, the only ones with the right to appeal to the population, were not represented in the Liberation Front. In the plenum of the OF, besides the Party, there were "only splinter groups of former political parties and not the conservative Catholic side, which without doubt represented an important part of the nation". The OF represented only certain opinion in Ljubljana and its surroundings. The opinion of the rural regions was not reflected at all, particularly of those who were under German and Hungarian occupation. Therefore, the OF did not represent the majority of the peoples' opinion, although the majority was hostile to the occupation. The KPS, which dictated the intention of the OF, acted illegally before the war. At the beginning of the war the KPS had about 1,280 members and, according to others, nearly 1,000. Therefore the KPS was objectively too weak to impose itself or even appealed to the minds of the population. The KPS was aware of this, which is why, at the beginning, on the basis of the enlarged OF, it hid under the very popular idea of liberation and watched carefully to put "the company" of the OF forward as a front organisation. People were enthusiastic about the idea of a meeting place of resistance. The majority of Slovenes were hostile to the occupiers or just rejected them. And now, there suddenly appeared an organisation about which they knew little, but which promised to mobilize all "to the liberty-devoted Slovene combat teams, irrespective of which political and world point of view they had" and defied them. The inclination of the OF does not automatically mean the inclination of the KPS. People at first did not even recognize the dominant position of the KPS in the organisation. Therefore, the OF became a symbol of the struggle for liberation. The establishment of an organisation such as the OF was deemed legal, in contrast to the denial of the same right to other political parties and social groups. Anyone who did not agree upon the principles of the OF, which was led by the communists, the

4 Tamara Griesser-Pečar, *Razdvojeni narod*, Mladinska knjiga, Ljubljana 2004; Bojan Godeša, *Kdor ni z nami je proti nam*: *slovenski izobraženci med okupatorji, Osvobodilno fronto in protirevolucionarnim taborom*, Cankarjeva založba, Ljubljana 1995; Bojan Godeša, *Priprave na revolucijo ali NOB?*, in: Slovenski upor 1941, Ljubljana 1991.

article denied the right to resist the occupation outside the OF. Non-communist groups within the OF, which was named as the "allies" in the sense of Russian civil war by the party, in truth had an absolutely subordinated role. The Party – in Lenin's sense – used them as a tool. At the beginning, the communists would not be successful without "the allies", because they offered a more extended platform to the Party. And when the communists had the whole situation under control, "the allies" were not needed any more, so in March 1943 they were forced to sign the Dolomiti Declaration, with which they finally capitulated.

With this decree the leaders of the OF hardly obstructed the resistance of traditional parties. Obviously, they did not strive to resist the occupation as such, but to set up the basis for a communist revolution. As early as at the end of August 1941, the organizing secretary, Tone Tomšič, clearly said: "Those are mistaken who thought that the great Liberation Front of the Slovene nation is possible without the strong organisation of the Slovene KP."

All activities, and therefore also resistance were "self-interested" and directed to national liberation if they did not act in the framework of the OF, under communist leadership and the partisan military. Besides the death penalty, other punishments were determined – confiscation of all property, destruction of property, "national boycott" (exclusion from society).[5]

"The protective decree" envisaged special secret courts, but it did not mention how they should be constructed, who should be named to them, and how they were to act. According to its judgment, this was a "typical form of revolutionary judiciary, which demands constant watchfulness from the responsible holders of political authority, the integrity of members of the court and the ability to properly evaluate information about criminal offences". Therefore this statement already indicated the true character of these sentences. Victims were selected by the leadership of the Party and not the executive committee of the OF. It only gave orders for the circle of people from whom the Security Intelligence Service (VOS) as an executor of the Party selected the appropriate casualties. According to the published cases, the accusations were very general, and did not bother to cite concrete evidence. They were dictated by the needs of revolution. They did not consider the principles of the rule of law or humanitarian acts. The purpose of these "liquidations" was not a punishment for some concrete act, but the discouragement and intimidation of others. Only after the decision of the

5 Metod Mikuž, *Pregled zgodovine NOB v Sloveniji I-V*, Cankarjeva založba, Ljubljana 1960–1973; *Dokumenti ljudske revolucije v Sloveniji I-X*, Inštitut za zgodovino delavskega gibanja (I-VII), Arhiv Republike Slovenije (VIII-X), Ljubljana 1962–2005; Marjan Žnidarič, *Do pekla in nazaj*, Muzej narodne osvoboditve, Maribor 1997; Bojan Godeša, *Priprave na revolucijo ali NOB*, in: Slovenski upor 1941 (ed. Ferdo Gestrin, Bogo Grafenauer, Janko Pleterski), Ljubljana 1991, 69-85.

executive committee of the OF on 31 July 1942 in "liberated regions" – regions which the Italians had deserted and were then invaded by Partisans – was a "special judicial commission" established. It was to make judgements according to "the protective decree", but because of the hard fighting it could not act properly. Later, after 1943, some criminal acts under "the protective decree" were left to military courts. But these "revolutionary courts" were also based on the reports of the VOS. In autumn 1943 their representatives accepted the reports of the VOS about the alleged guilt of 'the accused' as a valid proof of guilt without further deliberation.

The VOS acted until February 19, 1944, when at the first session of SNOS (Slovene National Liberation Council) in Črnomelj it was dissolved. The successor of VOS became Department for National Protection (OZNA).

Although the VOS had the title OF (VOS OF), which should emphasize party responsibility for the OF and documented that it served to the whole National Liberation Struggle (NOB), it was actually an exclusive body of the Party. The Liberation Front did not subsequently identify the VOS. Members of the VOS were exclusive members and candidates of the KPS and the Communist Youth Organization, SKOJ. The VOS answered directly and exclusively to the Central Committee of the Communist Party of Slovenia and served the Party exclusively. They carefully were hiding certain information from "the allies", and later wrote special censored reports for them.

The VOS was divided into three departments: the Mass Intelligence Service, Special Intelligence Service, and Security Service. The latter was some kind of executive body of the Intelligence Service. The units were organized on military lines and actions executed (sabotage actions and "liquidations") according to precisely defined plans. The units were manned by activists, supposedly brave and calm, but not reckless, ruthless, suitable and ready for total individual armed actions. The Security Service in Ljubljana executed house searches of obvious enemies of the communist partisan movement, stole their documents and records, destroyed printing offices, robbed weapons, equipment and money and, particularly, liquidated groups of people.

2. Communist rule established in Slovenia

Differentiation should be made between two phases in the worst communist repression after the WWII. First, we must remember the bloody battle with the Home Guard and other members of armed anti-communist and partly collaborationist units, the elimination of some most exposed anti-communists and bigger entrepreneurs (for example, culturist Narte Velikonja, industrialist Josip Benko) and the fight with the German minority on Slovene territory. Therefore, in autumn 1945 there were more than 3,500 Germans from Lower Styria and Prekmurje in prison or camps; 7,400–9,000 "Volksdeutsche" and Slovenes who acted for the Germans in the war, but were deported

between 1945 and 1946 by the Slovene and Yugoslav authorities. Then follows the period from August 1945 until the middle of the 50s, when terror weakened.[6]

At the end of the war, in May 1945, the Home Guard ("domobranci"), at that time officially part of the Slovene army, together with many civilians (about 6,000) withdrew to (Austrian) Carinthia. They entered the occupied territory of British 5th Corps of the 8th army, which occupied Carinthia. The retreat of the Slovene Home Guard took place between 8 May and 13 May 1945. The British settled them in Vetrinjsko polje (Viktring) near Klagenfurt/Celovec in military and separate civilian camps. It is interesting that the British did not return the anti-communist units (Chetniks, Home Guard members from Primorska), who retreated into Friuli back to Yugoslavia.

The British authorities began to return different anti-communists (Home Guard members, Chetniks, Ustaši, Croatian Home Guard) to Yugoslavia on 24 May. 11,000 Slovene soldiers (mostly Home Guard members) and about 600 civilians were returned. Some historians mention higher numbers, about 13,000. The British mostly assured them they would only transfer them to the camps in Italy. Although the Slovene anti-communist military and political leadership soon found that the returned Home Guard members had been transferred to Yugoslavia, they did not act effectively. They were probably guided by almost blind trust in the British political and military authorities, which grew during the war. They could not imagine that they could be extradited to the Yugoslav communist and non-democratic authorities by a country with a rich democratic tradition and gentleman behaviour.

On their return to Yugoslavia the Home Guard were divided into three groups: A (juveniles), B (mobilized from 1945) and C (the rest). All from groups C and the majority from group B were soon killed. Only in the camp at Teharje did they imprison 400 juveniles, who were released after August 1945, although many never returned home. They were killed on their way home by various groups and militias.

Immediately after the return of the Home Guard (domobranci) mass slaughter began, carried out by the Yugoslav OZNA with the help of military units (KNOJ = Korpus narodne obrambe Jugoslavije). The order to slaughter the returned was without doubt came from the highest authority in the Party. Prisoners were led to mass killing fields and usually shot in the neck and then thrown into karst caves, natural abysses, mines, tank ditches. So far, more than five hundred post-war graveyards have been discovered in the Slovene regions. The majority of Home Guard members are buried in Kočevski rog, in deserted mine pits in Zasavje region (Trbovlje, Hrastnik), in anti-tank ditches near Celje or in abysses near Ljubljana. Most liquidations were executed in June 1945.

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6 *»Nemci« na Slovenskem 1941–1955* (ed. Dušan Nećak), Znanstveni inštitut Filozofske fakultete, Ljubljana 2002.

Up till now we do not know precise number of Home Guard members liquidated at the end of the war by the Partisans. The then communist authorities drew up a list, but it vanished in the mid-1980. According to the numbers gathered during political emigrations, the number of victims is about 11,720. We must take into consideration also those who stayed home and did not retreat to Carinthia; therefore, the new Yugoslav authorities imprisoned or captured them later. Thus today the generally accepted number of Home Guard members and civilians killed is almost 14,000.[7]

Therefore, according to its Bolshevik revolutionary justice, in 1945 the Communist powers committed judicial slaughter outside the courts on Slovene territory, about which it was forbidden to talk.

In 1945, Slovenia was gripped by a wave of confiscations, which followed the mass persecution of real and imagined speculators. In summer 1945 a special court known as the "Court for Slovene National Honour" was established. They carried out agrarian reform and divided the confiscated estates of landowners and the Catholic Church among small peasants and country people. By this means they got the poorer peasants on their side, but these small rural producers could not replace the fall in production which resulted from the destruction and nationalization of large land establishments.

The next thing with which the Communist Party of Yugoslavia (KPJ) finally strengthened itself and apparently legitimized its authority was the election to the constituent assembly on 11 November 1945, which was actually a vote on the future social regime. The first elections in the second Yugoslavia were marked by election fraud and mass removals of voting rights. Although after WWII women received voting rights, the only candidates available were those checked by the Party and the secret political police. The communists used elections as a confirmation of their domination. In reality, people voted without having a genuine voting right. The arrangements for voting was not consider in the democratic sense, but went on in the shadow of pressures among differently thinking people and upon all who were not in the pro-communist "People's Front", and continued under the supervision of its political police – OZNA. A high number of people who would have voted against the new authority in the elections were crossed off the electoral register. Therefore the results of the elections were known in advance in favour of the Communist Party. The authorities wanted an election that

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7 Boris Mlakar, *Slovensko domobranstvo 1943–1945: ustanovitev, organizacija, idejno ozadje*, Slovenska matica, Ljubljana 2003; John Corsellis, Marcus Ferrar, *Slovenia 1945: memories of death, and survival after WWII*, London-New York 2005; Janez Zdešar, *Spomini na težke dni : beg iz teharskega taborišča*, Založba Družina, Ljubljana 2005; *Slovenska novejša zgodovina – II. del* (ed. Jasna Fischer et. al.), 836–839, Inštitut za novejšo zgodovino, Mladinska knjiga, Ljubljana 2005, 836–839; Jerca Vodušek Starič, *Prevzem oblasti 1944–1946*, Cankarjeva založba, Ljubljana 1992, 242–248; *Vetrinjska tragedija*, Zgodovinski odsek pri glavnem odboru Zveze slovenskih protikomunističnih borcev, Cleveland 1960; Tomaž Kovač, *V Rogu ležimo pobiti*, Buenos Aires 1968.

appeared democratic, but in the end they got some kind of referendum to decide on support for the ruling regime. Poll for the nominated "People' Front" list was placed in polling stations, because they wanted to leave better impression. This was intended for those who did not want to vote for the People' Front. The poll was known as the "black poll". First free post-war elections in Slovenia were hold only in April 1990.

In June 1945 group trials began against actual and imaginary opponents of the Communist system, particularly against representatives of cooperatives, banks and the economy. The authorities carried out numerous trials to compromise representatives of political opposition and the Catholic Church.

Following the Soviet example, in summer 1947 the Slovene Party staged a great Stalinist political trial, the so-called Nagode trial (named after the first accused, dr. Črtomir Nagode) in which fifteen people were accused of treason and spying for Anglo-Americans. In May 1947, the Slovene secret police, the UDBA, arrested 32 highly educated intellectuals. They were questioned and tortured for two months in Ljubljana prisons. The political bureau of the Central Committee of the KPS marked the arrested in public as "a handful of spies, class enemies, mercenaries from foreign countries, who had no political tenor and whose works are without any political basis to harm the people's authority". On 29 July, the trial against the twenty-nine accused began, broadcast via special loudspeakers to the citizens on the streets of Ljubljana. After thirteen days of trial, on 12 August three of accused were sentenced to death by firing-squad, among them dr. Črtomir Nagode, while the others received long prison sentences with forced labour and the removal of all citizen's rights. Two of the accused committed suicide. In 1991, the Supreme Court of the Republic of Slovenia overturned the judgment against Nagode and fourteen co-defendants. It was ascertained that the case was based upon false accusations and that this was an unfair trial against imaginary western spies.[8]

From April 1948 to October 1949 the so-called Dachau trials were held (nine trials), before the military court or the District Court against former internees at Buchenwald and Dachau. They were accused of collaborating with the Gestapo. After the war, they "continued their spying and treacherous activities and carried out sabotage". All the accused were pre-war Communists, activists in the OF or Partisans, some of them even fighters in the Spanish Civil War. Others had senior positions, particularly economic. Fifteen were sentenced to death (eleven were executed), three died in remand prison, twenty were sentenced to long terms of imprisonment. The Slovene political elite converted the trial against the accused into a real media spectacle. The trial was transmitted via loudspeaker

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8 Aleš Gabrič, *Opozicija v Sloveniji po letu 1945*, in: Prispevki za novejšo zgodovino, št. 2, Ljubljana 2005, 97–120.

and radio and fully published in newspapers. Now the Slovene Communists got ahead of the leaders of other Yugoslav Republics, because nowhere lese were there similar judicial performances. In Belgrade the initiators were even warned off.[9]

At first, mass political trials took place, and later, political trials and sentences became rare. Throughout the whole totalitarian period political trials involved some 25,000 people, about 2 per cent of the Slovene pre-war population. The number of political prisoners between 1948 and 1988 numbered about 6,500 according to official statistics of the former Communist authorities, which means approximately a quarter of the people judged in court. Their actual number was even higher.

Among the post-war trials before the Civil Court, trials against bigger farmers ("kulaki"), known as the "kulak trials", deserve special attention. They were also political in nature. They took place particularly between 1949 and 1951, when the campaign for collectivization and so-called "socialization" was at its peak in Slovenia. This was during the establishment of agricultural cooperatives (KOZ), which was the Slovene variant of the Soviet "kolkhoz". The adoption of the mentioned resolution and execution of collectivization in Slovenia and Yugoslavia were actually the consequences of the Yugoslav national and Party leadership upon reproaches from the Informbureau that Yugoslavia does not build Socialism, but just strengthened Yugoslav village capitalist elements. To counter such reproaches and prove its orthodoxy, the leadership of the KPJ decided to finally liquidate the private agricultural sectors, which they wanted to attain with collectivization. Its implementation was to be voluntary; however, besides strong propaganda urging membership of the cooperatives, the authorities also carried out various types of oppression. The worst was directed at the biggest farmers, who were considered as "kulaki", according to the Soviet model, and were accused as main guilty for the failures of collectivization as the government had envisaged. Many received severe sentences in fake trials, and often confiscation of property was one of them.[10]

The trials of peasants and consequently the confiscation of their property were also held because of their failure to surrender products. During the period 1945–1952, when a system of rationing was introduced in Yugoslavia, the authorities specified how much produce, meat, fat, etc. was to be surrendered. Many peasants could not deliver the required quotas and in some cases following the compulsory requisitioning

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9 Boro Krivokapić, *Dahauski procesi*, Prosveta, Beograd 1986; *Dachauski procesi* (ed. Martin Ivanič), Komunist, Ljubljana 1990.

10 Milko Mikola, *Zaplembe premoženja v Sloveniji 1943-1952*, Zgodovinski arhiv Celje, Celje 1999; Mateja Čoh, *Organizacija in delovanje ilegalnih skupin v Sloveniji ter njihov pregon v letih 1945–1952*, doctoral disertation, Maribor 2004; Mateja Čoh, *Ozadje sodnih procesov proti članom in podpornikom ilegalnih skupin v Sloveniji med letoma 1945–1952*, in: Časopis za zgodovino in narodopisje, book 3-4, Maribor 2008, 89-113.

of produce, some peasants were left with nothing, not even for sowing. So peasants hid their produce and slaughtered animals illegally. Such peasants were accused of being saboteurs and speculators, under the laws of unlawful killing, speculation and economic sabotage. They came before the courts. Otherwise, the Civil Court handed down sentences of confiscation less frequently than the military courts, the Slovene Court for National Honour and confiscation commissions. Only in 1947 did the Civil Court hand down sentences of 290 confiscations of property.

The Communists changed the economic characteristics of property with drastic reforms, which meant the restriction of private property to a minimum. All these ended in 1953, when the authorities realized that these experiments had not succeeded. Then the land maximum was defined (ten hectares of land, with some exceptions up to thirty hectares), which prevented remunerative production from farming.

By the end of 1945, the Communist authority had confiscated all important companies. This was done under the false accusation of "collaboration with the occupier", often meaning that some companies even operated during the war. These were mainly German properties or the properties of persons of German nationality. The authorities chose a strategy of gradual suffocating the private sector to dispossess owners of the remaining private property. According to the principle of from large to small, the appropriation process of private properties was based on ideological and partly economic reflection in all three phases of nationalization (1946–1948, 1948–1950, 1958–1963): from banks, insurance companies, industrial and building companies, hotels, cinemas, building plots, houses, apartments.

The fighting fist of the Bolshevik revolution was the Administration of National Security (UDBA), the secret political police (1944 the Department for National Protection – OZNA, from 1946 onwards, the Administration of National Security – UDBA, from 1969 onwards, the Service of National Security – SDV). It led a civil war by using all available means to attack political opponents as the enemies of the people at home and abroad. All-powerful and omnipresent, it restricted the freedom of thought and completely established a totalitarian regime. In 1946 there was one member of UDBA per 1,200 inhabitants of Slovenia (including the active informers, there was one member of UDBA per 282 inhabitants). Hundreds of thousands of people were affected by the constant spying and denunciations, creating an atmosphere of general distrust.

The success of OZNA was commended even by Josip Broz Tito (1892–1980) who, in 1948, found that the essential elements for building socialism had been established. Among these elements were total command of the position and action of national security, the militia and UDBA. In 1948, for example, the latter arrested 6,985 people and a year later, 8,762. Meanwhile, in 1947, 57,184 letters arriving in Slovenia were examined and in 1950, 98,000. They succeeded in planting their informants almost everywhere, even in the church organisation. The secret political police of the Slovene

Party spread into a well-structured expansive organism, whose tentacles extended into Trieste, Italy and Austria. In these countries UDBA organized legal commercial companies as fronts for collecting information, under the formal ownership of their informants; at the same time this also generated income. UDBA even organized illegal commerce.

The secret and violent actions of OZNA and UDBA also enabled the regime to terrorise the public. The regime tried to create the appearance of the rule of law by issuing many different, even revolutionary laws and legal decrees, which actually confirmed that the rule of law was not possible. The judiciary was also subordinated to political authority, because the courts became a "body for the class struggle of workers against their class enemies".

After the war there were numerous concentration camps (Teharje, Strnišče near Ptuj, Brestrnica, Hrastovec) and labour camps (Ljubljana, Medvode, Kočevje), and women's labour camps in Rajhenburg and Ferdreng near Kočevje. Many convicts from Slovenia were also sent to Goli otok Island in the Croatian Adriatic.[11]

Up to the end of the nineteen-fifties, there were strict controls on the frontiers of Slovenia or Yugoslavia, just as on the other frontiers between the Eastern and Western Bloc. After 1960, this regime weakened and the numbers of escapes over the border decreased, as foreign travel and economic migration were permitted. Before that, there were mass illegal escapes. From Slovenia between 1945 and the end of 1959, 34,256 people escaped, and 26,710 persons were caught when attempting to escape.

The Catholic Church in Slovenia represented the biggest "thorn in the flesh" for the Communist regime, because it was the only one which stayed organized outside the Party and had widespread support from the rather religious population. Therefore, on the one hand the Communists wanted to slander the Church in public, and on the other hand, destroy its economic basis. Only in Slovenia priests needed authority consents if during war they were not in theirs posts. Even those, who were deported or sent to concentration camps by the occupiers. Some 630 priests, monks, nuns and seminarists were imprisoned or in concentration camps. Many fake trials were held against Church representatives. Up to 1961, 429 trials took place (of about 1,000 priests); 329 were sentenced to imprisonment and nine to death – four death penalties were executed. The most important trial against the Church in Slovenia took place in 1946, before a military court in Ljubljana against the Bishop of Ljubljana, Gregorij

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11 *Dokumenti in pričevanja o povojnih koncentracijskih taboriščih v Sloveniji, ed.* Milko Mikola, Ministrstvo za pravosodje, Ljubljana 2007; *Dokumenti in pričevanja o povojnih koncentracijskih taboriščih v Sloveniji - II. del*, ed. Milko Mikola, Ministrstvo za pravosodje, Ljubljana 2008; Aleš Gabrič, *Informbirojevstvo na Slovenskem*, in: Prispevki za novejšo zgodovino, št. 1/2, Ljubljana 1993, 163-175.

Rožman (1883–1959), who in 1945 moved abroad. He was sentenced together with a very heterogeneous group who had nothing in common. Among them was SS General Erwin Rösener. The shadow of his guilt fell upon the less guilty or innocent.

At the same time, at the end of the forties and the beginning of fifties, the Yugoslav leadership tried to establish some kind of Catholic National Church on the model of the Orthodox Church. This Church would have been cut off from the Vatican and turned to be dependent upon the Communist regime. Therefore, at the beginning of fifties, diplomatic relations with the Vatican terminated.

The height of the persecution of the Church was in January 1952, when in Novo mesto the Bishop of Ljubljana, Anton Vovk (1900–1963), was covered in petrol and burned alive. And before this he had suffered numerous painful interrogations. That year, Christmas became Labour Day and was no longer National Day. Religion in schools was forbidden and the Theological Institute was expelled from the University.

At the beginning of the sixties there was a gradual warming of relations between the Catholic Church and the Yugoslav or Slovene political leadership. The consequence was the reestablishment of regular diplomatic relations between the Holy See and Yugoslavia. And with this, the former Yugoslavia became the exception among the Communist countries. The Church here acted more freely, unlike the position in other East European countries, but it could declare on social and political questions in public. Believers were considered second-class citizens until 1990.[12]

3. Typical cases of encroachment on human rights

The basic goal of the victorious communists was to execute the Bolshevik revolution. The first period of tough repression after the revolutionary victory in 1945 indicates an obvious suppression of human's rights. Direct and severe mass violations of human rights were typical and also essential freedoms were violated, often with brutal force. This was a period of revolutionary violence and terror needed for the Party to take power and gain strength. Therefore, for example, the authorities began to use so-called "temporary appointments of residence", instead of the deprivation of liberty

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12 Tamara Griessen Pečar, *Cerkev na zatožni klopi: sodni procesi, administrativne kazni, posegi "ljudske oblasti" v Sloveniji od 1943 do 1960*, Založba Družina, Ljubljana 2005; Tamara Griesser Pečar, France M. Dolinar, *Rožmanov proces*, Založba Družina, Ljubljana 1996; *Stanislav Lenič, Stanislav Lenič - življenjepis iz zapora*, Mohorjeva založba, Celovec, Ljubljana, Dunaj 1997; *Cerkev na Slovenskem v 20. stoletju*, (collection of scientific papers), Založba Družina, Ljubljana 2002; ed. Milko Mikola, *Religija, cerkev in šola v dokumentih občinskih komitejev ZKS Zgodovinskega arhiva Celje*, Zgodovinski arhiv Celje, The first and the second book, Celje 2003; Lovro Šturm, Ljuba Dornik Šubelj, Pavle Čelik, ed. France M. Dolinar, *Navodila za delo varnostnih organov v SR Sloveniji (Instructions for work of security organs in SR Slovenia)*, Viri št. 21, Archives Association of Slovenia., Ljubljana 2003.

with criminal decisions. They were passed by an administrative body on political opponents, who were sent to concentration camps, and other suspicious or harmful persons to remote parts of the country. This was connected with numerous enforced displacements of people. This period lasted from 1945 to 1955. In this period the State was based on murder (wartime liquidations, mass slaughter of political opponents, post-war "clearing the ground" of class and military enemies, judicial murders), robbery or legal collective theft (wartime and post-war confiscations, nationalizations, agrarian reforms, dispossessions, confiscations of property), violence against the body, dignity and other essential human rights (police terror, illegal arrests, fake trials, forced labour in concentration camps, arbitrary political interventions in official relations, fear, deception and lies (indoctrination, the manipulation of public opinion, ideological violence, the misappropriation of history).

As regards the relation of the totalitarian system towards the principle of division of authority, the Yugoslav and with it also the Slovene constitutional system was the same as all the other totalitarian systems. In opposition to the tradition of European legal civilization, it did not put advance human rights and form clear legal restrictions on national authority and its violence. Therefore it opened the possibilities for arbitrary authority. In the Constitution of the Socialist Republic of Slovenia stood the principle of unity, which meant that the boundaries between the executive, judicial and legislative branches were not precisely defined. And therefore also relations of independence, inspection and collaboration connected with it.

According to the constitutional concept of "people's democracy", which was defined by Communist ideology between 1945 and 1953, authority in the State should belong to the people or to a representative body elected among them. For practical reasons the Communist elite in Yugoslavia centred authority on the government, personally connected with the head of the Communist Party. The Party made excuses, as though the circumstances dictated constant powerful national interventions with political means and means of revolutionary pressure. Therefore it is not surprising that members of parliament met only twice a year. The government took over legislative functions and all vital relations were arranged by decrees with legal force. The number of these decrees and their content attained large extensions. In the period from 1945–1950, the Yugoslav government passed 345 decrees, and between 1950 and 1953, 104 decrees. The Constitutional Act of 1953 did not allow such decrees any more, but in 1953 the government issued 80 more, in 1954 more than 40, and in the following years over 20 more each year.

The decisions of administrative bodies were not subjected to judicial review until the introduction of administrative dispute, which occurred after 1952. Regulations of administrative process for the administrative-legal activity of national bodies were used only after the year 1957, when the General Administrative Procedure Act was adopted.[13]

The unity of authority principle, which actually meant the monopolistic authority of the ruling Communist Party, centred on its Politbureau, could not recognize the courts as independent and autonomous state bodies. The pressures on judges were various, from the most brutal purges of judges and their re-education, to the later more refined form of subordination of the judicial branch of power. Already at a meeting of the temporary People's Assembly in July and August 1945 in Belgrade political adequacy of judges was demanded during a discussion about qualifications. The judges could be lawyers, but only under the condition that they were "boundlessly loyal". Therefore, when choosing between uneducated, but loyal legal laity and educated lawyers who are not loyal, the opportunity had to be given to the former. The primary task of the judiciary was the liquidation of political opponents and enemies, and not the solution of disagreements by legal means.

The purge of judges formally began with a decree of revolutionary authority on 31 October 1945 on availability of all state employees. With this decree the new authorities took into service only those who seemed suitable. Other judges were systematically reeducated by the new authority. The primary task was entrusted to the Ministry of Justice, which tried to influence the judicial cadre professionally and politically. Most significant is one of the resolutions from the Ministry of Justice conference with the presidents of District Courts in December 1947: "The courts have to become the fighting body of people's authority. In our courts we must educate new people, new cadres of socialist jurists with advanced, hardworking methods." Therefore the judge had also to be a political worker. The role played by the judicial branch in the period of "People's Democracy", is best illustrated by the comment of the president of the District Court in Gorica in 1950: "The juridical function as part of the united people's authority is very important in the transitional period from capitalism to socialism. This is during the dictatorship of the proletariat, when the point of the state forces is fixed against those elements which tried to prevent or obstruct our progress to socialism. The courts are also a body of the people's authority, which has dealt a blow with help of criminal judiciary to exploitative elements and harmful persons of all kinds. At the same time, they protect honest working citizens to work untroubled. Therefore it is important how the courts execute punishment politics, which has the task of influencing people who have committed crimes in a good way. Therefore, the right punishment politics is the best weapon in the hands of working people, which

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13 Mateja Čoh, *Characteristics of the Judicial system in Slovenia between 1945 and 1951*, in: Crimes committed by totalitarian regimes (ed. Peter Jambrek), Slovenian Presidency of the Council of the European Union, Ljubljana 2008, 61-70; Jerca Vodušek Starič, *Med ljudsko demokracijo in demokracijo*, in: Slovenija 1848-1998, Pokrajinski muzej, Maribor 1998, 312-313.

also serve as to re-educate people." The authorities imposed repressive measures with the help of the criminal judiciary.

Activity by any political party except the KPJ was impossible after the war. Although some of them existed for some years after the war and their activities were allowed according to the law. The agreement on the activities of political parties on the political level, between Josip Broz Tito and Ivan Šubašič (the representative of the Government of Yugoslavia-in-exile in London) was achieved in 1944, with the third so-called Belgrade agreement. Otherwise, the formation of parties was allowed under a special act on associations, assemblies and public meetings from the formal-legislative view on 25 August 1945. This was valid until 1965, when it was replaced by the new primary assembly act. This 1965 act does not mention explicitly political parties, but it also does not forbid them. With temporary provisions defines that all established associations can continue with their work. But all parties were totally eliminated from political life and brutally repressed by repressive means. It is necessary to mention that the ruling KPJ or ZKJ was never formally legally registered and was therefore illegal. It is typical that the KPJ after taking power in 1945, used conspiracy and plots for some years. Prevention and suppression of the opposition were not only incompatible with the then Constitution, but also expressly illegal and meant the constant severe violation of human rights and privileges. Immediately after the WWII, the Slovene political leader demanded and the UDV (Administration of State Security) executed precise reviews of the activities of all political parties in Slovenia. At first the methods were violent, then more subtle: repeated interrogations, psychological pressure, threats of legal action, blackmail regarding family members etc.

The authorities in Slovenia and Yugoslavia did not allow the formal existence of parties, as was the case, for example in East Germany or in Poland, but instead, it found some substitute in so-called social-political organisations, particularly in one of these, Socialist Union of Working People (SZDL).

The right of political union is closely connected with the right of freedom of expression, and particularly freedom of the press. Like the rest of the Communist regimes in Eastern Europe, the Communist regime in Yugoslavia or Slovenia also did not allow freedom of expression and only free expression of opinions was subject to censorship.

The Party controlled all aspects of public life with the help of institutes, so-called "social-political suitability", which enabled privileges and discrimination regarding the views of the world or political beliefs and activity.

In the 1980s a secret Official Journal began to be distributed, but only to certain important persons. The introduction of this secret journal was in clear opposition to the then constitutional principles of laws and others legal regulations, and thus in opposition to the concept of democratic rule of law. All together 618 editions of the secret Official Journal were published, while in the same period, 817 public

Official Journals were published. There were also special secret general implementing regulations, which were never published and were never found in any secret Official Journal. They regulated certain matters in the field of national security.

A special form of human rights violation appeared in the Socialist Republic of Slovenia: the committees for general people's defence and social self-protection. They were established for realization of policies, goals and tasks for social self-protection, for evaluations of safety circumstances and for the assurance of realization by the Constitution defined role and responsibility of Communist Union for protection of socialistic self-government relations. The Committees were established in companies, local communities, districts and at Republic level. The president of the District or Local Committee for General People's defence and social self-protection was the president of the district Committee of the Communist Union. This system ensured UDBA or party supervision of all important state and social institutions or all interesting fields about protection, with the help of a wide net of secret police under the patronage of the Communist Party. All economic organisations, social services, associations and soldier-recruits were under control, irrespective of their location. The territorial organisation or division was very similar to the formal divisions of districts and local communities. In the safety area acted capillary network of the street commissioners and collaborators with special tasks.

Otherwise, the Communist Party had also spread its own basic cells, known as essential organisations of the Communist Union, everywhere. They were present in all economic organisations, social services (schools, universities, health centres, hospitals, museums), in state and district administrations, in courts, and among prosecutors.

Therefore the Yugoslav and Slovene Communist Union several times determinedly insinuated that they had no intentions of moving away from the classic Leninist-Stalinist model or of changing the nature of their authority, although they often announced new reforms. They renounced them as soon as they threatened the leading role of the Party in society. Their followers were characterized and considered dangerous to the social regime. The Union never allowed self-government and decentralization to dominate over principles of democratic centralism.[14]

Nevertheless, the bloody decay of Yugoslavia was the consequence of the mistaken and totalitarian policies of the post-war Yugoslav regime.

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14 Damjan Hančič, Renato Podbersič, *Totalitarian regimes in Slovenia in the 20th Century*, in: Crimes Committed by Totalitarian Regimes, Slovenian Presidency of the Council of the European Union, Ljubljana 2008, 39-60; Andreja Valič, *Is it wise to discuss themes that hurt?*, v: Crimes Committed by Totalitarian Regimes, Slovenian Presidency of the Council of the European Union, Ljubljana 2008, 219-221; *Temna stran meseca - kratka zgodovina totalitarizma v Sloveniji 1945-1990* (ed. Drago Jančar et al.), Nova revija, Ljubljana 1998; Peter Vodopivec, *Od Pohlinove slovnice do samostojne države*, Založba Modrijan, Ljubljana 2006.

4. Assessment of crimes in terms of international law

Crimes Against Humanity are defined as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".[15]
War crimes are "violations of the laws or customs of war"; including "murder, the ill-treatment or deportation of civilian residents of an occupied territory to slave labour camps, "the murder or ill-treatment of prisoners of war", the killing of hostages, "the wanton destruction of cities, towns and villages, and any devastation not justified by military or civilian necessity".[16]

The law of war is a body of law concerning acceptable justifications to engage in war (*jus ad bellum*) and the limits to acceptable wartime conduct (*jus in bello*). The law of war is considered an aspect of public international law (the law of nations) and is distinguished from other bodies of law, such as the domestic law of a particular belligerent to a conflict, which may also provide legal limits to the conduct or justification of war.[17]

Human rights are rights belonging to a human on the basis of his/her humanity, namely rights, which are not "conferred" to a human by the State, but – because a human historically existed before the State – he/she had been granted those rights prior the State and the State has only to positive legally organize, concretize and protect them. After WWI – because of the turn towards the total State – significant deterioration of the idea of human rights started and reached the limit in National Socialism.

4.1 Slovenia after 6 April 1941

After the German attack on Yugoslavia (6 April 1941) the situation in Slovenia during WWII was extremely complex. A relatively small territory, where Slovenes live, was in 1941 occupied by three forces, Germany, Italy and Hungary. All three followed more or less the same objective, namely to ethnically destroy the Slovenian nation.

During WWII the international war law was equally valid for all parties, for members of the occupying forces as well as for the civilian population in the occupied

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15 Nicolas Werth, Karel Bartošek, Jean-Louis Panné, Jean-Louis Margolin, Andrzej Paczkowski, Stéphane Courtois, *The Black Book of Communism: Crimes, Terror, Repression*, Harvard University Press, 6.
16 Ibid., 5.
17 http://en.wikipedia.org/wiki/Laws_of_war

territory. Despite thinking about unilateral legal privilege of the resistance against the aggressor's country during WWII that privilege was absolutely limited by the international humanitarian laws of war.

As the KPS (Communist Party of Slovenia) in 1941 expected an imminent end of war and a revolution, at that period of time its tactic was very offensive and it devoted much more attention to the preparation of the proletarian revolution as to the co-operation with allies within the national liberation movement.

During WWII the KPS took over the strategy of the Communists in the Spanish Civil War and in addition to partisan units set up its own security and intelligence organization. As early as August 1941 the Security Intelligence Service (VOS, later UDBA) was established, which was directly subordinate to the Communist Party.

After the first wave of brutal methods, UDBA began to apply subtler methods: multiple interrogations, psychic pressure, threats by courts, blackmail with pressure on family members or professional colleagues and friends, persecution, and in particular, denunciation among people who belonged to the same circle, belief and party, which was called "differentiation".[18]

Thus, UDBA was influencing activities inside individual groups, or directing them, and at the same time informing its superiors and leading political forums (the Central Committee of the Slovenian Communist Party, the Politburo and the Supreme Committee of the Liberation Front) about the activities and temperament of previous political groups, church circles, ministries, etc.[19]

4.2 Typical human rights violations in Slovenia

If we put the Slovenian events on the ground of the implementations stated above under the international legal assessment, we find out that the communist regime committed numerous human rights violations in the pursuit of its objective – to disable political opponents.

Although the communists tried to give the impression that their conduct is legally legitimate by issuing "laws" and regulations, it soon became clear that the intentions were not to punish acts, but to punish the beliefs that were not in accordance with the »objectives of the national liberation struggle«. That the law played only a subordinate role and was treated as available, is illustrated in particular by the following statements: "The jurist and even the judge has to follow the society, social development, step by step,

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18 Jerca Vodušek Starič, *Prevzem oblasti po vojni in vloga OZNE – obračun*, in: Slovenija v letu 1945, Zveza zgodovinskih društev Slovenije, Ljubljana 1996, 93–110.

19 Ibid., 96.

even if the legislator himself with his own norms could not as accurately and as quickly follow this development to include every state of development in the legal norm."[20]

Violation of elementary human rights by the Communists was taking place throughout the whole war and post-war period.

Violation of the right to life and physical integrity

By torturing political opponents and executing them during the war and post-war killings carried out without the judicial process, communist rulers violated the right to life and physical integrity, as expressed in Article 3 and 5 of the Universal Declaration of Human Rights from 1948.[21]

Violation of the right to personal freedom

With arbitrary arrests they violated the right to personal freedom, which is one of the fundamental human rights since the Habeas Corpus Act and is protected in the Article 9 of the Universal Declaration of Human Rights. With unlawful deprivation of liberty, detention and accommodation in labour and concentration camps, the Article 1 of the Universal Declaration of Human Rights was violated.

Violation of the right to human dignity

Violation of human dignity is every act that makes the victim a bare object of the State, by humiliating, stigmatizing, prosecuting and banning him. With interventions into physical integrity of individuals (tortures, humiliations) Article 1 of the Universal Declaration of Human Rights was violated.

Violation of property rights

The post-war nationalization of property of political opponents and imaginary enemies presents a violation of the Hague Convention on land warfare from 1907, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War of 1907. The Hague Convention on land warfare provides comprehensive protection of private property by prohibiting robbery in Article 47 and seizure (confiscation) in Article 2 Paragraph 46.

Confiscations carried out arbitrary were the rule in Slovenia. Expropriation without compensation violates the international law in particular when it aims at the destruction of livelihood of the affected.

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20 Griesser - Pečar, *Razdvojeni narod*, 411.

21 It was adopted and proclaimed by the General Assembly of the United Nations on December 10th 1948 with the Resolution No. 217A.

Violation of the right to citizenship

With the suppression of citizenship from disliked parts of the population Article 15 of the Universal Declaration of Human Rights was violated.

Violation of fundamental legal rights

Violation of the rights of defendants to be heard before issuing a decision on the factual and legal aspects of things and provide defensive funds and thus breach the presumption of innocence, punishment without stating the legal basis, and show trials presents a violation of the Paragraph No. 2, Article 11 of the Universal Declaration of Human Rights.

A special form of violating human rights and fundamental freedoms in the former state was the existence of a secret code of law. Formally, the Socialist Federal Republic of Yugoslavia had two forms of secret legislation: *the Tajni Uradni list SFRJ* (Secret Official Gazette of SFRY) and special secret subsections of laws. The secret official bulletin titled *Uradni list SFRJ – zaupno glasilo* commenced publication in 1980. It was sent to various recipients; their number ranged from 22 to approximately 40 recipients all over the country. The introduction of a secret official bulletin of the Socialist Federal Republic of Yugoslavia was in obvious conflict with the constitutional principles at that time in the publication of laws and other legal regulations. In 1981 all Yugoslav republics, including the Socialist Republic of Slovenia, introduced secret official bulletins. Since 1 June 1980, when the first copy of the secret official bulletin was issued, a total of 618 copies were published. If we compare this number with the number of ordinary publications of the general Official Gazette of SFRY, in this period in a total number of 817, we can see that it was an extremely complex part of legal regulation. The legal acts from the secret official bulletin of SFRY included 55 laws.[22] It should be pointed out that secret regulations of a general nature and wider scope were applicable early on and in force prior to the secret official bulletins.[23]

From the regulatory aspect, the regulations on state security, internal affairs and social self-protection that were in force at that time, along with the already mentioned secret implementing regulations, opened up to the political secret police unlimited possibilities for the violation of human rights.

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22 Lovro Šturm, F*enomen tajne zakonodaje v nekdanji Socialistični federativni republiki Jugoslaviji*, in: Vestnik JU 27, Ljubljana 1991, 3-4.

23 Franc Testen, *Trije primeri, ki kažejo na nekatere značilnosti prava v obdobju samoupravne socialistične demokracije*, in: Podjetje in delo, št. 24, Ljubljana 1998, 1098 and following.

4.3 The Yugoslav Constitution of 1946

The Yugoslav Constitution of 31 January 1946, granted equality of citizens irrespective of gender, nationality, race and religion; active and passive voting right; freedom of conscience; freedom of creed on the basis of Church and State separation; freedom of opinion and the press; freedom of assembly and demonstrations; person and housing inviolability; freedom of arts and sciences.

The Yugoslav Constitution contained a provision under which the granted rights may be limited when applied to undermine the constitutional order in antidemocratic purposes. Practice showed that the interpretation of the loss of fundamental rights was entitled to the undercover police and other security authorities, who used this provision in the interests of the Communist Party.[24]

4.4 Minimum standard of human rights

Already at the beginning of WWII we can prove a minimum standard of human rights that was regarding the international law binding for all States.

This standard derives from the war objectives as identified by the Allies (Atlantic Charter, Declaration of Tehran and Yalta), furthermore from the norms of international humanitarian law of war, which actual value was confirmed with the case-law of the Allied war crimes tribunal and was extended to crimes against humanity, and finally the Universal Declaration of Human Rights, which to a large extent confirmed human rights from the Charter of the United Nations. The Yugoslav constitution of 1946 also – nominally recognized human rights.

Already the internationally renowned Slovenian law professor Dr. Leonid Pitamic recorded in his book »*Država*« of 1927 (English version: *A treatise on the state,* 1933) a minimum standard of human rights:

1. physical freedom;
2. spiritual freedom;
3. economic freedom;
4. the principle of equality.

Among others he also wrote: "It appears that the positive law has two presumptions: power and morality. Between these two conditions there will always be a state of

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24 Karel Zalar, *Yugoslav Communism : a critical study*, Washington 1961, 131.

tension; when tension becomes too strong, it results in fight. The purpose of forming and proclaiming human rights was to prevent the fight."

4.5 Overview

Regarding the situation in Slovenia in the years from 1941 to 1953, when most of the crimes were committed we note as follows:

- the Liberation Front (OF) attacks on the Slovenian population are to be recognized as ordinary criminal acts until the confession of Tito's partisans as the belligerents side, and are to be assessed in accordance with the then existing criminal law;
- in organizing the Yugoslav statehood after the war for the communist side a minimum standard of human rights from the law of peace was binding, thus heavy and systematic violations of it may be prosecuted as crimes against humanity;
- severe war crimes and crimes against humanity are also genocide. Systematic persecution and liquidation of parts of the population meets the real objective of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.[25]

We can ascertain the existence of the international and domestic legal basis for the prosecution of perpetrator of crimes against humanity in the Slovenian territory. The statement can be supported by the existence of the so-called Martens clause, contained in the Preamble of the Second Hague Convention (29 July 1899) and the Preamble of the Fourth Hague Convention, indicated that where no specific provisions existed, the principles of international law as they resulted from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience must be used.

The Chamber of the District Court of Republic of Slovenia in Ljubljana[26] also dismissed the reasoning of the investigating judge that the provisions of the Slovenian criminal code concerning crimes against civilian population could not apply retroactively since those acts were not proscribed and criminalized at the time they were committed.

By allowing exceptions to the principle of legality the international community recognized that protecting the rights of victims of crimes against humanity and international law was even more important than the principle of legality. This also

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25 I Blumenwitz, *Okupacija in revolucija v Sloveniji* (1941–1946), 174.

26 *See* Chamber Decision of District Court, Ks 962/2006, 27 June 2006.

indicated the existence of general principles of law recognized by civilized nations that allowed exceptions to the principle of legality.[27]

5. Crimes and perpetrators of crimes under the communist regime in Slovenia

5.1 Legal situation

The Slovenian judiciary derives from the relics of the judiciary of the former totalitarian Communist regime. At the time of the independence of Slovenia judges' mandates have been automatically extended into life tenure until their retirement. There a number of allegations of corruption of various judges which remain unanswered. As a consequence, public trust in the Slovenian judiciary remains very low. A number of politicians are therefore calling for abolition of judges' life tenure. In this way, it is necessary to protect judicial independence and impartiality of each individual judge through annual public statement showing judges' property, assets and income. It must be noted that incumbent majority of judges at all levels of the courts in Slovenia have started their careers during the totalitarian communist regime.

5.2 Legal qualification of massacres in the Slovenian territory as crimes against humanity

Massacres in the Slovenian territory after Second WWII can be qualified as crimes against humanity. The question as to whether the Slovenian criminal law from the period after the independence, in its relations to crimes against international law, has adapted to or is more in line with international criminal law standards, can be answered in the sense that Slovenian Criminal Law adopts an approach enshrined in the Statute of the International Criminal Court and even extends the definition of some crimes beyond the definition enshrined in the ICC Statute.

This section argues that there are strong moral grounds and possibly legal grounds for prosecuting crimes against humanity committed in Slovenia after the WWII. As noted, the governmental commission for Settlement of Hidden Mass Graveyards has so far found between 500 and 600 hidden mass grave sites on the territory of Slovenia. In order to identify if the acts committed after the WWII on Slovenian territory would qualify as crimes against humanity, it necessary to first identify the crimes against humanity. To be classified as a crime against humanity, all crimes must satisfy

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27 *Ibid*. Para. 25.

particular common criteria, referred to as the chapeau elements: firstly the conduct must be committed as part of a widespread or systematic attack directed against a civilian population and secondly, the perpetrator has to know that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first common element is the most important; that the conduct was committed as part of a widespread or systematic attack directed against a civilian population. Trial Chamber of International Criminal Court for former Yugoslavia held in *Tadić* that: "It is now well established that the requirement that the acts be directed against a 'civilian population' can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts".[28] The term "population" does not refer to the entire population. Rather, "the 'population' element is intended to imply crimes of a collective nature and thus exclude single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity".[29] For crimes to be considered crimes against humanity there must be an association with a widespread or systematic attack. According to the ICC Elements of Crimes, the widespread or systematic attack must be carried out "pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population".[30] Crimes committed on Slovenian territory may fulfil these criteria since they were directed at part of the civilian population and they have been committed on a widespread basis or in a systemic manner. More specifically, the massacres have been committed throughout territory of Slovenia in a systematic manner in three months following the end of the WWII. They can be described as a widespread and systematic in the light of the fact that they were committed throughout Slovenian territory and over a longer period of time. As it has been noted earlier, almost six hundred hidden mass graves have been so far found. These are widely documented historical facts, which as such do not appear controversial or disputed. In other words, it may be argued that described attacks formed part of official state policy against the political opponents.

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28 ICTY, *Prosecutor v. Tadić, IT-94-1 "Prijedor"* (Trial Chamber), 7 May 1997, Sect. VI.D.2.(b).ii.a http://www.un.org/icty/tadic/trialc2/judgement/index.htm, last visited 5 April 2007.

29 ICTY, *Prosecutor v. Tadić*, Sect.VI.D.2.(b).ii.

30 Elements of Crimes, Article 7, Introduction para. 3, p. 116. *Rome Statute of the International Criminal Court*, (2002) 2187 UNTS 90.

Secondly, the perpetrator of crimes against humanity merely has to have knowledge of the existence of a wider attack, of the broader context in which his crime occurs.[31] here is no requirement of a specific intent for their actions to form part of that widespread or systematic attack or to contribute to the attack's objectives, nor is there a requirement of knowledge of the policy behind the attack. It would be very difficult to argue that high Communist officials as *de facto* government at the time at territory of Slovenia had no knowledge of any crimes committed in the territory of Slovenia. Despite this, it is equally difficult to identify or prove that a particular person gave instructions or had knowledge of existence of attacks.

Yet even if the Prosecution in *Prosecutor v. Ribičič* recognized the killings after the WWII as crimes against humanity, it had to prove the elements of the crimes against civilian population under Slovenian criminal law and not under international criminal law. It appears that would be possible. It is highly unlikely that a former high Communist official will ever be prosecuted for a crime against humanity, given the high requirement in the chapeau elements of the crime being a part of a widespread or systematic attack, which is hard to prove in the absence of documented evidence even though the remains of killed person are still found every week in the remote Slovenian forests.

Alternatively, it is submitted that it would be difficult to argue that persons massacred after the WWII constituted one of the protected groups (national, ethnical, racial or religious group) within the meaning of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide.[32] For example, the Prosecution Office first decided to charge Mitja Ribičič with the crime of genocide under article 373 of the Criminal Code of Republic of the Slovenia. At the later stage, it legally modified the request for investigation into alleged crimes against the civilian population under article 374 of the Slovenian Criminal Code.[33]

However, under the Criminal Code of Slovenia crimes of genocide committed with intention to destroy, in whole or in part, a national, ethnical, racial, religious group, and also if those acts are committed against a social or political group. Article 373 of the Criminal Code of Slovenia defines crime of genocide under the chapter on criminal offences against humanity and international law. Paragraph 2 of Article 373 the Criminal Code of Slovenia states that an individual can also be punished for crimes committed against a social or political group, which is wider definition than the one found in the

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31 ICTY, *Prosecutor v. Tadić*, para. 656.

32 Convention on the Prevention and Punishment of the Crime of Genocide Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 *entry into force* 12 January 1951, in accordance with article XIII.

33 *See Article 374 of the Slovenian Criminal Code.*

Genocide Convention.[34] The Prosecutor decided not to bring charges for genocide since it would be more difficult to prove direct intent of the allegations and alleged perpetrator, especially due to the lack of any documents or witnesses. However, it appears that charges against Mitja Ribičič could have been brought also for crime of genocide since specific intent to systematically destroy a particular political group might have been present.

5.3 Types of jurisdiction (ordinary or special), Applicable procedures. (There is no protocol for the procedures, specific laws regulating them, etc.)

There have been only two cases brought for alleged totalitarian communist crimes before Slovenian criminal courts in the newly democratic Slovenia. It must be noted that there have been several cases decided just after WWII against alleged Nazi and fascist criminals but we will refrain from analyzing those case at this stage as those judicial processes failed comply with fundamental human rights guarantees. The most notorious case was *Prosecutor v Mitja Ribičič.*

Mitja Ribičič was the first former official of Slovenian Communist Party to be charged in Slovenia for crimes against humanity since the end of the totalitarian regime in 1990. Documents found in the Slovene National Archive reportedly alleged that in 1945 Mitja Ribičič helped draft a list of 217 people for execution. Mitja Ribičič, was a deputy head in the Slovenian branch of Yugoslav secret police (OZNA) under Yugoslavia's post-war Communist leader, Josip Broz Tito. The OZNA was responsible for eliminating political opponents under totalitarian regime. Mitja Ribičič worked as a delegate until 1983 in the Slovenian Socialist parliament, in the Yugoslav federal parliament, and president of the Yugoslav Communist Party.

The Slovenian Interior Ministry official investigated post-WWII killings and had investigated Mitja Ribičič's involvement since 1994. However, only in 2005 he had "chanced upon new documents in the state archives" that helped to make the case against the former security official.[35] According to the new documents, the Slovenian authorities claimed that "Ribičič's 'armed group' not only targeted soldiers, but also murdered civilians viewed as collaborators and disposed of their bodies in mines and ditches".[36] The order for the liquidation of those civilians may have derived from the

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34 Paragraph II of Article 373 of the Criminal Code of Republic of Slovenia reads as follows: "The same punishment shall be imposed on whoever commits any of the acts under the previous paragraph against a social or political group".

35 Reuters, 25 May 2005, quoted in Prevent Genocide International, <www.preventgenocide.org/news-monitor/2005may2.htm>, last visited 10 November 2008.

36 International Relations and Security Network, <www.isn.ethz.ch>, 27 May 2005, Prevent Genocide International, <www.preventgenocide.org/news-monitor/2005may2.htm>, last visited 10 November 2008.

head of the provincial OZNA branches, but the orders would had to have had approval from Ljubljana and possibly Belgrade branch of the Communist Party.

On 13 May 2005, the Slovenian police filed a criminal complaint for genocide against Mitja Ribičič for his role in the massacres which took place in the aftermath of WWII on the territory of Slovenia. The 86-year-old Ribičič was suspected of having ordered the murder of 217 people without trial while he was deputy head of the Slovenian branch of the Yugoslav communist secret service (OZNA). This was the first time that the police had made genocide charges in relation to reprisal killings of the Yugoslav communist regime. In April 2006, the prosecution amended the qualification of the criminal act and eventually filed a request for judicial investigation for acts of "crimes against civilian population" pursuant to Article 374, Paragraph 1 of the Slovenian Criminal Code.[37]

On 21 April 2006, the Supreme State Prosecutor's Office of Slovenia presented the investigating judge of the District Court of Ljubljana with a request to open a judicial criminal investigation against Ribičič for his alleged involvement in these crimes. The prosecutor based his request upon an annotation next to some of the names on the list of detainees who had been executed, which read: "in line with the approval of comrade Major Mitja".

In Slovenia, a judicial criminal investigation was the first phase of a formal criminal procedure. To open the judicial investigation, the prosecution needed to show probable cause that the suspect had committed a particular criminal act. Judicial investigation was led by the investigating judge and its outcome was either the filing of the charging document and thus the commencement of a trial, or the procedure was to be terminated. If the investigating judge considered the prosecution's request for opening a judicial criminal investigation unfounded, he or she needed, pursuant to Article 169 (VII) of the Criminal Procedure Act, (Slovenia), to submit the matter to the respective district court for decision.

After examining the written documents and questioning the suspect, the investigating judge held that there was no basis for instituting criminal proceedings against Ribičič. First, the investigating judge argued that Ribičič could not be tried for crimes against humanity since Article 3 of the Criminal Code provided that the perpetrator of a criminal offence was subject to the statutory provisions applicable at the time the offence was committed. The investigating judge held that crimes against humanity committed on Slovenian territory in the months following the end of WWII were, at that time, not proscribed and criminalized in domestic criminal law or at the international level. Additionally, the investigating judge justified her opinion on the basis of Article 28 of the

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37 Official Gazette of the Republic of Slovenia, št 63/1994, (Slovenia) ("Criminal Code").

Constitution of Slovenia,[38] prohibiting retroactivity in criminal law. The investigating judge strictly applied the principle of legality and the prohibition of retroactivity of criminal law, and ruled that since the crimes had been committed before the Criminal Code entered into force, its provisions could not be applied.

Alternatively, the investigating judge held that the prosecutor failed to present evidence amounting to probable cause that Mitja Ribičič had played a significant role in issuing the orders for the commission of mass killings. The investigating judge opined that no strong evidence had been submitted indicating Ribičič's influence on deciding whether a certain group of people should be killed. The annotation "with approval of Major Mitja" could have been interpreted in different ways; it probably meant that Ribičič had reviewed a particular case and ordered it to be entered into the register of detainees. The register itself was only a transcript of data and there was no information in the evidence submitted as to who initially kept it, nor did it contain any signature of the suspect. Further, none of the documented testimonies indicated that Ribičič played a crucial role in the extra-judicial killings. The investigating judge also criticized the prosecutor for requesting the appointment of expert witnesses – historians – who would have determined whether there were sufficient grounds for opening the investigation against the suspect.

The Chamber of the District Court of Republic Slovenia in Ljubljana examined the appeal filed by the Supreme State Prosecutor and analysed the decision of the investigating judge of the District Court.[39] It dismissed the reasoning of the investigating judge that the provisions of the Slovenian criminal code concerning crimes against civilian population could not apply retroactively since those acts were not proscribed and criminalized at the time they were committed. By allowing exceptions to the principle of legality the international community recognized that protecting the rights of victims of crimes against humanity and international law was even more important than the principle of legality. This also indicated the existence of general principles of law recognized by civilized nations that allowed exceptions to the principle of legality.[40] Article 15 (2) of the International Convenant on Civil and Political Rights and the general principles it referred to were binding upon Slovenia but prohibited retroactive incrimination for all other acts. Accordingly, the exceptions to the prohibition of retroactivity in criminal law were allowed in certain instances. In the case at hand there existed a formal legal basis for instituting criminal proceedings for the alleged acts.[41] It also noted that Article 24 of the Rome Statute of the International Criminal Court does not apply in this case.[42]

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38 Official Gazette of the Republic of Slovenia Nos 33/91-I, 42/97; 66/00.
39 See Chamber Decision of District Court, Ks 962/2006, 27 June 2006.
40 Ibid. Para. 25.
41 Ibid. Para. 33.
42 Rome Statute of the International Criminal Court, 2187 UNTS 90, *entered into force* 1 July 2002. Article 24.

In the request for the opening of an investigation, the Prosecutor submitted that Registry of Detainees No. 7 detailed 11,966 persons between 1945 and 1946. Out of the 11,966 names and cases, a substantial number of cases were dealt with by "comrade Mitja". More specifically, the document entails annotations "in line with file comrade Mitja" next to the names of 5,830 persons.[43] The Registry of Detainees document included next to each person's name a short description of the status of that person such as whether individual belonged to the Home Guards, the Wehrmacht, was a partisan deserter or a person forcibly enlisted in the German army. This document enabled categorization in three documents: execution, release, adjudication. This description allowed the individuals to be allocated to three different categories: those who were to be executed, those who were to be released, and those who were to be put on trial. On the basis of this information, the Supreme State Prosecution constructed the case that the suspect was responsible for that kind of categorization of people. This categorization influenced what happened to persons following the distribution of Registration of Detainees document. Additionally several witnesses confirmed Ivan Maček, as head of the Slovenian Section of the Security Police, and Mitja Ribičič, as assistant of head of the Slovenian Section of the Security were the persons mainly responsible for allocating the final destination of arrested persons.

The Prosecution described the alleged execution of 217 people as part of a policy of a widespread attack on that part of the civilian population which refused to join the Communist led National Liberation Movement. Victims of extrajudicial execution after WWII were defined as such by the victorious Partisan National Liberation Movement. The Prosecutor also submitted that while the decision concerning extrajudicial killings at the Federal Yugoslav Level, but it was carried out by local forces of the Slovenian Component of the Yugoslav Secret Police. It must be noted that on 25 June 1946, Edvard Kardelj, the high Slovenian official in the Yugoslav Communist Party in Belgrade, informed the president of the Slovenian regional government, Boris Kidrič, that "there is no reason to be as slow as until now in cleansing in the future".[44] It is disputed what "cleansing" meant, but it most likely refers to extra-judicial killings carried out by the Yugoslav Communist Party.

The Court has confirmed that historical overview of international treaties to support the textual interpretation of Article 374 (crimes against civilian population) drawing the conclusion that crimes against humanity are incriminated not only in times of war but also in times of peace crimes.[45] International treaties adopted in the 19th and 20th

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43 See: Chamber Decision of District Court, Ks 962/2006, 27 June 2006, at para. 24.

44 Ibid. At para. 25.

45 Chamber Decision of District Court, Ks 962/2006, 27 June 2006, 15.

century showed that crimes against the civilian population were at first criminalized only during wartime but gradually became proscribed also when committed in time of peace.[46] The first codifications of international humanitarian law were the Hague Convention (II) Respecting the Laws and Customs of War on Land (29 July 1899),[47] and Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex.[48] The Preamble of the Second Hague Convention and the Preamble of the Fourth Hague Convention also included the so-called Martens clause, which indicated that where no specific provisions existed, the principles of international law as they resulted from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience must be used. This clause indicated the beginning of what was in recent times often referred to as the general principles of law recognized by civilized nations, a wording used, *inter alia*, in Article 7 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms.[49] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal ("London Charter") proscribed crimes against humanity also during peacetime.[50] Moreover, they placed themselves above the domestic laws as they criminalized acts even when those were not considered criminal acts pursuant to domestic law. This constituted an important exception from the principle of legality as known in various legal systems. The principle of legality was codified in Slovenia in Article 28 of the Constitution, and Article 3 of the Criminal Code.[51] It also noted that the general principles by civilized nations can also be a legal source[52] and that the decision also makes the conclusion that provisions of international treaties allowing for exceptions from the principle of legality on the basis of general principles of law are legal.[53]

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46 Ibid. para 14.

47 Hague Convention (II) Respecting the Laws and Customs of War on Land (29 July 1899), entered into force 4 September 1900 ('Second Hague Convention').

48 Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907) 36 Stat 2277; 1 Bevans 631; 205 Consol TS 2773; Martens Nouveau Recueil (3d) 461, entered into force 26 January 1910 ('Fourth Hague Convention').

49 European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222; 312 ETS 5, entered into force 3 September 1953 ('ECHR'Para. 15-16.

50 The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (8 August 1945) 82 UNTS 279, entered into force 8 August 1945 ('London Charter').

51 Chamber Decision of District Court, Ks 962/2006, 27 June 2006, at para. 22.

52 Ibid. Para. 20.

53 Ibid. Para. 19.

The Court did pinpoint to the widespread or systematic attacks against the civilian population when discussing the crime against humanity, although it indirectly referred to this requirement by ascertaining that there had been a plan, in which the accused participated, of eliminating the political opponents. The Court also confirmed that the victims had been civilians.

As to the issue of whether probable cause had been established, the standard had not been met by the prosecution. Thus the request for judicial investigation was rejected. The evidence submitted did not demonstrate that Ribičič had participated in issuing orders of execution against the opponents of the regime.[54] As correctly noted by the investigating judge, the prosecutor had requested the appointment of expert witnesses to provide evidence which should already have been presented to the court in order to justify the opening of a judicial investigation in the first place.[55] It could thus be inferred that the prosecutor himself implicitly recognized that he did not have sufficient evidence to show probable cause that Mitja Ribičič had committed the alleged crimes.

Further, the High Court examined the District Court's conclusion and held that the evidence for opening the investigation should have included an answer to the question of who or which organ has accepted a decision on massacring the opponents of the Resistance movement controlled by the Slovenian Communist Party. It should have addressed question concerning which decision have been made by Yugoslav leadership of Communist Party and OZNA and which decision have gone through hierarchically lower organs of Slovenian Communist Party. Since those arguments and evidence were missing from the decision, the Court concluded that investigation could not be opened. However, the court failed to provide exact reasoning for its decision. However, the High Court agreed with the Chamber decision of the District Court and denied a request to open an investigation in the conduct of Mitja Ribičič. The High Court confirmed that it could have been legally feasible to prosecute the defendant for crimes against humanity even though they were not criminalized at the time they had committed. It held that the District Court rightly established that those alleged crimes went against the basic principles of humanity.

5.4 The Nullum crimen principle vs. prosecution of crimes against humanity

The nullum crimen, nulla poena sine praevia lege principle, or the ex post facto prohibition, means that a statute criminalizing an act or creating a new offence or imposing a stricter punishment for an existing crime cannot be applied retroactively

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54 Ibid. Para. 36-54.

55 Ibid.

to acts committed prior to its enactment. In other words, a statute criminalizing an act or creating a new offence or imposing a harsher punishment for an existing crime cannot be applied retroactively to acts committed prior to its enactment. According to the Investigating Judge of the District Court in Ljubljana, crimes against humanity after the WWII in 1945 were not yet proscribed and criminalized; therefore Mitja Ribičič cannot be prosecuted. The District Court of Ljubljana rightly rejected the reasoning of the investigating judge that crimes against humanity were not criminalized in Slovenia in the aftermath of WWII, noting that the prohibition of retroactivity did not apply to the most horrendous crimes.

The court, however, overlooked that crimes against humanity had already been prohibited in Slovenian legislation at the time the alleged acts in this case were committed,[56] certain provisions, including those on war crimes and genocide, met the criteria set by international and domestic criminal law and could be applied by the courts in Slovenia. It followed that this possibility of criminal prosecution had not expired due to statutory limitations and in proceedings based on extraordinary legal remedies. As was concluded in the Constitutional Court's Decision on the Decree on Military Courts, The Constitutional Court of the Republic of Slovenia in its decision on the Decree on Military Courts recognized that already provisions of the Decree on Military Courts of 24 May 1944 ("Decree"), criminalized war crimes and crimes against humanity irrespective of whom they were committed by and it was not meant by the victor used for trying the vanquished.[57] Furthermore, Decision on the Decree on Military Courts, demonstrated that the constitutional practice of Slovenia enabled the use of general principles recognized by civilized nations. This decision dealt with the application of the Decree on Military Courts, and the Law on Establishment and Jurisdiction of Military Courts in the Yugoslav Army,[58] and stipulated that the provisions of the Decree which violated general principles of law recognized by civilized nations could not be applied. It is important to underline that the Decree applied during the first months after the War, when most massacres were committed. Hence, the Constitutional Court held that this Degree of Military Courts provides a sufficient legal basis for prosecuting crimes against humanity after the WWII on Slovenian territory and it is not necessary to rely on prohibitions set in customary international law.

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56 The Constitutional Court of Republic of Slovenia, U-I-6/93, 1 April 1994.

57 Ibid.

58 Official Gazette DFY, No 65/45 ('Military Courts Law').

5.5 Amnesty or leniency programs

Republic of Slovenia has not formally adopted any amnesty legislation for totalitarian crimes. Amnesties may serve a legitimate and lawful purpose, namely that of ending or preventing conflict. The ending of an armed conflict or the transition from an oppressive regime may certainly be said to constitute an important interest of a State. In a similar vein, if one were to recognize the effective functioning of the national judicial system to qualify as such an interest, the national and international prosecutions in situations of mass crimes cannot be the only means to safeguard that essential interest against the grave and imminent peril of collapse or deadlock. However, a moral recognition of totalitarian crimes committed appears to be required for amnesties to have any affect.

In short, it seems that non-prosecution of those responsible for totalitarian crimes in Slovenia amounts to informal amnesties, however without any recognition of those responsible for the crimes committed. Such situation amounts to absurdity, as it *de facto* gives amnesty to responsible perpetrators but without requiring that they recognize that they committed heinous crimes. Such approach undermines efforts for achieving catharsis of the Slovenian society and hinders reconciliation between different groups in the Slovenian society.

5.6 Statistics available on type of sentences (economic, political or criminal sanction)

No judicial sentences have been so far delivered in the Republic of Slovenia. The lack of sentences can be explained throught very few prosecutions and general reluctance to persue criminal or even civil responsibility of those persons allegedly responsible for totalitarian crimes.

Andreja Valič
Damjan Hančič, Boštjan Kolarič,
Jernej Letnar Černič, Renato Podbersič

MARIUS OPREA ► President, Institute for the Investigation of Communist Crimes in Romania

I think we all have a big problem – how to condemn communism. How to use democratic tools against a totalitarian system. This is our main problem. How to deal with the past. How to condemn, in a practical way, the communist system. Because we don't have the tools. We have the seminars, like this one, where we give speeches, where we express our many views on this topic…

What is the difference? The difference is that this is the state. Because the forensics, they have the gloves. But we don't have gloves. We find bodies buried in common graves. But they have, practically, all the tools. They said those crimes were prescribed as ordinary crimes. Not as crimes against humanity, not as a Holocaust. Why not? Are they not similar?

We found a 76 year old dead man in the mud, in a swamp. It was a hurtful experience for me and my team to discover this dead man. It is very difficult, make no mistake. We keep on discussing, in a theoretical manner, about the crimes of communism. But we seem to forget that those are crimes and that we have a duty. We must identify the bodies, we must identify the crimes in a practical way, not in theory. We have said enough in seminars, we have discussed enough theories. We must do field research. We must find the victims, because a crime starts with a victim. We must find the victims and after that we must identify the criminals.

We should act in the way the Wiesenthal committee did. I think we had enough time until now, twenty years after 1989, to understand the criminal nature of communism. But now we must start to identify the victims and the criminals. We all know what happened during the Holocaust. But the Holocaust entered the public conscience only twenty years after the war. I think the same process will happen with the communist crimes. And we must be prepared for that. We must identify the victims first. And we must begin by discussing with the victims and their relatives.

We must establish the truth starting with their point of view. We are not allowed to forget anything. We must begin our field research and we must find the victims. This is our duty. Not to have a lot of theories and to put a lot of emphasis on our scientific approach.

I can give you some numbers as an example, if you wish. In Romania, more than 10,000 people were illegally executed, without any sentence from a court of justice, without a fair trial. Last year, we found 50. Just 50 out of 10,000. All of them are in the ground. In graves, without any cross. This is our duty: to find them. To give the bodies to the families. This is the first step. This is mainly the first approach. The second one, also a very necessary one, is to modify the legislation. To have, let's say in EU countries, new criminal codes. And to consider crimes committed in the name

of communism by the secret services, by the militia, by the police, by the system, as crimes against humanity.

But for that we must have a common approach. And we must start from the victims. For example from that old man. His name was Simion. In his pocket we found a coin. Just one coin. He was 76 years old when he was executed by the forces, by the Securitate, without any sentence. I think we must start the trial against the communist regime from the victims. Not with theories, not with ideologies. I think we know, as historians, what happened with us during communism, what was wrong with the communist ideology, with marxism and so on. We now must start to find the victims and to find the criminals. This is my personal approach and please excuse me if maybe I am not in agreement with some of you but I think that it is the moment to abandon the scientific approach. That approach is necessary too, yes, I agree with that. I am not against it, because I am a historian. But let's go and find the human suffering. Thank you.

Crimes committed by the communist regime in Bulgaria

1. Brief history of the communist regime in Bulgaria

The Bulgarian Communist Party (BCP) is responsible for the state governance in Bulgaria from 1944 to 1989 and for the establishment of the totalitarian communist regime in the country.

The BCP seized power on 9 September 1944 through a coup supported by a foreign country – the Soviet Union, which had declared war on Bulgaria.

Founded in 1903 after a split in the Social-Democratic Party, BCP had failed to assert itself as a significant power in Bulgarian politics.

Its efforts to generate big electoral support were unsuccessful, and its parliamentary influence never matched that of the agrarian and social-democratic parties in the country.

In the 1920s the party leader Georgi Dimitrov directed the party to collaboration with the Bolshevik totalitarian regime in Russia and to terrorist activities.

In 1925 the communists prepared the St. Nedelya Church assault in Sofia. 150 people, mainly from the country's political and military elite, were killed in the attack and around 500 were injured.

In the 1930s Dimitrov joined the clique of political gangsters surrounding Joseph Stalin and during the Second World War he was repeatedly sending calls from Moscow for armed struggle against capitalism in Bulgaria. Even the total number of communists involved in armed actions in the period in 1941–1944 in the country did not exceed 3,000.

Immediately after the coup on 9 September 1944, the BCP started acts of terror against the "bourgeois". People were killed in all towns and villages of the country. There was a directive of the BCP to its members to organize groups of executors with the aim to go to every village and kill 2–3 of the "enemies of the people". The "enemies" were teachers, priests, civil servants, writers, journalists and civic leaders.

The executors arrested the victims in their homes early in the morning, collected them in the municipality offices and killed them the next night outside the settlement. But to their relatives who asked them, they answered that they must bring money, clothes and food for their fathers or brothers. And the spouses or mothers brought food and money week after week until they understood that their relative is dead. Some of the killers forced the families of the victims to leave their houses and started to live there, using the clothes of the victims they killed.

Some of BCP leaders – like Georgi Dimitrov and Vulko Chervenkov, were in Moscow, while others like Traicho Kostov, Anton Yugov and Todor Zhivkov were in Sofia. But all communicated to their followers, who typically were people from the villages without education, a simple and compelling message: the time had come to get rid of the "bourgeois scum." By the end of October 1944, approximately 26,850 people were killed without court sentences.

The next stage of the communist terror began in December 1944, when the government installed special People's Courts authorized to prosecute "fascists". Similar tribunals were established in every European state that was occupied by or collaborated with Nazi Germany; in Bulgaria, however, the purges were of a magnitude unseen elsewhere. In Hungary or Czechoslovakia individual members of parliaments and governments were indicted – whereas in Bulgaria the government put on trial all members of all governments and all parliaments between 1941 and 1944. Each one of these individuals was sentenced to death – 1,050 death sentences overall – and the verdicts were carried out immediately.

The term "fascist" was applied to anyone who had opposed the communists in the past or might oppose them in the future. In addition to the judicial and extra-judicial murders, "fascists" were subjected to imprisonment (the People's Court sentenced 6,188 people to imprisonment), deportations (approximately 5,000 families were sent into internal exile), and incarceration (by the end of 1945 approximately 10,000 people languished in concentration camps).

By the summer of 1945 several parties – the most popular of which was the Bulgarian Agricultural National Union (BANU) declared themselves an opposition to the communist government. Nikola Petkov, BANU's Chairman, became the main spokesman of the democratic resistance. The destruction of the opposition became a top priority for the BCP, and this murderous campaign was carried out under the guidance of the party's leader, Georgi Dimitrov.

The last multi-party elections in Bulgaria were held in October 1946. Despite the persecution of opposition activists and the systematic falsification of electoral results in the countryside the opposition still won 28% of the votes. In June 1947 Nikola Petkov was stripped of his immunity and arrested while delivering a speech in parliament. Charged with high treason, he was sentenced to death and hanged in September. Soon thereafter all non-communist organizations were banned, opposition deputies were arrested, and all remnants of political pluralism were extinguished.

As the process of monopolization of power reached its final phase, the BCP initiated a massive effort to build a Soviet-type economy. By the end of 1949 all privately owned businesses, industrial enterprises, banks and trading companies were confiscated, and most of the owners and their families were exiled to the countryside.

The last campaign against private property targeted the rural areas, where a Soviet-style collectivization of land got underway in the late 1940s. Officially described as "voluntary," this campaign quickly turned violent. In several regions of the country peasants rebelled and even engaged in guerilla warfare. Private farmers were eliminated as a social group only after a series of punitive campaigns during which hundreds of people were murdered and thousands detained in 82 concentration camps, the biggest one being the camp on the Danube island Belene.

By the mid-1950s Bulgaria was a typical Stalinist polity characterized by a one-party dictatorship, an all-powerful secret police, periodic purges that victimized "enemies", a fully nationalized economy and a cult of the national leader (initially Dimitrov, and after his death in 1949 Vulko Chervenkov, Dimitrov's brother-in-law and successor).

It must be emphasized that the communist totalitarian regime became consolidated only after several waves of terror, through the physical extermination of non-communist elites and the brutal victimization of entire social groups.

After Stalin's death Nikita Khrushchev's de-Stalinization campaign launched at the 20th Congress of the Communist Party of the Soviet Union in February 1956 had an immediate impact on Bulgaria. Chervenkov was forced to share power with Todor Zhivkov, who was appointed General Secretary in April 1956. By the early 1960s Zhivkov had outmaneuvered his rivals and established himself as the undisputed dictator of the party and the country – a position he was to retain until his downfall in November 1989, thus earning the distinction of Eastern Europe's longest-serving dictator.

Post-Stalinism in Bulgaria was characterized by the almost complete absence of political liberalization. In the aftermath of the Hungarian Revolution of October 1956 BCP's new leadership demonstrated its readiness to fight "reaction" by systematically arresting individuals whose social origin or cultural background rendered them "suspicious". It was during Zhivkov's tenure, in late 1956, that one of Bulgaria's most horrible concentration camps, Lovetch, came into existence. Over the next years almost 200 musicians, journalists and peasants were beaten and tortured to death there.

During the next decades the repressive infrastructure of the regime remained intact and was ruthlessly used. The leaders of human rights groups were imprisoned for a long time or killed like the writer Georgi Markov, assassinated in London in 1978.

During the 1980s as the rest of the world was entering the digital age, Bulgaria's communist leaders had to ration electricity and import food in order to forestall economic collapse. The country's foreign debt exploded (reaching $10 billion in early 1989). In response, the regime tightened political control and unleashed a wave of repressions. In a bizarre and cruel move, the Turkish minority in Bulgaria (10% of the population) was charged with disloyalty to the "socialist motherland", and ethnic Turks were forced to adopt Bulgarian names and renounce their cultural and religious traditions. Facing the resistance of local communities, the BCP government ordered the occupation of

the ethnically mixed regions. Several dozen protestors were killed and thousands were arrested; 300,000 ethnic Turks were forced to immigrate to Turkey.

In 1989 under the pressure of the growing opposition democratic movement and the revolutions in the other communist countries in Europe the BCP were forced to participate in free elections which was the beginning of the rebirth of democracy in the country.

Zhivkov died while under home arrest in 1996, but nobody from the Communist Party politburo or the other perpetrators of the communist crimes was convicted until now.

During its rule from 1944 to 1989 the Bulgarian Communist Party was a criminal organization the activities of which were aimed at suppressing human rights and the democratic system.

2. Data on the crimes commited by the communist regime

Killing of people without any legal procedure or the sentence being pronounced after their assassination

September–October 1944	26,850 people killed without court sentences
1945–962	Killed in concentration camps: 640 people

Unfair trials

January–May 1945	1,050 death sentences, 6,188 people imprisoned
1946–1975	Death sentences: 680 people

Inhuman treatment and torture especially in concentration camps, prisons and detention centres and especially against political prisoners and detainees

1945–1985	Arrested: 485,200 people
1944–1962	Imprisoned in 82 concentration camps: 89,430 people
1946–1986	Political prisoners: 36,500 people

Violation of the right of ethnic self-identification and involuntary displacement of people on ethnic grounds

1984–1989	Killed during street mass demonstrations of the Turkish minority: 160 people

1984–1989	Turks imprisoned in concentration camp: 1,200 people
1984–1989	Deportations of Turks to rural areas: 4,000 people
1989	Turks forced to leave the country: 300,000 people

Restriction of free movement in the state and abroad

1944–1980	Deportations to rural areas: 11,212 families (42,320 people)
1946–1989	Killed on the iron curtain: 1,500 people

Support for totalitarianism abroad

Fidel Castro, 1962: 5,000 carbines Mauser, 10,000 carbines Manlicher and 30,000 hand grenades submitted to the Castro regime in Cuba.

1968: Participation of Bulgarian troops at the invasion of the Warsaw pact in Czechoslovakia.

Pol Pot: 1 million leva and 7 million rubles submitted to criminal regime in Kampuchea

Saddam Hussein: Financial support to the regime of Saddam Hussein trough credits. 1,560,000,000 USD lost.

Total control of the security services over the life of the citizens
The Bulgarian communist secret political police Darzhavna Sigurnost (DS)

1949	Officers and sergeants of DS: 3,614 people
1956	Officers and sergeants of DS: 7,000 people
1973	Officers and sergeants of DS: 7,500 people
1989	Officers and sergeants of DS: 8,000 people
1952	Secret agents of DS: 55,000 people
1973	Secret agents of DS: 131,000 people
1989	Secret agents of DS: 129,460 people
1944–1989	Total number of the officers and sergeants of DS: 25,000 people

1944–1989	Total number of the secret agents of DS: 387,000 people
1944–1989	Total number of Bulgarian citizens observed by the secret political police: 2,000,000 people
Total volume of the archives of DS:	20 kilometers

- dissolving people's moral values and encroaching upon their religious freedom;
- employing permanent terror against people who disagree with the system of ruling and against whole groups of the population;
- abusing education, training, science and culture for political and ideological purposes, including justifying and creation of motivation to the acts described above;
- unscrupulous destruction of nature

The communist regime is responsible for:

- depriving citizens of any possibility to express political will by forcing them to hide their opinion on the situation in the country and forcing them to express in public their approval for facts and circumstances, which they knew were not true and which even constituted crime; this was achieved by persecutions and threats to persecute individuals, their families and close persons;
- systematic violation of basic human rights, oppressing whole groups of the population, based on political, social, religious or ethnic basis, regardless of the fact that in 1970 the People's Republic of Bulgaria had already joined the international instruments in the field of human rights;
- violating the main principles of democracy, rule of law, international agreements and legislation in force thus placing the Communist Party and its representatives' interests above the Law;
- persecuting citizens using all means of power, such as:
- executions, inhuman imprisonment regimes, forced labour camps, tortures and cruel violence;
- certifying or placing people in psychiatric institutions as a means of political repression;
- denying the right to property;
- preventing and banning education and the pursuit of a profession;
- preventing free movement in the country as well as out of the country;
- deprivation of citizenship;
- committing unpunished crimes and awarding unlawful privileges to persons involved in the commission of crimes and in the persecutions of other persons;

- subjecting the interests of Bulgaria to a foreign country to the extent which led to the ruin of national dignity and to practical loss of state sovereignty.

The circumstances specified above give ground to declare the criminal nature of the communist regime in Bulgaria from 9 September 1944 to 10 November 1989.

3. Resistance

3.1 Goryani Movement

The Goryani Movement was an armed resistance against the Bulgarian communist regime. It began immediately after the 9 September coup in 1944 which opened the way to communist rule in Bulgaria, reached its peak between 1947 and 1954, subsided by the late 1950s and ended by the early 1960s. The movement covered the entire country, including urban areas.

The members of the movement were dubbed Goryani (Bulgarian: ones of the forest). Though helped to a limited extent by Bulgarian emigres and to a very limited extent by foreign powers, the Goryani was an indigenous and spontaneous Bulgarian movement. Its mode of action was traditionally Bulgarian, as practiced by the anti-Ottoman hayduti: the Goryani hid in remote mountains, highlands and forests, relying on a large network of illicit helpers in settled communities, conducted sudden armed raids and withdrew before capture.

Largely composed of country folk who defended their land and property from the communists, the Goryani had no discernible ideology or platform and were united by their dislike of the communist authorities.

Armed resistance to the communists began in the immediate aftermath of the coup and reached sustainable proportions in the countryside after the execution of BZNS agrarian party leader Nikola Petkov in 1947 and the banning of the BRSDP social-democratic party in 1948. By the late 1940s, the Goryani comprised mostly country folk, alongside members of the disbanded opposition hiding from the authorities, former soldiers and officers.

Large-scale forced land colectivisation campaigns began in the 1950s.They involved mass intimidation of the peasantry, including threats, extrajudicial imprisonment and torture, and murder. This brought a new upsurge of support for the Goryani Movement.

At first the Goryani were poorly armed and merely hid from the authorities or agitated against them in fear of arrest. By 1947 they had banded into armed chetas (Bulgarian, cheti: detachments) in highland and mountain areas.

At that time, the overall number of armed Goryani was estimated at 2,000 in 28 chetas, with another 8,000 illicit helpers supplying them with food, shelter, arms and intelligence.

By the early 1950s, the Bulgarian DS secret police had identified some 160 Chetas, of which 52 were supplied from abroad or comprised hostile emigres who had infiltrated across borders. The movement was strongest in Southern Bulgaria, particularly in the localities of Sliven, Stara Zagora, Asenovgrad and the Mount Pirin area.

The movement was strongest in the Pirin area in 1947 and 1948. The main cheta led by Gerasim Todorov controlled the larger part of the Sveti Vrach county in the southwest of the area. In the spring of 1948, thousands of militsia troops invaded the northern Pirin, imposing a two-week emergency in the area. Gerasim Todorov and his men were encircled and he killed himself on 31 March.

By the early 1950s, the Goryani had a propaganda radio station, Radio Goryanin, which broadcast to Bulgaria from Greece. In mid-1951 the radio broadcast an appeal for an insurgent army to form in the centrally located Sliven area, where the movement was at its strongest. Some 13,000 police and troops invaded the Balkan mountains near Sliven. Bulgarian communist dictator Chervenkov monitored events from an armoured personnel carrier in the mountain. The largest cheta, led by Georgi Stoyanov-Tarpana, also known as Benkovski after a 19th Century Bugarian popular hero, was encircled by 6,000 troops. It fought them on 1 and 2 June, managing to break the encirclement and rescue their wounded. Few fell prisoner to the authorities. Some 40 Goryani were killed, but the Cheta commander fled along with his men. Stoyanov was captured by the DS secret police in late 1951 and was later tried and executed.

During the same period, some 15 Goryani parachuted into the Kazanlak and Ihtiman areas from training camps in Yugoslavia and France.

Despite the Bulgarian popular tradition of highland, mountain and woodland-based resistance, the movement was active in lowland and farming areas. The Dobrudzha area in the northeast of Bulgaria saw strong resistance activity, many villages being captured for short periods. The lowland Ruse area also saw Goryani activity led by Tsanko Tsankov-Mecheto and Tsvetana Popkoeva-Tsena. The commander Tsankov was shot in combat, while Popkoeva was tried in absentia, to be captured and killed without trial in time to celebrate May Day 1952.

The Goryani hoped that the USA, UK and the other western democracies would start a war against the totalitarian communist regimes in Europe but after the passivity of the West during the Hungarian Revolution in 1956 their hope was lost. This was the reason for the damping of the Goryani movement in the late 1950s.

1,040 armed members of the movement were killed by the communist regime in combats and they are Bulgarian heroes who died in struggle against the totalitarian communism.

Now in 2010 there is not a single monument of the Goryani in Sofia, but there is a big monument of the soviet army whose occupation of the country brought the communists to power.

3.2. Human rights defenders

In the 1960s, 1970s and 1980s there were Bulgarians with anti-totalitarian courage who struggled against the communist regime. Some of them like Eduard Genov, Iliya Minev and Yanko Yankov were imprisoned for many years, other like Boris Arsov, Volodya Nakov and the writer Georgi Markov were killed without court sentence.

In 1988–1989 the opposition to the communist regime grew and, together with the struggles of the democrats in Russia, Poland, Hungary, Czechoslovakia, Romania, Germany and China, contributed to its collapse.

All actions taken by persons to resist and to reject the communist regime and its ideology are fair, morally justified and they deserve honour.

Vasil Kadrinov in collaboration with
Professor Dinyu Sharlanov and Professor Venelin I. Ganev

Monument for victims of communism in the municipality of Jablanica, Bulgaria. Source: Preslav

Crimes of the communist regimes – the case of Serbia

My name is Marina Jelic and I'm from the Republic of Serbia. In my case the information where I come from is not irrelevant to the subject of this meeting in general. Because, as you may be aware, the country that I come from was, until the beginning of 1990s, part of a larger administrative territory – the Socialist Federal Republic of Yugoslavia. It is interesting to note that collapse of that complex country coincides with the fall of Berlin Wall, or collapse of communist systems in countries of Central and Eastern Europe. From the previously mentioned it is given to conclude that the communist regime can be only discussed in context of Yugoslavia (not Serbia). Serbia, which, after the collapse of federal country, went into wars, was in a particular way totalitarian organized state (as the most of former Yugoslav republics), which was in a way logical given the situation of open (or covert) war that prevailed in those newly created countries. It is not possible, however, to talk about classic communist model of government. (One party system, state ownership of property and materials for production, lack of freedom of press, total enclosed mass media, and so on…)

When you take this introduction into account, it is clear that you can talk about communist regime crimes only having in mind so called Second Yugoslavia, epoch from 1945 until 1990. Given the social development, it seems to me that the history of this country in relation to crimes (but not only them) we can roughly divide into three periods. First period, from 1945 to 1948, could be called period of revolutionary terror.[1] In these years the largest number of crimes was committed, not only on members of defeated military groups from World War II (Chetniks, Nedic National Guard, the Yugoslav Volunteer Detachment (ljotićevci) of the Serbs, and domobrani the Ustasha of Croats, ballistic organization of Albanians in Kosovo and Metohija), but on civilians that didn't fit in ideological and (or) economical matrix of new society that was emerging in Yugoslavia by the recipe of existing arrangement in Soviet Union (USSR). Here I think particularly on big capitalists, members of opposition to Marxist ideology, and large parts of peasantry and the clergy. During first after-war years, there are numerous examples of unjust confiscations of property, losses of civil rights, convictions on long prison sentences (luckily lowered or abolished soon afterwards) without valid evidence, and with dubious legal procedure. Concerning mass crime, case Bleiberg (place in today Austria) especially stands out, where Partisan units executed tens of thousands of Croat Ustashas and domobrans, who (with families) were

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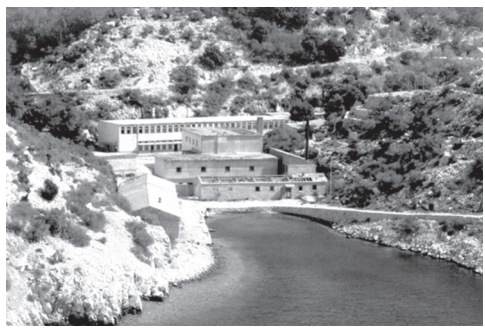
1 See M. Djilas, *Revolucionarni rat* (Revolutionary War), 1990.

found in the withdrawing to the West. Also, in nearly all Serbian towns mass executions of members of family, sympathizers and members of anticommunist movement were conducted, with inadequate, and often without any kind of court proceeding.

After sudden and abrupt change in Yugoslav politics that happened in 1948, and which was caused by break up of ties between USSR and SFRY (Social Federal Republic of Yugoslavia), and friendship between Josif Broz Tito and Josef Jughashvili Stalin, second period of history of communist Yugoslavia began.

During this time, still powerful repressive state apparatus, turned, rather than against ideological opponents, to yesterday's friends and comrades who in conflict of two communist dictators, chose the foreign one. Ideological-police terror against common citizens weakened, but, instead, Goli Otok was created, work camp located on small island in Adriatic Sea, intended primarily for communists of pro-soviet orientation. Beside inhuman behavior (beatings, starving, various kinds of humiliation) it is considered that on Goli Otok between five and ten thousand people was murdered (died). Large number of these men hasn't committed criminal offense, hasn't, for example, participated in armed rebellion that intended to overthrow the government, but, simply, by habit or conviction, in conflict of two communist regimes chose the older, foreign one. The fact that Stalin regime conducted even more hideous crimes, doesn't reprieve Yugoslavian leadership from crimes against its compatriots.


Goli Otok. Source: www.goliotok.com

And in the end, the last period of history of Yugoslavia that lasted from 1954 until 1990, started, symbolically, with two opposing events. In 1956, Goli Otok was closed, but the most famous Yugoslav dissident Milovan Djilas was dispossessed and arrested, because he published in daily newspaper "Borba" series of critical articles, which will, on West also, later on grow into famous book "New class".[2] Djilas, although in youth one of the most diligent and closest Tito's associates, during fifties and sixties has served nine years in prison totally due to his new faith in liberal democratic ideas. Now it would be a useful to say more about the nature of Yugoslavian communism, or self-administrative socialism, as it was called in final and the longest phase of existence of common state of South Slavs. Although the basic features of state organization of other countries of real socialism basically

2 M.Djilas, New class, 1957.

stayed unchanged in Yugoslavia also, the Socialist Federal Republic of Yugoslavia was significantly different from their ideological brethren from the European east. Foreign policy position of this country was in the large part conditioned by breakup with Warsaw Pact countries led by Soviet Union. That's why, formally communist Yugoslavia, was vastly materially financed by United States and developed Western Europe countries. Further on, political openness toward West resulted in relative openness of Yugoslavian market to goods and ideas created in Euro-Atlantic countries. Beside that, Yugoslavian companies often served as a mediator in trade between countries from one and the other side of so called "iron curtain". At the height of bloc division of world, in the early sixties, Yugoslavian authorities accepted the idea of non-alignment that enabled cooperation and trade with distant and populous non-European countries and nations. Foreign policy openness forced the need for inner liberalization, so some forms of private property was allowed in Yugoslavia (small shops, restaurants, craft workshops), and the rural population was enabled to have private possession of significant parts of the arable land. Of course this situation was unimaginable in countries under determining influence of Soviet Union. The possibility of free travel completes this picture of relatively liberal, economically and prosperous society. In this kind of ambient lack of political freedom and civil rights wasn't hard on majority of population. Seriously organized challenges to one-party monolith and charismatic leader (Josip Broz Tito) almost didn't exist. Therefore the need for large-scale repression didn't exist, although enforcement devices (army and police), like in other communist countries, stayed powerful and well organized. Naturally, occasional rebellion existed, mostly from intellectuals (literates, scientists and artists), but these sporadic excesses couldn't jeopardize foundations of one-party system. Mentioned "cases" (expression was used by official socialist press of the time) usually (with few exceptions) ended up without criminal prosecution and jail, even without permanent loss of employment. Usually, inappropriate intellectuals were transferred to less influential and less paid jobs.

Few serious crises, that could be mentioned, are foundation of Massive movement in Croatia in 1971 (where under the leadership of local communist elite wide layers of people made to central government separatist demands) and student protest in Belgrade in 1968 that started in a wave of similar event across Europe and whose goals in Yugoslavia were somewhat contradicting. Students, on one hand, demanded liberalization of social life, and on the other return to original communist principles of war and early post-war period. Both movements were suppressed, with practically no human casualties, and only a few leaders were sentenced to prison.[3] Also worth mentioning is situation in Kosovo and Metohija where state failed to establish practically

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3 See the editions of Committee for the defense of freedom of thought and expression

from the end of WWII. Until 1966 this province within Serbia was, with firm hand, ruled by police of powerful Interior Minister Aleksandar Rankovic. After toppling Rankovic (1966) police pressure has relented, but the Albanian national minority continued to raise rebellion (1968, 1971, 1981) in order to obtain the secession of the province from the Republic of Serbia where Kosovo administratively belonged.

In certain way death of dictator Josif Broz Tito (1980) announced the end of Yugoslavian state project. On one hand political freedom were started to be gained, so during eighties of last century almost any opinion could be published in press, although the monopoly in political sphere stayed in hands of only allowed party – Communists of Yugoslavia. But on the other hand, lenders from the West emerged to claim credits and loans that Yugoslavia spent in last twenty years. So, the society during the middle of ninth decade of twentieth century fell into deep economical crisis. Such economical environment encouraged national tensions and opened never solved historical disputes between Yugoslavian nations. Immanent collapse of federation was rapidly approaching. By the beginning of nineties Socialistic Federal Republic of Yugoslavia fell apart in, unfortunately, bloody few years lasting war.

Basic problem in assessing crimes, especially those who could be classified as crimes against humanity, is in the specificity of Yugoslavian history. Undoubtedly, the largest number of crimes committed by Yugoslavian communists happened soon after the end of Second World War, between 1945 and 1953. In later period of history of Yugoslavian society we can say that there were single, occasional crimes that were done in the name and under the favor of state, but crimes against humanity and huge police repression simply didn't happen. So, into serious consideration, in terms of crimes against humanity, only earliest historical period of existence of socialistic Yugoslavia should be taken into account. Problem occurs considering that these events happened over sixty years ago. Large number of participants in these events, victims as well as the executors is not among living anymore. Minority left are in those years and such medical condition that doesn't enable conduct of serious investigating efforts or conduct of as-as genuine criminal proceedings. It is hard to imagine people of ninety years old remembering circumstances under which some crimes happened more than half a century ago. Not considering the various flaw of judiciary in Serbia today, it is hard believe that even an international legislature would be able to help in over-passing these kinds of obstacles. Nevertheless, certain moral responsibility exist and I'm certain that individuals that participated and ordered mass tortures and liquidations feel moral conviction at least from its own surrounding if not from wider social community – general public.

Summary of criminal proceedings against persons, who have committed crimes in the period of existence of the communist regime, and that these criminal actions

took place before 1989, in the case of Yugoslavia, i.e. Serbia again is very difficult to make, because we are again confronted with different historical experience than other countries of so called Eastern block. While the beginning of last decade of previous century announced the end of communist one-party systems in countries of Warsaw Pact, for Yugoslavia those years represent period of state collapse and interethnic wars. Because I come from Serbia I will limit myself to describing situation in that former Yugoslav republic. In our case, after 1989, League of Communists of Serbia hasn't, as it happened in other countries of real socialism, left the government and went into opposition. League of Communists of Serbia united with Socialistic Union of Working People (a para-party formation, relapse from the time of socialism) and formed Socialistic Party of Serbia. This new organization ruled, alone or in coalition with other parties, Serbia for more then ten years. It not only inherited all property of SUWP (above mentioned organization where nearly all citizens belonged) but it also obtained enforcement devices (Army and police) of disappearing country. Naturally with this state of society there couldn't have been a place to talk about criminal prosecution of individuals which, in favor of state, broke the laws before 1989, for two reasons. First because, as I said earlier, there wasn't mass crime in the last decades of existence of SFRY and secondly because interethnic armed conflict was beginning on the territory of Yugoslavia, and military and polices forces were sorely and necessary needed to state in war environment, so the prosecution of some of its members wouldn't be particularly opportune. (Serbia until 1999 formally hasn't participated in wars in Croatia and Bosnia and Herzegovina. But Serbia helped Serbian side materially, in men power and military technology through out conflicts led in those former Yugoslav republics). Warfare caused major human casualties and severe destruction. Serious crimes were committed, including those that could be subsumed under the category of crimes against humanity. Because of these events the International Criminal Tribunal for the Former Yugoslavia was established, based in The Hague. The tribunal deals with the processing of persons associated with crimes committed in these wars. In recent years, newly created states in the Balkan Peninsula criminally prosecute individuals suspected to have committed crimes during the war years. As I said, in the period concerned, in Serbia alone there was no conflict (if you exclude NATO member countries air strikes against Serbia and Montenegro in spring 1999). There were, however, sporadic crimes committed under the aegis of the state, which, unfortunately, ever after the change of government in 2000 were not fully resolved. (Murders of journalist Slavko Curuvija, a former politician Ivan Stambolic and the three opposition party leaders from the Serbian Renewal Movement).

Through, by itself, a difficult period of transition and restoration of the capitalist social order, the Serbia entered additionally damaged by war and sanctions by the

international community. Moral norms underlying social life were destroyed, a large number of young professionals leaving the country, and considerable number of young people turned to crime and various other socially unacceptable behavior. In this context, in the conditions of global economic and moral crisis and disorientation, it is difficult to talk about correcting the undoubted, but long ago committed injustices and violations that took place in the now non-existent country – Yugoslavia.

Marina Jelić

Jiří Liška. Photo: Přemysl Fialka

Pavel Žáček. Photo: Přemysl Fialka

Harry Wu.
Photo: Přemysl Fialka

Naděžda Kavalírová. Photo: Přemysl Fialka

Martin Mejstřík. Photo: Přemysl Fialka

Dainius Žalimas. Photo: Přemysl Fialka

Nikita V. Petrov. Photo: Přemysl Fialka

Toomas Hiio speaking. Photo: Přemysl Fialka

Alexandr Vondra. Photo: Přemysl Fialka

Valters Nollendorfs. Photo: Přemysl Fialka

Emanuelis Zingeris.
Photo: Přemysl Fialka

Władysław Bułhak. Photo: Přemysl Fialka

János M. Rainer. Photo: Přemysl Fialka

Hans Altendorf. Photo: Přemysl Fialka

Hans Altendorf, Zuzana Vittvarová, Władysław Bułhak, János M. Rainer.
Photo: Přemysl Fialka

Andreja Valič. Photo: Přemysl Fialka

Marius Oprea.
Photo: Přemysl Fialka

Vasil Kadrinov. Photo: Přemysl Fialka

Marina Jelić. Photo: Přemysl Fialka

Andreja Valič, Zdeněk Křivka, Marius Oprea, Vasil Kadrinov, Marina Jelić.
Photo: Přemysl Fialka

Day 2 ►►►
The justice (to be) done

Welcome

Hubert Gehring, Czech Republic/Germany

Opening

Miroslava Němcová, Czech Republic[1]

1 Could not attend the conference in person.

HUBERT GEHRING ▸ Director, Konrad-Adenauer-Stiftung Prague

Hubert Gehring was the representative of the Konrad-Adenauer-Stiftung in Venezuela and Mexico. In 1998–2000, he was a member of the Mecklenburg-Vorpommern State Parliament and in 1997–2000, the general secretary of the CDU in Mecklenburg-Vorpommern. Dr Gehring studied agriculture and environmental protection at the University of Hohenheim. In 1993–1997, he worked in higher public service at the Federal Ministry of the Environment, Nature Protection and Reactor Safety and at the Office of the Federal Chancellor.

MIROSLAVA NĚMCOVÁ ▸ First deputy chairwoman, Chamber of Deputies, Parliament of the Czech Republic

Born on 17 November 1952 in Moravia, Miroslava Němcová lives in the town of Žďár nad Sázavou. She graduated from the Agricultural and Technical High School in Havlíčkův Brod, and later worked at the Czech Statistical Office. Since 1992, she has owned a bookshop in Žďár nad Sázavou. In 1994–2002, she was a member of the municipal council of Žďár nad Sázavou and a member of the town's local government. She joined the ODS (Civic Democratic) party in 1992. Between 1998–2006, she was a deputy of the Parliament of the Czech Republic and shadow minister of culture. In 2002, she was elected deputy chairwoman of the ODS and deputy chairwoman of the Chamber of Deputies. Miroslava Němcová has been first deputy chairwoman of the Chamber of Deputies since 2006.

HUBERT GEHRING ► Director, Konrad-Adenauer-Stiftung Prague

Dear Mrs Němcová, Ladies and gentlemen,

It is a great honour for me to welcome you to the second day of this conference in the name of the Konrad-Adenauer-Stiftung in Prague. I am glad that the conference is today dedicated to important aspects of coming to terms with communist crimes, namely to their legal appraisal and treatment.

The presence of eminent national and international discussion participants and chairs, and the patronage of the Czech government no less, attests to the importance of this subject. Special thanks belongs to the organisers, including the Institute for the Study of Totalitarian Regimes and also partners from the European Platform of Memory and Conscience.

Ladies and gentlemen, communist regimes were partly defined by their commission of a great number of crimes against humanity and against freedom, something we regard as almost self-evident today. Today's conference theme, "The justice (to be) done", is concerned with the difficult issue of dealing the injustices of that period. In this context, it is necessary not to treat the concept of "justice" per se as interchangeable with the concept of "the law". Dealing in outline with one's own past in legal terms represents an important basis for guaranteeing the rule of law. And the law applies equally for all citizens, from the victims to the perpetrators. Only in this way can the wilful manipulation of sensitive data be prevented.

I say this partly from the experience of my country, Germany. The Office of the Federal Commissioner Preserving the Records of the State Security Service of the former German Democratic Republic represents the main instrument tasked with such activities in Germany. Since 1991, the office has been regulated by laws which grant it access to Stasi documents. At the same time, rules on the protection of data, which the archives also fall under, are decisive. They have helped ensure that coming to terms with the past has not taken place in a wild manner. For that reason, I am very glad to see the name of Mr Joachim Gauck, who created the office and led it personally for almost ten years, among today's speakers.

Ladies and gentlemen, it is important and necessary for every country to define the ambits of on the one hand academic documentation and on the other the political-legal level. Finally, what does the English term "justice" mean? I am certain that this conference will contribute greatly to the discussion which is currently taking place here in the Czech Republic.

In the name of the Konrad Adenauer Stiftung in Prague, please let me thank you sincerely for your attention. I wish you an interesting and stimulating day at this conference.

MIROSLAVA NĚMCOVÁ ▸ First Deputy Chairwoman of the Chamber of Deputies of the Parliament of the Czech Republic

Ladies and gentlemen,

I consider the conference on the theme of the Crimes of the Communist Regimes to be enormously important. In particular, I appreciate the fact that it is being held in the Czech Republic on the grounds of the sovereign legislature on dates that left their mark 62 years ago on the history of our country as a precursor to a very tragic and long epoch.

This was the era of the communist totalitarian regime, which crippled the economy of the country, isolated us from freely developing countries in Europe and on other continents, and inflicted irredeemable moral damage.

For twenty free years, we have been coming to terms with the consequences of communism. This is not a simple process. For a significant portion of our citizens, the crimes this regime committed have been relativised. This is difficult to understand and it is necessary to constantly renew historical memory in this respect. One cannot accept that imperfect memory or the intentional manipulation of facts can enable what happened to be forgotten, particularly the political murders of men and women whose only fault was their deep respect for democracy and their ability to anticipate and identify the lethal danger of communism, which shortly after the defeat of fascism plunged our land into an equally destructive totalitarian ideology.

We cannot leave it to historians or researchers alone to shed light on a detrimental ideology which, besides murders, hundreds of thousands of long incarcerations, and forced emigration, also disrupted property relations in all strata of society. It is good that specialised journalists are devoting themselves thoroughly and systematically to this subject. It is laudable that the decisive political powers in our country refuse to cooperate with today's Communist Party of Bohemia and Moravia, which has not distanced itself ideologically from its predecessor. It is vitally important that we find support among politicians, historians and democratically minded people throughout the entire world.

Such systematic work at home and abroad benefits everyone – it is of benefit to those who lived under a totalitarian communist system and for those who had a happier fate. Together, we realise what it means to lose the opportunity to apply oneself in a free society, and what this means for each individual being. How their lives could have been they had not been blighted by a perverse ideology that aimed to subjugate people's free thinking and to erase that which gives meaning to our existence.

I would like to thank you – conference participants and organisers – for your work and for the conviction with which you approach a subject that is hugely important for both people today and future generations.

Session V.
Communist crimes in Czechoslovakia and their prosecution

Miroslav Lehký, Czech Republic
Pavel Gregor, Czech Republic
Eduard Stehlík, Czech Republic

MIROSLAV LEHKÝ ▸ First deputy director, Institute for the Study of Totalitarian Regimes

In the 1960s, Miroslav Lehký studied at the Faculty of Catholic Theology in Bratislava. He could not finish his studies due to political purges. In the 1980s, he was co-organizer of the underground university in Bratislava. He is a Charter 77 signatory and was Charter 77 spokesman for the year 1990. After 1989, he was secretary of the Czechoslovak (Czech) Helsinki Committee. He is also a former employee of the Office for the Documentation and Investigation of the Crimes of Communism of the Czech Police. In 2003, Lehký was involved in the establishment of the Nation's Memory Institute in Slovakia.

PAVEL GREGOR ▸ Former head of the investigations department, UDV (Office for the Documentation and Investigation of the Crimes of Communism of the Czech Police)

Pavel Gregor studied at the Faculty of Education at the Charles University. He attended home seminars at Prof. Jan Patočka's underground university and was a member of the student strike committee in 1989. He worked at the Department of Asylum Seekers of the Ministry of the Interior. From 1995, he was a member of the Police of the Czech Republic at the Office for the Documentation and Investigation of the Crimes of Communism of the Czech Police. Until the end of 1999, he was an investigator and later, until the end of his service in 2009, head of the investigations department. He participated especially in the prosecution of former members of the first directorate of the National Security Corps, i.e. the intelligence service. He currently works as an assistant to a Prague city councillor.

EDUARD STEHLÍK ▸ Head of the education department and of the military library, Institute for Military History

Lt-Col Dr Eduard Stehlík graduated from the Faculty of Arts at Charles University in Prague and is the author or co-author of around twenty monographs. He collaborated, among other projects, on the exhibition "Assassination Attempt – Operation Anthropoid 1941–1942," which was shown in Prague, Milan, Berlin and Bratislava. He

prepares a historical magazine programme for Czech Television. His book "Lidice – the Story of a Czech Village" won the Museum publication of the year award in 2004 in the Czech competition "Gloria Musaealis". He is co-author of the permanent exhibition at the Lidice Memorial called "And the Innocent Were Guilty…" In 2006, he was made an honorary citizen of Lidice.

MIROSLAV LEHKÝ ▸ First Deputy Director, Institute
for the Study of Totalitarian Regimes

Classification of crimes committed between 1948 and 1989 and the prosecution of these crimes after 1990

Dear Ms Němcová, ladies and gentlemen,

In introduction, let me present a brief overview of the most grievous crimes committed by the communist regime in Czechoslovakia between 1948 and 1989.

The period after the Communist Party's assumption of power in February 1948 saw severe violations of all principal human rights and freedoms as well as civic rights. The fabricated political trials that the communist regime used to eliminate the opponents of the regime, which were based on investigations carried out by the State Security Service ("StB") using torture and gross physical and psychological violence, resulted in the conviction of more than 257,000 people between 1948 and 1989, and if we include the people convicted by martial courts, the number exceeds 267,000 people. The very archival documents of the Central Committee of the Communist Party of Czechoslovakia ("UV KSČ") dating back to the 1950s list almost 27,000 people convicted for "anti-state crimes" between 1948 and 1952. The people were sentenced to severe imprisonment (15 or 25 years, or for life) and their personal property was forfeited and their civic and political rights taken away from them. A total of 248 people (including one woman) were executed for political reasons.

People who opposed the regime fell victims to political murders orchestrated by the StB both in Czechoslovakia and abroad. These did not happen in the 1950s only. Four priests (including two priests of what was referred to as the "secret church") and one layman died at the end of the 1970s and in the 1980s, and their deaths remain unexplained to this day. The official period investigations qualified them as suicides. Just around this time we remember the tragic death of Přemysl Coufal, a secretly ordained priest and abbot of the Benedictines. This man who used to be active in the underground (secret) church was found dead, his body in a terrible condition, in his apartment in Bratislava on 25 February 1981. He had been subject to StB's monitoring and investigations for several months prior to his death.

In this respect, it is necessary to mention the activities of the Czechoslovak intelligence service abroad (the "First Administration of the Ministry of Interior"). They include the preparations for assassinations, assassinations, and kidnappings of persons who the regime took issue with abroad.

For the period from the 1950s to the 1970s, we know of such activities having taken place in Strasbourg and Munich; there was an explosion at a military base in the FRG, and there was an attempted assassination of exiled Czechoslovak politician Pelikán in 1975 (he received a mail bomb).

There is a serious suspicion that Czech intelligence agent in Austria Alfred Petrovič murdered Bela Latuschnik, a Hungarian intelligence officer who had defected. The documents on this case are still classified as "top secret"!

In total, we have documented and clarified 20 kidnappings from the period until 1962. It was Czechoslovak citizens abroad who were kidnapped and brought back to the country.

We also know that the StB participated in the kidnapping of former East German state security officer Walter Thraene and his partner Ursula Schoene who successfully fled from the GDR to the FRG. They were kidnapped from Austria to Czechoslovakia and then deported to the GDR. The East German Stasi prepared and organised the kidnapping.

At least 4,500 people perished in prisons, in detention, and under the inhuman conditions in forced labour camps in uranium mines, and the upper limit of the estimations is about 8,000 people.

We must not omit violence committed on women and their unborn children in prisons and poor care for such women's newborns.

Between 1951 and 1955, the forced collectivisation of agriculture involved what was referred to as "Project K" (K stands for "kulak"), which in reality was forceful destruction of an entire social category – the peasantry. Documents known to date indicate that this project, which involved forced withdrawal of property, arrests, and convictions of certain people followed by forced exile into pre-defined locations with poor social, health, and economic conditions, affected more than 2,000 people. The documents of the UV KSČ mention up to 3,000 families. Deportations included pregnant women, children, and individuals aged 80 or higher. The deportation meant death within a short period of time in particular for the elderly. Some children were taken away from families and placed in shelters and all of them faced issues accessing further and higher technical education.

At present, this crime is under investigation with a view to it being qualified as genocide. Its outcome is still open. The peasantry was eliminated by the local village and district authorities and the StB and everything was orchestrated by the Ministry of National Security and the Ministry of Interior, of course under the leadership of the KSČ.

In relation to the existence of the iron curtain after 1948, we have evidence that foreign sports and civilian aircraft were shot down (and pilots killed) by the Czechoslovak air force between 1963 and 1975. The civilian aircraft intruded the Czechoslovak airspace as a result of loss of navigation. Five people were killed in a total of three incidents (four Austrian citizens and one Bavarian).

A Polish agricultural airplane was also shot down as its pilot, a Polish national, tried to escape from Poland to Austria via Czechoslovakia.

Such acts are in conflict with the Convention on International Civil Aviation. The Czechoslovak Socialistic Republic rejected any responsibility in all cases of the aircraft shot down. It bears reminding that none of the Czechoslovak civilian or military aircraft that lost their way and found themselves in the airspace of the FRG or Austria were exposed to open fire, much less shot down.

The serious crimes of the communist regime include the killings of more than 300 people on the Czechoslovak border by the Czechoslovak Border Guard between 1948 and 1989. The killings included Czechoslovak citizens as well as foreign nationals – the citizens of the Central and Eastern European countries who tried to flee to the free world. The armed actions against refugees included the endangered health and lives of the citizens of the FRG and Austria, some of whom were shot dead. This is a violation of the international law.

Let me pay special attention to the settlement – or rather failure of settlement – of crimes in two categories: the political trials and the killings on the Czechoslovak borders with Austria and the FRG.

I am convinced that the principal fact that needs to be taken into consideration is that the ČSR was not a legal and democratic state after the assumption of power by the KSČ. After February of 1948, Czechoslovakia became a totalitarian regime, a communist/proletarian dictatorship that destroyed the essence of democratic freedoms and fundamental human rights, keeping the formal traditional constitutional institutions and organisations as a façade to deceive both the domestic general public and the world around.

Fabricated trials

The fabricated trials involved thousands of people who were deprived of their personal freedom systematically and for long periods of time on the basis of their political or religious convictions or membership.

The StB fabricated the trials under the leadership of the top KSČ officials. People under investigation were subjected to torture and gross physical and psychic violence, and they

would confess serious crimes (high treason, espionage, subversion) that they had never committed. In addition, the StB itself ignited many acts of resistance against the regime. The prisoners served time under inhuman conditions of slave labour and degradation of human dignity. Many of the convicts lived on the margin of the society for the rest of their lives after release, or died soon of the consequences of the imprisonment.

The conviction of those innocent people was not a miscarriage of justice – it was organised crime directed by the representatives of the communist state and the top officials of the KSČ. Such crimes – if the perpetrators were ever prosecuted at all – were only evaluated and investigated as excesses of individuals (abuse of authority of an official etc.).

In addition, the investigation into the serious crimes after 1990 was made difficult or even impossible due to the respect paid to the amnesties granted by communist presidents, in particular the 1960 amnesty of the President and the Government of Czechoslovakia. While this amnesty reduced or pardoned the rest of the punishment for political prisoners, it also prevented the punishment of the perpetrators of this injustice. The amnesty orders not to institute criminal prosecution, or where commenced already, not to continue prosecution of perpetrators except for the crimes of murder, robbery, intentional bodily harm, and crimes against human dignity. However, the communist interpretation of the penal law understood the last mentioned crime only in terms of sexual abuse etc.

But is human dignity not related with the absolute value of being a human, with every human being's uniqueness, and the ensuing human right to life and freedom?

Can long-term and systematic imprisonment of thousands of innocent people to 10 to 25 years or for life and to a loss of property and civic rights be considered anything else than a direct attack on the dignity and absolute value of a human being, or a crime against humanity?

For the political prisoners whose rest of sentence the regime pardoned at the time, there was nothing to be pardoned for: they were innocent. They would never have been sentenced in a legal state in the first place. In addition, it was de facto the politburo of KSČ that made the decisions on the amnesties in cooperation with the top officials of StB – it was not just the president, who was also a member of the politburo. For example, in 1956 the Inspectorate of the Ministry of Interior rejected amnesty for political prisoners who were also sentenced to a loss of civic rights and property, because such forfeited – that is to say, stolen – property would have to be returned to them.

The releases of particular people as part of the amnesties, the political prisoners, were again a matter of decision for the StB that observed the extent to which people's personalities were broken and degraded.

The reason cited for the amnesty was the "strength and solidity of the regime" and the "trust of the working people in KSČ and the socialist state".

The amnesties also spoke about humanism as one of the reasons, but Russian scholar and philosopher Losski said in 1945 that there is nothing to be said about humanism where there is no recognition for the absolute value of a human being.

A majority of those who did the injustice, prepared and directed the trials, and participated in them directly could not be accused or sentenced: they remain unpunished and their crimes have not been declared clearly.

When assessing amnesties with respect to the crimes of communism, it was necessary to take into consideration the value discontinuity of the Constitution of the Czech Republic with the constitution of the communist Czechoslovakia. Also, it was and is necessary to respect the provisions of Act No 198/1993 on the illegality of the communist regime, in particular Section 1(1) e), which says "the communist regime and those who pursued it actively did not hesitate to commit crimes to achieve their objectives, allowed crimes to be committed without punishment, and gave unjust benefits to those who shared in the crimes and persecution".

Killings at the border

A massive amount of Czech and Slovak refugees, who chose to leave their country rather than to live without freedom and in oppression, fled the country after February 1948.

The totalitarian regime in Czechoslovakia could not exist without isolating its citizens from each other (using terror, violence, and an atmosphere of fear, distrust, and suspicion) and isolating its citizens from the free world around them. The communist ideology was based on a fictitious vision of the world, world order, and the human being. Thus, any confrontation of the ideology with reality posed a lethal threat to the regime.

When it comes to the killings on the border, it involved systematic and long-term use of automatic firearms on unarmed civilians during peace time – including women, pregnant women, and the disabled. The youngest victim was aged 14 and the oldest 90. Selected parts of the borders over a total length of 183 km were mined in the first half of the 1950s. The mines killed six people and seriously injured three.

The barbed wire barriers on the borders were connected to high electrical voltage (5,000 to 6,000 Volts) between 1952 and 1965. The high voltage killed almost 100 people.

When it comes to the border killings, the communist regime preferred its ideology and the pursuit of its goals to everyone's right to life, personal safety, and freedom of movement (including the possibility to leave the country and return freely).

The deadly conditions on the border were in a direct conflict with the Universal Declaration of Human Rights adopted by the UN on 10 December 1948, though Czechoslovakia was a UN member state, as well as with the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950.

The responsibility for the murderous conditions on the border lies not only with the soldiers who served as the border guard – it is primarily attributable to those who designed, deployed, improved, supervised and enforced the approach between 1948 and 1989. This means the commanders of the Border Guard, Heads of Staff, Commanders of the Border Guard Bridgades, and the Ministers of Interior and the top officials of the KSČ: the members of the politburo and Secretaries General of the KSČ.

None of them were tried or accused. Border killings were investigated merely as excesses of individuals on the lowest level, provided that they breached the communist regulations and laws in force at the time – i.e., again, not as organised crime.

The "Interim Service Guidelines for the Border Guard" was issued in July 1949 and it said that the chief task of the Border Guard is to secure and guard the state border and "eliminate anything" aimed against the state system and both internal and external security of the country. It also says that the "Border Guard shall, by all available means, prevent persons from leaving the country illegally, i.e. intercept and hold the persons or groups of persons who attempt to cross the border". The wording of the regulations was softened later, but the task of preventing border crossing at all cost remained in force until the very end of the regime. This can be demonstrated.

Can such crime not be defined as a crime against humanity, as initially defined by the Charter of the Nürnberg International Military Tribunal as part of positive international law in 1945?

Czechoslovakia adopted the Charter and agreement in 1947, as a result of which it became and still is a part of the Czechoslovak/Czech legal system.

The Secretary General of SED (the East German communist party), Krenz, and two high state officials of the GDR, Kessler and Streletz, were sentenced to imprisonment in the FRG after 1990 on the basis of their responsibility for the killings on the border between the FRG and GDR. They filed a complaint with the European Court of Human Rights against their sentence on the grounds that, among other things, the ban on retroactivity of law had been violated. The ECHR in Strasbourg rejected their complaint in full on 22 April 2001. ECHR Judge Mr Levits says in his concurring opinion:

"The minimum elements of the offence [of crimes against humanity] appear to be the following: (a) murder; (b) committed against a civilian population; and (c) systematic or organised conduct in furtherance of a certain policy. The last element is implied from the combination of elements (a) and (b). But even if one is only guided by the concept of 'crimes against humanity' emerging from the Charter of the International Military Tribunal of Nuremberg and the present case is examined only by reference to the minimum requirements of such a concept, as far as it relates to the facts of the present case, there is no difficulty in concluding that the activities for which the applicants were found guilty did undoubtedly qualify as 'crimes against humanity."

Ladies and gentlemen,

I am convinced that, based on the facts and our experience with communist regimes, it is inevitable to open an international debate on the crimes of communism as crimes against humanity.

A thorough settlement of such crimes and a clear declaration thereof is not only required in terms of justice – it is also of utter importance for our present and future.

The history is not over and we can see attempts at establishing other totalitarian regimes that may be much more refined and sophisticated than the previous ones. They test us – the extent to which we will make concessions. Our unwillingness or inability to deal with our past thoroughly may endanger our freedom and democracy and serve such regimes in the future.

Thank you

PAVEL GREGOR ▸ former head of the investigations department, UDV (Office for the Documentation and Investigation of Communist Crimes)

The legal aspects of coming to terms with the crimes of the communist regime in Czechoslovakia

In regard to the discussed issue of dealing with the communist regime in the former Czechoslovakia, particularly at the level of criminal law, it is impossible not to mention the Office for the Documentation and the Investigation of the Crimes of Communism. I worked in this office from the end of 1995 until August last year, and I had been the head of the investigations department since 2000.

Please allow me to first briefly mention the history of this institution. The Office for the Documentation and the Investigation of the Crimes of Communism (hereinafter referred to as the ÚDV) was established thanks to the man who became its first director – the important (alas now deceased) dissident and philosopher PhDr. Václav Benda, who later became a senator. The office was established as of 1 January 1995 via the amalgamation of a police section with investigative powers, but only for the area covering the activity of the State Security (StB) service, which was incidentally defined in its name – the Office for the Documentation and the Investigation of the Activity of the StB and the Centre for the Documentation of the Illegality of the Communist Regime at the Ministry of Justice (originally the Coordination Centre for the Investigation of Violence against the Czech Nation in the Years 1945–1989 at the General Prosecutor's Office).

It was organisationally incorporated into the system of police investigation offices with all investigative powers as a division with national jurisdiction, which was also reflected in the Act on the Police of the Czech Republic. The investigative police unit of the office became the investigations department. Until the reorganisation of the police in 2001, this was where investigators were assigned with the authority to launch and conduct criminal prosecutions; and upon their conclusion to submit a motion to the Public Prosecutor for the submission of an indictment. As of 1 January 2002, when the role of the investigators was abolished and the activity of investigation offices in the existing organisational structure was terminated, the ÚDV became one of the divisions of the newly established criminal police and investigation service with nationwide jurisdiction. From the beginning of its activity, the ÚDV had a branch in Brno.

Within the scope of its activity, the investigations department of the ÚDV proceeds as it is obliged to do in its capacity as a policy authority, i.e. in the standard manner pursuant to the Criminal Procedure Code, the Criminal Code, the Act on the Police of the Czech Republic and other legal regulations and internal rules that are applicable to the police and the Ministry of the Interior. In order for it to be possible for a specific

person to be brought before the courts for his or her illegal activity, it was and still is necessary to prove that they deliberately acted at variance with the law which applied at the time and that the facts of the case fulfil the commission of a crime, which must also be part of the Criminal Code that is valid today. At the same time, it is necessary to prove that it had particularly grave consequences. Moreover, the courts, at the very least, require substantiation of the (frequently very difficult to establish) fact that it had not been possible to prosecute and punish the specific crime for political reasons. The legality of the approach of the police body is subjected to the supervision of the Public Prosecutor, whose instructions it is bound by. The investigations department implements an investigation based on the instigations and criminal complaints of natural persons and legal entities, or possibly on the basis of information that has emerged from investigations that have already been conducted, or on the basis of findings from an archive collection.

The basic legal standard allowing for the launch of criminal prosecutions of most deeds became the provisions of Section 5 of Act No. 198/1993 of the Collection of Laws (Coll.), on the illegality of the communist regime and on resistance to it, according to which "the period of limitation for crimes does not include the period from 25 February 1948 to 29 December 1989, if no lawful conviction or acquittal took place for political reasons that are not compatible with the basic principles of the rule of law of a democratic state". On the basis of a motion filed by a group of 41 parliamentary deputies, the constitutionality of this Act with reference to its apparent retroactivity was examined by the Constitutional Court. This court rejected the motion for its abolishment by way of a decision made by its plenary session dated 21 December 1993 (published under No. 14/1994 Coll.).

The amendment of Act No. 140/1961 Coll., as amended, which was implemented by Act No. 327/1999 Coll., was crucial to the possibility of further prosecuting crimes of this nature. This has been in effect since 28 December 1999 (i.e. before the lapse of the 10-year statute of limitations concerning most deeds). On the one hand, it stipulated – in the provisions of Section 67, subsection 1, letter b) of the Criminal Code – a 12 year statute of limitations for crimes whose upper limit for sentencing was at least 10 years' imprisonment. On the other hand, it stipulated an exemption from the statute of limitations for the types of crime defined in the provisions of Section 67a, letter d) of the Criminal Code. According to these provisions, the lapse of the statute of limitations did not end the punishability of "other crimes committed in the period from 25 February 1948 to 29 December 1989, whose upper limit for sentencing is at least 10 years' imprisonment, if no lawful conviction or acquittal took place for political reasons that are not compatible with the basic principles of the rule of law of a democratic state, and they were either committed by public officials or committed in connection with the persecution of an individual or group of people on the grounds of

politics, race, or religion." The exemption from the statute of limitations is also defined in virtually the same way in the provisions of Section 35, letter c) of the new Criminal Code, No. 40/2009 Coll., which has been in effect since 1 January 2010.

In view of the different decision-making practices of courts, particularly the individual panels of the Supreme Court of the Czech Republic with regard to the interpretation of the bar of the statute of limitations and the specification of its commencement, the Grand Panel of the Criminal Division of the Supreme Court decided on 7 April 2005 that, upon fulfilling the conditions stipulated in Section 5 of Act No. 198/1993 Coll., criminal prosecution is not inadmissible if the limitation period starting from 30 December 1989 has not elapsed. Unfortunately, this decision is only binding for all the panels of the Supreme Court.

To date, the ÚDV has initiated criminal cases against 195 people in 101 criminal cases. 99 motions (32 of which are repeated motions) for the submission of an indictment have been filed with the relevant Public Prosecutor's offices against 125 defendants. On the basis of these motions, 77 indictments (20 of which were repeated indictments) were filed against 104 people. Up to now, 33 people have been lawfully convicted. 24 of these convictions were for terms of imprisonment with the sentences conditionally suspended for a probationary period. In most cases, criminal prosecutions were conducted for the crime of abusing the authority of a public official against representatives of the entire spectrum of communist public authority. In the cases where an indictment was submitted, the state prosecutors agreed with the results of the investigation, i.e. they came to the conclusion that a deed which was a crime had occurred and that it had been committed by the defendant. This frequently concerned a senior functionary of the communist regime. Consequently, those who came before the courts included five politburo members, three ministers of the interior and two of their deputies, the chief of the General Staff, the commander of the Border Guard forces and the People's Militia, four military and civilian prosecutors, including the first deputy of the General Prosecutor, eight judges of civilian and military courts, from the district court level up to the Supreme Court, the governors of two StB detention centres and the commanders of several regional directorates of the StB.

I think the disproportion between the number of people indicted (83% of the total number of people accused for whom the ÚDV filed a motion for the submission of an indictment) and the number convicted, i.e. only 26% of this group of defendants, is really quite telling. I don't want to make sweeping statements and to generally accuse judges of siding in any way with these perpetrators as former representatives of the communist regime. I am convinced that the issue of evaluating the bar of the statute of limitations plays a crucial role in this respect, whereby some panels of the Supreme Court also came to the conclusion, contrary to the aforementioned finding of the Constitutional Court that a criminal prosecution was statute-barred. A coalescence of

interpretation in this case did not occur until an appeal was lodged by one of those convicted, who referred to a specific decision by one of the panels of the Supreme Court, which had the opposite interpretation of the duration of the limitation period. It was not until 7 April 2005 (i.e. more than 11 years after the Constitutional Court's ruling) that the Grand Panel of the Criminal Division of the Supreme Court unified decision-making practices at the highest level of common courts. It is necessary to state, however, that this decision is not binding for courts of lower instance. For example, even after the given date, the regional court in Plzeň decided that a case was statute-barred, despite the fact that it had received the text of the decision by the Grand Panel from the ÚDV within the scope of a supplementary investigation that had been ordered. Without exaggeration, it is possible to talk about a huge battle that has been fought in the judiciary with regard to the legal evaluation of the bar of the statute of limitation and this has essentially only been concluded quite recently (and even then only to a certain extent).

I believe that the period that had elapsed since the time when a crime had been committed was a significant aspect of the decisions taken by the courts, not only in terms of dealing with the bar of its statute of limitations, but also in terms of evaluating the danger to society, which to a number of judges appeared to be minimal if not nil from a contemporary perspective. It is my own conviction that the legal formalism that existed in connection with these deliberations as well as a reluctance to refer to the particular specificity required in clarifying such old crimes, e.g. not rejecting archive records as important (often crucial) documentary evidence, generally contributed to a significant extent to the balance sheet that has now been established.

Another factor that undoubtedly had an influence on the number of people convicted is the fact that the ÚDV was not established to fulfil the statutory mandate of the cited provisions of Section 5 of Act No. 198/1993 Coll. until 1 January 1995, whereas pursuant to this law the period of limitation had already begun to run as of 30 December 1989. The five-year period of limitation for a large quantity of crimes of lesser gravity, for which the upper limit in terms of sentencing ranged from three to nine years' imprisonment, ended as of 29 December 1994.

In the interests of objectivity, it is also certainly impossible to overlook the fact that an initially insufficient number of ÚDV investigators were confronted, particularly at the outset, with a substantial conception of criminal complaints, and none of them had (and understandably couldn't have had) experience with investigating this specific criminal activity. The management of the ÚDV also had to wrestle with the problem of whether to rely on experienced investigators, i.e. police officers who had longstanding experience (meaning that it even dated back to before November 1989) or whether to hire people at the office for whom there was no risk of any encumbrance from the past. New investigators would necessarily have to obtain experience and practical skills,

and, with an increasing lapse of time since the commission of the deeds in question, this simultaneously reduced the possibility of their clarification and increased the probability that the perpetrators would pass away.

From my perspective, cooperation with the Supreme Public Prosecutor's Office appears to be crucial. This has been constantly improving over time and I would dare say that the most intensive attention devoted to the crimes of communism has come from the current Supreme Public Prosecutor. Upon taking office, JUDr. Renata Vesecká designated so-called "old crimes" as one of her priorities. Thanks to this fact, I have personally enjoyed excellent cooperation with the current management of the criminal proceedings department of the Supreme Public Prosecutor's Office. It is not possible to talk about interference on the part of the Supreme Public Prosecutor's Office in the supervision of materially and locally competent public prosecutors' offices (which are district offices with respect to legal classification). This would undoubtedly be at variance with the law. Rather it concerns the adoption of a uniform approach to legal evaluation while verifying and investigating this type of criminal activity by way of a certain methodological management within the public prosecution system.

As a recent example, it is possible to cite the extraordinary attention that was (and certainly still is) devoted to the large-scale and criminal displacement of the family units of private farmers from their properties and other forms of their persecution, particularly in the first half of the 1950s. In this case, the Confederation of Political Prisoners repeatedly instigated the launch of an investigation via the Supreme Public Prosecutor's Office based on suspicion of the crime of genocide.

It was the current Supreme Public Prosecutor's Office and its analytical department that began to systematically deal with this case. This resulted in the formulation of an extensive legal analysis, which was subsequently submitted to all levels of the public prosecution system. The formulated methodological material dealt with the legal classification of this action. According to the conclusions expressed, this action could not be included under the crime of genocide. The Supreme State Prosecutor's Office, however, adopted the stance that the actions of officers of communist power during the given form of persecution had been completely illegal and that it was possible to classify them as the crime of abusing the authority of a public official with evidence of particularly grave consequences. This allowed for the launch of an investigation into several deeds. The ÚDV then began examining criminal complaints that were subsequently submitted in more than 600 cases in the period from 2007 to 2009. An evaluation of the presidential amnesty of 1960 was a watershed moment. It concluded that this amnesty, which was also for the crime of abusing the authority of a public official, did not apply in the given cases. It is necessary to note that until recently this amnesty from President Antonín Novotný was uniformly considered within the judiciary to be an insurmountable obstacle to launching criminal prosecutions for the

given crime. Thanks to this fact, it was possible to launch criminal prosecutions against several people (and this even included some former prosecutors) for illegal actions against private farmers. An indictment has already been filed against two people.

The Supreme Public Prosecutor's Office, or the authorisation of the Supreme Public Prosecutor, has played an indispensable role in filing an appeal against the final and conclusive judgement of a court. In a number of cases, the use of this extraordinary remedial measure has been the final and only solution in terms of how to break the legal formalism of courts, often only after the case had been repeatedly returned by the court of appeal to the court of first instance or even directly to the Public Prosecutor. It was only after the decision by the Supreme Court, which upheld the appeal, that it became possible to finally convict the perpetrator following the pronouncement of a binding legal evaluation.

As the foregoing implies, dealing with the crimes of the communist regime in terms of criminal law comprises a complex series of legal, legislative, personnel and psychological issues. In the cases of crimes committed by already deceased perpetrators, I assume that subsequent developments will lead to their actions being properly classified and described after an investigation is conducted so that these actions do not remain forgotten and so that they will be named in the way that is needed. This is the stance adopted by the Supreme Public Prosecutor's Office with regard to how one should proceed further in these cases, and this approach has been applied in the aforementioned cases examining criminal complaints concerning the persecution of private farmers, where it was apparent from the outset that the vast majority of perpetrators had already died. Personally, I fully agree with this stance.

Thank you for your attention.

EDUARD STEHLÍK ▸ head of the education department
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Cases of unofficial (private) persecution in Czechoslovakia

During the more than two decades that have elapsed since the fall of the communist regime in our country, many historians and journalists have examined questions surrounding the persecution of enemies of the totalitarian regime. The army has often found itself the focus of their interest and it is also the subject of my piece. Thanks to the work of many colleagues, the general public are now familiar with the most flagrant cases of the persecution of soldiers involving, for instance, General Helidor Píka, Colonel František Skokan, Lieutenant Colonel Josef Gonic, Colonel Josef Robotka, and dozens of others. A relatively large amount of information has been published about the forced labour camp at Mírov, which became after two years a special "officers" camp. Other methods of persecuting soldiers and their families are also well known: eviction from their homes, expulsion from their jobs, harassment of them and their families, expulsion of their children from school, and many more. However, unofficial persecution, or perhaps "private" persecution is the better term, has not received a great deal of attention.

What do I have in mind by this? I am talking about cases where the reason for the eviction, long-term imprisonment, or even execution of the persecuted was not political or resistance activity (even though that may have been the case – but in most examples only as a kind of "extra"), but above all because of his property, or even mere personal rancour. Uncovering such cases today, six decades later, is next to impossible. This is not only because of the great interval of time but also because most witnesses of events at that time are no longer alive and materials relating to such cases have been preserved in only a limited number of cases, if they ever existed in written form. Nevertheless, it has been possible to document at least a few.

It may seem paradoxical to some today but one of the reasons somebody could have become the victim of persecution at the end of the 1940s or in the 1950s was that he was the owner of a nice car. It appears strange and unlikely, but that is the way it was. And if it was a foreign car, which would have aroused greater attention in post-war Czechoslovakia, then all the worse. A document has been preserved in the archive of the former infamous fifth Division of the Main Staff, headed by Bedřich Reicin, which can be paraphrased as follows: *"During the interrogation of Mr XY it was ascertained that he sold his car to Lieutenant Colonel Dítě. Lieutenant Colonel Dítě was not to be found at home today. Comrade Doubek will have to wait until tomorrow for the vehicle."* Lieutenant Colonel Dítě was subsequently arrested and interned at Mírov forced labour camp. There he died after 14 days because despite his poor health he was

not provided with medication. The case of Staff Capitan Václav Drtina is similar. He was arrested, charged with treason and sent to jail for 25 years. Immediately after his arrest his family had their car confiscated. It is likely that Staff Captain Drtina spent 11 years in a communist prison because of its existence.

One of the most flagrant cases, which without exaggeration can be termed robbery-murder, involved General Staff Colonel Karel Lukas. He had been a member of the Czechoslovak Legions in Russia and France in WWI and in WWII was staff commander of the first Czechoslovak Independent Brigade in Great Britain, a participant in the battle for North Africa, a veteran of El Alamein, a participant in the Allied landing in Italy and later Czechoslovak military and aviation attaché to the USA and Canada. When Colonel Lukas returned to Czechoslovakia in 1947 after his diplomatic mission he had no idea the new Packard automobile he brought back from America would prove to be so fateful. But then February 1948 came. A week after communists seized power, Colonel Lukas, then serving as commander of the seventh Brigade in Nový Jičín, was removed from the post, suspended and subsequently drummed out of the army at the age of 51 for being "politically unreliable". The secret police arrested him at his Prague home on 29 March 1949. The very same day his car was taken away to an unknown location.

According to the testimony of neighbours in the building where Lukas lived in a rented flat and relatives who I have succeeded in tracking down, the systematic looting of his home began that day. I employ the word looting completely deliberately and with full awareness of what I speak. In no sense was what took place a search. Looting of the flat took place repeatedly, usually at night time and sometimes throughout the night. In most cases two to four persons took part, usually two men and two women. Karel Lukas lived in what was called a divided flat, separated only by a partition, and his neighbours could hear perfectly what was going on in the rooms next door. No inventory of contents and property was made. Colonel Lukas's flat represented tempting prey. He had brought many hard to find items from the United States, such as alcohol, cigarettes or even women's stockings (as gifts). Shouts were heard on the other side of the wall: *"There are more nylons here! If we find any more, I'll keep them for Bláža*." After every such night, empty whiskey bottles were found in the courtyard of Karel Lukas's building. However, not only small items disappeared: so did a large fridge-freezer which he had brought from America. The fate of Lukas's art collection, which included paintings by Kupecký and a large collection of Hollar's etchings (part of which are at present in a museum in Šumperk), is unclear. The reason all of this was able to take place so quietly was that Colonel Lukas was single; he had neither a wife nor children and lived alone. That probably proved lethal to him, as in that case he was the only person who could have testified that anything had gone missing from his flat. For that reason he could not be allowed to come home from custody.

Karel Lukas was arrested for allegedly using his car to help General Alois Liška, a former leader of Czechoslovak armoured brigades in the UK, to cross the border illegally. On the basis of this charge, from which it arose that the automobile been used in the commission of a crime, it was possible for it to be confiscated, or to disappear into the possession of an interested party (according to testimonies from Lukas's friends and family, the Packard was seen repeatedly around Prague after his death). At first, the questioning of Karel Lukas took place in a relatively proper manner. He was interrogated at police buildings on Bartolomějská St., from where he was returned to Pankrác prison. The turning point came on 4 May 1949, a month and a half after his arrest. On that day, an interrogation led by StB secret police sergeant Theodor Bělecký took place. According to the available information, the goal of that interrogation was to kill Colonel Lukas. Ever more brutal methods of torture were employed as it went on. After initially beating on the head and body by batons and fists, Lukas was beaten in the stomach and head (including with sharp object) and so forth. Of course the standard StB interrogation method of the time was also used: this saw Colonel Lukas bound kneeling to a chair while the bones in his feet were broken and all of his toenails pulled out.

Though I have no written proof of this, I assume that this interrogation was carried out on the orders of whoever had robbed Lukas's flat and did not want him to return home (maybe they even took part). This hypothesis is borne out by the fact that after he was transported back to his cell at Pankrác prison Lukas received no proper medical examination. Everything points to his jailers and tormentors expecting that he would die in prison in a short period, after one or two days. "Unfortunately" for them, Karel Lukas was in such perfect physical condition that he did not die until the fourteenth day. At the same time, it was clear from day one that his medical condition was critical – he was urinating blood and had traces of blood in his stool. Despite this, he did not receive appropriate medication and was not examined by a physician. Guards even moved him from cell to cell as "camouflage", so new fellow prisoners would have the impression that he had just been brought from interrogation and that it was not a situation that had been going on for days. Karel Lukas died as a result of his torture on 19 May 1949.

Further evidence that Colonel Lukas was not arrested for illegal activities but because of his property is found in the fact that, unlike the furniture, personal items and art works stolen from his flat, most of which disappeared into thin air, the StB officers threw all documents of a military character that they found in his flat into the building's courtyard. These included various studies of military questions, written reports on stints with British and American units, various correspondence (in many cases with suspect individuals from the communists' point of view), photographs, personal diaries, and so forth. These items would naturally have been of key importance in an investigation of Lukas's alleged anti-state activities. (After his death, Lukas's flat

was taken over by a female warden from Pankrác, without the building's owner being contacted – one day the new tenant just appeared).

While in many other cases we do not have concrete proof that this kind of thing occurred, in the case of Karel Lukas a key document that indirectly confirms that it really was a case of robbery-murder has been preserved. When at the beginning of the 1950s an investigation was held into the illegal methods of Reicin's fifth Department (military intelligence), a secretary, Dagmar Marešová, was questioned. In her testimony one thing she said was: "*The next day Slavík* [Lieutenant Stanislav Slavík – StB liason officer with the OBZ military intelligence] *came with a report that Bělecký, code name Dorek, had killed Colonel Karel Lukas during an interrogation. Turek* [OBZ investigator Major Ludvík Turek] *asked if it would lead to any unpleasantness, but Slavík replied that Dorek was sitting at his post and that he'd do it somehow, and that the biggest job would be finding a doctor to write that it was because he had a weak heart.*" She also said: "*I remember that present at the interview was Souček* [Major Ludvík Souček – fifth Department investigator] *who asked why they hadn't given him to the fifth Department, when he was a soldier? Slavík said that he was retired, but Souček again said that didn't matter, that the OBZ looked after such things. To this Slavík explained that the real crux of the matter was that Colonel Lukas had a flat full of cigarettes, liquor, beautiful furniture and that he was alone, so it didn't occur to the StB to hand over such a person to soldiers.*"

There is nothing to add to this. Perhaps only that the StB did indeed manage to find a doctor who ascribed a weak heart as the cause of Lukas's death. He was then head of the Institute of Court Medicine in Prague, Professor František Hájek, a man who incidentally in 1943 had carried out an inspection on the order of the Nazis of the remains of Polish officers murdered by the NKVD at Katyn. After 1945, and especially after February 1948, he was therefore easily blackmailed (by the way, in March 1948 we find his name on the autopsy report of Jan Masaryk). The fact that Karel Lukas did not die a natural death is supported by the testimony of his brother Dr. Otto Lukas. As a doctor he knew the medical environment well and he succeeded in getting to see his brother's corpse. He was able, therefore, to describe in detail the wounds, bruises and welts that he found on him.

A question arises in connection with the three cases outlined as to whether there was any way to protect oneself from possible arrest. There was a way, at least in the case of a car: sell it as quickly as possible. Proof that that is how it worked is offered by the case of Capital Josef Hajšman. He too had bought an automobile while a diplomat in the United States, not a Packard but a Studebaker. When he learned of the fate of Colonel Lukas (who he knew very well having served as his assistant in the US) he immediately sold the vehicle at a discount. In so doing, he probably saved his life. Soon afterwards an StB arrest squad came to his flat, demanding his car keys when they had hardly crossed the threshold. When he told them that he had sold it, they left and never came back…

Many other cases, however, played out in a similar manner. One was investigated in its day by the Office for the Documentation and Investigation of the Crimes of Communism of the Czech Police. It involved the arrest of Infantry Colonel Bohumil Borecký who was sent to the Soviet Union in 1949 (he died at the Taishet camp on 14 October 1954). The reason for his arrest was alleged anti-Soviet activity, which he was meant to have carried out as a member of the Czechoslovak Legions in Russia in 1919, specifically the execution a Bolshevik commissar. According to what we know today and the testimonies of several people it is probable, however, that behind that arrest was somebody who Borecký could have given evidence against for collaboration during the occupation in the Hradec Králové area. The informer, who remains unknown, used this non-traditional method to get rid of an inconvenient witness.

In this group also belongs the case of Theodor Goller, a lieutenant colonel in the engineer corps and a member of the overseas Czechoslovak army in the West. He was not the owner of an automobile, but as a divorced young man displayed an interest in the secretary of General Josef Hanuš. Comrade General, who also had designs on the secretary, had little sympathy for his enthusiasm. With the help of friends, he had Lieutenant Colonel Goller arrested and sent to Mírov forced labour camp.

One interesting aspect of the case was that though Hanuš succeeded in having Theodor Goller sent to Mírov he did not look after the paperwork properly. Lieutenant Colonel Goller was therefore imprisoned in Mírov for two years without a forced labour order, the only one of the 500 officers there in that position. Goller later met a tragic end. He survived imprisonment in Mírov and went through a number of low grade jobs where he had absolutely no chance of making use of his talents. He later latched on with great hope to the developments that unfolded in Czechoslovakia in the spring of 1968. However, he was unable to bear the subsequent occupation that August and soon afterwards committed suicide.

My aim with this short article has been to draw attention to at least a few of the many cases of lawlessness and murder which occurred in Czechoslovakia at the turn of the 1940s and 1950s. The mere fact that I have concentrated solely on the army means that I obviously make no claim to completeness. However, I am no under illusion that the situation was any different on Civvy St. We are living in the Czech Republic after all.

Session VI.
Sentencing of communist criminals – country studies

Christoph Schäfgen, Germany
Witold Kulesza, Poland
Jernej Letnar Černič, Slovenia
Raluca Grosescu, Romania

Host: Göran Lindblad, President, Political affairs committee, and Vice-president, Parliamentary assembly of the Council of Europe, Sweden

CHRISTOPH SCHÄFGEN ▸ former prosecutor-general, Berlin

Christoph Schäfgen studied law and public administration in Bonn. In 1964, he moved to Berlin where he occupied various positions between 1967 and 1990, becoming deputy prosecutor general at the Superior Court of Justice. Between 1990 and 1994, he headed a working group dealing with the prosecution of so-called government criminality in the GDR. Starting in 1994, he became prosecutor-general of the Department of Public Prosecution II at the Berlin Regional Court which was newly founded in order to prosecute criminal acts of the regime of the GDR. In 1999, he was appointed head of the Berlin Central Office for the support of coming to terms with the injustice of the GDR, a position he held until his retirement in 2000.

WITOLD KULESZA ▸ Professor of criminal law, University of Łódz

Witold Kulesza studied law and co-organized the Solidarity trade union at the University of Łódz (1980). During martial law in Poland (1981), he defended people persecuted for political reasons. Since 1992, he has been head of the material criminal law section at the Department of Criminal Law at Łódz University. In 1998, he was installed as Director of the Main Commission for the Investigation of Crimes against the Polish Nation. He co-authored the law on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. In 2000–2006, he was director of the Main Commission and deputy prosecutor-general of Poland. Professor Kulesza has published and lectured extensively at home and abroad and is a recipient of both domestic and foreign awards and distinctions.

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Raluca Grosescu is a Ph.D. candidate in political science at the Paris X Nanterre University. She has conducted various research projects concerning the conversion of the Romanian communist elites after 1989 and the transitional justice that followed the demise of the communist regime. Raluca Grosescu is a co-author of the book *Justiția Penală de Tranziție, de la Nurneberg la postcomunismul românesc* (Transitional Criminal Justice: From Nurnberg to the Post-communist Romania).

CHRISTOPH SCHÄFGEN ▸ former prosecutor-general, Berlin

The prosecution of communist crimes in Germany

Criminal processing of the injustices committed by the state in the former GDR under the government of the Socialist Unity Party (SED) commenced during the final phase of the GDR era, in the autumn of 1989. Following the reunification of Germany, it continued systematically and without interruption until coming to an end with the last court case in 2005. A timely start and rigorous criminal prosecution was possible because the political will for such an approach was in place and because after reunification Germany had a sufficient number of legal personnel who had not been tainted by the past. Those who called for an amnesty went unheeded. On the contrary, the German parliament passed several bills which pushed the start of a statute of limitations as far back as was legally possible. Staff levels at local state attorney's offices and courts were beefed up. When deciding about criminal prosecution, the Federal Republic drew on its own experiences of insufficient initial punishment of the crimes of National Socialism, a fact which contributed to social unrest at the end of the 1960s.

Germany understood that it was not possible to limit coming to terms with the Communist past to criminal prosecution alone. It was clear to all who bore political responsibility that the various needs of the victims of the Communist regime could not be fully satisfied by the means afforded them by criminal law, which had to adhere strictly to rules when asserting individual guilt and establishing commensurate punishment. Therefore measures were approved leading to legal and professional rehabilitation; among other things, they set the levels of compensation for those imprisoned by the regime and individuals who had been professionally disadvantaged. At the same time, a great emphasis was placed on historical and political elaboration of the issue. Thanks to legislation and the establishment of a very effective agency, legal and organisational fundamentals were created that made the documents of the GDR's secret services available to those against whom they had committed wrongs, and also for the needs of research and the media. On top of this, a committee of the German Federal Parliament focused, in open session and over the period of two electoral periods, on the history of the SED's dictatorship and facing up to its results.

In short, a systematic process of coming to terms with the Communist past can be said to have taken place in Germany which, while not lacking a criminal law element, did not place that above all else.

The systematic, multifarious and numerous forms of intervention of state bodies in the GDR into human rights – the right to life, physical inviolability, and freedom – were the focus of criminal investigations. Such agencies held a monopoly on power. They

included the police, the above-mentioned secret services, the judicial system, and an army deployed to protect the state borders.

Events on the Inner German border linked to escape attempts were the main area of adjudication. The border had been guarded by soldiers with automatic weapons. From 1962 to 1985, lethal landmines were also used to secure the border. Both the law and military command ordered that border guards had to use armed weapons against escapees and that escapees had to be shot dead if there was no other way of preventing an escape. Guards were never punished for this; on the contrary, they received honours. The political leadership of the GDR took a number of steps to ensure practices used on its border were kept under wraps. Even when an escapee had been seriously injured by border guards, keeping the latter's actions secret took precedence over saving human lives. For this reason, medical assistance for injured escapees often did not arrive until it was too late. At least 265 people were killed by shooting or mines on state borders between 1949 and 1989, while several hundred were injured. Among those responsible for these actions were members of the Politburo, which took the decisions, members of the GDR's National Defence Council, as well as others in leading positions in the border army, all the way down to concrete shooters. Over 3,000 cases were taken against these persons.

In court, perpetrators offered as a defence that it had not been a crime in the country in which they had at that time lived and acted; rather, it was in line with the law and state practice. Therefore for the second time since 1945 the German judicial system was forced to ask the following question? Can something that was lawful then be considered unlawful now? In other words: Does written and practiced law have to be respected even if it contravenes justice? After the Allies had condemned Nazi crimes, the Charter of the International Military Tribunal in Nuremberg of 8 August 1945 established according to international law direct criminal responsibility for certain crimes, such as crimes against humanity. It was criminal responsibility regardless of the fact that the actions were or were not in line with the legal norms of the given country in which they had been committed. The Nuremberg Principles were subsequently confirmed a number of times, most recently by the Rome Statute of the International Criminal Court of 1 July 2002. Following the approval of that statute, relevant national criminal law also constitutes the actus preus of a crime against humanity. Prior to that date, international criminal law could only be asserted on the basis of a legal norm, which for constitutional law reasons it was not possible to employ during the punishment of crimes in Germany. For that reason, the German judiciary did not examine the question of whether violence committed on the Inner German border fulfilled the actus preus of a crime against humanity.

It had therefore to address the question of whether East German law allowed for the killing of escapees, as claimed by the perpetrators. The conclusions reached had

two mutually reinforcing justifications as to why those responsible for murder had committed a crime, despite the fact that their actions were justifiable from the point of view of the GDR. First: the GDR outwardly respected human rights and was committed to their protection. The GDR's constitution included the provision of protection of human life and recognised the principle of adequacy. It was through this prism that – from the point of view of the German Supreme Court – the law on borders could and had to be interpreted. If we consider the interpretation put forward, it follows that it was not permitted to shoot at or kill an unarmed escapee. If East German law had been correctly understood and applied, killing would have become an illegal and criminal action at the moment it was carried out. Therefore no contradiction arose between the law then and the law now.

The issue of killings at the border also led the Supreme Court to examine the question of where the point where the state's right to interfere in human rights ended. From this it arose that the law must not enforce its legitimacy if it offends against basic ideas of justice and humanity and contravenes international legal convictions regarding human values and dignity. At the same time, it pointed to the fact that the right to life according to common interpretation, as enshrined in the UN's Universal Declaration of Human Rights and international treaties, supersedes all other values. This right cannot be wilfully breached, except in exceptional circumstances (which was not the case here). Killing escapees at the border was intended to prevent the citizens of the GDR from leaving the country, which was in contravention of another internationally recognised human right: the right to leave one's country. State sanctioned killing, which in itself prevented the assertion of human rights, cannot be justified and is therefore regarded as arbitrary. In the view of the German Constitutional Court, such an application of the law is in accordance with the ban on retroactive effect.

If those responsible for carrying out killings in contravention of human rights had been able to prove retroactive effect, the protective function of that legal institution would have been reversed. This is because the ban on retroactive effect serves in a legal state to protect the citizen from violence. It does not serve as a shield against future punishment for breaching human rights for the leaders of dictatorial regimes and their henchmen.

This judicial power has on one hand allowed for the punishment of serious human rights breaches: not only killing by shooting and mines at the border, but for judicial imposition of the death penalty and imprisonment, or secret police operations which do not respect the life, health and freedom of the citizen. On the other hand, however, judicial power has limited criminal prosecution to just that.

Several of those convicted appealed to the European Court of Human Rights (ECHR), claiming that the German courts had ignored the ban on retroactive effect. However, the court unanimously rejected these complaints on 22 March 2001. In view

of the aims of this conference, I feel that it is important to mention that this court accepts the right of all democratic states to begin interpreting inherited laws in the legal sense and that culpability for killing was also found in East German law, and that those who breach their international legal obligations or basic human rights are legally responsible for doing so.

Unfortunately, the ECHR did not concern itself with the issue of whether killing at the border can be classified as a crime against humanity. If it had debated the actus preus, punishment would have been compatible with the ban on retroactive effect, for the reason that in the case of international crimes the perpetrators are banned from appealing on the basis of internal state norms. The international actus preus of a crime against humanity, which was codified in article seven, chapter one of the Statute of the International Criminal Court in 2001, is acknowledged as a legal norm; it requires that individual crimes, such as killing or torture, have been committed "as part of widespread or systematic attack directed against any civilian population, with knowledge of the attack. Typically such attacks are committed on the orders of or with the support of politicians of one state." As to the question of whether the exit policy of the GDR, directed against a great if undetermined number of people, fulfils this actus preus in connection with the measures implemented to guard the border, we cannot here give an unequivocal answer. In Germany the question is hotly debated among experts on international law. But here we have neither the time nor space to explain further or comment on this debate, which takes place solely on the basis of legal arguments. However, I will say this much: There are good arguments for classifying it as a crime against humanity, and it is therefore realistic. Two ECHR judges have also employed this actus preus in special rulings on culpability for border killings. The seriousness of the discussion and argumentation shows that these actions stand, to say the least, on the boundary of where they could be judged as international crimes – and other Communist crimes could also fulfil that actus preus. Such considerations ought to continue.

But regardless of whether or not state-ordered shooting of unarmed escapees can be considered crimes against humanity, both the German judiciary and the ECHR declare that arbitrary killing on the orders of the state is a crime, because internal state law does not have that much exculpatory power. In that respect, this actus preus is instructive for other states which have not yet come to terms with the crimes of Communism. The message is clear: Nobody can now plead that in lawful states there are legal barriers which prevent the prosecution of serious breaches of human rights on the part of former Communist leaders.

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The Trial of General Jaruzelski
Justice of the Victors, or the Victory of Justice?

The trial is taking place at a district court in Warsaw of General Wojciech Jaruzelski (87) and the other members of a group named the Military Council of National Salvation, which on 13 December 1981 announced martial law in Poland, took power, and during the 15 months of its operation banned the Solidarity opposition movement. It was the final attempt to conserve communism in the so-called real Socialism phase, which lasted for another nine years. Before I present the case presented in the arraignment against General Jaruzelski and his colleagues, I must first describe those events and the backdrop against which the crimes which are today attributed to him were committed.

Poles regard the beginning of the collapse of communism as the foundation of the independent trade union organisation Solidarity in the shipyards of Gdansk in August 1980. Soon afterwards almost 10 million people had joined up, both workers and members of the intelligentsia. Many members of Solidarity had previously been members of the Communist Party which the then constitution guaranteed the sole right to run the state. The activities of Solidarity consisted of supporting civil society, publishing a free press and previously banned books, and above all helping to overcome fear of absolute state power.

Many Poles remembered how that state power, employing the militia and the army, had suppressed mass protests in 1956, 1968, 1970, and 1976. For that reason the activities of Solidarity had the character of a self-limiting revolution. The aim was not to provoke communist power, which under the pretext of protecting a constitution founded on the power monopoly of the Communist Party, was inclined to violence. The limitations accepted as part of the movement's activities arose from Poland's geopolitical situation: it was inconceivable that Poland could leave the Warsaw Pact bloc of states. The view prevailed that sustaining communist power was a necessary condition to precluding a military intervention in Poland on the part of the Soviet Union. That opinion was based on arguments that Moscow would tolerate political and economic changes that could lead to "socialism with a human face" in Poland – on the condition that the communist monopoly on power was not threatened. Nevertheless, the ever-worsening financial situation in the country, a critical lack of essential goods, including basic foodstuffs, and growing inflation led to strikes at companies and factories. Solidarity wished to keep such strikes in check.

It had gradually become apparent that a centrally directed economy, based on state ownership of the means of production, was completely unproductive; its apparent initial development, made possible by Western loans, could not be sustained because the state

was unable to repay its debts. It later emerged that the shortage of essential goods had been caused to a certain extent by the state itself, which had stored items away for the first days of martial law. The idea was to persuade society of the benefits of martial law. However, the period of apparent economic improvement proved very short-lived.

Today we know that the communist authorities began preparing to introduce martial law in Poland soon after the foundation of Solidarity, and that they succeeded in keeping such plans secret. They included the creation of a list of those regarded as political opponents by the regime. These people were interned in the first hours after martial law was declared, on the night of 12–13 December 1981. The decree declaring martial law made it a criminal offence to continue activities within the Solidarity organisation. This included all forms of social protest, such as demonstrations, strikes, the printing of flyers, or statements of disagreement with the imposition of martial law.

Around 10,000 people were interned during martial law. They were either held on remand or handed prison terms. Many were fired from their jobs for political reasons, while journalists lost the right to practise their profession. The state also resorted to political murder, with the best known example probably the killing of the priest Jerzy Popiełuszko in October 1984. To this day, the killings of 107 members of the opposition remain unsolved. In many respects, the situation was reminiscent of the situation in Poland in the Stalinist era before 1956, particularly with regard to the activities of the security services, censorship and the persecution of individuals regarded as enemies of the regime.

The prosecution of the perpetrators of the crimes of the Stalinist era in Poland began in 1991. Hundreds of preparatory proceedings took place and arraignments were prepared for state security functionaries who in the years 1945–1956 arrested real and perceived opponents of communist power and in several cases tortured them to death. The systematic prosecution of communist crimes committed throughout the communist period (i.e. up to 1990), therefore including martial law, got underway in Poland in the year 2000 and continues to this day. To date, over 100 communist functionaries have been convicted for communist crimes consisting of repression and the contravention of human rights.

So far the dispensers of state injustice have been convicted of communist crimes. This concerns persons who harassed political opponents mentally and physically in a broad variety of ways. Those found guilty arrested their political enemies on the basis of the laws of the day and, with the blessing of their superiors, also committed torture. The trial of General Jaruzelski is the first in Poland in which a functionary from the highest level of the communist state has been indicted. These people did not commit crimes against the lives or the health of citizens, who from their position were their

subordinates, by their own hand. Therefore it is necessary to explain in detail what they are accused of today. It must be emphasised that the charges against them can only be based on the criminal law which was in effect when they were in power. A legal state has after all to respect the principle that the law does not apply retrospectively – lex retro non agit.

This principle is enshrined in the Polish constitution. As a result, in defining communist crimes there is an emphasis on the fact that functionaries of a communist state bear criminal responsibility only for such actions that resulted in the contravention of human rights and which were considered a crime under the criminal law in place at the time the act was committed. Whether by imposing martial law General Jaruzelski committed a crime, and if so what crime, is not clear-cut, and there has been a heated debate in the press in connection with the case. If we are to elaborate on how the arraignment against the members of the Military Council of National Salvation (Wojskowa Rada Ocalenia Narodowego, WRON) is framed, we should begin by making the obvious point that in Polish criminal law the crime which Jaruzelski committed, and by which from his position of power he denied Poland the hope of life in a democracy, has never been and is not today defined. In preparing the arraignment, the state attorney's office had to describe the activities of the council while at the same time working with the 1969 Criminal Code which was in force when martial law was imposed. The arraignment contains the assertion that neither the origin nor the activities of the council had legal bases, and that the council relied on the de facto power possessed by members of the army, the militia, the security services, the state attorney's office, the courts and the entire state administration. The Military Council decided to use all the means at its disposal to defeat a society demanding civic freedom. The establishment of that body had been unlawful and it originated with the purpose of unlawful activity. The state attorney said that the fact that this "association" counted on the support of the army and armed police was decisive in the criminal qualification of the group as an association of armed character.

The central figure in the group was its chairman, General Jaruzelski, who when martial law was declared held both the posts of first secretary of the Communist Party and prime minister. Taking power in the state by means of the Military Council of National Salvation, which he himself had founded, amounted to a coup d'etat, because it had been committed by an "insider" possessing the greatest power in the state.

The unlawfulness of the declaration of martial law lay in the fact that five members of the Council of State had been impelled to sign it. The Council of State had no right to issue decrees because at that time a session of the Sejm was taking place. If the takeover of power happened according to a plan that had been in place for several months and the issuing of the decree declaring martial law contravened laws in force at that time, then the Military Council can be classified as an association whose aims were unlawful.

That the Military Council was armed in character was borne out by the fact that armed militia and the army would be deployed to suppress the protests of citizens against the imposition of martial law. Three days after the declaration of martial law, special militia units (ZOMO) shot dead nine miners from the Wujek mine who were taking part in a strike of occupation.

It needs to be emphasised that the arraignment against General Jaruzelski does not include a crime against the life and freedom of the citizen, because the state attorney decided that he was unable to ascribe to him crimes against individual citizens committed as a result of the imposition of martial law. Therefore it was not possible to charge Jaruzelski with partial responsibility for the killing of the miners from Wujek, or with depriving concrete interned citizens of their freedom.

However, charges of directly endangering human lives were filed against another member of the Military Council of National Salvation, General Kiszczak, who employed his powers to decide on the use of arms "downward" in the organisational structure of the militia, to what were known as the lowest commanders. The initiator of the attack on the Wujek mine made use of his powers and gave the order to shoot at the miners. The separate trial of General Kiszczak, who claims innocence, has been dragging on for 16 years. In the first verdict handed down he was acquitted; in the second he was convicted to two years in jail; in the third the statute of limitations was adjudged to apply; the fourth verdict should be delivered soon and is expected to answer the question as to whether Kiszczak deliberately committed a crime. After several conflicting court rulings, a trial against the commanders and members of ZOMO units who shot at miners ended in conviction last year.

From the preparatory proceedings onwards, General Jaruzelski has refused to give evidence and has denied that he founded and led the armed association the Military Council of National Salvation, which the state attorney says had criminal intentions. After the handing over of the arraignment to the court, defence lawyers for the general and the co-accused members of the Military Council demanded that it be returned to the state attorney's office, and called on the state attorney's office to call witnesses including Mikhail Gorbachev and Margaret Thatcher. However, the court decided to accept the arraignment and a trial which should prove pivotal for contemporary Polish legal culture was able to get underway.

The essential question is whether the court accepts the legitimacy of the legal qualification of the actions of General Jaruzelski, i.e. the establishing and leading of an armed organisation. Reports in the press often criticise this point in the arraignment of this armed group which imposed and ran martial law. The opinion is often expressed that expressions like "criminal conspiracy" and "organised criminal group" refer to organised crime, i.e. to criminals organised for the purposes of committing crimes

such as armed robbery, kidnap, car theft, and such like. From that perspective, it is not possible to regard a group of senior officers who declared a state of emergency as a criminal group, because it was made up of state representatives occupying the highest position in the power structure.

Media opinions in support of General Jaruzelski and the members of the group he led make the claim that martial law was declared in Poland during a state of emergency. If the court were to confirm that assertion, the unlawfulness of all the acts with which the initiators of martial law are charged in the arraignment would be precluded. State of emergency can be understood to mean that the obstruction of legal interest is not unlawful if it represents the only way to protect another, higher legal interest. According to the supporters of the accused, the imposition of martial law was intended to protect such a legal interest, namely the living conditions of citizens in December 1981. There were two causes of this threat.

The first cause, which is often used to justify the imposition of martial law, was the general strike called by Solidarity, which could have completely paralysed both the production of crucial goods and mining. Solidarity, which then had 10 million members, threatened danger when its head Lech Wałęsa and the leadership of the organisation, which then numbered 10 million, planned a general strike which would have threatened the lives and health of its members. This means that their actions could have led to the break-up of the movement they led.

A threat to the political situation in Poland was also felt by the dispensers of power: functionaries of the state and the Communist Party, employees of the so-called ideological front who shaped the party press, some administrative officials, the directors of state companies, representatives of the security services, and political officers in the army. This civic platform, which identified its status and interests with the functioning of communist power in an unaltered form, numbered between 120,000 and 200,000 people. The introduction of martial law freed this section of the population from a feeling of menace, and therefore they supported it.

The second threat to the country and its citizens was represented by the possibility of a military intervention on the part of the Soviet Union, which martial law was intended to prevent, even though at the same time it would have led to the abolition of Solidarity. From the perspective of criminal law, the question of whether armed Soviet forces could have entered the country in December 1981 (Red Army units had been based on Polish territory since 1944) is very important, as this would have disturbed the very foundations of the Polish state.

It is necessary to note that a state of emergency can only be appealed to by whoever has removed the direct threat which has endangered his legal interest. Therefore the question arises as to whether the defence during the trial will be able to prove that

General Jaruzelski and the other initiators of martial law being tried with him did save the country from the direct danger of military intervention by the Soviet Union. Historians who claim that no such danger was threatened offer as evidence a protocol from a meeting of the Soviet Politburo on 10 December 1981. The protocol, which Boris Yeltsin presented to Lech Wałęsa, writes that General Jaruzelski asked the Soviet side for a declaration promising military support if the imposition of martial law were to meet with such extensive opposition from Polish society that it would have no longer been possible to manage things using Polish forces. However, the Moscow authorities have not made clear whether they were ready to send military forces to Poland. In numerous press interviews, General Jaruzelski has denied ever asking the Soviet side for military support, and cast doubt over the trustworthiness of the Russian documents.

The general's behaviour is rational from the strategic point of view. If he had not questioned the veracity of sources claiming that he asked Moscow for military support, he could not keep appealing to the state of emergency which he used to justify imposing martial law. Whoever by his own actions causes danger cannot in a state of emergency effectively appeal to the removal of danger. In other words, the argument that the declaration of martial law arose from circumstances precluding the unlawfulness of that act would not be possible if the Soviet documents were true.

At the same time, it is must be pointed out that Moscow demonstrated its readiness to mount a military intervention by holding military training along its western border in order to put pressure on the relevant Polish authorities. This move was intended to pressure the Polish leadership, not to mention the "Polish comrades", into concrete actions, including the abolition of Solidarity, on their own steam. Historians believe that the threat of a Soviet intervention was real in the spring of 1981. However, the party first secretary at the time, Stanisław Kania, Jaruzelski's predecessor, did not wish to co-operate with Moscow and therefore Warsaw Pact soldiers taking part in exercises did not enter Poland. Soon afterwards Jaruzelski entered the position of party first secretary and started to thoroughly carry out a plan that both fulfilled Soviet demands for a resolution of the "Solidarity problem" and the expectations of those who identified their interests with the continuing of the communist system in an unchanged form.

We should emphasise that even if there was not a direct threat of military intervention at that time (i.e. in December 1981), Poles were convinced that the Soviet Union was prepared for such an eventuality. This belief led Polish society to regard General Jaruzelski's declaration of martial law as a preventative measure against unlikely though still possible Soviet military manoeuvres on Polish territory. In other words, the possibility that Soviet forces would enter Poland could not be completely ruled out.

The tragic events of 1956 in Budapest and the invasion of Czechoslovakia in 1968 (which General Jaruzelski supported as defence minister) have not been forgotten and remain matters of discussion. This could explain why today half of Poles understand

the decision to introduce martial law at the end of 1981, even if otherwise they did not sympathise with the communist government. For them General Jaruselski is somebody who knew what could be expected from the Soviet side and opted for martial law for that reason.

The comments above make it possible to formulate hypotheses relating to the intellectual approach of the court which in its ruling will answer the question as to whether General Jaruzelski as the initiator of martial law on the Military Council of National Salvation committed the crime outlined in his arraignment. It appears that it is not possible to prove that the accused acted in a state of emergency. Because of this we must accept that participation in the organised group was unlawful.

The defence's argumentation can be imagined: despite the lack of a decision on the part of the Soviet authorities in December 1981, General Jaruzelski acted on the conviction that the country was under direct threat from the USSR This argument is of fundamental significance as regards the criminal accountability of the accused, because it points to his belief that he was acting in a state of emergency. Under criminal law this conviction, even if mistaken, could mean the accused is not guilty of a criminal act. Guilt is precluded if the perpetrator's offence is justified in view of the threat of danger. In other words: it is possible to demand that a person who was possibly wrongly but still justifiably of the belief that he must prevent danger should act in accordance with the law. Such a situation, which precludes guilt, is defined in article 29 of the Polish Criminal Code. It is possible to acknowledge that this regulation influenced the accused in the trial of the architects of martial law and confirmed their claim that they acted on the basis of the mistaken but justified belief that it was necessary to protect the Polish state from Soviet military intervention.

If we accept the opinion that this conviction was justified, the defence could point to the fact that the Soviet Union reacted with armed intervention every time suppressed peoples demanded their rights, for instance in Berlin in 1953, in Budapest in 1956, and in Prague in 1968. However, the communist power felt threatened every time a neighbouring country began moving towards democratic changes.

If the court accepts this argumentation it is expected to lead to a ruling that although the actions of the accused were unlawful they are still not guilty, because of the justified, if possibly mistaken, conviction that they found themselves in a situation which offered only one way out – the introduction of martial law.

Many of the public statements defending General Jaruzelski refer to the argument that after round table negotiations in 1989 he voluntarily gave up power. From the point of view of criminal law it must be established whether the general later expressed regret in some way. We can speak about effective regret only in the case of a voluntary action

which compensates for the results of the injustice caused. If it was the changes in the Soviet Union in the Gorbachev era or the disastrous state of the Polish economy that led him to give up power, we must introduce one more aspect.

The criminal law under which Solidarity was attacked did not work in practice and continued repression would not have brought the authorities the desired results. This is clearly attested to by a security services report written in 1986, over four years after the imposition of martial law. It said that there were 24,000 underground activists in Poland publishing a total of 4,000 magazines and books of varying sizes. In this context it is possible to understand Jaruzelski's handover of power as the result of a loss of faith in the efficacy of repression, not as the result of democratic sentiment and good will.

The trial of General Jaruzelski is not the revenge of the victors who in consequence have charged him with contravening laws that were in place when he committed the act outlined in the arraignment. However, what is striking is his disdain for basic legal principles when he imposed martial law in Poland, which speaks of a deep conviction on the part of the perpetrators that they would never face accountability for injustices committed at that time. The current legal state is dealing with injustices committed in the past because the statute of limitations does not apply to injustices. The arraignment against the architects of marital law did not arise as an act of revenge, but because the relevant law demands it. We will be able to say whether the trial of General Jaruzelski has been an act of justice after the verdict has been delivered.

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Responding to crimes against humanity committed in Slovenia after the Second World War

Introduction

As many as 130,000 people are estimated to have been summarily executed in Slovenia in the months following the end of the Second World War on 8 May 1945.[1] It is further estimated that around 15,000 of those executed were of Slovenian nationality, whereas others included Croats, Serbs, and Germans. They were mostly civilians but also included members of the Slovenian Home Guard and other political opponents of the resistance movement led by the Slovenian Communist Party. These crimes – carried out by members of the Slovenian section of the Yugoslav Secret Police – were committed mostly in the form of systematic summary executions at hidden locations across Slovenia, predominantly in unpopulated rural areas and in forests[2] They were part of a systematic plan of the Slovenian Communist Party to eliminate their political opponents and their families, civilian or otherwise. It is still unclear whether the order for the liquidation of alleged political opponents and civilian population originated from the head of the former Yugoslav Security Police in Belgrade or the Slovenian branch in Ljubljana.

The Commission for the Settlement of Hidden Mass Gravesites of the Government of the Republic of Slovenia has indicated that almost 600 hidden mass graves have been

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1 See Pavel Jamnik, Post-World War Two Crimes on the Territory of Slovenia: Police Investigation and proof regarding criminal offences that do not fall under the statute of limitations in, Peter Jambrek (ed.): CRIMES COMMITTED BY TOTALITARIAN REGIMES, SLOVENIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, BRUXELLES, Ljubljana, at p. 207. See also Jože Dežman, Communist Repression and Transitional Justice in Slovenia, in Peter Jambrek (ed.): CRIMES COMMITTED BY TOTALITARIAN REGIMES, SLOVENIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, BRUXELLES, Ljubljana, 2008, at p. 204; and Jerca Vodušek Starič, *Kako se čistila Jugoslavija?* Gordogan, 2004, pp. 36-50. Further, Ljubo Sirc notes that the total number of victims is "estimated to be between 150,000 and 200,000".

2 Jože Pučnik, Mass Post-War Killings, in Drago Jančar (ed.), THE DARK SIDE OF THE MOON. A SHORT HISORY OF TOTALITARIANISM IN SLOVENIA 1945-1990, Ljubljana, 1998, pp. 39-52.

found in Slovenia thus far.[3] The Commission has as its long-term goal the exhumation and re-burial of all Slovenian victims killed on Slovenian territory.

This article explores judicial responses to crimes against humanity committed in Slovenian territory in the months following the end of the Second World War. It also examines the recent decisions by Slovenian courts in *Prosecutor v. Mitja Ribičič*,[4] a case specifically concerned with crimes during peacetime. Mitja Ribičič was a former official of the Slovenian Communist Party and former deputy head of the Slovenian section of the Yugoslav Security Police, or the Department for Protection of the People (OZNA) as was it was then known. This was the body that allegedly orchestrated the killings on Slovenian territory. In early 2006, the prosecutor brought a case before the District Court in Ljubljana requesting an investigation against Ribičič, alleging that he facilitated crimes against humanity on Slovenian territory. This case was the first brought against any of the officials of the Communist P"arty in Slovenia since it had hitherto been thought that the dearth in substantive evidence would make prosecution very difficult.

Section I of the present work briefly outlines the factual background of the crimes committed in Slovenian territory after Second World War. This is followed by a discussion of the decisions of the Slovenian District and High Courts in the case of Prosecutor v. Mitja Ribičič in Section II. Section III offers an analysis of the decisions from the perspective of international criminal law and transitional justice, trying to draw out lessons concerning the understanding of current ideological and political divisions in Slovenian public space. Section II and III lay the basis for the argument that there exists a strong legal and moral ground for prosecuting perpetrators of crimes against humanity. In this light, this paper also examines alternative responses to post-war crimes and the prospects for any future criminal cases against former high officials of the Slovenian Communist Party, or anyone else for that matter, who may have been involved in the killings.

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3 For a detailed historical account see Dr. Mitja Ferenc, Topografija evidentiranih grobišč, POROČILO KOMISIJE VLADE REPUBLIKE SLOVENIJE ZA REŠEVANJE VPRAŠANJ PRIKRITIH GROBIŠČ 2005-2008, Ljubljana 2008, Družina d.o.o, Tamara Griesser-Pečar,: Razdvojeni narod, Mladinska knjiga, Ljubljana 2004, Das Zerrissene Volk: Slowenien 1941-1945, Okkupation, Kollaboration, Bürgkrieg, Revolution, <http://www.ukom.gov.si/eng/slovenia/publications/slovenia-news/3646/3688/>,last visited 25 March 2009. *See* also Public Exhibition *Prikrito in očem zakrito*, Museum of Contemporary History, 2005 Ljubljana, Slovenia, last visited 25 March 2009. See also Lovro Šturm, Blaž Ivanc, Brez milosti: ranjeni, invalidni in bolni povojni ujetniki na Slovenskem, urednik in soavtor, 2000.

4 *Prosecutor of the Republic of Slovenia v. Mitja Ribičič*, Original case numbers: Ks 962/2002, Kpr 122/06.

1. Factual background

The Second World War came to Yugoslavia when the German Luftwaffe bombed Belgrade on 6 April 1941. Following an invasion by Axis forces, the Yugoslav monarchy surrendered on 17 April 1941.[5] It was in this light that the Slovenian Liberation Front, the leading group in the Slovenian resistance, was established in Ljubljana on 27 April 1941.[6] A Slovenian historian Božo Repe notes that "during the war, the Communist Party in Slovenia, which organised and operationally controlled the resistance against occupiers, began articulating revolutionary goals"[7] and in March 1943 "the Slovenian Communist Party persuaded a number of non-Communist groups in the Slovenian Liberation Front to unify under Communist leadership".[8] Parts of the population organised and formed the Village Guards and later, after Italian capitulation in September 1943, the Home Guard, which opposed the monopolisation of the resistance movement by the Communist Party.[9] This resulted in a civil war between the members of the Slovenian Liberation Front and members of the Village and Home Guards, particularly following the massacres of non-Communist members of Slovenian National Front in 1943.[10] The political opponents of the Slovenian Communist party were mostly Christian Democrats who had refused to join the National Liberation movement.[11]

The Slovenian Liberation Front won the armed conflict with against German and Italian forces and liberated Slovenia. The Slovenian Communist Party seized the opportunity to turn a national liberation movement against the Axis forces into a civil war, and prohibited those who did not accept the leadership of the Communist Party from fighting against the occupiers. In other words, the resistance was a partisan movement led by the Slovenian Communist Party who ultimately emerged as the victors at the end of the war.

At the end of the Second World War, in light of the partisan guerrilla advancement, and following an unsuccessful attempt to establish their own parliament and government

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5 Božo Repe, Slovenia During the Second World War, <http://www.theslovenian.com/articles/2008/repe1.pdf>. Last visited 10 November 2009. At page 1.

6 *Ibid. At 2.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 The Slovenian Communist Party monopolized during the Second World Waethe National Liberation movement against the occupying German, Italian and Hungarian forces. This therefore led to civil war between the Slovenian Communist Party and Christian Democrats.

in May 1945, the political opponents of the Communist Party (including the Slovenian national army) fled to the British Occupation Zone in Carinthia and were detained in a camp at Vetrinj.[12] At the end of May 1945, the British troops handed over 30,000 men to the partisan forces, which were controlled by the Slovenian section of the wider Yugoslav Communist Party led by Josip Broz Tito.[13] Most of them were then subsequently executed in forests and caves in destinations throughout Slovenia. Only after the fall of the Iron Curtain did the totalitarian regime's secret gravesites begin to be discovered. Dr Mitja Ferenc notes that "methodical record-keeping of secret mass graves only began in 2002, accompanied by a huge response in the media which was triggered by the discovery of 431 victims from two mineshafts in Zgornja Bistrica and in Štajerska".[14] The Ministry of Labour, Family and Social Affairs of the Republic of Slovenia has catalogued 3,986 wartime graves and mass graves in Slovenia from the Second World War.[15] This data does not include the number of secret mass graves in Slovenia. As noted above, the Commission for Settlement of Hidden Mass Gravesites of the Government of the Republic of Slovenia, in particular spearheaded by Dr Mitja Ferenc, has so far catalogued almost six hundred hidden mass gravesites in Slovenia. Ferenc divides the locations of posthumous remains into four groups: pits; mineshafts and shelters; anti-tank and previously excavated shafts; and "karst" abysses. Map 1 illustrates the identified secret mass graves that have so far been found on the territory of Slovenia.

Dr Mitja Ferenc notes that, for most of the victims, "it is not even known where they lie, and they never received a burial worthy of a human being" He continues that "crimes were exacerbated by forced silence and suppression of the right to a grave" and that "victims simply did not exist".[16] Similarly, Dr Jože Dežman has succinctly described the fundamental characteristics of the post-Second World War totalitarian crimes in the following way:

Killing civilians and prisoners of war after [the] Second World War is the greatest massacre of unarmed people of all [time] on Slovenian territory. Compared to Europe,

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12 *See* T. Giesser Pečar, at p. 529.

13 *Ibid.* At 457. See also Anthony Cogwill, Thomas Brimelow and Christopher, *The Repatriation from Austria in 1945. The Report of an Inquiry*, London 1990 (Cogwill Inquiry, Reparations); Cogwill Inquiry. The Documentary Evidence Reproduced in Full from British, American, German and Yugoslav Sources, London 1990; and Ian Mitchell, *The Cost of Reputation*, Glasgow 1997, Nigel Nicholson, Long Live, New York 1998. *See* also John Corsellus, Marcus Ferrar; Slovenia 1945: *Memories of Death and Survival After World War II*, I B. Tauris & Co Ltd, 2005.

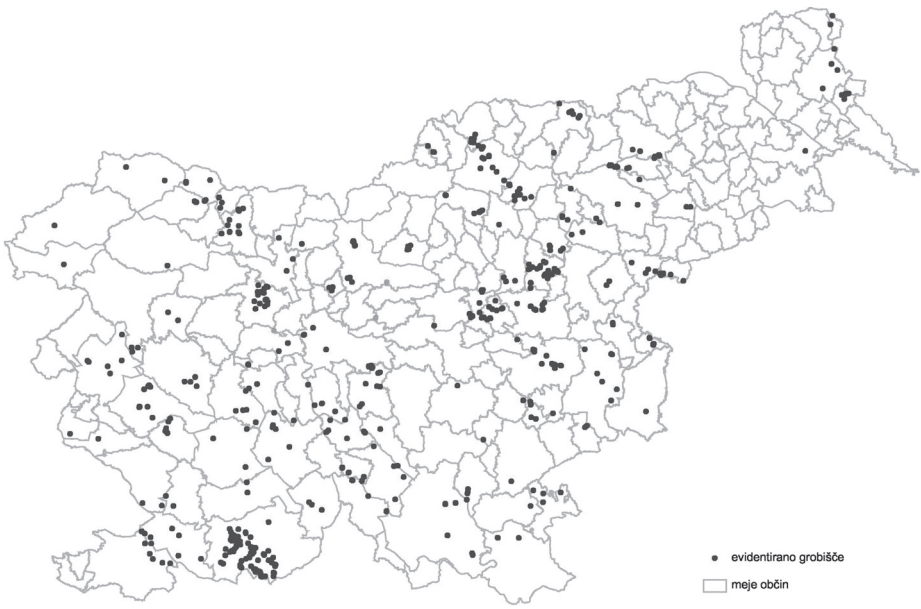
14 Mitja Ferenc, Secret World War Two Mass Graves in Slovenia, in Peter Jambrek (ed.): CRIMES COMMITTED BY TOTALITARIAN REGIMES, SLOVENIAN PRESIDENCY OF THE COUNCIL OF THE EUROPEAN UNION, BRUXELLES, Ljubljana, 2008. At p. 158.

15 *Ibid*. At p. 155.

16 Mitja Ferenc, 2008. At p. 157.

the Yugoslav communist massacres after the Second World War are probably right after the Stalinist purges and the Great Famine in the Ukraine. The number of those killed in Slovenia in [the] spring of 1945 can now be estimated at more than 100,000[.] Slovenia was the biggest post-War killing site in Europe. It was a mixture of events, when in Slovenia there are retreating German units, collaborator units, units of the Independent State of Croatia, Chetniks and Balkan civilians; more than 15,000 Slovenia inhabitants were murdered as well. Because of its brevity, number of casualties, way of execution and [massiveness in size], it is an event that can be compared to the greatest crimes of communism and National Socialism.[17]

Having briefly examined the factual background, the following section turns to the analysis of the decisions of Slovenian courts in *Prosecutor v. Ribičič*.



Identified secret mass graves on the territory of Slovenia

Source: Dr. Mitja Ferenc, Topografija evidentiranih grobišč, POROČILO KOMISIJE VLADE REPUBLIKE SLOVENIJE ZA REŠEVANJE VPRAŠANJ PRIKRITIH GROBIŠČ 2005-2008, Ljubljana 2008, Družina d.o.o., at page 25.

17 Jože Dežman, 2008. At p. 204.

2. Prosecutor v. Mitja Ribičič

2.1 Factual background of the Prosecutor v. Mitja Ribičič case

Mitja Ribičič was the first former official of the Slovenian Communist Party to be charged in Slovenia for crimes against humanity after the end of communist reign in 1990. Documents found in the Slovene National Archive reportedly show that in 1945 Mitja Ribičič helped to draft a list of 217 people for execution in his post as a deputy in the Slovenian branch of the Yugoslav secret police (OZNA). This organisation was under the leadership of Aleksandar Ranković, a close assoicate of the post-war Yugoslav communist leader Tito, and was responsible for eliminating political opponents of the communist regime. After being a deputy in this organisation Mitja Ribičič went on to work as a delegate in the Slovenian Socialist parliament, in the Yugoslav federal parliament, and was president of the Yugoslav Communist Party from 1969 to 1971.

The Slovenian Interior Ministry began investigating Mitja Ribičič's involvement in post-war killings in 1994. However, it was not until 2005 that they "chanced upon new documents in the state archives" that helped to make the case against the former security official".[18] Based on the evidence found in these documents, Slovenian authorities alleged that "Ribičič's 'armed group' not only targeted soldiers, but also murdered civilians viewed as collaborators and disposed of their bodies in mines and ditches".[19] While the direct orders for the killing of these civilians may have come from the heads of OZNA's provincial branches, they would have to have been approved by Ljubljana and possibly Belgrade as well. Consequently, this may mean not only that Ribičič, as a high former communist official, could have ultimately have a hand in all the killings, but that their origins may also lay beyond him higher up in the hierarchy.

On 13 May 2005, the Slovenian police filed a criminal charge of genocide against Mitja Ribičič for his alleged role in these crimes. This was the first genocide charge in relation to the Yugoslav communist regime's reprisal killings. In April 2006, the prosecution amended the qualification of the criminal act and requested a judicial investigation of acts of "crimes against [the] civilian population" pursuant to Article 374, Paragraph 1 of the Slovenian Criminal Code.[20]

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18 Reuters, 25 May 2005, quoted in Prevent Genocide International, <www.preventgenocide.org/news-monitor/2005may2.htm>, last visited 10 November 2008.

19 International Relations and Security Network, <www.isn.ethz.ch>, 27 May 2005, Prevent Genocide International, <www.preventgenocide.org/news-monitor/2005may2.htm>, last visited 10 November 2008.

20 Official Gazette of the Republic of Slovenia, št 63/1994, (Slovenia) ("Criminal Code').

2.2 The District Court Decision

On 21 April 2006, the Prosecutor asked the District Court of Ljubljana for permission to open a judicial criminal investigation against Ribičič. In Slovenian law, this is the first stage of criminal proceedings, and the prosecution must show the investigating magistrate that there is probable cause to believe the accused has committed a particular criminal act.

The Investigating Court found that no investigation could be opened against Ribičič on two grounds: legal and evidential. First, the investigating court argued that Ribičič could not be tried for crimes against humanity since Article 3 of the Criminal Code provides that the perpetrator of a criminal offence be subject to the statutory provisions applicable at the time the offence was committed. Second, the investigating judge opined that no strong evidence had been submitted indicating Ribičič's influence on deciding whether a certain group of people should be killed as the prosecution failed to present evidence amounting to probable cause that Mitja Ribičič had played a significant role in issuing the orders for the commission of mass killings.

The Chamber of the District Court of Republic Slovenia in Ljubljana examined the appeal filed by the Supreme State Prosecutor and analysed the decision of the investigating magistrate of the District Court.[21] It held that there were in fact legal grounds to try Ribičič for crimes against humanity given sufficient evidence, but nevertheless agreed with the Investigating Court that the prosecution had failed to meet this standard.

The prosecution appealed this decision as well. The High Court examined the District Court's conclusion and held that the prosecution's evidence for opening the investigation should have included an answer to the question of what person or agency had issued the decision to massacre opponents of the communist-controlled resistance movement. It should have shown whether or not this was done by the Yugoslav leadership of Communist Party and OZNA and then proceeded hierarchically down to the lower organs of the Slovenian Communist Party. Since such arguments and evidence were missing, the court concluded that an investigation into Ribičič's alleged crimes could not be opened. The court concurred with the Chamber decision of the District Court that denied the request to open an investigation into the conduct of Mitja Ribičič. The High Court confirmed that it was legally feasible to prosecute the defendant for crimes against humanity, even though these were not criminalized at the time of commission, as it held that the District Court had rightly established that the alleged crimes contravened basic principles of humanity.

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21 *See* Chamber Decision of District Court, Ks 962/2006, 27 June 2006.

3. Analysis of the court's reasoning and prospects for future prosecutions

Following this description of the judicial decisions taken in the Prosecutor v. Ribičič case, I now turn to an analysis of the High Court's reasoning and a discussion of the prospects for future prosecutions. As to the issue of whether probable cause was established, the prosecution had indeed failed to meet that standard, and thus the request for a judicial investigation was rejected. The evidence submitted did not adequately demonstrate that Ribičič had participated in issuing orders for the execution of opponents of the regime. The prosecutor's request for the appointment of historian experts witnesses to provide evidence should already have been presented earler to the court in order to justify the opening of a judicial investigation in the first place. It could thus be inferred that the prosecutor himself may have recognised that he lacked sufficient evidence to show probable cause that Mitja Ribičič had committed the alleged crimes.[22]

3.1 Challenges of bringing a crimes against humanity case so many years after events

Following the decision of the High Court of Slovenia in Ljubljana, the head of the Slovenian Supreme State Prosecutors noted that the courts might have employed a higher burden of proof than usually required in similar criminal cases. The Prosecutor was therefore unsuccessful in demonstrating probable cause for the belief that Mitja Ribičič orchestrated the commission of heinous crimes after the Second World War.

The reality is that there may not be many more cases of this kind heard in court: elderly witnesses are dying and records of crimes have been erased, hidden or, in some cases, lost. Whether or not the courts reached the correct conclusion when they refused to open judicial criminal investigation into alleged acts of Mitja Ribičič is in dispute. Some commentators argue that, on the basis of historical evidence, probable cause had been demonstrated by the Office of the Prosecutor. Further, the organisation Prevent Genocide International notes that "the order for the liquidation of alleged collaborators might have originated from the head of the provincial OZNA branches, the authorities said, but the orders would had to have had approval from Ljubljana".[23] It is debatable whether the decision to conduct summary killings was indeed reached at the federal

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22 Chamber Decision of District Court, Ks 962/2006, 27 June 2006, para. 36-45.

23 International Relations and Security Network, <www.isn.ethz.ch>, 27 May 2005, Prevent Genocide International, <www.preventgenocide.org/news-monitor/2005may2.htm>, last visited 10 November 2008.

level of the Yugoslav secret police or Yugoslav Communist Party. Ribičič used to be the deputy security chief for Slovenia in the OZNA security and intelligence agency of what was then Yugoslavia. Holding this senior official position may in itself imply that Ribičič knew what was going on in Slovenian territory in the months following the Second World War. Another issue is whether Ribičič or other allegedly responsible persons would even be medically fit to stand trial.[24] Just as importantly, there is hardly another living person left to be prosecuted.

While the prosecution's reasons for modifying charges against Ribičič from the crime of genocide to crimes against humanity may have been justified, there appear to be a number of weaknesses in the Court's reasoning. The Court could have interpreted the evidence differently, as there are various suggestions that Ribičič might have been decisively involved in the killings of the 217 people. In particular, the annotation in a document that reads: "in line with the file of comrade Major Mitja", could have been seen as strong evidence of involvement. As a result of the uncertainty surrounding the annotation, the Prosecution requested that a special team of historians be set up to investigate whether "Ribičič's name on the list actually means that he had a say in the killings", but the investigating judge rejected this motion. The court's decision would arguably have been much more convincing if it had employed a group of experts who could have produced an authoritative statement supporting the court's conclusions. The High Court held, however, that probable cause was not proven in relation to whether there was any intention on the part of the accused to destroy part of the civilian population. Consequently, the first case against a former senior Communist official suspected of having played a major role in the summary killings of civilians after the Second World War stumbled at the first obstacle.

Criminal justice may play an important role for achieving a kind of catharsis for a particular nation. In this way, it may contribute to the successful transition from totalitarianism to democracy based on the rule of law. Domestic prosecutions of crimes against humanity in Slovenia, however, face many difficult challenges. First, it may appear that the Slovenian courts apply higher standards than those applied in similar criminal cases. Second, it appears that much rests on the political will of those with power, despite the crucial recognition in the international community that there can be no lasting peace without justice. There will always be those who argue that prosecutions are a hindrance to, rather than a foundation for, reconciliation between different groups

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24 *See* Nicholas Kulish, In Germany, Whispers of "Enough' at a War-Crimes Trial, New York Times, < http://www.nytimes.com/2009/02/08/weekinreview/08kulish.html?ref = weekinreview>. accessed 9 February 2009.

in society. However, the answer might be that both peace and justice are possible and necessary; the question is not if but when justice should be pursued.

There are also several obstacles working against the domestic prosecution in Slovenia relating to factors beyond formal and substantive dimensions of law. The problem in Slovenia is not that the country does not have a constitutionally (formally) independent judiciary and normative safeguards protecting the right to a fair trial. The real and far deeper structural problem is that Slovenia does not have the relevant agencies to ensure that these normative safeguards are enforced. This is mainly due to the continuing influence of invisible forces of the former totalitarian regime. In other words, while Slovenia's judiciary is now theoretically independent, the continued influence of communism may mean there are structural and practical barriers to fair trials. It seems that there are lessons useful for other countries facing similar transitional justice issues to be drawn from the failure of the prosecution to present a sufficient case in Prosecutor vs. Ribičič. Prosecution of crimes against humanity requires appropriate resources, including an investigatory structure, security infrastructure for judges, courtrooms, lawyers (prosecutors, defence and other lawyers), investigators, and detention facilities. It is open to question whether the Prosecution in Slovenia was qualified enough to work on this case.

3.2 How to deal with post-Second World War crimes in Slovenia

This section argues that there must be some response to the crimes committed after the Second World War. In Resolution 1481 (2006), the Parliamentary Assembly of the Council of Europe noted the "[n]eed for international condemnation of crimes of totalitarian communist regimes". Furthermore, it added that:

"[T]he fall of totalitarian communist regimes in central and eastern Europe has not been followed in all cases by an international investigation of the crimes committed by them. Moreover, the authors of these crimes have not been brought to trial by the international community, as was the case with the horrible crimes committed by National Socialism (Nazism)".[25]

It further observed that "[p]ublic awareness of crimes committed by totalitarian communist regimes is very poor"[26] and that moral assessment and condemnation of

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25 Council of Europe, Parliamentary Assembly, Resolution 1481 (2006), Need for international condemnation of crimes of totalitarian communist regimes, *Assembly debate* on 25 January 2006 (5th Sitting) (see Doc. 10765, report of the Political Affairs Committee, rapporteur: Mr Lindblad). Text adopted by the Assembly on 25 January 2006 (5th Sitting). <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1481.htm>, accesed 10 May 2009. Para. 5.

26 *Ibid*. Para. 6.

crimes committed play an important role in the education of young generations.[27] Thus, perpetrators should be subjected to some mechanism that would at least emphasize apologies and compensation given that punishment of unknown perpetrators is hardly feasible at this stage.[28]

That the decision in Prosecutor v. Ribičič has not sparked any legal commentary or even discussion from members of the academic legal community in Slovenia may be prima facie surprising. This shows how a number of Slovenian intellectuals and politicians share the fear that opening the investigation for crimes committed so many decades ago would deepen disagreement between different parts of Slovenian society and would hinder the path towards reconciliation between members of the former Communist Party and the rest of Slovenian society. However, historical examples show that without historically and legally addressing atrocities committed, catharsis within society may not be reached. Nonetheless, the need to address the atrocities legally is not accepted as necessary within all the academic literature on transitional justice.

It is highly unlikely that a single judicial decision can address the "collective trauma" of the past through which the Slovenian nation was split. However, it may be argued that this is necessary, as "a kind of catharsis" to set the new century on a course based on principles of non-discrimination, tolerance, and diversity in Slovenian society. The handful of reactions to the case came only from members of the media. Most of them agreed that prosecuting persons for crimes that were not criminalized at the time of commission does not violate the prohibition of retroactivity since those crimes were already at the time of commission contrary to fundamental principles of humanity.[29] However, some authors also disagreed with that opinion.[30]

Similarly, Judges Fura-Sandstrőm, Thór Bjőrgvinsson and Ziemele noted in their joint dissenting opinion in Kononov v Latvia: "Why should criminal responsibility depend on which side those guilty of war crimes were fighting on?"[31] Further, Judge Myer opined in its concurring opinion in Kononov v Lativa that:

"[U]nderstandable as it may seem that the Partisans wanted to take revenge for the betrayal and subsequent massacre of their fellow Partisans – or even wanted to set an example to other Latvian villages who might otherwise be willing to collaborate

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27 *Ibid*. Para. 7.

28 *See Ronald* C. Slye, The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights, 22 *Wisconsin International Law Journal* 99, 107 (2004).

29 Študijski center za narodno spravo, Totalitarizmi – vprašanja in izzivi, Zbornik, January 2010.

30 L. Bavcon, "Zakaj povojni poboji ne morejo zastarati?', Mladina, št. 18, 2009, <http://www.mladina.si/tednik/200918/zakaj_povojni_poboji_ne_morejo_zastarati>.

31 *Kononov v. Lativa*, ECHR, Application no. 36376/04, Joint dissenting opinion of judges Fura-Sandstrőm, Davíd Thór Bjőrgvinsson and Ziemele, Para. 3.

with the occupying German forces – they should not have resorted to an 'eye for an eye' approach and should have chosen other means. Even in a situation of war, and even allowing for the difficulties facing a Partisan group having to take collaborators prisoner and transport them to a safe place to stand trial, they ought not to have killed these people on the spot. Besides, some of the killings were particularly gruesome."[32]

In the same way, Prosecutor v. Ribičič highlights the importance of bringing crimes against humanity cases before the court even when many years have passed since the events had occurred. It may appear irrelevant that there was judged to be insufficient evidence to proceed with criminal investigation in Prosecutor v Ribičič. What is required is a clear national consensus on the ways to tackle crimes against humanity after the Second World War.

Is it not worrying that this was the first case ever to be brought before the courts for crimes against humanity committed in Slovenia after the Second World War? Should the judiciary not play a role in addressing dark chapters of Slovenian contemporary history? Or should the Prosecutor refrain from criminal proceedings and should alternatives to criminal justice be employed? If one wants to avoid impunity, then the only plausible option would be to establish a special department within the criminal courts dealing only with the cases arising from the post-Second World War massacres. If, on the other hand, one thinks the challenges are too great, some other non-judicial mechanisms could be taken into consideration. Regardless, however, it is clear that not doing anything is an unsatisfactory response. As long as Slovenian society remains unwilling or unable to effectively tackle this dark chapter from its past, this problem will remain. Slovenia needs to act to deal with these crimes so many decades after the events mostly because this is necessary not only as a matter of principle but also due the lessons to be learned for future generations.

Thus, the Slovenian judicial system might not be the only possible solution for the prosecution of individuals for heinous crimes against humanity. Instead, Slovenian society has to reach agreement on how to tackle those crimes, and consider how to achieve reconciliation between different parts of the Slovenian society. If the crimes against humanity committed by Slovenians against Slovenians after the Second World War are not addressed appropriately, they may are will remain on the dark side of the collective memory of the Slovenian nation. However, Prosecutor v. Ribičič emphasises

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32 *Ibid*. Concurring opinion of Judge Myjer, Para. 12.

the lesson that the Slovenian judiciary and prosecution should not shy away from taking action in these situations. Even if a country implements prosecutions after some time has passed, those involved in criminal justice will need to consider the issue at the same time as considering alternative approaches. Few of the possible mechanisms have so far been used in Slovenia. A number of non-judicial alternative responses such as institutional reform or reparations, truth and reconciliation commissions or truth-seeking processes, pardons, lustration processes, civil proceedings and declaratory statements of apology or the construction of an official memorial should be considered. The next section evaluates the prospects for a truth commission in Slovenia.

Prosecutions of international crimes, whether in national legal orders or at the international level, are easier to accomplish if they take place in close proximity to the time of conflict, because evidence and memories are fresher. However, each transition from war to peace is different. Prosecutor v. Ribičič was the first occasion when a case was brought against a former Communist official for the atrocities committed at the end of the Second World War in Slovenia. It was impossible to hold such prosecutions during the period of Communist rule since the Slovenian judiciary was far from independent, especially in cases against former members of the highest circles of the Communist Party. No prosecution for post-war killings have been brought in the first ten years after Slovenia gained independence. Even today, the question of whether national and/or international criminal justice could be the right answer for addressing the issues of post Second World War crimes remains unanswered.

3.3 Truth and Reconciliation Commission for Slovenia?

This section examines the suggestion that a useful alternative would be to establish a truth and reconciliation commission for Slovenia. This would involve creating an independent commission, which would investigate human rights violations in the Slovenian territory after the Second World War.

What would be the purpose of the Truth and Reconciliation Commission in Slovenia? Clearly, Slovenian society needs to pose itself that question. Generally, such commissions are established to secure peaceful transition from a military and totalitarian regime to a new, more democratic and accountable governance. The violations committed in Slovenia after the Second World War must be addressed if reconciliation between all sections of the Slovenian population is to be achieved. A truth and reconciliation commission in Slovenia may offer a way of doing this without resorting to prosecution of crimes at a national level. It would emphasise apologies and compensation rather than punishment. Such a system may contribute to the identification of perpetrators, but with the goal of promoting peace and stability in society. Truth and reconciliation increases the possibility of the peaceful resolution of conflict. Schabas has noted that "[p]eace and reconciliation

are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded."[33] The work of the South-African Truth and Reconciliation Commission illustrates that truth commissions can be a valuable mechanism for victims, provided that they adopt and implement "victim-centred" ideals.[34]

It appears unlikely that such a commission similar to the South African TRC or other possible models from around the world could be created in Slovenia, since many decades have passed since the crimes occurred. A Truth and Reconciliation Commission would have advantages in that it would offer victims of human rights violations a state-created forum in which their suffering could be publicly acknowledged, and help to fix in historical memory the social context in which these violations occurred. But in so doing, it would be difficult to avoid the intrinsic tension between the Commission's objective to achieve national unity and reconciliation as well as the just resolution of individual human rights violations. The importance would by giving equal status to all those civilians killed during and after the war, whether by communists or fascists. All in all, it seems that there is no point in establishing a Truth and Reconciliation Commission because not enough people are still alive. Perhaps future effort should be focused instead on identifying the location of gravesites and memorials. Such efforts should not be seen as mutually exclusive.

3.4 Settlement of secret mass graves and the creation of memorials

All persons have the right to a name and a grave. This right exists regardless of who won or lost conflict. The Parliamentary Assembly of the Council of Europe noted in its Resolution 1481 (2006) that "that those victims of crimes committed by totalitarian communist regimes who are still alive or their families, deserve sympathy, understanding and recognition for their sufferings".[35] Thus, another alternative would be issuing a public apology and construction of public memorial sites dedicated to the victims of the crimes against humanity. The Government of the Republic of Slovenia

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33 See, for example, William A. Schabas, Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone, 11 University of California Davis Journal of International Law & Policy, 145, (2004).

34 *See* Sam Garkawe, The South African Truth and Reconciliation Commission: A Suitable Model to enhance the role and rights of victims of gross violations of human rights?, [2003] *Melbourne University Law Review* 14.

35 Council of Europe, Parliamentary Assembly, Resolution 1481 (2006), Need for international condemnation of crimes of totalitarian communist regimes, *Assembly debate* on 25 January 2006 (5th Sitting) (see Doc. 10765, report of the Political Affairs Committee, rapporteur: Mr Lindblad). *Text adopted by the Assembly* on 25 January 2006 (5th Sitting). <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1481.htm>, last visited, 10 May 2009. Para. 8.

issued a formal apology condemning crimes committed after the Second World War in Slovenia in 2007 – establishing memorials would go a step further in this regard. Such memorials could include a list of the names of all victims killed on the particular site. The publication of these names would also serve as an acknowledgement that they have died for Slovenia. What appears to be required are simple and dignified memorials. They would be dedicated to the memory of the victims of post-war crimes in Slovenia. This would ensure a return to civility and, perhaps, normality within Slovenian society. A number of such sites have been already constructed, such as the Memorial Chapel at Kočevski rog gravesite. In 1984, Spomenka Hribar had already raised the question of a public memorialisation of the victims executed at secret locations all over Slovenia.

It seems, however, that each individual gravesite would require an individual chapel. Additionally, a museum could be created honouring all victims killed after the Second World War by the totalitarian regime, which would include testimonies, documents, and photographs to illustrate what took place. This hopefully would help to ensure that such acts are not repeated in the future. As earlier generations did not address post-war killings and secret war graves, younger generations remain obliged to properly settle this question in a manner that will show equality to all persons. In short, it appears necessary that the burial sites of all persons killed by the Slovenian totalitarian authorities after the Second World War should include the personal information of victims, the date and location of their death, and should carry the inscription "Victims of war and post-war killings, Republic of Slovenia".[36]

3.5 Preserving institutional memory

A number of positive developments can be traced related to post Second World War crimes. The Republic of Slovenia has recently established the Study Centre of National Reconciliation, which attempts to examine "all forms of violence and violations of fundamental human rights and freedoms against the Slovenian nation and members of other ethnic and religious communities in Slovenia during specific periods caused by all three totalitarian systems: fascism, communism and Nazism".[37] In another development, the Slovenian National Parliament amended the Slovenian Criminal Code in 2008, which criminalizes in Article 297 (2) "Stirring up Hatred, Strife or Intolerance based on Violation of the Principle of Equality". Thus, whoever provokes or stirs up ethnic, racial or religious hatred, strife or intolerance or disseminates ideas on the supremacy of one

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36 Spomenka Hribar, Guilt and sin, in E. Kocbeck's Collection, Ljubljana 1987, pp. 11-68.

37 Slovenian Study Centre for National Reconcilliation, <http://www.scnr.si/en/about-us/introduction-2/>, last visited 15 June 2009.

race over another, or provides aid in any manner for racist activity or denies, diminishes the significance of, approves of or advocates genocide and/or crimes against humanity may be punished by imprisonment of up to three years.

4. Conclusion

The awareness of post Second World War crimes is one of the preconditions for avoiding similar crimes in the future of Slovenia and elsewhere. Discussion on crimes committed on Slovenian territory after the Second World War and secret mass graves is often underpinned by deeply-rooted emotions that suppress rational dialogue. This has led to long-term polarization of Slovenian society along left and right lines of the political spectrum. There are no simple answers to the fundamental questions raised by cases such as Prosecutor v. Ribičič. The challenge posed by transition from oppression to democracy is to account for the totalitarian regime and then rebuild a new society in its wake. The Second World War in Slovenia was primarily a time of social revolution that saw the forceful takeover of authority by the then illegal Communist Party of Yugoslavia. In the end, legally, it seems unlikely that any former high Communist official will be prosecuted in the future by the Slovenian Court for these crimes. Prosecutor v. Mitja Ribičič has shown that it is very difficult to show probable cause for opening a criminal investigation into crimes against humanity committed on the Slovenian territory in the months following the Second World War. The issues concerning crimes against humanity after the Second World War in Slovenia are rife with political implications, and none of the crimes themselves fall within the rationae temporae jurisdiction of the International Criminal Court or International Criminal Court for the Former Yugoslavia. Perhaps most importantly, it is unlikely that the Supreme Prosecution Office of Slovenia will take steps to prosecute more former high communist officials due to the procedural obstacles.

It might perhaps be overly simplistic to call for a compromise over these difficult legal and political questions. In the case of crimes against humanity in Slovenian territory, the various constituent groups often do not listen to each other or leave room for compromise. But until all politicians realize that some form of justice is inevitable in the foreseeable future, and victim-oriented political parties cease asking for nothing but justice, nothing will be done to effectively to tackle the impact of these crimes. Though the present situation may appear grim, consensus does appear to be growing for meaningful and continued reform, which would settle the question of post-war killings and the secret mass graves of victims in a manner that will respect victims' right to a name and a grave. By showing the extent to which the judiciary and law in Slovenia has (not) responded to crimes against humanity in Slovenia, this work is a modest attempt to push for continued progress and possibly legislative reform in the hope that this dark chapter in the Slovenian history will be closed once and for all.

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Transitional criminal justice in post-communist Romania

The present article[1] analyses the factors influencing the development of criminal transitional justice in post-communist Romania. In this study, we shall approach the trials against communist dignitaries, responsible for crimes and abuses committed between 1945 and 1989, other than repressing the demonstrations leading to the fall of Ceausescu regime in December 1989. We find this type of trial particularly significant as far as dealing with the past is concerned, as it tackles the injustices of the communist regime as a whole and not only its traumatic end.

We find that, while the events of December 1989 were the object of numerous criminal trials (Mioc 2004, Stan 2008), post-communist justice stood almost still concerning the political crimes and abuses committed during 45 years of dictatorship. Despite protests from civic organizations and victims associations, in Romania, an official state policy regarding decommunization and punishing the political actors involved in repression was never implemented. From 1990 to date, only four indictments of crimes committed by members of the repressive apparatus have been filed, only two of which were finalized by verdicts of condemnation.

The hypothesis we set out is that the small number of trials concerning communist crimes in Romania was determined by the following factors:

a) constraints related to the criminal law system;
b) the nature of the Romanian communism;
c) the general disinterest shown by the post-communist political class in dealing with the past;
d) the chaotic activism of civil society regarding the decommunization process.

In order to test this hypothesis we analysed, on one hand, the documents of the trials and the legal framework in which they were conducted, and on the other hand, the public discourses held about the purpose, the development and the results of these criminal procedures. We have also conducted interviews with politicians, the accused, victims, prosecutors, lawyers and judges taking part in these trials, as well as with historians and members of civil society. We have also used communiqués, decisions

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1 This article is part of a larger research project published in Romanian in 2009 (Grosescu & Ursachi, 2009).

and decrees published in the *Official Journal*, as well as articles from the Romanian press and memoirs of public figures.

1. A brief synopsis of the cases

Although the victims of Romanian communism are numbered in hundreds of thousands of arrested, deported or executed people, between 1990 and 2009 only four indictments laid by public prosecutors referred to crimes ordered or committed by communist dignitaries before December 1989. On the one hand, the state did not take action to investigate the killings or inhuman treatments committed in the interrogation cells of 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 rapidly stopped due to the decease of incriminated persons, others were interrupted on grounds of claimed lack of evidence.

In 1993, the former Interior Minister in the Gheorghiu-Dej period, Alexandru 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 act did not refer to the role that Drăghici had played in systematically repressing political opponents for almost 20 years, but only to an act of personal abuse, without relevance for the political repression by the communist regime.[2] In 1992, when the investigations begun, Drăghici was already living in Hungary. The extradition request by the Romanian state was rejected by the Budapest government, on grounds that the statute of limitation for this crime had expired since 1969, even though according to the Romanian Criminal Code the crime could still be the object of a trial. All the accused have died before a sentence was pronounced.

In 1997, 8 Militia and Securitate officers including Alexandru Homoşteanu (the minister of Interior Affairs in the early 1980) and Tudor Postelnicu (the chief of the Securitate in the early 1980s), were convicted for executing, without a legal order, 2 young persons who, in 1981, kidnapped a bus with passengers and asked for passports and 10,000 dollars in order to get out of the country.[3] The two persons were executed in the woods without any trial. The convictions in this case (named "The Bus case") were significant especially by the importance of the positions held in the communist state by those

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2 ACMAB, 1999/The Archives of the Appeal Bucharest Military Court, file no. 15/P/1999, "Rechizitoriu din 8 aprilie 1993", "Rechizitoriu din 7 septembrie 2000".

3 AICCJ, 1998/The Archives of the Romanian Supreme Court of Justice, file no. 2932/1998, 'Decizia nr. 1292 din 12 martie 2002 a Curții Supreme de Jutiție – Secția Penală'.

involved in the trial. A former interior minister, a chief of Securitate and local leaders of the Militia and of the political police received sentences of over 10 years of imprisonment. However, the accused benefited from a general amnesty from 1988, the time due was cut in half and all were freed for health reasons before the end of the punishment. The trial did not involve any of the institutions of the communist state, neither the former Securitate, nor the former Militia, nor the Ministry of Interior being called forth in the trial as responsible parties under the civil law. The final sentence has put into light the manner in which certain officers of these institutions occasionally transgressed communist legal order, without underlining the systematic violations of the socialist laws by the regime's own repressive structures (Grosescu & Ursachi, 2009, p. 189).

In 2002, two Militia officers were convicted for murdering, in 1983, the political dissident Gheorghe Ursu, who was placed under arrest in a prison in Bucharest.[4] Although the dissident's death was ordered by the political police, no Securitate officer was prosecuted. This case was the only trial referring to political crimes in Romania where condemnation sentences were pronounced. This success was due primarily to the efforts of the family members, as well as to the militant spirit of civic organizations such as the Group for Social Dialogue or Academia Civica. Hundreds of articles referring to the Ursu case were published in the Romanian and international press between 1990 and 2004, and many public debates about the case presented it as "the emblematic case of the trial of communism" in Romania. However, the investigation could not include the structures of Securitate, neither did it establish the hierarchical chain of responsibility. Similarly, the indictment act and the sentence did not condemn the Militia or the Securitate as responsible under the civil law, even if these repressive institutions had ordered and allowed the killing of the dissident. The investigation was limited to establishing the guilt of two Militia officers who directly ordered the crime (Grosescu & Ursachi, 2009, p. 193).

In 2000, colonel Gheorghe Crăciun, chief of one of the hardest political prisons of 1950s Romania – the Aiud prison – was brought before in Court for aggravated murder.[5] The accusations referred to the deaths of 216 political prisoners, tortured or starved during detention in Aiud. For the first time in the Romanian transitional justice, in the indictment act the facts were correlated with the communist state policy regarding political opponents. The indictment act underlined in this sense that the treatment applied to political prisoners was of such nature that it contained "the premises of causing" an "extermination system", and "the principle of solidarity

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4 APMICCJ, 2000/The Archives of the Military Prosecutor Office within the Supreme Court of Justice, file no. 49/P/2000, 'Rechizitoriu din 22 noiembrie 2000'.

5 Ibid.

of silence" regarding crimes and abuses against regime opponents "appeared to be a general rule". The testimonies of prison officers called as witnesses attested to the fact that "an extermination regime was instituted in the political penitentiaries, which was approved and tolerated by the top of the hierarchy of the communist state".[6] Colonel Crăciun deceased shortly after the beginning of the trial. Nevertheless, even in the absence of a judgment, the significance of the indictment act was important, as the accusations addressed for the first time the direct implication of the communist state in the extermination of the political prisoners. The crimes of Aiud were not presented as a personal abuse of the commander, but as a state policy, ordered and coordinated by the superior leadership of the communist party and of the Securitate (Grosescu & Ursachi, 2009, p. 194).

With these, the Romanian justice has closed, so far, its dealing with the past of communist repression. Neither the number, nor the contents of these trials could bring a wider understanding of the nature of this repression and of where responsibilities lie. This small number of trials dealing with the communist crimes has multiple causes, of a juridical, historical and political nature.

2. The nature of the Romanian communism

Imposed in 1945 by Soviet political intervention and military occupation, the Romanian communist regime has known several stages of development. Consolidated in the 1950s by brutal methods of eliminating political adversaries, the Romanian communism was based in those first years on a police system openly using violent repression to counteract any form of opposition towards the Party and its policies. The regime proceeded to hundreds of thousands of arrests, deportations, internments in forced labor camps or summery executions. Between 1945 and 1958, the Bucharest leadership was under a strong Soviet influence, Moscow dictating the political and economical organization as well as practices for consolidating power. Once Soviet occupation troupes retired in 1958, the Romanian Communist Party constructed yet another legitimacy, based on gradual promotion of national communism. In 1964, the pardon of the great majority of political detainees marked the end of the visible repression. Forced labor camps were closed and numerous intellectuals were rehabilitated (Tismăneanu, 2005; Ionescu, 1964; Deletant, 1997).

After 1965, once Nicolae Ceaușescu succeeded Gheorghiu Dej, the national communist line was reinforced and accompanied by certain reforms, granting more freedom of

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6 ACMAB, 2000, p. 334.

expression, condemned Stalinist practices from the Dej era and lead to a certain economic liberalization. Efforts to improve the image of Romania abroad included renouncement to the terror measures applied until 1964 or hiding them from public eye. Despite the respect for the rule of law that the regime tried to demonstrate internationally, violent practices continued between 1965 and 1989, without equalling however the excesses of the Dej era.

Thus, massive repression against political adversaries took place mostly in the 1950s. Most of those responsible for the crimes and numerous victims were deceased after 1990, which lead to the ceasing of criminal investigations. Lacking witnesses and wide access to archives, numerous cases could not unite the elements necessary to prove that a crime was committed. As far as the repression under the Ceauşescu regime was concerned, the abuses had become less flagrant, above all because the population had internalized the mechanisms of terror, but also because the communist regime was searching a dialogue with Western democracies. At the same time, starting 1965, in Romania the violation of human rights by state organisms was hidden even in the secret documents of the responsible institutions, and political prosecutions were most of the times camouflaged behind accusations of ordinary criminal acts. The absence of clear and impersonal procedures in the decision-making process at the top of the regime, as well as the will to hide the abuses from the international community have made that the orders were transmitted by informal channels and become contingent to the cliques and clans functioning in the system (Offe 1992, p. 18). Thus, establishing the true sender of the orders becomes very difficult.

3. Legal constraints related to condemning communist crimes

From a juridical perspective, the trials made against former communist dignitaries in Romania after 1990 used as a legal framework the Criminal Codes valid at the time of the facts, according to the principle *nullum 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 a juridical order, the major obstacles being: 1) the amnesty of certain crimes by presidential decree emitted at the end of Ceaușescu 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.

3.1 Amnesty decrees

During the communist regime, the political repression materialized in numerous crimes and abuses, among which the most serious were: killings, torture, inhuman treatments, illegal detention, forced labor, abusive arrest etc. all these crimes were sanctioned *de jure* in the socialist Criminal Codes. In January 1988, Nicolae Ceauşescu

gave an amnesty for all crimes punished of up to 10 years imprisonment (Romania's Official Journal, 1988). In this category were numbered most political crimes and abuses committed by the regime: torture or bad treatments, serious bodily harm, abusive imprisonment, correspondence privacy violation, home privacy violation. None of these facts could thus be condemned if it was committed before January 1988. The presidential decree also reduced in half the punishments of more than 10 years imprisonment. The punishment for homicide, for example, was reduced from 20 to 10 years imprisonment.

Thus in 1990, at the fall of communism, the only crimes that could still be punished were those committed after January 1988, except killings and imprescriptible crimes. The annulment of the 1988 amnesty was officially required only in 2006, in the Final Report of the Presidential Commission of Analysis of the Communist Dictatorship in Romania,[7] without results. The decree emitted by Nicolae Ceaușescu remains valid to the day of the writing of this study, in 2010.

3.2 Statute of limitation

Another juridical barrier to the judgment of the communist political crimes is the expiry of the statute of limitation for these acts. In the socialist Criminal Code, the criminal responsibility was removed after 15 years for murder, after eight years for torture, after three years for bad treatments or for abusive arrest and inquiry. Thus, if an act of torture, for example, had been committed in 1950 and no criminal investigation was conducted for eight years on the case, the guilty person could not be judged for it starting 1959. In these conditions, even in the absence of the 1988 amnesty, after the fall of communism the Prosecutor's Office could incriminate only killings committed after 1975, acts of torture committed after 1982 or abusive inquiries committed after 1987. Most crimes of communism committed in the 1950s could not, at any rate, be the object of a trial in 1990.

However, according to socialist Criminal Codes, the statute of limitation could be suspended if the criminal investigation had been obstructed for various reasons (Romanian Criminal Code, 1968, art. 128, p. 65). In an indictment act drawn in 1993, the prosecutors in charge with investigating cases of killings and torture committed in the 1950s by communist officials evoked this possibility of suspending the statute of limitation. Their argument was based on the fact that, throughout the whole duration of the communist regime, the members of the state and Party apparatus had a privileged

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7 The Presidential Commission of Analysis of the Communist Dictatorship in Romania was constituted in the spring of 2006 by the President Traian Băsescu, with the mission to produce a report on the political repression of the communist regime. Based on this report, President Băsescu condemned the communist regime as illegitimate and criminal in a solemn declaration in the Romanian Parliament.

status before the law, their political position offering them actual impunity.[8] Accepted as legally valid by the court, this suspension of the statute of limitation created a precedent, by stating that for the abuses committed by communist leaders the statute of limitation should have started in 22 December 1989, when their political function no longer protected them. The way was thus opened for judging killing cases, be they committed in the Ceauşescu or the Gheorghiu Dej period.[9]

Thus, in Romania the statute of limitation could be suspended for the entire period of the communist regime. The effects of the 1988 amnesty limited though the possibilities to judge crimes committed before that year, others than homicide. After 2005, even this crime could no longer be object of criminal investigations. The only possibility left was to frame communist crimes in the category of imprescriptible crimes.

3.3. Imprescriptible crimes

The term "imprescriptible crime" was first introduced in Romanian jurisprudence by the Criminal Code in force since 1 January 1969, and referred to crimes considered extremely grave, for which criminal responsibility could never be removed (Romanian Criminal Code, 1968, art. 128, p. 65). Those crimes were the *genocide* and the *war crimes*. Though in 1968 Romania had signed the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (ONU Resolution no. 2391 – XXII – of 26 November 1968), the crimes against humanity were not introduced in the socialist Criminal Code, because they referred among others[10] to "persecutions on political grounds", which could have applied to most crimes committed at the time by the dictatorial regimes, including the communist regime. Also, the Convention stipulated the imprescriptibility of these crimes, "irrespective of the date when they were committed" (ONU Resolution nr. 2391 – XXII – of 26 November 1968, art. 1), and could aim, for instance, crimes committed in the 1950s. This clause was accepted by the ONU and the signatories of the Convention, including Romania, because it was

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8 ACMAB, 1999, p. 223.

9 If the 1988 amnesty would have been annulled, crimes such as applying bad treatments, abusive inquiry, imposition of forced labor, violation of correspondence could have been judged until 1993. acts of torture could have been object of investigations until 1998.

10 The assasination, extermination, reducing to slavery, deportation or any inhuman act committed against a civil population, in war time or in peace time, or persecutions on political grounds [underlined by authors], racial or religious grounds – irrespective if they are or not violations of the internal law of the country in which they were committed". *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.* ONU Resolution nr. 2391 – XXII – of November 26, 1968), Art. 1, al. B.; the Statute of the International Military Tribunal – London Convention of August 8, 1945, Art. 6, al. C.

considered that the defense of human rights and the punishment of war crimes and of crimes against humanity were more important than the principle of non-retroactivity.

Thus, framing the communist crimes in the category of imprescriptible crimes as defined by the socialist Criminal Code is problematic. Committed during peace time, the summary executions, acts of torture or deportations cannot be legally considered "war crimes". They do not correspond either to the definition of "genocide", since they did not aim to "exterminate an ethnic, racial or religious group", but rather the elimination of the political opponents of the regime, a group that is not protected by the definition of genocide.

The only possibility to legally characterize these crimes as being imprescriptible would have been to transpose in the Romanian Criminal Code the integral definition of the crimes against humanity, a category inexistent in Romanian law. This did not happen, despite the legal obligation of states to adapt the national law to the international treaties, according to the *Vienna Convention of 1969 regarding the law of treaties*.[11]
The question of introducing crimes against humanity in the Criminal Code was not tackled with until mid-2000s. In 2007, the Institute for the Investigation of Communist Crimes in Romania[12] solicited the Ministry of Justice to fully integrate in the national Criminal Code the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*. IICCR required both the sanctioning of the crimes against humanity and the introduction of the provision "imprescriptible irrespective of the date when they were committed" (AIICCR, 2008, pp. 1-2).[13] The Ministry of Justice rejected however the Institute's demand, by motivating that it would violate the principle of non-retroactivity of the law. What was rejected was not only the idea of judging these crime irrespective of when they were committed, but also the possibility of judging them starting from 1969, the year of the ratification of the Convention by the Romanian state. To date, thus, the juridical framing of the communist crimes in the category of imprescriptible crimes has proved impossible.

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11 The Vienna Convention regarding the law of treaties, ratified by Romania on May 23, 1969, made the following provision (art.27): „Internal law and respecting treaties: One party cannot invoque the dispositions of its internal law to justify the non-execution of a treaty".

12 The Institute for the Investigation of Communist Crimes in Romania (IICCR) was created under government aegis in December 2005, to investigate and seize the justice institutions about the political crimes and abuses committed during the communist regime.

13 AIICCR, 2008/The Archives of the Institute for the Investigation of Communist Crimes in Romania, "Propunere de completare a Titlului XI din Codul Penal din 22 februarie 2008".

4. Civic and political actors towards the trials of communism

Beyond juridical constraints, the failure of court condemnation of communist crimes can be also explained by the attitude of the various political parties and civic actors towards this question, both from the perspective of their discourse as from the perspective of concrete actions.

Since 1990, civic organizations like the Group for Social Dialogue or the Civic Academy systematically militated in the press for the opening of a "trial of communism". This was invoked, however, in a generic fashion, without further details on what such a trial would entail. The arguments usually mobilized had a globalizing character, based rather on syntagms like "the red Holocaust", "communist genocide" or "the crimes of the red plague" than on precise cases. An intellectual trial of communism took place in publications like *Revista 22, România Liberă, Dreptatea* etc. The articles underlined the totalitarian character of the ideology and of the regime, by "using the memory of the abuses as a central argument for a condemnation without nuances" (Gussi, 2007, p. 374). However, even if these groups denounced the extermination, torturing, abusive imprisonment of hundreds of thousands of victims, the juridical action they actually undertook was almost non-existent. These groups were preoccupied neither by modifying the Criminal Code after 1989, nor by the abrogation of the 1988 amnesty, nor by filing judicial complaints, their systematic revolt towards the failure of the "trial of communism" remaining at a discursive level (Grosescu 2007, p. 190). Coming mostly out of the humanist intellectuality, the members of these organizations preferred to militate for a global condemnation of communism rather than concrete judicial actions. This political activism did however prove its utility in cases such as the one of the engineer Gheorghe Ursu, where the constant pressures exerted along the years – by articles, debates, petitions – have allowed the case to stay on the public agenda and ultimately lead to the punishing of the guilty (Grosescu & Ursachi, pp. 196–197).

The associations of victims filed only two collective complaints with the prosecutor's office, in 1991 and 1998 respectively. Other demands for investigation were individual or signed by two or three persons, without being backed by an organization. Most of these complaints had rather a character of a general denunciation, accompanied by lists of victims (many times impossible to identify), without proof and without incriminating named persons. Lack of confidence in the capacity of the institutions of the post-communist state to punish these crimes, and continuities between the old and the new regime – both at an institutional level and at an elite level – were invoked as main arguments to justify such lack of mobilization (Dumitrescu, 2003).

Another explanatory factor for the lack of mobilization can be the heterogeneity of the associations of former political prisoners. These persons came from different political groups and from different generations. Ideological conflicts appeared between

former political prisoners originating from the former extreme right movement and those originating from the historical parties, and ultimately led to the scission in the mid-1990s of the Association of Former Political Prisoners and to the creation of a new association: the Romanian Association of the Former Political Prisoners and Anticommunist Fighters. The dialogue between these two organisms became very difficult, as they act separately and sometimes even compete. Within the two organizations gradually appeared internal conflicts caused by the collaboration of certain members with the former political police. These associations of victims did not succeed to coalesce into one unitary voice and to campaign together for the condemnation of the crimes of communism (Grosescu & Ursachi, pp. 196–197).

Finally, the activist initiatives, be they individual or coming from associations, have systematically stroke against obstacles raised by the post-communist state. In a first phase, the conversion of the nomenklatura affected the decommunization process. Originating in the very system that was supposed to be judged, the communist elites (regrouped in the National Salvation Front) that took power after 1989 preferred a discourse of "national reconciliation", often invoking the Spanish model of forgetting the past. For example, for Ion Iliescu – ancient deputy member of the Political Executive Committee of the Party in the 1970s, marginalized by Ceaușescu in the 1980s and elected president of post-communist Romania in 1990, 1992 and 2000 – a "trial of communism" was useless, the fall of Nicolae Ceaușescu representing an exemplary event of the condemnation of the old regime: "The greatest trial of communism was the revolution itself. What more is there to say?", declared the former chief of state in 2005 (Iliescu, 2005). The discourse of the great majority of the post-communist political parties (created and lead by the ancient nomenklatura) granted an implicit amnesty to the individual responsibility of the communist leaders, either by evoking a national collective responsibility for the instauration and perpetuation of the regime, or by explicitly rehabilitating the communist regime, presented as a form of progress and modernization.

In their turn, the historical political parties (the National Christian Democrat Peasant Party – PNTCD – and the National Liberal Party –PNL) re-created in 1990 after 40 years of interdiction, have focused their election campaigns in 1990, 1992 and 1996 on the necessity of decommunization and on the opposition towards the continuity of the old communist elites in the public life. Originating in the group of the former political prisoners, many of the leaders of these parties were directly interested in the punishment of the crimes and abuses of the regime. In the context of the "ambiguous silence" on the past maintained by the state institutions between 1990 and 1996, the historical parties have used the argument of the necessity of a "trial of communism" in order to demarcate themselves from political adversaries. At the same time, these parties have perpetuated the "confusion between the condemnation of the

past and the condemnation of the former communists that still ruled the country". Thus, their rhetoric towards the "trial of communism" was almost always "implicitly and sometimes explicitly oriented against Ion Iliescu" (Gussi, 2007, p. 374).

Once arrived in power, however, the interest of these parties regarding the "trials of communism" diminished. The state still did not take action regarding crimes and abuses committed by the old regime, and the investigations continued with the same slowness. The only successes registered in this field were the indictment acts in the case of the two Militia officers directly responsible for the death of Gheorghe Ursu, the indictment act in the case of colonel Crăciun, and the condemnations in The Bus case. However, these measures did not have the amplitude that the electorate of PNTCD and PNL had hoped.

On the one hand, starting with 1996 and until 2000, between these parties and their governing partner, the Democratic Party (PD), one of the inheritors of the National salvation Front, appeared conflicts regarding the dealing with the recent past. PNȚCD and PNL sustained, at least at a discursive level, the necessity of a rapid decommunization, PD opposed such policies (criminal procedures or measures of lustration) in the name of national reconciliation. On the other hand, the necessity of implementing economic reforms has placed the problems of decommunization at the periphery of public agenda (Gussi, 2007, pp. 449-451). While the public interest of most Romanians was not concentrated on this issue, but rather on the economic crisis, the historical parties have diluted their anticommunist discourse and replaced it with other themes that could have brought a surplus of political capital. The political stake of the "trials of communism" has become quite small, and therefore the attention of the historical parties on this aspect gradually diminished until disappearance.

5. Conclusions

The Romanian transitional justice referring to communist crimes was limited to a small number of trials that did not have the capacity to fully show the individual and institutional responsibility for the state crimes committed between 1945 and 1989. The four indictment acts and the two sentences pronounced have presented the cases as occasional violations of socialist legality, without succeeding to show the systematic nature of the state violence along the four decades of communism. The reasons for this state of affairs were multiple.

First of all, the nature of the old regime fundamentally influences the way that the dictatorial past is being dealt with. The longevity of the East European communism, and of the Romanian one in particular, represented a determinant factor of the measure in which the crimes of the past could be judged. The abuses of relatively shorter regimes, like the Nazism or the military dictatorships in the Southern Cone that lasted less than

a generation, can be more easily condemned than those of a long-lasting regime, like the communist one that lasted 45 years in Eastern Europe. The most serious crimes of communism took place during the massive repressions of the 1950s. Or, the difficulties to investigate crimes committed decades ago are evident, both from a juridical point of view (the status of limitation being expired) as from a practical point of view. Authors as well as witnesses and victims are difficult to bring before courts of law, for reasons of biological order.

Similarly, respecting the principle *nullum crimen sine lege* imposed different juridical constraints that blocked the sanctioning of those responsible for the communist political crimes. The amnesty emitted by Nicolae Ceaușescu in 1988, the expiry of the statutes of limitation and the absence from the Romanian Criminal Codes of the category "crimes against humanity" were the main such constraints. Ignoring the international conventions on the imprescriptibility of crimes against humanity signed by Romania has closed this way of attack, which could potentially underline the political character of the crimes committed.

Beyond the historical and juridical reasons, however, the absence of judicial action was due also to the weak mobilization of the repression victims. Their individual and collective activism was limited. The complaints filed demanding investigations were few and far between. Internal divisions of the victims' associations on political criteria also stopped the unification of their actions. The members of these civic organizations preferred a global activism against communism instead of focusing on judicial action, which would have involved an expertise and a juridical culture that these persons did not have. A singular case in the Romanian landscape, the exemplary dedication of the son of the engineer Gheorghe Ursu to the punishment of the guilty for his father's killing has shown the role that the mobilization of victims, of their families and of the civil society could have in starting criminal investigations.

Not in the least, while the political power was taken over in 1989 by a party formed and lead by former nomenklatura members, the political will to bring to court members of the repressive apparatus was minimal. At the same time, even if at the beginning of the 1990s the historical center-right parties militated for such trials, once in power in 1996 their interest in such policies strongly decreased. Thus, in Romania, the political discourse on the crimes of the communist regime was intensely used for acquiring legitimacy, without ever becoming concrete action.

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Session VII.
Thick lines, limited justice and the consequences

Vytautas Landsbergis, Lithuania

Host: László Tökés, Bishop, former dissident, Member of the European Parliament, Romania

VYTAUTAS LANDSBERGIS ▸ former dissident and president of Lithuania, MEP

Vytautas Landsbergis was originally professor of music history at the Lithuanian Academy of Music (1978–1990). He holds an honorary doctorate from the Sorbonne University. In 1988, he co-initiated the "Sajudis" Lithuanian reform movement and was chairman of the Sajudis Seimas Council. In 1989, he was elected to represent Lithuania in the USSR People's Deputies' Congress. In 1990, he was elected president of the Supreme Council of Lithuania and Head of State. 1996–2000 he became President of the Seimas (Parliament) of the Republic of Lithuania. He has been a member of the European Parliament since 2004. Professor Landsbergis has been awarded numerous distinctions, orders and medals.

VYTAUTAS LANDSBERGIS ► former dissident and president of Lithuania, MEP

Speech at the Conference "Crimes of the Communist Regimes", Given on 25 February 2010, Prague

Ladies and Gentlemen,
allow me first to say some remarks on war crimes.

The most terrible war crime is the war itself. More precisely, somebody's initiated war of deliberate destruction and conquest, usually based on conspiracy and betrayal of the given international commitments, without regard for the caused human suffering – this is the war crime Number one. If there is no war, where would war crimes come from?

The state – initiator and conqueror – comes there as a perpetrator responsible for its deeds. Sometimes all this, as well as the situation of crime, are fixed immediately, in flagranti.

Both initiators of the Second World War were excluded or kicked out of the League of Nations as aggressors and blood-spotted robbers of their smaller neighbours. Then it was clear: the condemned and politically punished states were Germany and the USSR, not the "regimes" or ideologies, to remind of the usual misty self-deception and self-confusion of nowadays. The common starting point for both in 1939 was Poland and Finland, with Baltic States still anticipating their execution. Just before that latter happened, the looters or marauders were in advance bargaining for the forthcoming conquest of the neighbouring lands.

A part of Poland was exchanged for Lithuania beyond her back. In this way two cities, Lublin and Chelm, finally stayed for Poland. In Lithuania, secretly sold to the USSR, the occupying red empire introduced its infamous Red Terror and mass deportations of civil people out of their homeland into the occupying state. They were taken forcibly, with military force used, as state slaves for exhausting forced labour and for never coming back home. Little children and elder people, as well as babies born in cattle wagons used for long weeks of transportation if dying inside, used to be simply thrown away by the guards in military form.

In our Criminal Code such genocide-type action of the occupier belongs to the chapter on war crimes.

But let us yet go back to that fundamental war crime which was the conspiracy to start that big war with all the subsequent particular war crimes.

What about the terms – when did WWII begin? As the Lithuanian Sajudis stated at its greatest rally on 23 August 1988 in Vilnius, that exact day in 1939 when the secret protocols on the partition of six sovereign countries were signed, was the beginning.

And when did the war end? Please, have in mind the simplest consideration: until military occupation has not ended, the war has not ended for both the occupier and the occupied one. This was proved by the Soviets' continued bloody war against Lithuania still in 1991.

Yes, Lithuania was occupied by the USSR which accepted international rules and responsibility by signing the 1949 Geneva Convention on the state's behaviour during the war and occupation, despite it had no intention to adhere to its requirements. The USSR was a state of communist totalitarianism which imposed on Lithuania its foreign law (if that could be called "law"), its own Orwellian or Potiomkin constitution, enforced citizenship, illegitimate administration shaped in the form of a "soviet republic" of the same foreign country, and finally the "legal" system of unlawfulness without any human rights.

In this light, all crimes committed by the communist state in Lithuania, Latvia and Estonia did differ from those committed elsewhere, as in the Baltic States they were exercised entirely by the foreign country. There was no "national" communist dictatorship.

Several years ago, when Lithuania commemorated the great deportation of 1948, pundits from Moscow echoed: it was done under the request of your Lithuanian authority, and "we" just assisted it. If this was meant for complete idiots in the West the remaining Soviets did miss the address. The same would apply to the collaborators: when they fought on the Soviet side against the Lithuanian forest army, they indeed did belong to the Soviet military, while the freedom fighters made up the Lithuanian volunteer army of resistance. (Not a "civil" war). Such understanding was enforced by self-liberated and restored Lithuania in the law of 1996. Even more, the famous Declaration of Lithuanian Freedom Struggle Movement of 1949 with a provisional Constitution for those times when the occupier will have left was affirmed 50 years later by our Parliament as a historical law of the Lithuanian State, and the leadership of Freedom Struggle Movement was retroactively affirmed as the only legitimate Government on the then territory of Lithuania.

You can see, Ladies and Gentlemen, that the status of the militarily occupied and unlawfully annexed Lithuanian state is of fundamental importance also when we speak and dispute on Soviet crimes in Lithuania.

Present Russia is unique in that while it tries to deny that very status for Lithuania under the Soviets, despite that Russia of Boris Yeltsin has recognized Lithuania in our historical bilateral treaty of 1991–1992: "being convinced that once the Union of Soviet Socialist Republics annuls the consequences of the 1940 annexation violating Lithuania's sovereignty, will be created additional conditions for mutual trust between the High Contracting Parties and their peoples". Later, in 1996, while acceding to the Council of Europe, Russia officially committed itself "to assist the persons, previously

deported from the occupied Baltic States and/or their descendants, to return to their country according to special repatriation and compensation programmes". The Putinist Russia until now refuses any dialogue on the issue of damage caused by the occupation and its compensation. Nevertheless, the given commitments do exist.

Now let us leave the situation of assault and abuse (not to say, criminality and victim), while we speak about the level of juridical persons – two states, one of them being a legal continuation of the USSR. In turn, any concrete crime taken on the level of physical (or murdered) persons always contains personal approaches of being guilty either being abused. Thus the victims – groups of relatives of Poles executed by the Soviets in Katyn – are now going, supported by Poland as the third side, through court cases against Russia for deserved compensation.

The Lithuanian Parliament passed this January a resolution on compensation for the victims of the Soviet aggression in January 1991.

Reminding that the USSR armed forces carried out the act of aggression against the independent State of Lithuania and its people on 11–13 January 1991;

stating that many unarmed defenders of Lithuania's independence were killed and seriously injured as a result of these USSR government and military actions; taking into consideration the fact that the Russian Federation is recognised as the successor state to the USSR by the world's countries and the Russian Federation itself, etc.

Russia's Foreign Office reacted with a desperate statement: Hey, Lithuania then did not yet exist! Take in the point: the killers were right to do what they did! I will save your time now not debating that three-etage ignorance and stupidity on crime and compensation only stating that the perpetrators of the Vilnius massacre of unarmed people safely live until now shielded by the state umbrella in Russia and Belarus, decorated and subsidized, outside the reach of any justice.

What then about the victims and perpetrators of the communist USSR living in today's Lithuania? Our not rich state continues paying compensation and social support for those disabled and orphaned by the bloody crime of another state. Similarly, Lithuania started compensating the savings of our people confiscated by Soviet Sberbank, now Russia's Saving Bank, which enjoys that stolen money and at the same time, likely, respect on international markets. In a meantime, Lithuania is still waiting when Russia becomes a normal state and not a mutant communist one, giving the stolen private property back. Russia's juridical assistance in the desired investigation of war crimes will some time come, as well. Sooner or later; most probably, later.

In a meantime, again, criminal cases against single executioners, perpetrators of Soviet state crimes, proceed slowly, unwillingly and unconvincingly. The number of cases and convictions are rather limited near symbolic ones, and no bigger fish has been touched. Too many prosecutors and judges remain related to their communist past, while former agents of the KGB too easily win suspicious exonerations in such

courts. The process of lustration was undercut while the returned ex-communists stayed in power too long.

There is something special, when prosecutors and judges try to avoid any definition of war crimes. This is probably related with the problem of desired prescription, if nor subscription. Even when a Soviet military unit invaded and killed in 1991 our seven disarmed and detained servicemen at the Eastern border – this case is still in process short of 20 years with no convictions – the very crime was and is defined as "killing of two or more people". As if the killers were not a special Soviet terrorist unit, but simple hooligans. The same is true about the massacre of civilians at the TV tower in 1991, which was perpetrated by purposely sent special troops. Our judiciary constantly disagrees, if it would be not independent in soul, to define this action as war crime. [Later in 2010 it was done].

According to Lithuanian law of 1998, "the USSR State Security Committee … shall be regarded as a criminal organization which has committed war crimes, genocide, acts of repression, terror and political persecution in the Republic of Lithuania occupied by the USSR". Practically, a member of a criminal organization to give favourable witness for each other in our court, and that is OK.

Allow me to finish with two responses to yesterday's issues and one essential remark on the item of all similar conferences.

First, about the continuity of Russia's expansionist policies in the Baltic Sea. After the Putin-Schröder pact which will further lead to annexation of international waters by Russian navy already exercising future guardianship of the pipe – Kremlin's property laid down on the sea-bottom – recent decision of France to sell an offensive weapon, an aircraft carrier "Mistral", thus enabling Russia to attack or blackmail its littoral neighbours, is the freshest betrayal of all European principles of solidarity between member States.

The second response is to the question why Nuremberg-2 on communism did not and can not come. The failure was rooted in Nuremberg-1 where one of the two bandits became a judge on the second one, by the way, his previous ally. This was a new great victory of Stalin and capitulation of the Western judiciary as they left the bloody Nazism properly condemned and the bloody Soviet Communism pardoned and acquitted from all war-and postwar-crimes. From then on the European hypocrisy of double standards while dealing with totalitarian regimes is flourishing nicely under the care of KGB and Stasi gardeners.

And here rises my deep hesitation, whether the wording "Crimes of Communism" is the proper one. Has anybody ever seen Mr Communism entering the room and killing the innocent? It reminds me an old Georgian joke of Soviet times: Skaży dorogoy … "Tell me, dear, who is that Slava CPSS ["Слава КПСС!"] and what he is doing now?"

As Mr Communism did not fall yet (one more myth), we shall strive for maximum clear stances and options. The crimes we are speaking about should be separated into two simple qualifications: 1) crimes of a communist state committed internationally against other states and their people, and 2) crimes of communist governments (not "regimes") committed internally by the use of usurped powers in the form of totalitarian oppression or even war against their own people. The governments do include real persons with given names, not only the abstract "family" name communism.

Without reminding the given names, we will stay helpless, and no form of justice may come.

Hubert Gehring. Source: Konrad Adenauer Stiftung

Miroslav Lehký. Photo: Přemysl Fialka

Pavel Gregor.
Photo: Pavel Gregor

Milan Hulík and Göran Lindblad. Photo: Přemysl Fialka

Eduard Stehlík.
Photo: Přemysl Fialka

Pavel Žáček and Christoph Schäfgen. Photo: Přemysl Fialka

Witold Kulesza. Photo: Přemysl Fialka

Jernej Letnar Černič. Photo: Přemysl Fialka

Raluca Grosescu. Photo: Damjan Hančič

Christoph Schäfgen, Göran Lindblad, Witold Kulesza, Jernej Letnar Černič, Raluca Grosescu. Photo: Damjan Hančič

Vytautas Landsbergis. Photo: Přemysl Fialka

László Tökés. Photo: Přemysl Fialka

Jana Hybášková and Vytautas Landsbergis. Photo: Přemysl Fialka

Göran Lindblad.
Photo: Přemysl Fialka

Photo: Přemysl Fialka

Photo: Přemysl Fialka

Day 3 ►►►
The solution?

Welcome

Jan Fischer, Prime minister of the Czech Republic

Opening

Jana Hybášková, Czech Republic

JAN FISCHER ▸ Prime minister of the Czech Republic

Jan Fischer graduated from the University of Economics in Prague with a degree in economic statistics. He was then employed at the Federal Office for Statistics, becoming its vice-chairman in 1990 and, after the partition of Czechoslovakia, the vice-chairman of the Czech Statistical Office in 1993. In 2003–2010, he held the office of chairman of the Czech Statistical Office. He was appointed Prime minister of the interim government of the Czech Republic in 2009–2010. Jan Fischer was a member of the Communist Party of Czechoslovakia in 1980–1989, for which he has publicly expressed his regrets.

JANA HYBÁŠKOVÁ ▸ former ambassador, former member of the European Parliament

Dr. Jana Hybášková is a politician and expert on terrorism, European security, the Middle East and democratisation policies. She is a former Czech ambassador to Slovenia and Kuwait. Between 2004 and 2009, she was a member of the European Parliament and author of the EP resolution on European Conscience and Totalitarianism. Since 2006, she has been a member of the steering committee of the World Movement for Democracy. She is the founder and chairwoman of the Evropská demokratická strana ("European Democratic Party" – EDS). She is fluent in English, Slovenian and Arabic.

JAN FISCHER ▸ Prime Minister of the Czech Republic

First of all, I would like to thank our esteemed guests for having accepted the invitation to this conference. It was indeed a representative selection of speakers from whom we can learn a great deal about the nature of the crimes of communism, about the causes which led to them and about the solutions which we need to adopt in order to prevent a repetition of history.

I would also like to thank the organisers for the idea of convening this meeting, which was not only about describing the past, but also the present and the ways in which the post-communist countries are coping with the shadows of totalitarianism. And of course also about the future, about seeking ways how to prevent any future possible loss of our freedom.

Because it is the future and freedom which should be on our minds above all. History never repeats itself literally. "Real socialism" in its concrete form belongs to the past. And the practices of the current communist regimes differ from one another widely, oftentimes like fire and water. It is not sufficient to state simply that the essence of communist crimes lies in the elimination of democracy. Their essence lies above all in the elimination of freedom.

Moreover, today's world is abundant with regimes with a varied degree of formal democracy which cannot be called communist but can certainly be called severely authoritarian. A common trait of these regimes is neither the ideology, as in the times of the communist bloc, nor the question of voting rights. It is the suppression of civic freedoms and human rights.

If the future is indeed our concern, it is true that we must learn from history, but we also must be careful not to be getting ready for yesterday's war. In the contest of the two blocs with a similar history and civilisation development, the issue of democracy became the basic mark of differentiation. In November 1989, it was enough to call for "free elections". And everybody knew what it was about, everyone believed that everything else would come by itself.

Today we see that the transition from totalitarianism to freedom was not easy even in European countries. That not everything can be settled by a vote in Parliament. That a functional democracy implicitly expects the existence of strong moral values and the rule of law. That for our free development, an integration into Euroatlantic institutions has proved to be crucial.

Totalitarianism namely did not destroy democracy alone. It also disrupted our system of values and law. It extracted us from the community of free European nations. Still, at least we had somewhere to pick up from. Even under communism we knew where we really belonged and where we wanted to return to. Although the road turned

out to be more difficult in the end than we had imagined twenty years ago, we knew, or sensed at least where it lay.

This is different with the current tyrannical regimes. It is not enough to prescribe democracy to these countries. Without respect for freedom and human rights, without education toward moral values, without a solid legal system they will continue to be threatened by totalitarianism. Therefore, it is necessary to build further institutions of the free society: schools which educate both in knowledge and in morality, free media, police and the judiciary which maintain law and order, an economic basis which offers people a perspective and prosperity. Of course all this must be shielded by a functioning international community which is ready and willing to help, including, if necessary, to intervene by military means.

This conference has in a vivid way demonstrated the past, the present and the outlook on the future. If we indeed want to fight against all forms of totalitarianism, we need to lean on civic freedoms and human rights. This way, our fight will be efficient and also legitimate. It will be efficient because no form of totalitarianism, however it may choose to mask itself, whichever doctrine it may have for its foundation, or even if it were completely non-ideological, cannot stand human freedom. And it will be legitimate because people may be different, with different traditions and a different perception of culture and civilisation. But we all are born free and equal in our rights.

We ourselves spent forty years living in totalitarianism. We have been living in freedom for twenty years already. Let us utilise this experience to the benefit of ours and that of our children, as well as to the benefit of freedom everywhere in the world.

Thank you for your attention.

JANA HYBÁŠKOVÁ ▸ former ambassador, former member of the European Parliament

It is a tremendous honour for me to be here today in the presence of the Czech prime minister. I can thank him for one very important thing. You are well aware that when we met before two years ago, we put together the Prague Declaration. I would like to thank the tens of thousands of signatories who have signed the declaration up to now. I would also like to thank the parliaments who have signed up to it. The European Parliament's European Conscience and Totalitarianism resolution arose out of this declaration. And it was at the last meeting of the General Council of the European Union under the Czech Presidency (which was already under the patronage of the prime minister) that the Council of Ministers of the European Union adopted and supported the European Parliament resolution. And ensuing from the European Conscience and Totalitarianism, it also made a commitment in this sense of the word that this history is a common European history, that communism was not some exotic eastern deviation, that it is a common horrific European legacy, and that we must also recognise it in the future and attempt to pass judgement on it. These conclusions from July's Council of the Czech presidency were already established under the patronage of our Czech prime minister. And so far it is actually the most important legal proof that we have; it is a European Union document; and it is a European Union decision. This document has also given rise to the creation of a Platform of institutions dealing with the history, studying and passing judgement on communist and totalitarian regimes throughout Europe. And I hope that it will be the Czech government which will take this commitment further and actively support the establishment of the Platform so that it does not simply remain as a Council of Europe decision, but that we are actually able to accomplish this together as active Europeans, from the north, south, east and west.

What is key are the four points contained in the Prague Declaration. This comprises the decision that condemning Nazism and fascism is not the only thing that belongs to our common European history, but also all forms of totalitarianism, including communism. And that communism, Nazism and fascism can be compared in their causes and consequences. The second task is study. The third task is to attempt to condemn communism as a crime against humanity. And the fourth task was the establishment of the Platform.

Where are we at this juncture? National reports are being created. We are able to document the horrific fate of tens of thousands of victims, including invalids, who were butchered and thrown into mass graves. We are able to talk about places like this, such as Huda Jama in Slovenia or Kurapaty. We are studying and sharing our research. In the Czech Republic, the Ministry of Education has adopted a document for the Methodology of History Teaching, which also teaches about the horrors of

totalitarianism and communism. I think that is something which is worthy of being emulated in a number of other Central and Eastern European countries.

We are studying and attaining historical knowledge. This conference in its first and second day has clearly shown that we have also reached a certain level of historical consensus. But there are still many hard battles to fight. From what has been heard at the conference, it is quite apparent that some of us are coming to terms with the fact that communism was and unfortunately still is intellectually attractive. While no one would allow themselves to call Nazism and fascism intellectually appealing, communism is still discussed at some universities. We are even conducting a fierce debate on the word communism. Was it Stalinist communism, totalitarian communism, or authoritarian communism? We should once and for all clearly agree that it was communism.

It is also clear that a debate is emerging about how some situations and certain horrors occurred primarily as a war crime or a crime of the occupation. President Vytautas Landsbergis clearly spoke about how it is primarily about occupation and a crime of war in the Baltic States. Unfortunately, for some of us, it can be clearly heard that it also concerned our own crimes, not just crimes of the occupation. The Ribbentrop-Molotov Pact cannot be blamed for it all; Stalinist Russia is not responsible for everything. I think that has been heard completely clearly here.

What we are having to battle hard, however, is a Platform where the biggest problem lies at this juncture, which is the field of law. In Central and Eastern Europe, we accepted legal continuity and we now encounter three types of legal problem. The first is the abuse of the authority of a public official. And in this form it comprises the mass use of automatic weapons, the laying of minefields, running 500–600 volts through wires on the Czechoslovak border – our Czechoslovak invention, considered to be the abuse of the authority of a public official. Is this how it is?

And then there is the second thing. The commanders of border guards and others were perhaps members of organised crime. This is already heavily statute-barred. But can we say that all those who died in Kurapaty, who were buried in all 610 mass graves in Slovenia, the approximate number of 26,000 people who passed through labour camps in the former Czechoslovakia were a mistake and an abuse of the authority of a public official? Perhaps it was something even more than organised crime.

And it is up to us to think about one serious thing: was it or wasn't it a crime against humanity. Have we fulfilled or not fulfilled the concept of serving justice of General Ečer, who said that a crime against humanity is the commission of mass violence against the civilian population for racial, political or religious reasons. I believe that this concept was fulfilled in Central and Eastern Europe. Naturally, we would need an international tribunal for this. And I am not naive, because I know that most international tribunals are called by the UN. And because we have here Mr Harry Wu, who spent 19 years eating snails and squirrels, and because China is still active in the UN just like Russia, it is

difficult to imagine that we will get an international tribunal by this route. Consequently, it is probably down to European politicians. Therefore, it is probably up to Europe to have this difficult legacy of modern history settled in this area.

Why am I speaking about this? Because Europeanism stems from Christianity. And we must remember St. Augustine, who clearly tells us that not doing active good is evil. And the second point: if we remember all of these victims, we have no right to deny the demand for justice. Nobody has this right. And one more thing we cannot do. International Law is created from the political will of those who participate in it. It is not some objectively existing mould. And if, as Europeans, we want to be the bearers of the values of active positive international law, then we cannot devalue it, but we must, on the contrary, strengthen it. We cannot allow international law to be devalued. If we use the term abuse of the authority of a public official to describe the mass use of automatic weapons, minefields, rape, beating and killing invalids, the things that happened to the mother of Sandra Kalniete and the things that happened in the gulags, we devalue international law.

I would like to remind you of one other thing. Many of you know that I am an Arab scholar by profession. Part of my activity means that I go to the Republic of Iraq every two months as one of those who evaluate the activity of the Iraqi tribunal. You would be really amazed at how many Iraqis look at how we have proceeded in Central and Eastern Europe in their own de-Ba'athifaction process. Saddam's regime cost at least 2.6 million human lives. Do we have the right to set them the example that this concerned the abuse of the authority of a public official? I don't think we have. And Darfur awaits us in the future. I firmly believe that within a few weeks or years, this question will be posed again in Iraq and, ultimately, Mr Harry Wu, this question will certainly be posed in the largest and most populous country in the world, which is China. If we want to contribute to democratic processes, we cannot allow ourselves to bend international law. Consequently, we take action, we provide impetuses and we strive to ensure that it is Europe, with its unequivocal European Council decision, which take this process forward so that one day, when China is democratic, it will genuinely be our partner, just like Iran and Sudan will be in the future. Thank you.

Session VIII.
Crimes of Communism and Nazism – what have we learned?

Anders Hjemdahl, Sweden
Petr Brod, Czech Republic
Milan Zver, Slovenia

ANDERS HJEMDAHL ► Institute for Information on the Crimes of Communism

Anders Hjemdahl is a writer, media producer and communication strategist. He is a co-founder of the Institute for Information on the Crimes of Communism, based in Stockholm. He has published and lectured extensively on Estonian, Finnish and Swedish history, the history of communism and related issues. He is co-founder of the Human Rights and Reconciliation Alliance, an international network of like-minded organisations working against all forms of political repression. He was awarded the 2009 Templeton Freedom Award by the Atlas Foundation.

PETR BROD ► former head of the Prague office of the BBC, freelance journalist

Petr Brod was born in Prague and moved to Bavaria in 1969. He earned his M.A. from the University of Munich in 1977, and also studied at the London School of Economics and Political Science, and Harvard University. He worked for the BBC in London, then for Radio Free Europe, becoming the station's first permanent correspondent and bureau chief in Prague in 1990-1992. Brod later joined the staff of Süddeutsche Zeitung in Munich. In 2000, he rejoined the BBC, taking charge of its Prague bureau. Since 2006, he has been freelancing in Prague, where his activities have included presenting the "Historical Magazine" programme on Czech public TV's news and current affairs station CT24

MILAN ZVER ► political scientist, sociologist, Member of the European Parliament

Dr Milan Zver graduated in 1990 from the Faculty of Sociology, Political Sciences and Journalism at the University of Ljubljana. In the 1990s, he was a government advisor, a local councillor, and later a national councillor. After completing his doctoral thesis at the Faculty of Social Sciences in 1998, he taught at the University of Maribor. He is active in cultural and humanitarian organizations, and has also been a member of the Executive Committee of the Slovenian Political Science Society. In 2004, he was elected a deputy to the National Assembly and between 2004 and 2008, he was minister of education and sports.

ANDERS HJEMDAHL ▸ founder, Institute for Information on the Crimes of Communism

Ladies and gentlemen, excellencies, honored guests, I would like to begin by expressing that I'm honored to be here in Prague, and how happy I am to see so many people here from so many organizations and institutions in so many countries. I would also like to thank the prime minister of the Czech Republic and commend our Czech hosts and organizers for their excellent and hard work in bringing us all together here in Prague, right in the heart of the reunified Europe.

We are all here for basically the same reasons. One reason is a wish to, at long last, bring the crimes of communism to light, and make this tragic part of European, and indeed of World history, an integral part of the general, public knowledge of recent history.

Another reason is to, finally, see at least some measure of justice be done, to the still unpunished perpetrators of these crimes, the effects of which will continue to haunt and affect hundreds of millions of people for generations to come.

I believe we all agree on the need for vigilance towards resurgences of totalitarian ideologies, which have plagued or continent for so long. And in order to be vigilant, we need knowledge. Without knowledge, there is no self-determination, and there can be no true exercise of free will. Without knowledge, we cease to be individuals and turn into a herd.

Much progress has been made in improving knowledge, in collecting and publicizing facts and personal stories in the former communist-controlled countries, through the tireless efforts of many great individuals, organizations and institutions, many of which are represented here today.

This work is crucial, not only for the respective countries these institutions are based in. These facts, these stories, and the immense, nightmarish, historically unsurpassed, terror, mass murder, destruction, oppression and dehumanization they tell us of, are part of the knowledge and heritage we all need, deserve, and are entitled to, as free human beings and citizens of Europe.

As is the case with all goals, there are also obstacles which has to be overcome. Political complacency is one. Lack of resources is another. The legacy of the communist regimes, in the form of individuals and organizations trying to sabotage our efforts, sometimes even counting perpetrators of these crimes among their ranks, form others.

Many of these obstacles have been taken into account at this conference, at seminars and in working group meetings. They all need to be taken seriously, and strategies need to be formulated for all of these obstacles, as well as for several others we will continue to face.

But there is one particular issue that I would like to address specifically today, an issue I believe may form the single greatest obstacle to the realizing of our goals, and

that is the active resistance to the condemnation of communism and the exposure of the crimes of communism which we are facing from socialists in Western Europe as well as in the United States.

This opposition is well organized, well connected, highly resourceful, well established, well respected, deeply entrenched in desicionmaking bureaucracies, and in many cases amply funded. They have the ear of many decision makers, and the power to intimidate many more through their influence over public debate. They have access to most major media channels, some of which they dominate completely. In some cases, they even dominate goverments or form part of powerful political alliances, which influence both debate and democratic decisions.

These socialists still form a significant part of the intellectuals in western Europe, and in order to succeed, we need to understand how this opposition works, and we need to develop strategies to counter them and their methods.

This tradition of unwillingness to grasp the facts, and to understand the real-life consequences of a fully implemented socialism, has many roots. It is the continuation of an almost century-long tradition by Western intellectuals of unwillingness to face the reality of totalitarian socialism, motivated by a deep-set fear of allowing the stark reality to tarnish the image of socialism.

Soviet propaganda, and the continued propaganda of the current FSB-dominated Russian State, has provided additional nourishment for this tradition. The propaganda has warped and twisted debate, obscured facts, and complicated efforts at telling the truth for more than a half century. It has also deeply influenced, and continues to influence, the world view of historians, journalists, politicians as well as ordinary people.

These are obstacles that must be faced by anyone involved in efforts to improve knowledge of the crimes of communism.

Propaganda can and must be countered by facts, for example by the great work of the Museum of the Occupations of Latvia, IPN in Poland, and the Institute for Study of Totalitarian Regimes here in Prague, and many others. Gradually, the effects propaganda can be at least partly overcome by the presence of correct information.

But a bigger obstacle than propaganda to truth and the passing of justice, are the continued, and indeed increasing, efforts by some Western intellectuals to "save" Socialism from the harsh verdict of historical reality.

This, in combination with the previously mentioned propaganda, has created a normality where Lenin is seen as a champion of liberty and equality, where Che Guevara is a romantic hero of Hollywood proportions, and where even the Soviet empire and the other communist dictatorships themselves are, again increasingly, viewed as viable, basically noble but somehow bungled efforts to create better societies, free from the curses of capitalism, competition and shallow materialism.

According to this worldview, the Republic of Vietnam was liberated by the communists in 1975. Mao Zedong was a noble leader. There was basically not much of a difference between the captive nations on the eastern side of the Iron Curtain and those on the West, which were enslaved by ruthless capitalism and predatory market forces, dictatorships of the dollar, wrapped up as farsical, phoney democracies where the "workers" were little more than slaves or prositutes. All according to this twisted world view.

I could go on with examples, but what is important here is that this is not the worldview of extremists or loonies without influence, these are the mainstream views of many modern socialists, young and old, many of them highly influential.

These are the views which has dominated Western media and education for many decades, and which is still exerting considerable influence. These sentiments also influences the views of many conservatives and liberals, however unwittlingly.

In order to succeed, we must take this into account, as it is the root of the lack of political will to deal with the criminality of communism which we are facing in the West today.

It is also the direct cause of the near-total lack of knowledge of the crimes of communism among the general public in the West, and of their almost complete lack of knowledge of recent history in the formerly communist-controlled neighboring countries.

As an example from my country, Sweden, where socialism has been the dominant state ideology up until very recently, according to a nationwide survey performed in 2007, 90% of the students had never heard of gulags at all. This can be contrasted by the 95% who were well informed about the Holocaust.

40% of the students believed that communism had contributed to increased prosperity in the world. 22% of the students believed that communism is a democratic form of government. 43% percent believed that communist regimes had claimed less than one million lives, during the entire 20th century. A fifth of those surveyed put the death toll at under ten thousand.

This lack of knowledge is sadly not unique to Sweden. But a widespread lack of knowledge of even the basics of recent history, and the lack of knowledge of one of the greatest threats in history to peace, democracy and liberty, is a direct threat to the values which form the foundation of European civilization, a direct threat to European unity, and an issue of utmost importance for the sake of the European future.

Only last week, my daughter was informed by her school books, that the living standards of North and South Korea were comparable, and she was required, as part of her school assignment, to give positive examples of planned economy. In her school books, like in those that I had at school, there is no mention of communist crimes

whatsoever. I hope that the new school books will prove less fictious, but the real lesson here is that this lack of knowledge has not occured by mere chance.

It must actually takes a rather significant effort to shut out the real world to the extent that the socialist intellectuals have done, and that they doggedly continue to do, in their effort to save socialism from the verdict of reality.

The time-tried defense by Western intellectuals of the communist dictatorships; that the crimes committed by the communist regimes were not examples of "true" communism becuse of their imperfect implementation, and thus cannot be seen as communist crime; has turned into negating any critique of socialism based on real world examples by stating that if the system wasn't perfect, then, ergo, it cannot have been socialism, since socialism is perfect.

After the collapse of the Soviet empire, the socialist left have even retreated even further into their impregnable ivory tower built on human misery, on crushed freedom and quenched hopes, on the graves of countless innocent men, women and children, for the most part representatives of the underclass the socialists have always claimed to be the selfless champions of.

Strangely, the very demise of real-world socialism and the collapse of the Soviet empire had a paradoxical effect – it liberated the socialists from the burden of defending its real-life shortcomings, and in the words of Jean-Francois Revel, "the faithful could return to the roots of their fanaticism. They felt free at last to restore socialism to its primordial state: Utopia. After all, socialism incarnate was always vulnerable to criticism. Utopia, on the other hand, lies by definition beyond criticism."

We need to realize that the only way for socialism to survive as an ideology is to insulate itself completely from reality, and to deny historical facts. Concealing the facts about the history of socialism in general, and of communism in particular, is essential for the very survival of the ideology itself. Socialism is thus best understood as a fundamentalist religion, where doubt is seen as blasphemy, and the opposition is reflexively denounced as heretics or saboteurs.

For these reasons, It is important to realize that our work does not consist of entering into debate with the socialist left. To them, we are, and always will be, infidels. Our motives will always be questioned, because who in their right mind could criticize perfection; equality, prosperity, justice, and the end of all human suffering?

We must realize that nothing we can say or do will ever sway them. The deportations and the slave camps of the gulags didn't sway them. The Cultural Revolution and The Great Leap Forward didn't either. Mass murder and oppression on a scale unprecedented in human history never intruded into the comfortable cocktail party conversations of the socialist intellectual elites in the Western democracies – while the trains to the gulags kept on rolling. It is useful to understand just how powerful these groups are,

and have an understanding of their motivations, in order to anticipate their actions, understand their tactics, and be able to develop better strategies to counter them.

We must realize who the people are, that are telling us that we will never succeed, that our message is too controversial, that it needs to be watered down, that we must learn to say Stalinism instead of communism, that we must be realistic. We must realize that giving up the terminology means ceding the debate. This is central to socialist strategy. Because how can we inform about communist crimes, if we can't mention communism? If the crimes somehow aren't crimes anymore? And how can we explain what has happened, if we accept being prevented from discussing the very nature of communist ideology?

Luckily, influential though the socialist intellectuals may be, they do not represent our audience. Their tactics of sowing fear, doubt and mistrust is a smokescreen to mask their eventual impotence.

Their sentiments and prejudice are not the sentiments and prejudice of the majority of the general public. Real world socialism is perhaps the most repeatedly disgraced ideology in world history, and the socialists' natural aversion to truth and facts stand in stark contrast to the natural curiosity most people share in the lives of others, in the fates and experiences of our fellow men.

This is why biographies and books on history top the best seller lists, year after year. This is why Sandra Kalniete's book "With Dancing Shoes In Siberian Snows" has already been translated into a dozen languages. There is a natural, healthy curiosity about the realities of other people.

That is one of the most basic instincts and abilities we have as a species – to communicate and learn from each other. *People want to know*.

And what do we have? All of us here today: we have the facts. We have the stories of thousands of people, victims of communist crimes and witnesses of the criminality of the communist regimes.

We have human experiences for everyone in the world to learn hard-earned lessons from, perhaps most especially important to learn for those of us who are lucky enough to have been born in free societies, those of us lucky enough to never have known totalitarian terror.

We have a ready audience throughout the world, and the voices of the victims of communism are increasingly being heard, in books, in movies, through exhibitions, and on the Internet, influencing public opinion, slowly but surely, paving the way for a true, general recognition of the victims, and for justice to be done.

So, while being aware of the opposition and the need to devise counter strategies, let the socialists retreat ever further into their ivory tower, while we get on with the work at hand, the work which we owe both the dead and the living.

Sometimes, you hear that this is a complicated issue to debate. Nothing could be further from the truth.

There is really only one argument we need to make, and that is that the Universal Declaration of Human Rights is, indeed, universal. The Declaration does not give any room for special lenience for ideologically motivated violations of Human Rights. It is actually abundantly clear on this point.

I quote:

"The general assembly proclaims this universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

And, importantly,

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

These are words worth repeating.

The Declaration of Human Rights was never meant to be applied selectively. It is a profound moral argument, and it is a weapon that was meant to be used effectively against tyranny.

Let us use this weapon.

Because our message and our mission is not, and can never be allowed to be construed as controversial.

Ideologically motivated opposition to the Universal Declaration of Human Rights, on the other hand, should rightfully be viewed as highly controversial, in any society aspiring to be civilized.

The burden of evidence lies firmly with the socialists and the apologists, and there it should rightly remain.

Let us use the Universal Declaration of Human Rights as our main, self-evident argument. Let's call things by their proper names.

We must not allow ourselves to be manouvered into controversy. Let us not waste time trying to break through insurmountable barriers. Let's go around them. Let's be creative. Let's come up with novel, effective ways of reaching ordinary people. They want to hear what we have to say. We don't need to tell everybody everything, but we need to tell many people something. This is not an impossible task, and we are already doing it, all of us here and many, many others, throughout the world.

We must not be disillusioned, we must not lose heart when we face Socialist impregnability to facts, or when we face their callousness and their total lack of empathy with the victims. It is inevitable, and is something we all will have to face, again and again, for many more years to come, as we try to change the way reality is perceived and interpreted. It will eventually fade away.

While the human stories and the facts of the crimes of communism spread, the ivory towers slowly crumbles.

Soon, there will be no victims of communist terror left alive in Europe.

Their voices, their experiences, their hopes and dreams, and their dignity will live on.

There are facts to be presented. There are stories to be told. And there is justice to be done. Thank you all for your time.

PETR BROD ▸ journalist, former head of the BBC in Prague

Thank you, Mrs Chairwoman.
Ladies and gentlemen,

This conference is subtitled "The View of Historians and Legal Experts". I myself am neither a professional historian nor an expert on the law. Rather, I speak from personal experience as somebody who comes from a family that suffered in various ways under both totalitarian systems, and as somebody who lived in exile and in his own way took part in activities aimed against the communist regime in Czechoslovakia – in my case, at foreign radio stations. There are in essence two strands to what I would like to speak about. I will partly attempt to answer certain questions which come under this panel's heading. And I would also like to consider certain aspects of these issues from the Jewish perspective. That is because we find in the histories of both the 20th century's totalitarian regimes tragic and interesting links to Jewish history. Some have already been discussed, and I have my own perspective on them.

I don't wish to claim that it will be a viewpoint that encapsulates the position of all, or even the majority, of Jews. You are certainly aware that Jewish society is very pluralistic, with heated internal disputes occurring frequently. This also applies in the case of issues such as Jews' relationship to communism, or comparisons of Nazism and communism. At the same time, I shall attempt to steer clear of what has already been said so eloquently by a number of previous speakers. I think, for instance, that in his opening address Senator Jiří Liška already made the most fundamental of points, which we can all agree on, with regard to coming to terms with the communist past. This morning's speeches by Jana Hybášková, Sandra Kalniete and Anders Hjemdahl also contained crucial points. So I shall not go into general aspects of the totalitarian regimes, and I shall not repeat that they committed enormous crimes. Rather I shall try to speak about things which have not yet been mentioned.

We can certainly speak about the crimes committed by the 20th century's two dictatorships. However, as has already been said, this does not mean that both totalitarian systems were identical, that they arose from the same ideological roots, that they had the same impact on different societies, and so on. We can compare their crimes, and those who have carried out comparisons have found many common elements: the role of ideology in their policies; the function of violence in political practice; efforts to penetrate ideologically and politically into all social classes and activities; efforts to subjugate those activities and make them an instrument in the interests of the totalitarian system; or the condemnation of entire social classes to extinction. Both systems expect to use violence or other means to remove various elements of the subjugated society in order to reinforce their own power. In the case of

Marxism-Leninism, this concerns the so-called reactionary classes, while in the case of National Socialism it concerns the so-called inferior races, be they – in the Nazis' classification – Jewish or of other races. We know that after the successful control of the Euro-Asian space, Slavs and others were also in line to become "inferior races". So there many points of overlap and comparisons really can be made between both dictatorships.

What did the Western countries know about the contravention of human rights in the communist bloc? Here I reach further back into the past than the previous speakers have done. I would say that the Western parliamentary democracies knew a great deal, from the very beginning, about the crimes of communism. The question is, however, whether their elites, whether their political decision makers, whether the general public, wanted to know what was happening in that other world in Eastern Europe. Despite the widespread view that in, say, the 1920s and 1930s, little was known in Western and Central Europe about the crimes of communism, it must be stated that relevant materials and spurs to look more deeply into the Bolsheviks' politics existed. Let me remind you only that one of Stalin's close circle, Boris Bazhanov, escaped through Turkey to the West as early as the 1920s. He published a book which also came out in French. Thanks to Bazhanov, even in the 1920s people were able to form a picture of what was going on within the upper echelons of the Soviet regime and where its actions were leading. The flow of defectors, as they are sometimes called, though that is a somewhat controversial term, continued in the 1930s. Among them were high-ranking figures from the Soviet interior ministry and the secret police (NKVD), who took various routes to get abroad. In Bulgaria, for instance, a local NKVD agent "defected". He and others brought with them detailed reports on what was happening in the Soviet empire as well as the extent of the Stalinist purges of the 1930s. Some Soviet agents in the West refused in those days to return home, as they knew what would most likely await them, and also gave testimony. If we only take into account the defectors' books and reports it is clear that such literature could have provided the Western world with a relatively detailed picture of events in the Soviet Union.

On the other hand, there were the so-called "fellow travellers", who heaped praise on the USSR and downplayed authentic testimonies about the country's crimes in various ways. They were not always left-wingers, either. As an extreme example I would give the US ambassador to the Soviet Union, Joseph Davies. Davies lived through the biggest Stalinist purges in the 1930s and wrote a very influential book about his stay in the country entitled *Mission to Moscow*, which was translated into Czech and published in 1947. He was somebody who fell for all of the propaganda of Stalin's regime as regards the purges and the "democratic character" of the Soviet leader's new constitution. Other names that come to mind in this respect are, for instance, the German author Lion Feuchtwanger and the British playwright George Bernard Shaw. They overlooked

the then known facts about the gulags and how the Soviet regime dealt with real and potential political opponents. By contrast, they helped foster an impression in the West that the Soviet Union was a specific type of democratic regime. It is, of course, necessary to say that this was greatly aided by the threat of Nazism, which for many Western societies was more immediate and much more of a sensitive matter than the threat posed to the West by communism and its agents (in this respect I include large movements such as the French and Italian communist parties under the heading Soviet agents). In the 1930s we can also observe the creation of something that could be termed an anti-fascist or anti-Nazi consensus. It resulted in the spread of a belief in a certain solidarity between the Western world and the Soviet Union or the communist movement in the sense that the USSR and the Communist International were possible allies in the fight against the immediate physical threat to the West stemming from the hotbeds of the fascism and Nazism that had appeared in the 1930s. The Spanish Civil War was important in this respect, as the fight between the Republicans and their foreign allies against the uprising led by General Francisco Franco created something of a preview of the coalition of democrats and the radical left, including communists, which later, after 1941, arose out of a common war against Adolf Hitler and Nazism.

In Spain in the second half of the 1930s there was a struggle between on the one side people with deep democratic convictions, like George Orwell, along with radical Socialists, Communists and Trotskyists, against on the other side forces linked to Italian fascism and the Third Reich. A Popular Front government was formed in France at that time on a similar ideological basis. To a certain extent these were precursors of the global anti-fascist coalition, which I've already mentioned, after a very short break in historical terms between 1939 and 1941 when it seemed there would be long and close co-operation between both totalitarian systems. That was the impression given by Stalin and Hitler's pact of August 1939, which Jana Hybášková spoke about. The Soviet Union and the Third Reich really did work together in many areas during the period of the pact, with Poland and the Baltic states among the victims of their co-operation. Hitler's attack on the USSR in June 1941 naturally brought a return to "normality" for the anti-fascist or anti-Nazi consensus which arose from the fact that National Socialism, its expansion and crimes against humanity, were a direct physical threat to the existence of Western civilisation. One element of that consensus was the belief that it was necessary on the Western side to overlook somewhat the sinister aspects of communism, which were already known, and that it was necessary to subordinate everything to the needs of a common battle against the fascist powers. Adding to this was the great contribution the Soviet Union made to the defeat of Nazi Germany, which Emanuelis Zingeris spoke about so eloquently. Of course, we cannot ignore the role the Soviet Union played in the defeat of Nazi Germany. It was in many respects decisive, and we live with its symbolic results to this day. We see this for instance in the current

controversy in Brno, where there is a question as to whether the symbol of communist power, the hammer and sickle, should remain on a monument to Soviet troops who died in the liberation of Czechoslovakia.

It is important to bear in mind that throughout the post-war period there was a widespread feeling in some parts of the US that the fact America and the Soviet Union had been linked in the period of the anti-Hitler coalition should not be forgotten, and that following the fall of communism both countries happily returned to emphasising the importance of their common fight against Nazism. In this respect, there are historical reasons why many politicians in Europe currently look on the crimes of communism rather differently than those of National Socialism. And this leads me to something else I wanted to talk about – the Jewish aspects of those positions, which to a marked degree go along with what I've already said. For Jews, National Socialism was a real existential threat, while communism was not such a danger. Yes, communism had anti-Semitic elements at various phases and the policy of communist states was defined as anti-Zionist, which was seen in the fact that from the mid-1950s they stood firmly on the Arab side in the Arab-Israeli conflict. However, there were also times when in the eyes of many Jews, socialism or communism was a system that took their interests into account. Again I am predominantly speaking about the Soviet Union in the 1920s and 1930s. For many Jews, Tsarist Russia, which before World War I had the globe's biggest Jewish population, was a repressive regime which until the revolution of 1917 discriminated against Jews, placed limitations on them in public life, did not allow them to settle where they wished, and so forth. For that reason, many of them linked their fates to the communist revolutionary movement. There were Jewish members of the socialist revolutionaries and also Jewish social democrats. Persons of Jewish origin played a significant role in the early days of the Soviet state; suffice it to name the commander of the Red Army, Leo Trotsky. His opponent Stalin sometimes gave the impression of being a radical anti-Semite. For instance, in 1952 he had leading Soviet authors writing in Yiddish executed, which to a certain extent was punishment for the fact they had on their own initiative established contact with Jews in the US and attempted to get them to contribute material aid for the Soviet Union's efforts during the war. The ambivalence of the Soviet dictator's position is illustrated by the fact that at the same time he left in his circle until the end the likes of the editor-in-chief of Pravda Lev Mekhlis, who was of Jewish origin, or the Politburo member Lazar Kaganovich.

Jews' view of communism is linked to these recollections and I would also like to remind you that today there are a great number of Jews living in Israel who come from the Soviet Union. Among them are veterans of the "Great Patriotic War" against Hitler who have set up their own associations in Israel. For many older immigrants from former Soviet territory, it is very difficult to separate themselves radically from the part of their lives they spent under a communist regime. For them it is hard to

indiscriminately condemn the entire Stalinist period, so I would like to appeal to you to try to understand that if – as at this conference – communism and Nazism are compared it will meet with scepticism in some Jewish circles and some Jewish organisations, because they are afraid that in this way the fate of the Jews is relativised and the unique character of genocide, which Jews suffered during the National Socialism period, is downplayed.

MILAN ZVER ► Slovenia, political scientist, sociologist,
Member of the European Parliament

Distinguished guests, Ladies and gentlemen!

My intention is not to intimidate but rather to warn or remind all of us of the "fragility", weaknesses and vulnerabilities of the newly established democracies in Europe and beyond, although – I have to stress right at the beginning – I do not agree with H. P Martin (former MEP), who produced the thesis of the End of (EU) democracy.
However, let me present you with some facts and expectations from 20 years ago – which I would argue are important to explain my point of view. Well, what happened at the end of the eighties?

Firstly: Democracy triumphed in Europe. At that time the third wave of the spread Democracy took place in Europe and in the world and so it seemed the end of totalitarian regimes in Europe had finally materialized.

Secondly: Even more, some talked about the Triumph of Western Civilisation over the rest of the world, with the domination of its culture and market economy. The End of Ideologies and History is Fukuyama's famous thesis.

Thirdly: On that basis a rapid and successful transition to a democratic system was predicted by mass movements and new elites. The phenomenon of a new democratic culture seemed at the time to be unstoppable.

Twenty years after this big party we ought to recognize that we are still confronted with many problems. Let me introduce to you ten that I consider to present a big challenge to us and democratic societies of the West.

1. A global and universal Crisis is threatening modernisation and economic progress in many parts of the World.
2. Large geo-strategic changes: Western civilization is losing military, economic, demographic and political powers (Huntington).
3. Slow modernization process of the post-communist countries: Where there was no rupture with the totalitarian system, progress is slow. Why? Most of the power in society is still in the hands of the old elites. In most of the cases the old-boys networks influence financial dealings, control large corporations, media etc. They have no interest of changing anything. Besides that, in some transitional countries the new political forces rule in the old, undemocratic way.
4. Democracy in stagnation: The Economist Intelligence Unit's Democracy Index (2008) has confirmed that the spread of democracy has come to a halt "… in only

one country in this region (the Czech Republic) was there a slight improvement; and in eight other counties the score remained unchanged".

5. A decline in the trust in democracy: Particularly in the post-communist countries there exists some kind of a counter-democratic culture. The social differentiation and inefficiency of the governments has increased and that fact has negative influence in the trust in modern structures (like market economy) and values.
6. A decline in the turnout of voters.
7. The rapid rise of undemocratic and radical movements (like terrorist organizations, religious fanaticism, neo-Nazis, anti-migrants groups, …, etc.) on one side and on the other, the state violence against democratic movements (like for example police violence against the demonstrators in Moscow).
8. A decline of active citizenship as a result of a damaged mentality, particularly in the transition countries. The citizens see themselves as an outsider; they are angry and uninterested in political participation.
9. Non-transparency of democracy: democratic dialog needs more opportunities and more space; democracies becoming advertising democracies.
10. Reaffirmation of communist symbols (Slovenia, Romania; Keane: "Forgetting or remembering the wrong things is dangerous for democracy".)

"**Those who forget the past are condemned to repeat it**"

The ten problems have been having an effect on the current democratic climate in Europe, particular in the post communist countries. Actually, the current situation is very similar to the circumstances of the first half of the 20th century. Let me remind you of three patterns of behaviour that marked the developments after the end of WWI and that we can observe are happening again.

1. A large wave of democracy after WWI – and then
2. Economic crisis, which caused more protectionism between countries, which led to conflicts and consequently of citizens distrust in market economy and democratic institutions – and then
3. The establishment of new systems of authoritarian and totalitarian regimes.

Favourable circumstances – a little bit of optimism in finding a way out

Thank God mankind is equipped today with added knowledge, experience and mechanisms to overcome the crises of democracy.

1. The EU membership has been expanding. Europe has been vertically integrating and has developed good mechanisms for resolving conflicts. Former communist

countries established democratic institutions; most of them joined NATO and the EU.
2. There is still more then enough critical mass for defending and preserving democratic political culture, particularly in the western part of the EU.
3. EU became more democratic by the adoption of the Lisbon Treaty (the democratic deficit has been reduced. EU citizens, National Parliaments, and EP have now a greater say in the EU decision making process).
4. The majority of the EU countries prefer the model of social-market economy to any other potential models out there.

So what do we all need?

1. A speedy economic recovery and overcoming of the crisis.
2. Improving transparency of the central democratic institutions (within national states and the EU framework, as well)
3. Education for democracy to strengthen of the democratic values and beliefs, promote active citizenship and governance, teach about tolerance and cultural diversity, promote the European dimension in schools' curricula, and recognize, understand and overcome our common history.

Education for democracy

Some sociologists state, that it is not easy to form the common meaning in modern societies, which have become structurally very fragmented. In the post communist countries, that problem is even bigger. Who can improve the situation?

1. **School:** Education and training are losing their traditional roles in society. But expectations are getting higher and higher. Educational systems still have a strong impact on the creation of what some people call the software of the mind. The main task of education policy is to form the new curricula of tomorrow.
2. **Science:** The main purpose of science is to establish the truth and in that task firmly establish and point out the differences between totalitarian and democratic systems.
3. **Political and state institutions:** Governments (with different policies), parliaments, mass movements and political parties, politicians, opinion makers etc, must bear a special responsibility for destruction of the remains of totalitarianism and watch out for any sign of totalitarian patterns in every-day political life in order to prevent it from ever happening again.

4. **Media:** The media has huge influences and shapes opinions, beliefs and values. Its task should be to support and report the truth (and nothing but the truth).

These four factors of political socialisation did not play an appropriate and correct role in the past 20 years, in the period of transition to democracy. What can we expect will happen in the coming two decades? History is the best teacher, however … it needs more students!

Session IX.
The European Union and human rights

Heidi Hautala, Finland

Host: Sandra Kalniete, former dissident, ambassador and European Commissioner, Member of the European Parliament, Latvia

HEIDI HAUTALA ► chairwoman, Human Rights Subcommittee, European Parliament

Heidi Hautala worked as a journalist in 1976–1985. She received her Master of Agriculture and Forestry degree in 1988. She has been widely active in voluntary work, which includes being a member of the board of the Finnish league for human rights and chair of the Finnish-Russian Civic Forum. She was a candidate in the presidential elections of 2000 and 2006 and a member of the Helsinki city council in 1985–1994. She was elected three times as a member of the Finnish Parliament. Ms Hautala was elected a member of the European Parliament with the Greens/EFA group in 1995 and again in 2009.

HEIDI HAUTALA ► chairwoman of the European Parliament's Subcommittee of Human rights

Dear participants of the conference Crimes of the Communist Regimes,

I can't unfortunately be present in the conference, as I am taking part on a European Parliament's fact-finding delegation visit to Belarus.

Twenty years after the fall of the Iron Curtain and almost six years after the accession of post-communist countries to the EU, it is natural to ask how one should deal with the past of the communist states. How should we evaluate the actions of the communist regimes behind the Iron Curtain? For me the points of departure are definitely human rights and justice.

It is undisputed that the communist regimes violated human rights, as the Resolution of the Parliamentary Assembly of the Council of Europe of 25 January 2006 states. However, it is not as clear how we should deal with this past.

In my contribution I will touch upon the question of the power of interpretation, the need for a free and tolerant public debate, the complex issue of transparency and the diverse roles of politicians and researchers in Vergangenheitspolitik. The question is: who interprets the truth?

The politicians have a great responsibility in interpreting the "truth". How do we see our past and how does it influence the present? The one, who has the power to tell us what the true state of our society is, also has the political power.

I would like to emphasize that assessing this question can not be made just from a legal point of view. Instead, in my view the historical and political side of the question cannot be over emphasized. As said, the interpretation and reconciliation of the past is eventually always a matter of debate on whose version on the course of events is "right". It can also be seen as an issue about the right to speak up: who has the right to speak up, say what and about whose past.

In German academic discourse there is a concept "Deutungshoheit", which means "the power of interpretation". It is a hegemonic mandate which allows one to dictate "the right way" to see historical events and to interpret them to have rather powerful meanings. Both the victims and the offenders seek to gain that position and, via that, a justification for their own interpretation of the past.

Even if the dealing with the past does not achieve any ultimate goal, such as reconciliation, debate as such is already success in itself.

A Finnish historian, an outstanding specialist of the history of GDR, Seppo Hentilä has stated: "The societal consensus is not the yardstick for the solidity of democracy. More important is the capability to tolerate differences of opinion and handle them in

a non-violent way. The stronger the democracy in the country, the more critical, open and tolerant is its way of dealing with the past."

In essence this means, that one single group should not claim to have the exclusive right to interpret the truth, but space should be given for open and diverse public debate. Even if objective interpretation of historical facts is not possible and objective narratives of the past events do not exist, academic historians can use scientific tools to study the past and thereby try to achieve as objective results as possible. Thus, the role of academic research is crucial in the mastery of history. It is also crucial to understand that research into past events is continuous, as new layers inevitably unfold in the process.What do we then need?

We need a comprehensive scientific account of the wrongs committed by the communist states. These injustices need to be assessed via an unrestrained dialogue in order to find the best possible solutions. The goal of this process should be reconciliation within the post-communist societies and strengthened European integration across the former East-West divide.

Furthermore, as the objective of the process is to attain more unified and harmonious society, there has to be room for self-criticism of the offenders. Indeed, one criteria of the success of Vergangenheitspolitik is whether the offenders are able to speak out also outside courtrooms.

It is important to note, that only the fact that somebody has been working in the machinery of a totalitarian regime does not suffice to prove the person guilty. Such fact needs to be further defined, how the person was involved with the regime and why. Moreover, those found guilty should be encouraged to also look into this issue by themselves. As, the late President of Estonia, Lennart Meri, wisely said: "We can forgive, but we can never forget."

All in all, a multifaceted view of the events of the past is needed. Democratic systems guarantee the best grounds for such a view. However, interpretation of historical facts should never be imposed by simple majority decisions by parliaments. What about transparency?

In this context there are two differing views as to how the archives should be used. Some consider that all of the documentation should be accessible for every person, whereas others believe that access to areas of privacy should be more restricted and data protection fully respected.

I personally belong to those who see some problems with the radical openness of the data and maximal opening of the archives. For example, documents stored by security structures can be misleading and it may be wise to open the archives first to a restricted group of qualified academic and scientific researchers. Not least should we also remain mindful about the fact that the unrestricted public access to documents can be distressing for the victims.

All this does not mean that we should not make a genuine effort towards opening up archives, only that steps must be taken to ensure that this process will not be abused for political witch-hunts.

In this vein, there should be a clear legal framework regulating access to documents held in the archives of internal security services, secret police and intelligence agencies. I also emphasize here that such documents must be available, in general, in their broad context as an uncritical and random exposure of this kind of data based on its digitalisation may not help to understand the complexities of the past.

Indeed, one can argue that access to documents is just a starting point. Objective and thorough analysis is needed to reach conclusions. This should be done with the help of academic historians and other researchers. This makes the process more accountable and professional and thereby helps in avoiding uncritical tabloid journalism. The politics of the past should not instrumentalize the past for politics. What is the role of politics?

As said, politicians have an enormous responsibility in interpreting the truth about the past events. Politicians can also make specific decisions to help reconciliation with the past. For example when in Switzerland there was a big debate about the country's role in the Second World War, it was decided that all the relevant archives would be opened to a foreign academic researcher group.

Moreover, in this field best practices should always be shared with other countries. In this regard, for example Norway and Sweden are excellent examples for other countries on the benefits of opening up the archives of secret police. In those countries the activities of the secret police after the Second World War have been in depth researched. These initiatives were made by the parliaments and the victims were given access by law to their own data in the archives.

High quality debate about the past events and reconciliation transfers into the society most often via mediums such as the press and school books. For this reason the content of school books is a deeply important. It can become a matter of fierce political dispute. Civic education should promote critical thinking instead of simplified dichotomies.

Politicians can make significant decisions concerning past events on the basis of initiatives arising from the civil society. For example, in Finland, a book by Elina Sana claimed that there were more Jews delivered to Nazi Germany in the Second World War than had been earlier estimated. This claim attracted international attention and triggered a perceptive debate in Finland. As a result the Finnish government decided to start a project called "Finland, prisoners of war and extraditions 1939–1955". What could be the role of European parliament and the European Union?

Whereas the core objective of the European integration process is to ensure respect for fundamental rights, democracy and the rule of law (POISTO: in the future), it is highly appropriate role for EU to contribute to integration of the post-communist societies into common European heritage.

So far EU has been unfortunately unable to close the historical gap between Eastern and Western Europe. How can we ever achieve progress in integration in Europe where violations of fundamental rights remain unsettled?

Existing platforms should be more used, such as UN or the Council of Europe. The resolution of the European Parliament on European Conscience and Totalitarianism from April 2009 has many elements for EU to build on:

- Initiatives for documentation and activities of non-governmental organisations that are actively engaged in researching and collecting documents should be supported financially.
- The resolution also calls for a Platform of European Memory and Conscience to provide support for networking among national research institutes specialising in the subject of totalitarian history. A pan-European documentation centre for the victims of all totalitarian regimes should be created.
- It also calls for the strengthening of the existing relevant financial instruments with a view to providing support for professional historical research.

Finally, I am convinced that the awareness of history is one of the key preconditions of avoiding violations of human rights in the present and future. Societies that neglect the past have no future.

Europe will not be duly united unless it is able to form a common view and understanding of its history through an open dialogue.

As the European Parliament has stated in its resolution of 2 April 2009, no political body or political party should have a monopoly on interpreting history.

Learning from the past lessons can guide in the present and towards the future. For example, the war against terrorism has led to grave violations of human rights and international humanitarian law. The European Parliament considers that those EU Member States linked to the CIA renditions and illegal detentions in secret prisons on European soil must carry out investigations concerning the allegations and hold those responsible accountable.

As the national security services are engaging increasingly and inevitably more into the transnational cooperation, the question of who supervises them remains. Britain's most senior judges ordered the government to reveal evidence of MI5 complicity in the torture of the British resident Binyam Mohammed. The protection of relations between secret services is not anymore a valid reason to not to publish these files. This ruling matters for two important reasons; the citizens have the right to know and this is an important form of public scrutiny.

To conclude, it has to be guaranteed that rule of law is followed, not only with regards the events taking place today but with regards the past events. That is why our Subcommittee on Human Rights gives a great attention to further developing international justice and accountability.

Session X.
International justice: UN tribunals, the South African Truth and Reconciliation Commission

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IVANA JANŮ ▸ the Constitutional Court, former judge of the International criminal tribunal on former Yugoslavia

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Introduction

A society in a moral crisis, whose origins lie in an authoritarian, totalitarian regime from the recent past, cannot be healed unless it holds a mirror up to itself. Above all it must ask itself what relationship it actually has with the past. Consequently, it is not enough for it to be about documents based on the opinion of specialists and professional analysts such as intellectuals. The opinion of the majority should ensue from a relatively sophisticated survey of public opinion, which would distinguish what direct participants in the period of national history that is being examined think and how young people are informed about it. Naturally, information on the standard of history teaching at primary and secondary schools should also be added to this. Only then is it possible to effectively influence the convictions of society with a view to restoring the values that were destroyed by the previous regime.

1. International criminal tribunals

The history of international criminal justice is not a long one. After a little thought, almost everyone will state that the first instance of it was the International Military Tribunal that sat in Nuremberg after the end of the Second World War (hereinafter only referred to as the Nuremberg Tribunal)[1] and judged Nazi crimes. The Tokyo Tribunal is no longer so well known in Europe.[2]

In 1993, another International Criminal Tribunal for the Former Yugoslavia (ICTY) was set up to judge crimes perpetrated in that country. A year later in 1994, an International Criminal Tribunal for Rwanda (ICTR) was also established for the crimes

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1 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. Available at: http://www.unhcr.org, together with the appended Statute of the Military Tribunal dated 8 August 1945, published under No. 164/1947 of the Collection of Laws, the so-called London Charter.

2 The Tokyo tribunal was established in 1946 by way of a proclamation by General Mac Arthur. Charter of the International Military Tribunal for the Far East, annexed to the Proclamation by General Mac Arthur, 19 January 1946, in T.I.A.S. No 1589.

committed there. In 2002, the International Criminal Court came into being, and like the ICTY it is also based in The Hague. This is a court with a permanent mandate unlike the ICTY and ICTR, which are ad hoc courts that will end their activity as dictated by their mandate, which was laid out for them by the Security Council, i.e. after obtaining criminal convictions for serious crimes pursuant to international humanitarian law.

1.1 The Nuremberg Tribunal

The legal basis for the establishment of this tribunal was an international treaty or Charter agreed by the four victorious powers after the defeat of Nazi Germany for the prosecution and punishment of crimes. This was also part of the Tribunal's Statute. According to the Charter the principal criminals were supposed to be punished by way of a joint decision by the allied governments, i.e. the USA, the USSR, France and England. The Statute comprised the composition, authority and tasks of the tribunal. The Charter was open to allowing the accession of other governments. Accession was implemented by notifying the government of the United Kingdom by diplomatic means. The former Czechoslovakia and 18 other states acceded to it. The Charter did not preclude exercising the jurisdiction of any, already established state or occupation court (or any such court intended in the future) on any allied territory, or in Germany, while judging other war crimes. The agreement on a common procedure was concluded for a period of one year.

In accordance with the Statute, the International Tribunal was established for fair and speedy criminal trials of the principal war criminals and their punishment (Article 1). Each signatory had one member on the tribunal and one alternate for these members. The alternate members were obliged to be present at all sessions and to replace a member if this was required (Article 2). A President was chosen for each criminal case that was dealt with. The presidency was a rotating post (Article 3). A verdict was adopted by a majority of votes. (If voting was tied, the President had the casting vote.) Convictions and punishments, however, could only be imposed by the affirmative votes of three members (Article 4). The Tribunal had the authority to judge and punish the principal war criminals individually as natural persons or individually as members of organisations. The Tribunal judged the following crimes:

a) crimes against peace (specified in the Statute),
b) war crimes (specified in the Statute),
c) crimes against humanity, namely murders, extermination, enslavement, deportation and other inhumane acts committed against the civilian population, before or during the war; or persecutions on political, religious or racial grounds or in connection with any crime in the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a Common Plan or conspiracy to commit any of the foregoing crimes were responsible for all acts performed by any person in the execution of such a plan (Article 6). It is interesting that the doctrine of Joint Common Enterprise (JCE, originally Common Plan or Common Criminal Purpose or Common Design) is also used by the ICTY, which followed up on this provision and deduced that it was necessary as forms of the collective committing of crimes in international law. Details of this will be given in part 2 on page 5. The ICC also has a detailed provision in its Statute – Article, 25, paragraph 3, letter d).

The official status of the defendants, whether as heads of state or members of government, was not taken as a fact that would leave them immune from responsibility or as a fact that would mitigate punishment (Article 7). The fact that a defendant acted on the orders of his government or a superior would not divest him of individual responsibility although it could be considered in mitigation of punishment if the court determined that justice demanded it (Article 8).

During the trial process for any individual member of a group or organisation, the Nuremberg Tribunal could declare (in connection with any act of which the individual could be convicted) that the group or organisation of which the individual was a member was a criminal organisation (Article 9). If a group or organisation was declared criminal, each signatory state could bring members to trial for this membership before military or occupation courts. In such cases, the criminal nature of the relevant organisation could no longer be called into question (Article 10).

Other articles of the Statute contain the principles of a fair trial for those who were being tried, including the right to defend themselves or to be defended by a defence counsel, to present evidence for their defence or to cross examine witnesses called by the prosecution ... *(Essentially, the principles also fulfil the requirements of a fair trial pursuant to today's criteria – author's note)*.

This is followed by the procedural rules for conducting court proceedings, including the option of admitting or denying guilt, closing speeches and a final statement from the defendant (Article 24).

The judgement of the court – a verdict of guilt or innocence – was not subjected to further review. However, the Control Council for Germany, which issued orders for the sentences to be carried out, could change or reduce the punishment, but it could not increase the severity of a sentence to the detriment of the condemned person (Article 27). In addition to the punishment imposed, the Tribunal could also divest an accused person of "any stolen property" and order its delivery to the Control Council for Germany (Article 28).

The fact that the victorious powers (the USA, Britain, France and the USSR) decided to jointly implement what each of them could have done individually on

occupied German territory was accepted with respect in the nascent international community, and thus the foundations were laid for international criminal justice. Other international criminal tribunals that were established subsequently have proceeded on the basis of these foundations.

The international significance of the Nuremberg Tribunal was further strengthened on 11 December 1946, when the UN General Assembly unanimously adopted a Resolution,[3] which recognised and confirmed the principles of international law that the court had proceeded in accordance with and which were contained in its Statute and decisions. It could be said that it was this step which formally turned the court of these four powers into an international court, as it has indeed been perceived by the wider international community since its establishment. In the course of roughly one year, 24 former Nazi leaders stood before this court and they were indicted for crimes against peace, war crimes, and crimes against humanity committed during 10 years of Nazi dictatorship. All of the defendants denied their guilt. The Nuremberg Tribunal exclusively exercised its jurisdiction and it is worth noting that it judged defendants even in their absence (if they were on the run or in hiding).

Other ad hoc courts – the ICTY and ICTR – took their lead from this court. A comparison of how they performed is worth noting. In just one year, the Nuremberg Tribunal convicted 24 defendants.[4] In the 18 years it has been in existence, the Tribunal for the Former Yugoslavia has indicted 161 people and had finally and definitively convicted a total of 120 people as of 20 June 2009. It is apparent that the Nuremberg Tribunal would win any "Performance Efficiency Prize". The reason for this outcome can be attributed to the current increased protection of the rights of the accused and those who are indicted as well as the fact that the Nuremberg Tribunal only had a one-instance procedure. Moreover, as has already been mentioned, it also made judgements in absentia. It is interesting to consider why contemporary international tribunals have abandoned this practice. The possibility of conducting a trial in absentia in a situation where the defendant knows he is being called to account, and yet is on the run or in hiding, exists in the legal systems of many democratic states[5] (with various options

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3 Affirmation of the Principles of International Law Recognised by the Charter of the Nűrnberg Tribunal, G.A.Res. 95 (I), U.N.GAOR, Ist Sess., pt.2, at 1144, U.N. Doc. A/236, 1946. Also available at: http://untreaty.un.org/cod.

4 Of the 24 accused, the following convictions and sentences were imposed:
11 sentenced to death
3 sentenced to death
3 acquittals
The remainder were given prison, sentences of 10 to 20 years

5 Italy, France, Austria, Switzerland, Czech Republic

for subsequently reviewing the judicial decision). What is important is that, with the passage of time, evidence (particularly witness testimony, whose accuracy can naturally dwindle) is registered and recorded. Essentially, the current principle, whereby it is not possible to conduct a trial in absentia, poses a threat that the guilt of the accused will never be proven (e.g. in the case of General Radko Mladić).

2. The International Criminal Tribunal for the Former Yugoslavia (ICTY)

The ICTY came into existence on the basis of Resolution 827 of the UN Security Council (hereinafter only referred to as the UNSC) dated 25 May 1993,[6] which proceeded on the basis of Chapter VII of the Charter of the United Nations. This Resolution also contained the Statute of the ICTY.[7] For these reasons, the ICTY is an ancillary body of the UNSC. A year later (1994), the ICTR was established in a similar manner.

According to Chapter VII of the UN Charter, the UNSC shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall decide what measures shall be taken to restore international peace and security.

The ICTY is an ad hoc tribunal (just like the ICTR). It has been called upon by the SC to judge and punish crimes committed after 1 January 1991 on the territory of the former Yugoslavia. Its mandate pertains to all serious violations of international humanitarian law. Its jurisdiction has primacy over the jurisdiction of national courts or it has concurrent jurisdiction with this jurisdiction. Nonetheless, the Tribunal retains the option of breaking the principles of "non-bis-in-idem" and can retry someone in the event that the national court proceedings were designed to shield the defendant from international criminal responsibility or the case was not a due process. It applies international humanitarian law and customary international law. According to international law, there are three types of crimes that fall under the jurisdiction of the ICTY (ratione materiae):

a) war crimes,
b) genocide,
c) crimes against humanity.

2.1 War crimes

War crimes are divided into two sub-groupings pursuant to the Statute. The first comprises grave breaches of the Geneva Conventions of 1949 (Article 2). The second consists of violations of the laws or the customs of war, and of the Hague Convention

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6 United Nations Security Council Resolution 827, available at: www.un.org/documents
7 Statute of the Tribunal, available at: http://www.icty.org.

of 1907 with the appended Laws and Customs of War on Land (Section 4). War crimes can only be committed under the conditions of an armed conflict. In the case of the first sub-grouping, a gross breach of the Geneva Conventions of 1949 requires the conflict to be of an international nature.

2.2 Genocide

Genocide is defined so that it was taken verbatim from the wording of Article II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The crime of genocide can be committed both in a time of war and a time of peace (Article 4).

2.3 Crimes against humanity

Crimes against humanity are named in a demonstrative list in Article 5. They comprise the following crimes: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. Crimes against humanity must be directed against any civilian population and it is necessary for these crimes to have been committed in an armed conflict, whether international or internal in character. This condition is no longer required in the Rome Statute of the ICC. Furthermore, the practical application of the ICTY requires attacks to be widespread or systematic (even though this requirement is not an express requirement of Article 5). The ICTY exercises jurisdiction over natural persons (Article 6).

Individual criminal responsibility pertains to people who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2–4 of the Statute, and they shall be individually responsible for the crime (Article 7, paragraph 1).

The second paragraph excludes the possibility of the defendant's position (as a head of state or member of government) being a reason to reduce or relieve a person's criminal responsibility or to mitigate punishment (Article 7, paragraph 2).

A superior is responsible if he knew or had reason to know that a subordinate was about to commit or had already committed a crime and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrator thereof (Article 7, paragraph 3). In the practical application of the ICTY, this provision is used for both military and civilian superiors.

The fact that an accused person acted pursuant to an order of a government or of a superior shall not exonerate him or lessen his guilt, but it may be considered in

mitigation of punishment if the ICTY comes to the conclusion that justice demands it (Article 7, paragraph 4).

The Tribunal may judge all crimes committed on the territory of the Former Yugoslavia beginning from 1 January 1991 (Article 8). The Tribunal's jurisdiction has primacy over national jurisdiction (Article 9).

The ICTY consists of the following organs (Article 11):

a) the Chambers, comprising three Trial Chambers and one five-member Appeals Chamber
b) the Prosecutor
c) a Registry, servicing both the Chambers and the Prosecutor

The rights of the accused are regulated in great detail in Article 21.

The remaining articles of the Statute contain the *general principles of criminal proceedings before the ICTY*. The detailed regulation of criminal proceedings is contained in the Rules of Procedure and Evidence, which the ICTY adopts itself and also amends. The Prosecutor initiates investigations ex officio and presents an indictment and evidentiary material to the court or a judge, who confirms or dismisses it. The criminal proceedings have the character of an adversarial process, which stems from the Common Law system. The accused has the option of admitting or denying their guilt at the start of proceedings. Nonetheless, this system also contains elements from the area of continental Civil Law. The Prosecutor has an obligation during the investigation to collate evidence in favour or not in favour of the accused and to obligatorily make it available to the defence at a certain stage of proceedings. The judges also have greater scope for actively intervening in the process. The ICTY makes a decision by way of a judgement, which must be supported by the votes of a majority of the judges of the Trial Chamber. A dissenting judge may append his own opinion or a divergent opinion. The severest punishment that the ICTY can impose is life imprisonment.

People punished by the ICTY serve out their sentence in states with which the ICTY has concluded an agreement on the serving of sentences. Thus far, 17 states have concluded this agreement.[8]

The doctrine of Joint Criminal Enterprise, hereinafter only referred to as *JCE*

8 By September 2008, these states comprised Italy, Finland, Norway, Sweden, Austria, France, Spain, Germany, Denmark, the United Kingdom, Belgium, Ukraine, Portugal, Estonia, Slovakia, Poland and Albania.

The aforementioned doctrine of joint criminal enterprise was invoked by the Appeals Chamber of the ICTY in the case of Duško Tadić, and it was based on the premise that although crimes pursuant to international law are mostly perpetrated collectively, it is necessary to judge their perpetrators individually. It is the task of the indictment to prove before the court the individual guilt of the perpetrators beyond all reasonable doubt.

The following is quoted from the judgement of the Appeals Chamber in the case of Duško Tadić in points 190–195.

190. The Statute does not stop at the definition of personal jurisdiction of individual criminal responsibility (Article 7, paragraph 1). It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (actus reus and mens rea) of this

category of collective criminality. To identify criminal actions and criminal intent one must turn to customary international law.

Customary rules on this matter are evident and discernible on the basis of various elements: chiefly case law, i.e. judgments passed on war criminals after the Second World War and a few instances of international legislation

195. Many post-World War II cases concerning war crimes proceed (according to the Appeals Chamber) upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group.

Close scrutiny of the relevant case law shows that, broadly speaking, the notion of common purpose encompasses three distinct categories[9] of collective criminality.

Questioning the legitimacy of the ICTY

Questioning of the Tribunal's legitimacy is based on the opinion that the executive organ, which is the SC, cannot assume authority that belongs solely to the UN General Assembly (hereinafter only referred to as the UN GA), where each state would be able to exercise its own independent will or with the participation of all states via a diplomatic conference. These objections have been repeatedly raised in various cases heard by the court. The Tribunal dealt with this objection in the first case it decided upon (the Tadić case). This was also heard in the Appeals Chamber on the basis of an appeal, which confirmed the authority of the SC. This objection has also been raised by Slobodan Milošević, Radovan Karadžić and others. The unsustainable catastrophic humanitarian situation in the former Yugoslovia, where it was necessary to act as quickly as possible led to the justifiability of the step taken by the SC. Going down the route of a UN General Assembly or a diplomatic conference is a very length process (ten years, see the ICC). Moreover, the choice of judges and the court budget are entirely under the competence of the UN GS.

3. The International Criminal Court (ICC)

On 17 July 1998, a diplomatic conference adopted the Rome Statute (hereinafter only referred to as the RS) of the International Criminal Court.[10] This court's statute, which is a multiparty international treaty, came into effect on 1 July 2002 (six days after being ratified by the sixtieth state). Consequently, it cannot judge crimes committed before

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9 Prosecutor vs. D.Tadič, Case No.: IT-94-1-A, Judgement, 15 July 1999, points 196-220 (not translated).

10 Rome Statute of the International Criminal Court. Available at: http://www.icc-cpi.int.

this date, because it would breach the non-retroactivity ratione personae contained in Article 24 of the RS. Unlike the ICTY and the ICTR, this court is a permanent institution with its own legal personality under international law. Consequently, it is not an ancillary body of the UNSC, unlike the preceding ad hoc courts. Its ratione materiae jurisdiction is contained in Article 5 of the RS and it comprises the following:

a) the crime of genocide,
b) war crimes,
c) crimes against humanity. These crimes are basically identical to the regulation in the Statute of the ICTY. Some of them have been more widely expanded upon. Moreover, there is also letter i) the enforced disappearance of persons, and letter h) the crime of apartheid. It is a demonstrative list. It is very important that according to the Rome Statute, which represents the current level of development attained in international criminal law, crimes against humanity need not be connected with armed conflict, but they still must be connected within the scope of an extensive or systematic attack against the civilian population whilst being aware of the existence of such an attack.
d) the crime of aggression (this has not yet been defined). Jurisdiction concerning the crime of aggression will be exercised by the ICC after a provision is adopted which defines this crime and sets the conditions under which this jurisdiction can be exercised.

Beginning on July 1, 2002, the court can judge crimes committed by the citizens of member states/signatories as well as crimes committed on the territory of member states, regardless of the citizenship of the perpetrators. Other cases that go beyond these two criteria can only be judged by the ICC on the initiative of the UNSC. The Security Council can also ask the ICC to shelve an investigation in a given case, or to not launch a prosecution or to refrain from continuing with a prosecution for a period of 12 months. The UNSC may also repeat this request under the same conditions. In this way it implemented the Resolution pursuant to Chapter VII of the UN Charter.

The ICC works on the principle of complementarity, i.e. the court only judges the aforementioned crimes and persons in the event that national courts cannot or do not want to judge and administer justice themselves. Individual states, signatories of the RS, are therefore preferably responsible for criminally prosecuting the crimes contained in the Statute.

The ICC begins exercising its own jurisdiction with regard to the crimes mentioned in the statute

a) on the basis of an announcement from a party to the treaty (signatories),
b) on the basis of an announcement by the UNSC,

c) The prosecutor (plaintiff) may launch an investigation on his own initiative (proprio motu) based on a submitted announcement.

Besides the law regulated in the RS, the ICC applies international humanitarian treaty law and international common law.

So far, the ICC has not decided any criminal case.[11]
For the Czech Republic, the Rome Statute came into effect on 1 October 2009 and the Czech Republic became the 110th party to the treaty.[12]

Since the Nuremberg Tribunal, it has been a common feature of all international criminal courts that not even heads of state or the high-ranking persons are excluded from criminal liability.

The purpose of their activity is:
- to punish those who commit crimes (retribution),
- to deter other perpetrators from committing crimes (deterrence),
- to provide justice to the victims of crimes,
- to help bring peace and order, to support reconciliation in areas affected by war, where the efforts of sovereign states have failed.

It would appear that the establishment and commencement of the activity of a permanent International Criminal Court in 2002 should serve as a reminder to all the powerful in this world. It should help people remember that institutionally prepared justice awaits with ever ready prosecutors and judges and that it will judge all cases in which national courts are dragging their feet or passively looking on while there is an increase in powerless victims of crime. (Unfortunately, we must bear in mind that it concerns crimes that were not committed until after 1 June 2002 and, as has already been mentioned, the activity of the ICC can be repeatedly suspended for 12 months by the UNSC.)

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11 On 31 March 2005, by way of Security Council Resolution No. 1593/2005 (dated 31 March 2005), Sudan's Darfur region was assigned to the ICC. On 1 June 2008, the ICC prosecutor Luis Moreno-Ocampo charged the current president Al Bashir of Sudan with genocide, crimes against humanity and war crimes in Darfur. The court issued an arrest warrant and limited the scope of the case by leaving out genocide. The court's decision has been criticised by the African Union, the League of Arab States as well as by the governments of Russia and China.

12 Of the permanent members of the Security Council, the USA, China and Russia have not yet ratified the Rome Statute.

4. Guilty pleas

The admission of guilt is an acceptable institute in some national jurisdictions. Besides enabling an effective expression of remorse and confession to a crime, its purpose is to try and reduce the length of case hearings and to prevent courts from becoming overburdened and to speed up proceedings.

The same institute is also contained in the ICTY procedure within the framework of preliminary proceedings (Rule 62 bis Rules of Procedure and Evidence). If the accused enters an innocent plea, this is followed by normal evidentiary proceedings. If he admits his guilt, abridged proceedings follow, i.e. a Sentencing Hearing, which means that the case is usually completed in one public hearing. The conditions under which the court may accept an admission of guilt are as follows:

- the guilty plea must be voluntary,
- the guilty plea must be informed,
- the guilty plea may not be equivocal,
- it must be sufficiently proven that the crime occurred and the accused participated in it. Furthermore, insofar as the facts of the case (factual bases) are concerned, there may not be any disagreement among the parties in the lawsuit.

Whereas there were only four guilty pleas at the ICTY from the time when it came into existence up to 2002, i.e. a total of seven years, there were surprisingly 10 guilty pleas in 2003. Since that year, there have only been sporadic cases of guilty pleas. I will deal with two cases of guilty pleas that are exceptional in their nature.

Dražen Erdemović – this 23 year old Croatian was a member of a military unit of the Bosnian Serb Army and he participated in the mass execution of Bosnian Muslim men aged 17 to 60 years, who had been taken from Srebrenica in the village of Pilica on 16 June 1995. Erdemović, who had been severely troubled by his conscience, told his story to a journalist. He was subsequently arrested and transferred to The Hague. He fully admitted his guilt (initially admitting a crime against humanity and later changing it to war crimes). He was in a very bad mental state, so the judge ordered that he undergo psychiatric and psychological examinations. It was ascertained that he suffered from post-traumatic stress disorder and disorientation. Consequently, his trial had to be delayed. In his defence, he stated that the offences were committed under duress. He had no choice in that that he either had to shoot or be shot himself. He personally executed 70 people. Later, he himself was injured and he was subsequently hospitalised in Belgrade.

The defence argued that according to the general principles of criminal law such duress is a complete defence and that it rules out the illegality of the perpetrator's actions.

Nonetheless, the Appeals Chamber like the Trial Chamber of first instance concluded that not even such direct duress could relieve the perpetrator of personal responsibility and guilt, and that it could therefore only be a mitigating factor in accordance with Article 7, paragraph 4 of the ICTY Statute. After considering all mitigating factors, such as the accused's age, family situation, reluctance to carry out the order, his character and his full admission of guilt, the duress he was under and his high level of cooperation with investigators, which fundamentally led to the clarification of subsequent cases heard on the genocide in Srebrenica, his original sentence of 10 years imprisonment was reduced to 5 years.[13]

Biljana Plavšić – Plavšić was a member of the highest political leadership, i.e. the collective presidency of the Serb Republic (Republika Srpska) of Bosnia and Herzegovina, which consisted of Radovan Karadžić, Nikola Koljević and Biljana Plavšić. In January 2001, she voluntarily gave herself up to the ICTY. On 2 October 2002, she admitted her guilt in regard to point 3 of the indictment, which concerned persecutions and crimes against humanity.

Originally, she had wanted to refute these accusations. Subsequently, however, she had time to assess them with her lawyers and to conduct her own examination and to reach her own conclusion that thousands of innocent Bosnian Muslims and Croats had become victims of an organised and systematic displacement from territory claimed by Serbs. "Our leadership, of which I was a necessary part, led an effort which victimised countless innocent people..." she said. "By the end, it was said, even among our own people, that in this war we had lost our nobility of character. The obvious questions become, if this truth is now self-evident, why did I not see it earlier? And how could our leaders and those who followed have committed such acts? The answer to both questions is, I believe, fear, a blinding fear that led to an obsession, especially for those of us for whom the Second World War was a living memory, that Serbs would never again allow themselves to become victims... [We ceased] to respect the human dignity of others. We were committed to do whatever was necessary to prevail. Although I was repeatedly informed of allegations of cruel and inhuman conduct against non-Serbs, I refused to accept them or even to investigate... I remained secure in my belief that Serbs were not capable of such acts.

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13 Prosecutor vs. Erdemovič, Case No IT-96-22 Sentencing Judgement, 29 November 1996. Freely translated by the author.
Prosecutor v. Erdemovič, Case No IT 96-22-A, Sentencing Appeal 7.October, 1997. Freely translated by the author.

The accused further stated that during the two days of her trial she had heard a litany of suffering that this produced among the persecuted. Consequently, she accepted her responsibility for the aforementioned crimes. "The knowledge that I am responsible for such human suffering and for soiling the character of my people (*meaning Bosnian Serbs*) will always be with me," she said. "There is a justice which demands a life for each innocent life, a death for each wrongful death. It is, of course, not possible for me to meet the demands of such justice. I can only do what is in my power and hope that it will be of some benefit, that having come to the truth, to speak it, and to accept responsibility. This will, I hope, help the Muslim, Croat, and even Serb innocent victims not to be overtaken with bitterness, which often becomes hatred and is in the end self-destructive."

The accused went on to say that although she had separated from the other leaders, she had done so too late.

"I have been urged that this is not the time or the place to speak this truth," she said. "We must wait, they say, until others also accept responsibility for their deeds. But I believe that there is no place and that there is no time where it is not appropriate to speak the truth...Others will have to examine themselves and their own conduct. We must live in the world and not in a cave… As for me, it is the members of this Trial Chamber that have been given the responsibility to judge. You must strive in your judgement to find whatever justice this world can offer, not only for me but also for the innocent victims of this war. I will, however, make one appeal, and that is to the Tribunal itself, the Judges, Prosecutors, investigators; that you do all within your power to bring justice to all sides. In doing this, you may be able to accomplish the mission for which this Tribunal has been created."[14]

5. On national reconciliation

5.1 South Africa's Commission for Truth and Reconciliation – experiences

Taken from the expert witness testimony of Dr. Alexander Lionel Boraine in the trial[15] of the Bosnian Serb President Biljana Plavšić.

Dr. Boraine, the head of the Methodist Church in the Republic of South Africa, grew up in the Apartheid era and his experiences of the injustices of this period led him to take holy orders and to decide to fight apartheid. In an effort to make things

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14 Case No IT-00-39&40-Record of open proceedings, pp. 609-619. Freely translated by the author.

15 Prosecutor vs. Biljana Plavšič (Case No IT-00-39&40/1-S – record of verbal proceedings dated 17 December 2002, pp. 586-608). Freely translated by the author.

better, he entered politics, but after 12 years he realised that changes were not possible in this area, because South Africa had become a military state in the interim. In 1995, President Mandela asked him to take over the presidency of the South African Truth and Reconciliation Commission. He worked closely with Archbishop Desmond Tutu in this position.

He later taught law at the NYU faculty of law, initially on a fulltime basis and then part-time when he began publishing (A Country Unmasked). In his publications, he primarily focuses on the work and importance of Truth and Reconciliation Commissions in other parts of the world. The Centre for Transitional Justice, which he established, operates in 15 different countries, not just in Africa, but also in the Balkans, Northern Ireland and South Asia. Before the ICTY, he was supposed to focus on the contribution to reconciliation in the former Yugoslavia caused by Ms. Plavšić's admission of guilt and personal responsibility for crimes committed in Bosnia and Herzegovina. In particular, Dr. Boraine was meant to comment on his own general experience of the fact of responsibility being acknowledged in the reconciliation process. "In my experience, accepting responsibility for terrible crimes can have a transformative and traumatic impact on the perpetrator, but also on the victims and the wider community," he said in his testimony. "Such acceptance, whether by a guilty plea in a criminal case or in some other forum, can, I believe, be a significant factor in promoting reconciliation and creating what I would call space for new attitudes and new behaviour." A system of criminal justice is not solely to ensure retribution but must also contribute to peace and order in society. The ICTY was not established solely to determine guilt or innocence but to also "contribute to the restoration and maintenance of peace." That means contributing to the settlement of wider issues of accountability, reconciliation, and establishing the truth behind the evils perpetrated in the former Yugoslavia.

Mrs. Plavšić was the former president of Republika Srpska, and she plead guilty to the crime of persecutions on political, racial, and religious grounds for acts committed in more than 30 Bosnian municipalities in 1992. And with this act, this act of acceptance of guilt, she assumes responsibility for those horrors that many Serb leaders continue to deny. And the list of crimes is almost like a litany of death: A killing of defenceless civilians, torture, physical and psychological abuse, sexual violence, the forced displacement of entire communities, the existence of detention camps where thousands of prisoners were kept in inhumane conditions and many killed, the razing of entire villages.

When asked what importance could be attached to Mrs. Plavšić's admission of guilt. Dr. Boraine gave the following response: "As a Serb nationalist and former political leader of some significance, her confession sends out a very crucial message about the true criminal character of the enterprise with which she was engaged. It really takes very seriously what happened… It also sends a powerful message about

the legitimacy of this Tribunal and its functions. It's important to recognise that Mrs. Plavšić surrendered herself to the Tribunal, voluntarily travelled to The Hague… Mrs. Plavšić has apologised and called on other leaders to examine their own conduct. I think this is particularly significant. And fourthly, this acceptance of responsibility may demonstrate to victims that at long last someone has acknowledged their own personal suffering… Mrs. Biljana Plavšić has taken this crucial first step, so different from so many other leaders from that part of the world."

We have been reminded that appropriate weight should be given to her role in ending a war and seeking to implement the Dayton Peace Accords. Her role in seeking to steer her people away from the violent nationalism that she herself helped to foster should be recognised as one of a series of steps.

In assessing the role victims play in the process of accountability and dispensing justice, Dr. Boraine had the following to say: "I think that victims ought to be at the very centre. The problem is we don't like victims very much because they make demands. They cry to be heard." And in the very nature of things, in criminal justice it's very difficult to find the time and the energy and the place so that they do become central and they are very often marginalised. Full justice cannot ever be delivered if it is done at the expense of the victims. They need to be heard. And I think all of us have to learn to listen much more than perhaps we do right now. Reconciliation can all too easily be undermined if victims feel that their pain and suffering has not been given sufficient recognition in both judicial and non-judicial processes established to respond to gross violations of human rights.

The South African Truth and Reconciliation Commission (hereinafter only referred to as the Commission) was a commission and not a court. Many do confuse the two sometimes, but truth commissions are neither the same as judicial bodies, nor, I hasten to add, an adequate substitute for them. Truth commissions are non-judicial bodies – and as such have far fewer powers than do courts. They have no power to put people in prison. They cannot even enforce their recommendations. But on the other hand, they can do a lot of other things. By gathering, organising, and preserving evidence that can be used by the commission and in prosecutions; providing a public platform for victims through public hearings. In South Africa, we heard over 22,000 victims. The Commission can also make far-reaching recommendations regarding victim reparation and necessary legal and institutional reforms.

The Commission in South Africa was unique in that unlike any other commission, it had the authority to grant amnesty to perpetrators of politically-motivated crimes. These amnesty provisions were arguably an important but also very controversial power to wield.

Ultimately, we received over 7,000 applications for amnesty, which came as a considerable shock because the general view was that no one would come forward. Why would they? But of course there was both the carrot-and-the-stick approach, and

that, I think, brought many of the perpetrators to come and to confess. One of the conditions of the South African legislation was that the full account had to be given in order for amnesty to be considered. And if the judges of the Supreme Court who sat on the amnesty committee felt for any reason whatsoever that full accountability had not been given, then amnesty would obviously be withheld.

As regards the issue of what impact an admission of responsibility and guilt has on both victims and perpetrators, Dr. Boraine had the following to say: "It's the same cry that I've heard all over the world in so many different cultures and different languages, and it goes something like this, quite simply, and yet desperately: 'I want to know what happened. I want to know why it happened. I want to know where the body is of my loved one. I want to know'… I think the fact that perpetrators came and told sometimes very grizzly stories of what they had done was almost a relief to the victims. They actually faced the perpetrators, because obviously they were encouraged to attend the amnesty hearings and, indeed, were provided with transport and provision to do so. And this knowledge and acknowledgement, I think, was extremely important. But also through personal story-telling, a public process got underway, a silence was broken… It has to be acknowledged that, of course, perpetrators who came forward to give confessions did so with the expectation of getting something out of it. It was a kind of quid pro quo. They hoped that by making full confession, they would be saved from appearing in court or going to prison. But I have to admit that sitting and watching and listening for two and a half years, I was struck by the number of perpetrators who actually did confess and apologise; many broke down, quite literally, as they gave their public testimonies and asked of the Commission that we organise meetings between themselves and their victims. Sometimes the victims agreed; sometimes they refused. And it became, I suppose, a kind of national catharsis… I think truth-telling by victims and perpetrators struck a very powerful blow against amnesia in my country."

Dr. Boraine had the following to say about other experiences:

East Timor – low-level perpetrators were able to avoid prosecution provided that they participated in community reconciliation processes whereby they confessed, apologised, and agreed to perform an act of reconciliation, community service.

Confessions and apologies can be cheapened if they are not accompanied by the appropriate remedial action. I have no doubt that admissions of responsibility, particularly from civilian and military leaders are a key factor. They can help prevent basic points of fact from continuing to be a source of conflict or bitterness. And this, of course, in turn, can help to reduce tensions in society and thereby facilitate peaceful coexistence or reconciliation, so there is a potential to break the cycle of violence and create a more sustainable peace as a result.

Germany – the 1960 domestic trials in Germany helped the international community and even the holocaust survivors to see Germans in a different and more positive light.

Chile – I think victim compensation programmes – and one looks at Chile for their reparations programme for the families of murdered and disappeared – helped to restore for some victims, at least, a greater trust in the state and the society in a more different and positive light as a result of the removal of abusers from office.

Everywhere I have been in the world, I have found that one – only one – of the aspects which have been extremely helpful in creating a climate where people can begin to co-exist is this act of truth-telling, of truth delivery.

6. The nature of the crimes of communism

If my presentation is to conclude with how one should deal with the crimes of communism in former communist states, I would say the following:

1) The conflict in the former Yugoslavia lasted five years and ended in December 1995.[16] According to estimates, it resulted in 200,000 victims.
2) The Second World War, which is said to be the most deadly conflict in history, is estimated to have resulted in 60,000,000 victims.

"Nazism was condemned at an international trial in Nuremberg as a criminal ideology and it was denounced by the entire world. Its exponents were exemplarily punished and Nazi crimes are not statute-barred in order to underline their fiendish nature."

3) "Communist ideology, which resulted in crimes being committed that were comparable with Nazi wrongdoings, was not condemned by the international community," even though its "balance sheet" is frightening[17] 100,000,000 victims[18] without a war.

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16 Duration of the war: Slovenia, June 1991, 10 days; Croatia, July to December 1991, 6 months; Bosnia, March 1992 to December 1995, 4 years

17 "The extraordinary attention paid to Hitler's crimes is entirely justified… But the revelaions concerning Communist crimes cause barely a stir. Why is there such an awkward silence from politicians? Why such a deafening silence from the academic world regarding the Communist catastrophe, which touched the lives of about one-third of humanity on four continents during a period spanning eighty years?" Quoted from The Black Book of Communism I, p. 26, Paseka, 1999

18 The Black Book of Communism I, written by Stephane Courtois, Nicolas Wert, Jean-Louis Panné, Andrzej Paczkowski, Karel Bartošek, Jean-Louis Margolin.

What everyone of us and the entire international community really do not know is that in countries such as the former Soviet Union, China, Vietnam, Cambodia, Eastern Europe and other places… an internal destructive conflict was waged for entire decades, whereby the fanatical ruling communist parties and their apparatus literally massacred their own civilian populations and placed entire national, ethnic, religious and class groups under genocidal conditions.

a) It is never too late to establish justice, but the passage of time is counterproductive to obtaining any redress. Victims are dying and getting older. And the accuracy of their memories is fading, which weakens the persuasiveness of their testimony. The following could contribute to obtaining justice:
   - international courts,
   - national courts,
   - pleading guilty before a court,
   - truth and reconciliation commissions, as another platform for acknowledging guilt.

b) As far as the Czech Republic is concerned, it is a pity that the law on the illegality of the communist regime and resistance to it (Act No. 198/1993 of the Collection of Laws) has not been used effectively, not only insofar as the lapse of statutes of limitations is concerned, but particularly in terms of its exhortative content being used to give rise to the political will to appoint a specialised, sufficiently qualified group of investigators, state prosecutors and judges to quickly arrange proper redress.

c) As regards the issue of forgiveness and reconciliation, I would say that only the victims have the right to forgive that wrongs that they have suffered at the hands of others. Only the victims have the right to draw a thick black line under the past, and always only for the injustices that have been done to them. Nobody else has this right! And if someone appropriates this right, then accounts still remain to be settled. If I were to paraphrase the statement of Biljana Plavšić in which she admitted her responsibility in her closing speech (at 72 years of age) before her conviction at The Hague, then I would state the following: Anyone who deliberately thwarts the lives of others has only one life with which to pay for their actions, and even if they lay down their life, it cannot undo the death of tens of thousands, hundreds of thousands and millions. Consequently, the only thing they can do is admit the truth and humbly beg for forgiveness. As far as I know, no individual members of communist parties or their organisations have done this yet.

d) A civilised society, which (rightly) takes the administration of justice out of the hands of victims and does away with the law of revenge that says "an eye for an eye, a tooth for a tooth", is obliged to administer justice responsibly and in a

proportionate manner. I think that Dr Boraine's words that the victims "need to be heard" are imperative. The victims of communism have not yet been heard.

7. Personal thoughts in conclusion

My mandate as a judge at The Hague lasted three years, from 2001 to 2004. It is not easy to stand face to face with documented violence, because a judge is also a person, who can be hurt by violence. Personally, however, I felt "honoured" that I was one of those who could at least partially contribute to letting justice take its course, which is so important to those who have lived through horrors. And yet, many of them still have no possibility of even visiting the graves of their loved ones, their children, spouses, parents, and siblings. Judges are closer to justice when they are capable of empathy. They cannot be absent in spirit, when a victim in their role as a witness describes before them the horrors that they have endured – when they were raped, when their mother was bound in front of them, and she was doused in petrol and set alight. By communicating their grief to judges, victims undergo their own form of therapy. They are fulfilling their debt to the dead. The court listens and comes to its conclusions. Without convictions for crimes, it is also not possible to expect any future reconciliation in the former Yugoslavia or anywhere else in the world where crimes against humanity have occurred and are still occurring…

ALEXANDRA MIHALCEA ► former collaborator of
the International Criminal Tribunal for Rwanda

Dear conference participants,

It is not easy for the speaker to make the presentation before such an overwhelmingly important and prestigious audience.

Moreover, it is quite certain that most of the issues treated in the presentation itself are to be debated fundamentally in previous contributions. (At the time of the presentation, on Friday – 26 February, this will be a "fait accomplit").

When, between July and December 1999, I experienced international justice for the first time (and still the last time, at present), being close to the International Criminal Tribunal for Rwanda, little did I imagine that ten years after I would officially link this close encounter to one of the most dramatic and painful efforts of my own people in the course of its history: the fight against communism.

I admit it, it often crossed my mind while in Arusha (the Tanzanian head-quarters of the Tribunal), in just a theoretical way, to make parallels between the Rwandan genocide and the Romanian tragedy for almost half a century. But now I realize that we can do much more than drawing philosophical parallels.

When we received the most honoring invitation to attend to this conference and even to intervene in its course, I asked myself a natural question: what are we going to do there? Are we going to argue and re-argue the same generally known truths, about the horrors and the monstrosities of communist regimes? Are we going to tell well known stories about our own experiences? Are we going to re-affirm our determination not to let it happen again?

The answer was clear to me: we are going to put together our own knowledge and experience, in order to learn whether humanity is willing and capable to bring to justice the crimes of communism.

Is there sufficient political will to do it?
Do we have sufficient legal instruments or are others necessary to be created?
Can we base our endeavors on existing precedents or must we build anew?

No matter the response to these questions, we are here to find (or to begin the quest) for the path to Justice.

We have at least two allies: international law (existent or to be developed), which is the instrument; and international justice, which is the Force.

I must say that reading the program of the present conference was extremely encouraging to me: the goals of this meeting are just what humanity needs.

Now, let us go back to the Rwandan experience:

Rwanda is a beautiful country in central Africa, unanimously known as the "African Switzerland". A complex history made Rwanda a multi-ethnical state, and we are now interested in the two main groups: the Tutsis (minority) and the Hutus (majority).

In the course of the last decades, many were the moments when the two groups found themselves in conflict, but these were kept under control, either by the efficiency of the state institutions, or (more likely) by and for the obscure political local, as well as regional interests.

On April 6 of the year 1994, things exploded: the plane with Rwandan president Juvenal Habyarimana, who was accompanied by the Burundi president and other officials, was gunned down shortly before landing on the Kigali airport.

The gesture (whose origin is still unknown) was the start (or the pretext?) of a mass killing of Tutsis and moderate Hutus by Hutu whom we should call "fundamentalists".

The massacre (at random during the first days and weeks, then systematical and performed by the Government's officials (army, "Gendarmerie", police) was only stopped in June 1994, by the (late) intervention of the international community, through the "Turquoise Operation" of the French Government, mandated by the Security Council of the United Nations.

The total number of victims is still officially unknown: around 1 million people (tutsies) were massacred during individual or mass killings, between April and June 1994.

Although during the genocide and in order to stop it, the response of the world was too and unjustified long expected, when it came to justice, the international community reacted quite promptly: in November 1994 an Ad-Hoc court of Justice was established in a neighboring country, Tanzania. The place was chosen to be the city of Arusha, situated under the Mount Meru.

I was appointed assistant counsel in the team of Maitre Francois Roux from the Barreau de Montpellier (lead counsel in the case), to defend the former mayor of the Mabanza Commune – Ignace Bagilishema.

My activity lasted 6 moths and I worked in Arusha, in Paris and in Montpellier.

At the end of his trial, Ignace Bagilishema was acquitted, the sentence being maintained by the Court of Appeals from the Hague.

(We can see that, although the duration of the ICTR proceedings was not short, still, compared with the crimes of communism, the international community made quick steps to achieve justice in Rwanda.) How does the International Criminal Tribunal for Rwanda function?

1. Prosecution

The prosecutor's office of the ICTR (based in Kigali) performs the actual investigation. It seeks evidence, it gathers witness depositions, it travels to the fields, it forms the prosecuting files.

There was a tremendous advantage of the ICTR, as well as of the Criminal Tribunal for Ex-Yugoslavia: they were dealing with very recent facts. The actors of the deeds were still alive and capable to stand before justice.

The evidence was fresh, the information rigorously systematized, there was huge media coverage, archive were full (or could be filled) with stories of journalists, the political back-ground was well-known (well, at least as much as we can be sure of anything in this world), the people involved (including chiefs of states, ministers, heads of international bodies, army leaders, but also victims, eye witnesses, relatives etc.) could have been heard, their depositions making a judge actually see the factual circumstances.

What happens, then, with the communism trial?
What evidence do we still have? Where are the actors now? Are they still alive?
Are they occupying important positions in state and government hierarchy?
Are they heads of important political parties?

Where are the victims? Of the 1980s, of the 1970s, but also of the 1940s and 1950s?
Whom should we question?
What are the criteria for the incrimination?
Works of historians?

Yes, there are remarkable authors, like Stephane Courtois or Thierry Wolton, who dedicated their lives in studying the crimes of communism, who know much, but not all.

There are other scholars, high prestige historians, like our fellow countryman Marius Oprea, who not only studied facts, but tried to act. Some of them are authors of drafts of laws, which have never been adopted (least of all applied).

There are civil activists, such as the Timisoara Society, represented here by us both guests from Timisoara, who endeavored to impose a law of lustration in Romania.

How could we keep on fighting to create a court for the crimes of communism, when smaller and less radical attempts failed so discouragingly?

I will not try to draw any conclusion. Coming back to my initial fear, I feel myself complaining, without proposing something feasible.

I come to believe that incomplete or imperfect Justice is better than none at all. Or is it?

Turning again to the prosecution of the crimes of communism, it should deal with at least 50 years of terror and non-human acts (I say at least, because there are places on the earth where the night lasted more, up to 80 years and its traces still resist), with huge number of victims (both direct and collateral), plus the heirs for the victims, victims themselves of a prejudicial past, of which some (and far too many) have never recovered.

Compared to the Rwandan genocide, where the genocide lasted three months (according to the official, internationally accepted and prosecuted version, because the local and regional conflict in Central Africa is much older and will last long still) and the number of victims is about 1 million people, the communist genocide lasted almost a century and made a hundred times more victims (according to Stephane Courtois documented "Black Book of Communism").

These calculations may sound cynical, but they are made only to enable the construction of an efficient prosecution, if there ever will be the case.

A legal device able to function under efficient conditions should be built differently for different dimensions (in time, in space and in numbers) of crimes.

Another essential starting point should be, as far as the prosecution is concerned (but also the court itself, as we will see a little later) the set of values defended by the Tribunal, which should be established "a priori" by the international community, as an expression of their will to achieve justice in the matter.

I believe there must first be an official and general acknowledgement and admission of the very existence of crimes and of their possible inclusion into the definition of "genocide" and that of "crime against humanity".

The very creation of the Tribunal should have as basis the recognition of crimes – which are to be included and duly considered as crimes against humanity, described so as to fit exactly into the existing definitions.

There also must be a general acknowledgement of the fact that these crimes were committed in the name of a false and hypocrite ideology, by state authorities and by their representatives, over entire populations and people, who were abusively included in the category of "enemies" of the "state", "working class", "people", "social order".

There must be an acknowledgement that most of these regimes were installed totally un-democratically, without legally organized elections (for never was any population properly consulted on their on will to establish communism in their country), by the force of the arms and following a devastating war which created sufficient vulnerability in the international community.

The acknowledgement should conclude that these regimes were totally and essentially illegal from their very beginning, being put in place in the total denial of the most elementary rules and values of democracy.

And then, if today we value, promote and defend democracy as the most important principle that governs the peoples of the earth, then we also must deny communism the

right to claim a legitimate status and, moreover, we should proclaim its illegality and the determination to prosecute and condemn it legally.

For the achievement of the goal of making justice possible, we must admit there were crimes, for the elementary reason that there are victims.

I remember being in Arusha, at the ICTR, where attorneys first asked the defendants (while preparing the defense): "Do you admit that there was a genocide in Rwanda?" No defense ever started on different basis, but the one of acknowledgement.

2. Trials

1. First of all, the legal bases for the trials is the Tribunal's by-laws (le statut du Tribunal), which, in fact, represents the substantial applicable law.

This document is extremely interesting to read, for, besides the natural references to the Geneva Treaties) it has some clear points about the guilt, the burden of proof, the legal value of the "order given by a superior" etc.

It is interesting to observe that, regarding the last issue, those responsible for genocide were not only the actual perpetrators, but also the ones from whom the orders came.

On the other hand, the simple "obedience" of the military order does not absolve the executants from penal responsibility.

I believe that here there is a large field of debate, for in Romania, for example, many years after the 1989 Revolution, there were far too many discussions around the problem of the "blind" execution of the military order.

Can this be an excuse for mass killings? Can this be an excuse for killing your own people, in a situation other than of war? Can this be an excuse for cold-blooded murder of civilians?

Coming back to our own discussion, the Court to be (that for the creation of which we find ourselves here) should have such substantial law, to be based on.

It should be either a regulation similar to the ICTR's, or it should be a broad and deep declaration (both juridical and political) of the world states, made individually or institutionally.

If such a declaration could have the form of an international treaty, then it would definitely be bounding for the signing parties.

Such a declaration could be based on the model of the Universal Declaration of Human Rights and/or on that of the European Convention of Human Rights.

It should bear the unconditional support of prominent public personalities or organizations, unanimously recognized by the international community as activists for human democratic rights, accepted as being above all group or individual interests.

Such a universal declaration is fundamental for the creation of such a Court, because it would form an absolute presumption of the existence of the crimes.

And hence many useful technical conclusions regarding matters like the burden of proof.

2. The procedure before such a court is also essential for its well-functioning.

Is became a custom that international ad-hoc courts of justice would have two official working languages (English and French), corresponding to the two large systems of legal proceedings: the Common Law (based on jurisprudence and the legal precedent) and the French (Napoleon) inspiration codified law.

The ICTR makes no exception to that rule, so, according to the same by-law, it adopted a mixed collection of procedural norms, using elements both of Common Law and of French law.

In ICTR's case, the French codified influence is clear, since there is a by law we spoke about (which can be considered to be a code of legal regulations).

It is important to remark that all European former communist states had and still have procedural regulations inspired by the French system, but strongly affected by Stalinist proceeding rules.

Therefore, the court we all wait to see, should function on the basis of a set of proceedings well established and thoroughly analysed.

Many other questions could be asked:

Starting from the thought that such a Court could be created, should it be a permanent or a temporary one? Should it be an ad-hoc tribunal or a definitive and long term establishment?

How should its competence be: rationae loci (limited or general in space), rationae tempori (limited or unlimited in time), rationae materiae (dealing with all or only some categories of crimes)?

What should be the object of such a Tribunal: individuals or/and institutions? For there is only an individual criminal responsibility, but should the institutions which provoked the majority of crimes (and some of them still exist as state institutions, even if with changed names) be exonerated from their guilt (if not criminal responsibility, then at least some other kind of legal one – general civil liability, for example)?

Should statues of limitation be applied? I think not, since we are dealing with crimes against humanity.

There should be permanent political instruments to support and to assist such a court, otherwise it could not resist neither in time, nor in its decisions.

I believe that we are not exactly pioneers in what concerns legally and institutionally condemning the crimes of communism.

I think we are not wrong in considering that the trial of communism regimes begun with the admittance of ex-communist European countries in the Council of Europe and their submission to the European Convention of Human Rights, as well as to the jurisdiction of the European Court of Human Rights.

Thus, it was possible ever since 1993 (for Romania) to reach "restitutio in integrum" in civil matters, when the Court in Strasbourg pronounced decisions to restore property previously nationalized/confiscated by communist regimes, but there was also condemnation of states for unjust prosecution or sentencing.

It is generally known that the jurisdiction of the European Court of Human Rights begins with the date of the inclusion of the state in the Council of Europe.

However, through some very important decisions, the court extended the effects of its decisions also to remotely anterior periods (such as the decisions when the court stated that it has been continuous violation of the right to property since the act of communist nationalization in the early 1950s till the present days – see Judgment of 2005 in the case Strain and others vs. Romania)), which means that the competence to find and to sanction the violation went deep into the communist regime.

Not only the right to property is being dealt with at the ECHR, but also all the other fundamental rights to be regulated in the European Convention, and they can all be linked to crimes of totalitarian regimes (including communism), because in fact the Convention was signed as a response to all regimes which continuously ignored the fundamental rights of human beings.

But in the case of the European Court of Human Rights the jurisprudence which accomplished such an extension of competence is still poor, and deals more with concrete and specific facts than with matters of principle (for example, one is still compelled to prove before the ECHR the abusive character of confiscation during communist regimes.)

I do not know if these parallels can be of use; experience can be of use. Good will can be of use. Determination can be of use, conviction as well. And, above all, responsibility, care and active sympathy for the victims.

NTSIKI SANDI ▸ lawyer, former member of the Amnesty Committee, Truth and Reconciliation Commission

Transitional justice in a post-apartheid South Africa: the relevance of the truth commission

"I am ready to forgive but I want to know whom to forgive and for what."
(Witnesses constantly asking TRC Commissioners)

Introduction

Chairperson, I first want to thank the organizers of this very important conference for inviting me to come and be one of the speakers today, and share the experiences of our respective countries since the collapse of dictatorships. I thank the Czech Republic's office in South Africa for quickly arranging that I get the visa to enter this country. My sister the Honourable Ambassador Madam Sandra Botha and her staff, for their very prompt assistance in this regard.

I think this is a very important conference which will pave the way forward not only for the people of the Czech Republic but for all the nations of the Central and Eastern Europe. As South Africans we wish you well in your endevours to transform your justice systems in the post-communist era, but more importantly the need to dig out the truth about the past so that your people can be reconciled.

I was born in South Africa and I grew up there, and also received most of my education there. I have lived almost all my life in South Africa and the first time I was out of the country was in 1993 and 1994 when I was a student in England. When I was born the "white-domination" National Party[1] which ruled the country from 1948 to 1994 had been in power for just over ten years. So, I saw and also experienced most of the madness and the atrocities of the apartheid monster. I also saw how in the end apartheid came to an end, partly through goodwill on both sides and the sometimes-amazing human ability to reach out to the other side. With the collapse of communism in Europe it became impossible for the apartheid regime to justify itself on the ideological basis of the Cold War. The system simply could not continue without the risk of plunging the country into a bloodbath of unprecedented proportions. White

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1 This was a system of racial segregation and oppression of the non-white races by the white minority as a racial group which had exclusive control of political power and the economic structures and resources of the country.

divisions and open defiance even by Whites themselves created serious contradictions for the system. The pariah state had to find radical alternatives.[2]

Change in South Africa is sometimes described as "a miracle" because many people used to think that Apartheid would one day explode into flames. An open war between blacks and whites. However, this never happened and in April 1994 we had the first democratic elections, the first black president and the first truly representative government with a nonracial Constitution and Bill of Rights. Of course many people died before change came in 1994, but it was relatively peaceful. South Africa is proud to be counted amongst the most progressive non-racial democracies in the world today after graduating from the status of the "skunk of the world".[3] The theme of the conference is transitional justice.

Transitional justice has been described as :

"… processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, to serve justice and achieve reconciliation". (The 2004 UN Report to the Secretary-General on The Rule of Law and transitional justice in conflict and post-conflict societies)

The question is how does a nation which has undergone a long period of repression and human rights abuses reconcile and unify its peoples into one nation, create a new ethos and culture of human rights, and ensure that what happened in the past does not happen again?

What is the role of the law enforcement agencies such as the police and the courts in that process." What about the media, faith groups and educational institutions? Shouldn't these institutions be helping the emerging societies rebuild themselves, heal themselves by educating the present generation about the wrongs of the past in a positive way and thereby ensure that the past is not repeated?

There can be no lasting reconciliation without the truth. The truth in its ugly form must be known before those who perpetrated human rights abuses can be forgiven. There is simply no short cut to lasting peace, stability and prosperity for any nation that has experienced human rights abuses. You can only have a united nation if both the perpetrator and the victims agree that what happened in the past was wrong; that it should not have happened in the first place and that it will never happen again.[4] The victims must be allowed to ventilate and tell their stories. Perpetrators must publicly

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2 In the early 1960s the liberation organizations such as the ANC, the PAC and the Communist Party were outlawed and were forced into exile. However, and despite the relative political lull which prevailed in the 1960s and early 1970s, in the 1980s the country became ungovernable. Cosmetic reforms such as extending the franchise to Coloureds and Indians only worsened the situation. Negotiations became the only logical solution for the country.

3 Nelson Mandela in his inaugural speech.

confess that they have caused harm to many people in the past. They must repent and show genuine remorse before they can be forgiven. But the idea that victims must simply "forgive and forget" is dangerous, because it trivializes the pain and the suffering of the victims. It can also lead to a false reconciliation.

1. The Truth and Reconciliation Commission (the TRC)

I have been asked to talk about the South African experience on these matters and I come here with very little knowledge of the history of your country and of its institutions. Everyone agrees that on these sensitive and delicate matters each nation has to find and shape its solutions according to the peculiarities of its own history, its complexities, even its internal contradictions and a host of other factors which I need not detail here. It is not prudent to import solutions from the outside and carbon-copy them into your own situation. I am not suggesting that this is what you want to do.

Of course external experience is very relevant because what has happened in other countries will always provide useful lessons for other nations which still have to undertake the same journey. I am trying to say here I am very aware of the extremely difficult, risky and potentially dangerous exercise you are about to embark upon in your region, namely to revisit the human rights abuses that occurred in the past.

South Africans were very fortunate to have had the opportunity to learn from the experiences of other countries like Chile, Argentina, and Uruguay which after overcoming political conflicts undertook the sensitive task of reconciliation through the truth. Still, this does not make our model perfect or the best that can be adopted by your region.

As Immanuel Kant says: "out of the crooked timber of humanity no straight thing was ever made". Reconciliation is a process and not an event.

The TRC was born out of the realization that what had happened during the Apartheid era could not be swept under the carpet. There was not going to be any general amnesty for the crimes committed during the conflict. The past had to be confronted head-on to try and heal the wounds of those who had suffered in many different ways. In our situation there was no victor and no vanquished party. So the Nuremberg type of trials was out of question. In any case experience had already shown that political trials were too expensive for the new Government of National Unity which faced a huge

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4 See Roberto Canas in Dealing with the Past (ed): Desmond Tutu and Alex Boraine says: "Unless a society exposes itself to the truth it can harbour no possibility of reconciliation and trust. For a peaceful settlement to be solid and durable, it must be based on truth".

backlog on social services such as public health, education, housing and job creation.[5] The legislation was promotion of national unity and reconciation act and not the justice act in the sense of addressing the past exclusively though prosecutions.

The argument that the TRC Act violated international law has been rejected by our courts because, whilst the interim constitution recognized South Africa's obligations, it conferred powers upon the National Assembly to pass a law even if such law was contrary to international customary law.

Sec 231 (1) provided that:

"All rights and obligations under international agreements which immediately before the commencement of this Constitution were vested in or binding on the Republic within the meaning of previous Constitution, shall be vested in or binding on the Republic under this Constitution, *unless provided otherwise by an Act of Parliament".*

Sec 231 (4) provided that:

"The rules of customary international law binding on the Republic shall, *unless inconsistent with this Constitution or an Act of Parliament*, form part of the law of the Republic.

After looking at these sections of the Interim Constitution the Cape Provincial Division of the High Court took the view that the Clause 1 (2) of the Additional Protocol II (Adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, and which came into force on 7 December 1978) was not applicable and had no relevance to the South African conflict which was *"not a fight against colonial domination or against an alien occupation."*

The court said "whilst it could be said to have been a fight against a racist regime, those engaged therein were not doing so in the exercise of their right to self-determination" but were fighting for equality in their own country…"

On appeal this approach was approved by the Constitutional Court and legal challenges to declare the TRC act and its amnesty provisions failed. Writing for the majority, the late deputy president of the Constitutional Court said:

"The call to punish human rights criminals can present complex and agonizing problems that have no single or simple solution. While the debate over the Nuremberg

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5 The marathon trials of Magnus Malan the former Defence Minister and the one of Eugene De Kock who had murdered many freedom fighters cost several millions of rands.

trials still goes on, that episode – trials of war criminals of a defeated nation – was simplicity itself as compared to the subtle and dangerous issues that can divide when it undertakes to punish its own violations.

A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. The human rights criminals are fellow citizens, living alongside everyone else, and they may be very powerful and dangerous. If the army and police have been agencies of terror, the soldiers and the cops are not going to turn overnight into paragons of respect for human rights. Their numbers and their expert management of deadly weapons remain significant facts of life… The soldiers and police may be biding their time, waiting and conspiring to return to power. They may be seeking to keep or win sympathizers in the population at large. If they are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget.

These problems are not abstract generalities. They describe tough realities in more than a dozen countries. If as we hope, more nations are freed from regimes of terror, similar problems will continue to arise. Since the situations vary, the nature of the problems varies from place to place.[6]

The epilogue to the Interim Constitution of 1993 described the constitution as providing: *"a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race class, belief or sex… the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge."*

It went on to say that:

"These can now be addressed on the basis that there is now a need for understanding but not for revenge, a need for reparation but not for retaliation, a need for ubuntu but not for victimization."

Then it concluded:

"In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past."

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6 AZAPO and Others vs President of the RSA 1996 (4) SA 671(CC) at 680f-681A-B.

1.1 The mandate of the TRC

A truth commission has to be workable and focused and cannot investigate all the crimes that have been committed in the past, otherwise it becomes a self-defeating and purposeless exercise. It is also not possible to identify and punish all those who collaborated with the oppressive regime in the past. Some of them may have changed and genuinely assisting the new regime to rebuild the nation.

The TRC had to establish as complete a picture as possible of the gross human rights violations that had occurred between 1 March 1960 and 9 May 1994, the former being the date on which liberation organizations were banned and the latter being the date on which Nelson Mandela was inaugurated as the first democratically elected President of the country.[7]

Because the Commission could not investigate and identify the perpetrators of all the crimes that had occurred during the Apartheid era, the Act defined Gross "human rights violations as "meaning violation of human rights through –

(a) the killing, abduction, torture or severe ill-treatment of any person;
(b) any attempt, conspiracy, incitement, instigation, command, or procurement to commit an act referred to in paragraph (a).

Which emanated from the conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive; …"

There is no cut and dry formula as to what duration of time a truth commission should be given to investigate the past. It all depends on the circumstances of each individual situation. Not too short, not too long. The TRC initially had to complete its task within 6 months which could be extended to 12 months to enable the body to complete any outstanding work. However, its mandate came to an end in 1998 but the Amnesty Committee of which I was part continued until it finished its work at the end of 2001. The report was submitted to President Mbeki in 2003.

Operating on an annual budget of about 18 (American) million dollars it had 17 commissioners who were all appointed by the state President after going through a rigorous process of public interviews. They had to be "fit and proper persons who are impartial and who do not have a high political profile". No more than two non-

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7 In his speech Mandela said the country was entering into a covenant and the victory was the victory of all South Africans.

citizens could be appointed as Commissioners to assist in the work and it was broadly representative of the different communities in the country.

Amongst the principles of conducting its business the Commission had to treat all victims equally, with compassion and respect for their dignity, and without any discrimination. It had a chair and a deputy chair, Archbishop Desmond Tutu and Dr Alex Boraine, respectively.

The TRC received about 21 298 statements from victims the majority of whom were Africans (19,144); coloureds (354); Indians/Asians (45) and whites (231).

In its report it listed the names of all those who were found to have been victims of gross human rights violations, as well as the names of perpetrators in each individual incident of violation. About 2000 victims appeared at public hearings to tell their stories and this was the most difficult time in the Commission as sometimes victims would burst out crying when they recall the pains the had experienced.[8] The public hearings were widely publicized on national television and in print media, including simultaneous transmissions on radio in all the languages.

The world and many citizens of our country were shocked, White South Africans in particular who for the first time became aware of the extent of inhumanity that was committed in the name of "defending civilization" and "maintaining law and order". In order to carry out its function and purpose the TRC had three committees:

1. Chapter 3 of the Act: The Committee on Human Rights Violations ("the HRVC") with a Chair and Chairperson, that was Archbishop Tutu and Dr Boraine, respectively;
2. Ch. 4: The Amnesty Committee ("the AC") which operated independently of the TRC, in the sense that its decisions could not be set aside by the Commission. It was chaired by a Judge with a Deputy Chair, also a Judge. Its additional members who were all lawyers were appointed by the State President. This committee notified victims of amnesty hearings and held the hearing at places closer to the victims. During all the hearings a counselor would sit next to the victim as evidence was being led. Victims would be transported to the venues where hearings were being conducted and they would be provided with refreshments as well.
3. Ch. 5: The Committee on Reparation and Rehabilitation ("the CRRC").

The first committee had statement takers who traveled through the length and breath of the country interviewing victims. These statements were then investigated by members of the investigation unit; the information would be analyzed by researchers to establish common trends and identify the perpetrators who would then be approached

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8 Skeptics labeled the Commission "the crying commission".

for comment on the allegations being made. The outgoing Chief Justice set aside the Full Bench decision of Friedman JP which ruled that King J was wrong in his interpretation of the Act.[9] He reinstated[10] the King J Judgment and said on the principles of natural justice all perpetrators had to be given sufficient notice before their names could be mentioned at public hearings, and be able to respond to the allegations. This caused serious public outcry and fury as it meant that its lifespan would be prolonged. Initially perpetrators would come to hearings with lawyers but in the end very few came as they feared being humiliated by victims with the truth…

The HRVC held special public hearings and hearings on "window cases" throughout the country and invited submissions from various sectors such as political parties; security forces; liberation movements; NGOs; faith groups; members of the media; business sectors and a wide range of bodies. These sectors had to advise the Commission as to what, in their perspectives, was the cause of the violations that occurred in the past, and more importantly how these could be avoided in the future. The Judiciary refused to appear before the TRC and explain their role during the Apartheid era. However, some Judges made individual submissions in writing and admitted that the Judiciary could have done better.

The Amnesty Committee which in effect succeeded the Indemnity Committee received and considered applications for amnesty which it could grant or refuse. If granted, the successful applicant could not be prosecuted. Neither could civil proceedings be brought against him by the victims.

The crime committed had to be "an act associated with a political objective". Section 20 (3) of the Act read:

"Whether a particular act, omission or offence contemplated in ss (2) is an act associated with a political objective, shall be decided with reference to the following criteria:

(a) The motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of the or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether

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9 Truth and Reconciliation Commission v Du Preeze and Another 1996 (3) SA 997 (CPD) 1009J-1010D.

10 Du Preeze and Others vs Truth and Reconciliation Commission, 1997 (3) SA 204 (AD) at 233-234. In another development Acting Judge Buchanan said he did not agree with the King J interpretation of the Act: Nieuwodt vs Truth and Reconciliation 1997 (2) 70 (SE) at 74.

the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter;

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness or proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, …"

In terms of Sec 20 (3) (ii) hose who acted out of personal malice, spite or ill-will did not qualify for amnesty.

The AC received 7,116 amnesty applications and only 1,167 of those applications were granted. It refused 5143 such applications for amnesty. The reasons for refusal ranged from lack of political objective and failure to make a full disclosure or acting for personal gain. In other cases applicants still denied that they were guilty in which case they did not qualify for amnesty.[11]

1.2 Recommendations and the post-TRC era

The TRC had a number of legal challenges right from the beginning to the time when it was concluding its report.

Former State President FW De Klerk brought and urgent application objecting to a finding that had been made about his possible knowledge regarding covert operations of the security forces. The matter was settled out of court and the TRC was legally advised to remove the objectionable findings.

Chief Mangosuthu Buthelezi, traditional Zulu leader who during the anti-apartheid struggle was criticized by liberation organizations for "working for change from within the system", strenuously refused to appear before the Commission for the second time to answer questions about "warlords" in his region. He brought an application to compel the TRC to furnish him with documents which he believed he required to bring a defamation suit against the TRC.

Former State President PW Botha refused to attend the TRC hearings and answer the questions that were being asked of him. His conviction by a black Regional Court

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11 Martin Coetzee gives a statistical analysis and presentation of amnesty applications in The Provocations of Amnesty: Memory, Justice and Impunity by Charles Villa-Vicencio and Erik Doxtader (eds), Institute for Justice and Reconciliation Publication, 2003.

magistrate for obstructing the Commission in its work, was subsequently set aside by the Cape High Court.

Dr Wouter Basson the chemicals expert and renowned cardiologist who faced charges of providing drugs for the elimination of 100s of anti-apartheid activists was acquitted after a trial which took more than two years at great expense to the State.

Former Minister of Police and his erstwhile subordinates who were charged with attempting to murder a prominent activist confessed the crime and received a suspended sentence. In exchange they were to assist the prosecution authorities to investigate the human rights violations that had occurred during the Apartheid era.

Ironically, the ruling party which had invented the idea of the TRC and spear-headed nation building and reconciliation suddenly became critical of the TRC as it was about to submit its report to the then head of State, President Mandela.

Quite a number of recommendations were made amongst them that those who did not apply for amnesty, including those who did apply but failed, should be prosecuted. However, there were very few prosecutions some of which were unsuccessful. This exacerbated the victims' pains who expected that at least their suffering would be mitigated by comprehensive reparations. This could not happened as the new government was facing immeasurable problems of social reconstruction.

Be that as it may, what is clear is that the truth and reconciliation commission route to foster nation building, is not an easy exercise at all. I hope you will find my contribution in this debate helpful.

Thank you.

BORIS BURGHARDT ▸ lawyer, Department of Ciminal law, Humboldt University, Berlin

Killing on the Inner German border – a Crime against Humanity?

Were the killings on the Inner German border a crime against humanity? Twenty years after the fall of the Berlin Wall, nearly two decades after the demise of the GDR, this question may seem passé. Why should we be interested in a question, when from the criminal justice point of view the issue of injustices in the GDR has been closed for a long time?

We can put forward two reasons. The first is purely academic interest, without benefit, which in this concrete case gathers impetus from the fact that answers put forward to date have not been satisfactory. The second is that the border policy of the GDR regime is of such historical significance that it calls for evaluation by means of normative criteria for judging the criminal responsibility of individuals in the framework of concrete prosecutions. Clear proof of this is seen in the recently begun, passionate debate on the classification of the GDR as a country afflicted by injustice.

Finally, this presentation should offer the first thoughts at this conference on to what extent the international legal category of crimes against humanity can play a role in the legal processing of the injustices of Europe's Communist regimes.

1. Border regime of the GDR – an overview

Before a legal evaluation, I think it would be wise to begin with a summary of the important facts surrounding the GDR's border regime.

Even before the GDR had been established, refugees escaped from Berlin's Soviet zone, where there was a closer guard of the demarcation line and greater regulation of movement between sectors, to the British and American occupations zones and the Western sectors. The first shooting at individuals who had crossed the demarcation line without permission took place at this time.

Hand in hand with the foundation of the GDR there was a significant increase in security measures: the border area began to resemble a forbidden area, with the exception of the internal state border in Berlin itself. Control belts were set up in the border zones. These were surrounded by security zones and closed zones of approximately five kilometres. The German border police – who were responsible for guarding the border – started to acquire a military structure from the 1950s. Its members were housed in barracks and subject to special instructions. People illegally crossing the border were also repeatedly shot at in this period. At the same time, however, trade in goods smuggled across the border with the tacit acquiescence of the border police also took

place. Due to dissatisfaction with the political and financial situation, the number of citizens of the GDR crossing the border to the West continued to grow. Between 1949 and 1961 around 2.5 million Germans settled in West Germany or West Berlin. The majority were of productive age and had good qualifications.

In 1961, the chairman of the GDR's State Council, Walter Ulbricht, and representatives of the USSR introduced an immediate closure of the border, making it only possible to cross at checkpoints. In the early hours of 13 August 1961 police started closing off the Western sectors of Berlin with barbed wire and barricades, which were later replaced by a wall. Security measures were also stepped up once again on the rest of the border with West Germany, with landmines placed in sections. The border police, which by then were completely under the Ministry of State Security, were issued with orders to use arms to limit systematically attempts by GDR citizens to get across the frontier. Self-detonating mines were installed at some sections of the border in 1970.

At the same time, the East German government strongly limited legal travel to the West for its citizens. Until 1 January 1989, it was practically impossible to grant legal travel permits to "politically unprivileged citizens of lower than pension age, regardless of individual family emergencies". Applying became harder. Applicants and their families suffered repercussions in the form of discriminatory measures, including being fired from their jobs, denied the right to study, or even facing criminal prosecution. Illegal attempts to cross the border were classed as a crime under art. 213 of the GDR's criminal code.

Data on the number of escapees and people killed or injured trying to escape is only partially available and varies greatly. According to the GDR's National People's Army, there were 2,474 recorded escape attempts in 1972 and 3,004 the following year; between the end of 1974 and the end of 1979, there were 4,965. Most attempts led to arrest even before border barriers had been crossed. Around seven percent of attempts were successful. An investigation by the state attorney's office found that between 1946 and 1989 at least 270 people lost their lives. They were killed by classic mines, self-exploding mines, or – in the majority of cases – by weapons wielded by border guards. Other estimates suggest there were up to 1,000 deaths in connection with escape attempts in the period in question. There is a lack of reliable information on the number of persons injured.

2. Cases of killing on the Inner German border as crimes against humanity?

Legal analysis of this issue can logically be divided into three phases. First we must determine whether it was a crime against humanity bound by international law at the time it occurred. Then it is necessary to clarify whether cases of the killing of escapees in the border area were criminal acts. And finally: such partial crimes had to have

been committed within the framework of an overall action characterised as a crime against humanity.

2.1 Crime against humanity as possible actus reus?

Judging cases of killing on the Inner German border as crimes against humanity is legally possible if the actus reus of the act applies to persons responsible for the planning, creation and carrying out of measures to protect the border at the time of the committing of the act as immediately binding international law. The norms of international law establish direct liability for the individual in cases when it applies as a peremptory norm of international law. Only in such a case it is possible to interrupt the traditional mediatisation of individuals in international law and for laws and obligations set by international law to apply, regardless of internal state law, without the transformation of international law into internal state law for individuals.

Today there is no doubt that the actus reus of crimes against humanity applies in the framework of international customary law as a binding international law. As to whether crimes against humanity were of that character at the time of the committing of an act, in other words in the period between 1946 and 1989, there is no unequivocal answer. However, in terms of results, a positive answer can be given. The reason is that crimes against humanity and the principle of direct individual culpability under international law were recognised in art. 6 c) of the Statute of the International Military Tribunal (IMT). The Statute of the IMT was ratified by 22 states as part of the London Charter. In the period immediately after the war, this arrangement was confirmed by art. 5 c) of the Statute of the IMT for the Far East and in art. II (c) of Law No. 10 of the Control Council and in the Nuremberg Principles approved by the General Assembly of the U.N., specifically in principle VI (c). The document Code of Crimes against Peace and Security of Mankind, created in 1954 by the U.N. Commission on International Law, also speaks about crimes against humanity as being international crimes. In practice, this actus reus was used not only in the period right after the war, but also in the trial of Adolf Eichmann and in the trials of Klaus Barbie and Paul Touvier. Referencing and following on from the Nuremberg and Tokyo rulings, it was also implicitly confirmed in the International Convention Relating to the Status of Refugees from 28 July 1951 and in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity from 26 November 1968.

The fact that the Nuremberg and Tokyo rulings failed to become established and stabilised as international legal custom in the period of the Cold War is presented as a counter argument. Until its revival in the ad hoc tribunals for the former Yugoslavia and Rwanda, this approach had only been used as a special law for trying the German and Japanese losers of World War II. Only genocide as the actus reus of a criminal act regulated

at the level of international law in an independent convention was recognised widely. In the case of crimes against humanity, by contrast, an already established corresponding opinio iuris may prove contentious, because neither the Nuremberg Principles nor the Code of Crimes against Peace and Security of Mankind established binding effect as international legal treaties; also the International Convention Relating to the Status of Refugees from 28 July 1951 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity from 26 November 1968 were not ratified until the end of the Cold War by a sufficient number of states for them to become legal custom and to serve as proof of legal obligation. There was a lack of necessary legal practice in every case in the 1949 to 1989 period. As individual cases, the trials of Eichmann, Barbie and Touvier did not represent sufficiently established practice.

However, these objections underestimate the constitutional character of modern international law. Since the Second World War at least, human rights, not state sovereignty, have been the paradigm of international law. Since that time, international law has created a certain framework which links states and limits their sovereignty and to a great extent still represents "the essential basis for the legitimacy of national constitutional law". In legal systems based on this conviction the serious breach of basic human rights in a systematic or extensive manner is the cause of serious international legal injustice which – according to the still valid lessons of Nuremberg and Tokyo – demands individual punishment according to international law and without regard to national law. This normative evaluation was not revised even during the Cold War. It is possible that the political will was lacking here after a decade that could have helped establish such an evaluation in practice, even at the cost to a party's own power politics interests. However, this changes nothing regarding the normative validity of these decisions. The opposite view slides towards an already outworn legal realism which conflates inconsistent political practice with the prosecution of the law and without regard to circumstances extracts from "what is" conclusions as to "what should be".

3. Partial crimes: intentional killing

Cases of killing on the Inner German border must be qualified as partial crimes fulfilling the actus reus of crimes against humanity. All codification of the actus reus of that crime arise from art. 6 c) of the Statute of the IMT, which designates variations of the act of intentional killing (murder).

3.1 Objective side of the crime

The objective side of the actus reus of partial criminal acts is clear. At least 270 people lost their lives in the border zone between 1946 and 1989 as a result of shooting

by border guards, active self-detonating mines and explosions of blast mines and fragmentation mines.

3.2 Subjective side of the crime

The subjective side of a criminal act requires at least indirect intent in the question of causing death. The West German judiciary conditionally confirmed intended action in the cases of border guards who had been involved directly and their direct superiors and in the cases of persons at the political leadership level who had decided to set up and maintain the border protection system. With the Statute of the IMT there is controversy over whether the perpetrator merely regarded it as a possibility that an effect defined as an actus reus could arise as a result of his actions. There is no doubt, however, that at least according to customary international law, and to the law in place at the time of the action, dolus eventualis is sufficient. This arises from the rulings on art. 6 c) of the Statute of the IMT for the Far East and art. II (c) of Law No. 10 of the Allied Control Council

3.3 Unlawfulness of killing from the perspective of international law

3.3.1 Bases

Intentional killing has to be in contravention of international law. The concept of crimes against humanity serves as an international criminal law buttress of the international legal protection of human rights. A criminal act in the sense of crimes against humanity can therefore only be a breach of human rights in contravention of international law. If a given action can be justified from the perspective of international law, it cannot be classified as a crime against humanity. It is not necessary to determine whether with regard to the structure of a criminal act this occurs at the level of actus reus or because of exemption from punishment.

Consideration of other public international law is explicitly given in many cases of actus reus of partial criminal acts. Under art. 7 c. 1 e) of the Statute of the IMT, deprival of personal freedom fulfils the actus reus only when it occurs "in contravention of the basic rules of international law". The incompatibility of given acts with international law is also given as a premise when it comes to the actus reus of criminal acts like deportation or the violent expulsion of the population under art. 7 c. 1 d), c. 2 d) of the Statute of the IMT, torture under art. 7 c. 1 f), c. 2 e) of the Statute of the IMT, forced pregnancy under art. 7 c. 1 g), c. 2 f) of the Statute of the IMT, and persecution under art. 7 c. 1 h), c. 2 g) of the Statute of the IMT.

The fact that the intentional killing of a person represents a breach of internationally recognised human rights may at first appear to be a fact that does not require

further explanation. However, in its conclusions this actus reus also requires further explanation. Even international law on the right to life allows for exceptions. If murder is permissible in exceptional cases from the point of view of international law, then culpability does not come into consideration.

3.3.2 Right to life as an international law peremptory norm

Today the right to life is recognised as a common belief from the point of view of international legal custom and applies as a peremptory norm. We can find concrete formulations in international conventions on the protection of human rights in, for instance, art. 6 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966 (effective from 23 March 1976), in art. 2 c. 2 of the European Convention on Human Rights (ECHR) of 4 May 1950 (effective from 3 September 1953) and in art. 4 of the American Convention on Human Rights (ACHR) of 22 November 1969 (effective from 18 July 1978), in art. 4 of the African Charter of Human and People's Rights (ACHPR) of June 1981 (effective from 21 November 1986) and in art. 5 of the Arab Charter on Human Rights of 2004 (effective from 15 March 2008).

Substantiating the validity of the right to life as an international legal peremptory norm at the time of the committing of an act has proven difficult. The human rights conventions listed came into effect as international law during or even after the committing of the act. Again it is necessary to bear in mind the constitutional character of modern international law: as an essential basis for the enforcement of all other human rights the right to life represents a foundation stone and basis for new international law created after World War II. The right to life is clearly expressed in art. 3 of the Universal Declaration of Human Rights (UDHR) which was approved on 10 December 1948 by the General Assembly of the U.N., then made up of 73 states. This declaration, though it did not have any direct binding effect in international law, must be understood as a normative elementary covenant for the new world order. The human rights listed in this declaration were not regarded as new international law, but as rights superseding all law (national and international). Therefore, art. 3 of the UDHR is testament to a belief in the legal obligation of international legal custom.

It is also necessary to make reference to the existence of corresponding legal custom. We should first point out that the right to life was widely recognised at national level in individual constitutions in the form of articles and charters on the protection of human rights. It was implicitly recognised in the criminalisation of intentional killing of another person. At the level of international law it is not possible to explain the Nuremberg and Tokyo rulings on crimes against humanity without recognising the right to life and the crucial human rights. Another foundation stone is the Law of the Hague regulating armed conflict, which is primarily aimed at protecting the lives of

civilians, and its underpinning in international criminal law: the actus reus of war crimes following on from the Law of the Hague. In consequence it is necessary to confirm the validity of the right to life in the framework of international customary law as a peremptory norm in the whole period of the committing of a crime.

To be comprehensive, it is necessary to point out the GDR did not express agreement with either this legal obligation or legal practice. It explicitly recognised the right to life by means of national and international legal documents. The GDR's criminal code naturally also criminalised the intentional killing of another person as a crime. Furthermore, at the general level the GDR agreed with the principles of Nuremberg and Tokyo law and the principles of international law.[1] On 18 September 1973, the GDR even joined the U.N. and on 8 November 1973 it ratified the ICCPR. Nevertheless, it is necessary to emphasise that these were subsidiary considerations. Under our approach, the right to life was a binding international right for the GDR, regardless of whether the country recognised and embodied it in its national law.

3.3.3 Exceptional international legal admissibility of intentional killing?

In very exceptional cases, international law admits the justification of intentional killing according to national law. Nevertheless, arbitrary killing is always in contravention of international law. This is enshrined in art. 6 c. 1 s. 3 of the ICCPR. Specification of which cases of killing cannot be classed as arbitrary are to be found in, for instance, art. 6 c. 2 of the ICCPR, art. 2 c. 1 s. 2, c. 2 of the ECHR, and art. 15 c. 2 of the ECHR.

According to art. 2 c. 2 b) of the ECHR, intentional non-arbitrary killing occurs when "it arises from the use of force which is not greater than completely necessary, during (…) the execution of legal arrest or preventing the escape of a lawfully arrested person". The actus reus of this exception therefore refers above all to national law.

The law of the GDR criminalised "unlawful crossing of the border" from 1954, firstly in Section 8 of the GDR law on passports of 15 September 1954 and from 1969 in Secction 213 of the GDR criminal code. This was further added to through internal border police regulations, specifically from 1982 by means of Sections 26, 27 of the GDR law on the state border. In order to successfully prevent border crossing, this legalised not only arrest but the killing of so-called violators of the border

The actus reus given in the exception under art. 2 c. 2 b) of the ECHR does not limit the adoption of classifications of national law. The justification of killing according to the law of the GDR is merely a requisite, not a sufficient basis for making it possible

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1 E.g. art. 5 I 1949 constitution, art. 8 I 1968 constitution, and in the revised version of 1974, Section 258 1968GDR criminal code, and in the revised version of 1974.

to establish whether arbitrary killing has occurred. Ultimately international law, international human rights law in particular, remains decisive. National law legalising killing has to prove that it is in line with international law.

That is not the case here, however. Criminalising illegal travel, on the basis of which the use of weapons by border police was instituted, was on the contrary in flagrant contravention of international law. Under international legal custom, the freedom to travel – covering both temporary travel from a state and emigration – is recognised as a human right. This arises from, for instance, art. 13 c. 2 of the UDHR, art. 12 c. 2 of the ICCPR, art. 2 c. 2 of the fourth protocol of the ECHR, art. 22 c. 2 of the ACHR, and art. 12 of the ACHPR. The GDR never expressed agreement with this international legal conviction of legal liability.[2] It is not necessary to determine to what extent the freedom to travel has, or had at the time of the act, the character of binding international law.

However, the freedom to travel is not unreservedly protected either. Regulating and limiting the freedom to travel under national regulations is permitted. We can take as an example art. 12 c. 3 of the ICCPR, which acknowledges limitations "which are established by the law and which are necessary for the protection of national security, public order, public health or morals, or the rights of others and which are in accordance with other rights acknowledged in this covenant".

However, not even this proviso, which acknowledges the state's broad powers of adjudication, can legitimise the absolute deprivation of an international right of a guaranteed human right by means of national law. GDR law was aimed at just such an absolute denial of the freedom to travel. For broad sections of the population it was practically impossible to get permission to travel abroad legally. Minimising the legal means of travel was supported further by the criminalisation of unlawful border crossing, which it was legal to prevent by means of excessive violence. As a result, the absolute undermining of free travel by means of GDR law can be asserted. Such a state may at the very extreme be permitted temporarily and under extraordinary circumstances under international law. However, the GDR's border protection system remained in place for decades.

Limiting the freedom to travel was in every instance disproportionate and in contravention of international law. This applies in particular to Section 8 of the GDR's law on passports, 213 of the GDR criminal code and subsequent laws on the use of armed weapons by the border police. From the perspective of international law, the GDR – because of the disproportionate manner in which it limited freedom to travel – did

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2 The GDR constitution of 1949 recognised freedom to travel in art. 10 para. 3 explicitly as a civil right. In the constitution of 1968 there was no corresponding provision. However, when the GDR joined the UN it ratified the ICCPR.

not have the right to criminalise unlawful border crossing or to prevent it by excessive means. In view of the de facto impossibility of acquiring legal permission to travel abroad, attempts to leave the country illegally were actions which were in line with international legal classifications. They were a reaction to the behaviour of the GDR, which, by contrast, was behaving in contravention of international law. Limiting the right to life in connection with illegal border crossing is therefore proven to be abuse of the law. Therefore it has no foundation when international legal criteria are applied. Cases of killing on the Inner German border were a breach of the right to life in contravention of international law.

3.3.4. Partial finding

Cases of killing of escapees on the Inner German border can be qualified as a crime in the sense of a crime against humanity.

4. General act: extensive or systematic attack aimed the civilian population

Cases of killing on the Inner German border had to have been committed within the framework of an extensive or systematic attack aimed at the civilian population. Even under international law valid when they were committed these acts did not have to be linked to any armed conflict.

4.1 Attack aimed at the civilian population

We classify as an attack a process which is aimed at breaching the human rights of the civilian population and which leads to plural committing of partial crimes fulfilling the relevant actus reus. It is not necessary for this process to have a violent character. A civilian population is defined as every large group of persons who are generally non-military and linked by common characteristics, because of which they become the target of attack.

We find such an attack against the civilian population in the long-term discriminatory policy of the GDR against those of its citizens who wished to travel. The GDR's policy above all represents a thorough process aimed at the breaching the human rights of its citizens. In concrete terms this is because, in contravention of international law, it prevented the citizens of the GDR from travelling for fear that they would use this opportunity to leave the country for good. To enforce this policy the GDR made use of numerous measures which went hand in hand with the breach of human rights; this was not the immediate aim, but a necessary result of such a policy. Restrictive legislation and administrative practice therefore had at their disposal numerous

discriminatory measures, such as expelling citizens from work or school when they applied for a permit to go abroad. This policy also consisted of the criminalisation and criminal prosecution of persons who openly expressed the desire to travel or attempted to cross the border illegally. To this also belongs the border protection system in the narrow sense. It included extensive security measures on the Inner German border, the crossing of which was made markedly difficult, and in the final result included using state sanctioned violence to prevent illegal border crossing. The direct target of the attack was therefore in contravention of the international right to prevent free travel. Again and again the intentional killing of persons attempting to wilfully cross the border occurred within the framework of this complex process – amounting to a partial criminal act fulfilling the actus reus of a crime against humanity.

The objection is frequently put forward against this assertion that we can only speak about an attack when the action as a whole is aimed directly at committing a partial criminal act and the perpetrator implicitly wants this to occur. The GDR's policy against those who wished to travel would therefore not constitute an attack on the civilian population, because killing was not an implicit aim – it would only occur in "emergency cases".

We must resolutely dismiss such arguments. Above all it is necessary to make it clear that after deliberation the politically responsibly individuals not only chose to take into consideration when setting up and maintaining a border defence system the possible result of cross-border escapees being killed – they acted with the full awareness that it would unavoidably lead to repeated killings. Furthermore, it should be pointed out that in view of the results (intentional killing on the Inner German border) whether the perpetrator of a criminal act directly wished for that effect or was only aware that it would undoubtedly be the result of his action plays no role whatsoever at the level of illegality and individual culpability. Giving a legal ranking to an attack as a process that is in contravention of human rights, particularly with regard to causal connection, is not convincing. Rather, such differentiation greatly paves the way for hypocritical attempts at justification. It is not possible to ascertain where such a definition of the signs of attack comes from. International jurisdiction expresses it the other way around completely: "An attack may also be non-violent in nature, like imposing a system of apartheid, (…) or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner".

Summing up, we can assert the following: The Policy of the GDR, which prevented its own citizens from travelling and at its extreme led to intentional killing, was in contravention of human rights and represented an attack on the civilian population.

4.2 Systematic or extensive character of the attack

It is easy to substantiate the systematic character of the attack: The discriminatory exit policy of the GDR in its many gradations consisted of a closely elaborated system of national measures at the most varied levels of the legislature, administration and judiciary.

The "extensiveness" of the attack needs to be corroborated. At the same time, it is not possible merely to measure the number of killings on Inner German border as established by an investigation by the state attorney's office. Some 270 deaths over a period of 40 years do not fulfill the quantitive criterion of "extensiveness". However, even this criterion will be fulfilled if we take into account the countless discriminatory measures taken against those who wished to travel, and especially their criminal prosecution, which was in contravention of international law. With the inclusion of such measures, the necessary volume will be reached even from the quantitive point of view.

5. Summary

In the preceding comments, we have shown that cases of intentional killing on the Inner German border, which occurred in conjunction with the GDR's border protection system, fall under the heading of crimes against humanity. If we take as a starting point current developments in international law and international human rights it is even possible to say: This classification has gone surprisingly "smoothly". The most demanding justification will be necessary when it comes to proving that decisive international criminal law and human rights regulations were binding for the GDR, including at the time of the act's commission. We would not face this problem if we could use the yardsticks that apply today in international legal assessments. The application of international criminal law, which resolves the problem of the ban on retroactive effect at the level of national law by saying national law is not to be respected and determining that international law is decisive, does not prevent the problem that retroactive validity appears on the international law level.

By examining particular partial questions we have once again clearly explained that the road to international law began after World War II and particularly after the end of the Cold War: the number of human rights conventions, their ratification, and international human rights courts working to enforce them, have grown continuously. Even more striking is the development dynamic of international criminal law: after the threat that Nuremberg and Tokyo would lose their character as precedents due to years of inactivity, we have seen an explosion in the last two decades at the international and national levels in practice and codification work in the area field of international criminal law.

This has above all made it easier to appeal to human rights and international criminal law. The quantative growth in human rights conventions and their effectuality in the area of international law has, thanks to the great number of state ratifications, made it possible for us to assert today they have the validity of international customary law and even as peremptory norms in key areas. On the basis of the constantly increasing international criminal law practice of ad hoc tribunals, the International Criminal Court, various hybrid courts, and lastly national courts, and relevant legal modifications in the field of international criminal law at the international and national levels, it is possible today to argue that the international actus reus of criminal acts and the principle of direct criminal responsibility have now acquired validity in the field of international customary law.

The value of this development could easily be underappreciated. Some could object that the increased positivisation of human rights and international criminal law do not in the end raise their rational legitimacy in real terms. The concepts of human rights and international criminal law are not more plausible than they were in 1945 from the epistemological point of view. Neither can positivisation replace the political will to genuinely support human rights and international criminal law. There are, however, arguments that can be employed by those who in certain given circumstances have political power thanks to which they are able to support the idea of human rights and international criminal law. The ability to build on previous developments greatly adds to the cogency of these arguments, along with the corresponding willingness to even use such arguments. The growth of positivisation also indirectly increases the chances of human rights and international criminal being advanced.

In this way we have arrived at an answer to the question that is fundamental to this conference. That is whether international criminal law ought to be used in processing the crimes of Communism. The answer is: Yes! International criminal law offers not only an adequate normative category for dealing with systematic injustice. It also multiplies the materials on which it is possible to build further! Don't hesitate! Increase the chances that human rights and international criminal law will be achieved!

Thank you for your attention.

Session XI.
How to attain justice in post-communist societies, notably in the new EU member states?

Pavel Žáček, Czech Republic

Roundtable discussion

Host: Pavel Žáček, director, Institute for the Study of Totalitarian Regimes, Czech Republic

PAVEL ŽÁČEK ▸ Institute for the Study of Totalitarian Regimes

Dear conference participants,

I would like to start the final panel, which should comprise an overview of everything that has happened at our conference entitled *Crimes of the Communist Regimes*, which we have jointly dedicated ourselves to over the course of three days. At the same time, I would like to outline some steps to be taken in the future.

I perceive this international conference on the most serious subject from our recent past, which constantly affects us in this geopolitical area, to be the culmination of the activity of our Institute for the Study of Totalitarian Regimes thus far.

I can say that our involvement in work on an international level, as anticipated by our law, has been successful and has smoothly continued on from the activity of the Slovenian presidency. This is where the hearing at the Council of Europe was which has already been mentioned several times. We have followed up on this, strengthened by our own initiating source, the Prague Declaration from the summer of 2008.

After preparations at a working meeting in Prague, thanks to the hearing in the European Parliament in March 2009, we succeeded in covering a huge part of the journey up to this point. We managed to agree on a procedure for ensuring that overcoming the totalitarian past is officially enshrined in European structures as a subject of great social import, and to thereby correct a certain imbalance in the western and eastern parts of the European Union.

In a nutshell, I believe that this has understandably been supported by the sum-total of all the relevant contributions presented by historians, lawyers, political prisoners and even journalists, which amounts to the most important outcome that we expected from our event.

Sometimes we encounter opinions that say this is primarily some sort of political act, but for us it is a civic matter. For us, this is about things that go far beyond the political sphere.

I will give a very topical example for the sake of greater clarity. Yesterday evening, when the working group discussed the draft text whose approval we will debate here, I went to Czech Television, where I had been invited to take part in a very popular programme. A participant who had been shot from the Iron Curtain of the 1950s, the lawyer Milan Hulík, and I, as a representative of our institute, faced representatives of the Communist Party of Bohemia and Moravia and former commanders of the Czechoslovak Border Guards.

It was a very intense discussion. It was obvious that there was a huge chasm between us. We were forced to respond to arguments that were hard to believe. We not only proceeded on the basis of our own experiences and a description of the legal (or illegal)

state of affairs, but also on the basis of what is known from the archives. On the other side of the fence facing us, we had to contend with what was mostly ideological stubbornness and an inability to admit that anything bad happened during the totalitarian era. The former representatives of the organs of power were even capable of claiming twenty years after the fall of communism that all the murders that occurred on the borders – which were analogous to those that occurred on the East-West German border and at the Berlin Wall – were the fault of those who had died, and that it wasn't the violent regime and its machinery of power which was responsible for ending their lives…

This attitude, which lacks any respect for the dead and offers no reflection on what happened, is absolutely unacceptable to all of us here. For me, it means that our task is ongoing. It is obvious that it is not possible to ignore these one-sided views of our past. It is necessary to contend with these opinions more than is apparent to those who live to the west of the former Iron Curtain. This situation is helped by a certain laxness and significant public support for the process of forgetting, which is unfortunately being passed on to the younger generation thanks to inadequate education. It is necessary to take a stand against this, both with archives and research projects that are as open as possible and with the personal experiences of witnesses, support for the institutions of a democratic state and, above all, international cooperation.

One of the participants in the televised debate, a parliamentary deputy for the Communist Party of Bohemia and Moravia, called the standard support from democratic structures of the state "a political approach". Understandably, parts of democratic structures are also political structures, whose obligations in accordance with the constitutional order also include protecting democracy, the plurality of opinions, and the democratic constitutional establishment. Our common task is to defend against the remnants of totalitarian residua, which exist here in objective terms. One of these residua also concerns the legal and moral impact of the failure to investigate flagrant crimes committed by exponents of the communist regime, which, among other things, even breached their own applicable laws.

I wish this would not be a negative signal which in the future could encourage any other exponents of totalitarian movements, who by referring to the inability of democracies to prosecute for crimes, could get carried away by the current situation where there is no crime and therefore not even a culprit. They could try to change the constitutional establishment was well as democracy and could establish a totalitarian or authoritarian means of government without any worries, precisely because they know they will have the same impunity as the previous communist regime.

To a certain extent, I believe that we are continuing some processes that were initiated at the beginning of the 1990s. I remember a conference on the crimes of communism taking place in Dlabačov in Prague in 1991, but then this subject faded away for a relatively long period.

I am glad that we have come together to show that this concerns very topical problems that are only exacerbated by the failure to deal with them.

I am also glad that we can demonstrate how this "club" composed of our Central and Eastern European institutions along with Western partners and even colleagues from outside the European Union has come together and can obtain the support of European institutions and thereby complete this common task.

Now, I would like to take the liberty of reading the draft declaration point-by-point. This should be a point of intersection and the outcome of our conference. In the event of any disagreement or textual amendment or addition, please make yourself heard immediately so that we can finish this.

Declaration on Crimes of Communism

We, the participants of the international conference "Crimes of the Communist Regimes" held in Prague on 24-26 February 2010, declare the following:

1. Communist regimes have committed, and are in some cases still committing, crimes against humanity in all countries of Central and Eastern Europe and in other countries where Communism is still alive.
2. Crimes against humanity are not subject to statutory limitations according to international law; however, the justice done to perpetrators of Communist crimes over the past 20 years has been extremely unsatisfactory.
3. We must not deny the tens of millions of victims of Communism their right to justice.
4. Since crimes against humanity committed by the communist regimes do not fall under the jurisdiction of existing international courts, we call for the creation of a new international court with a seat within the EU for the crimes of Communism. Communist crimes against humanity must be condemned by this court in a similar way as the Nazi crimes were condemned and sentenced by the Nuremberg tribunal, and as the crimes committed in former Yugoslavia were condemned and sentenced.
5. Not punishing the Communist criminals means disregard of and thus weakening of international law.
6. As an act of reparation and restitution, European countries must introduce legislation that equalizes the pensions and social security benefits of perpetrators of Communist crimes so that they are equal to or smaller than those of their victims.
7. As democracy must learn to be capable of defending itself, Communism needs to be condemned in a similar way as Nazism was. We are not equating the respective crimes of Nazism and Communism, including the Gulag, the Laogai and the Nazi concentration camps. They should each be studied and judged on their own terrible merits. Communist ideology and Communist rule contradict the European Convention of Human Rights and the Charter of Fundamental Rights of the EU. Just as we are not willing to relativise crimes of Nazism, we must not accept a relativisation of crimes of Communism.
8. We call upon EU member states to increase the awareness raising and education about crimes of Communism; we remind them of the need to implement, without further delay, the Resolution of the European Parliament (2 April 2009) to mark 23 August as the European-wide Day of Remembrance of the victims of all totalitarian and authoritarian regimes.

9. We call upon the European Commission and European Council of Justice and Home Affairs to adopt a Framework Decision introducing a pan-European ban on excusing, denying or trivializing the crimes of Communism.
10. The creation of the Platform of European Memory and Conscience, as supported by the European Parliament and the EU Council in 2009, must be completed at EU level. Individual governments must live up to their commitments regarding the work of the Platform.
11. As an act of recognition of the victims and respect for the immense suffering inflicted upon half of the continent, Europe must erect a memorial to the victims of world Communism, following the example of the memorial in the USA in Washington, D.C.

Contributions to the discussion leading to the adoption of the Declaration on Crimes of Communism

From among the panelists of the conference:

Martin Mejstřík, Czech Republic
Witold Kulesza, Poland
Sandra Kalniete, Latvia
Harry Wu, USA
Tunne Kelam, Estonia
László Tökés, Romania
Emanuelis Zingeris, Lithuania
Milan Zver, Slovenia
Vasil Kadrinov, Bulgaria
Anders Hejmdahl, Sweden
Raluca Grosescu, Romania
Jana Hybášková, Czech Republic
Göran Lindblad, Sweden

From the audience:

Martin Vadas, Czech Republic
Michiel Klinkhamer, Netherlands
Pavel Kozák, Czech Republic
Zdeněk Boháč, Czech Republic

Jan Fischer. Photo: Přemysl Fialka

Jana Hybášková. Photo: Přemysl Fialka

Sandra Kalniete and Anders Hjemdahl. Photo: Přemysl Fialka

Petr Brod. Photo: Přemysl Fialka

Milan Zver. Photo: Přemysl Fialka

Sandra Kalniete.
Photo: Přemysl Fialka

Heidi Hautala on screen. Photo: Přemysl Fialka

View of the conference hall. Photo: Přemysl Fialka

Photo: Přemysl Fialka

Discussion. Photo: Přemysl Fialka

Tunne Kelam. Photo: Přemysl Fialka

Ivana Janů. Photo: Přemysl Fialka

Ntsiki Sandi. Photo: Přemysl Fialka

Boris Burghardt. Photo: Přemysl Fialka

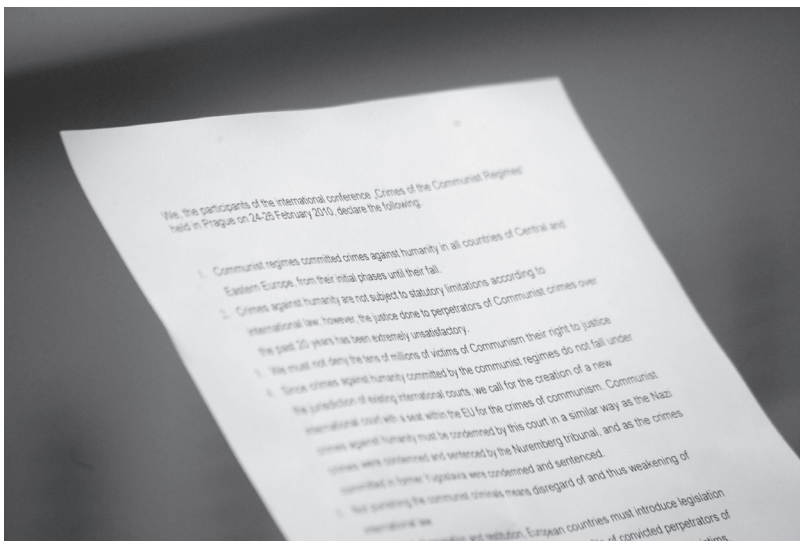
Photo: Přemysl Fialka

Pavel Žáček, Göran Lindblad, Emanuelis Zingeris, László Tökés, Harry Wu, Sandra Kalniete, Milan Zver, Tunne Kelam, Ntsiki Sandi. Photo: Přemysl Fialka

Photo: Přemysl Fialka

Panelists and speakers of the conference discussing the draft. Photo: Přemysl Fialka

Martin Mejstřík, Pavel Žáček, Göran Lindblad. Photo: Přemysl Fialka



Draft Declaration on Crimes of Communism. Photo: Přemysl Fialka

About the Institute for the Study of Totalitarian Regimes

The Institute was founded based on Act No. 181/2007 Coll. passed by the Parliament of the Czech Republic. It assumed work on 1 February, 2008. Its mission includes the study and evaluation of the period of Nazi occupation and communist rule in former Czechoslovakia, the anti-democratic and criminal activities of the state, especially its security services, and of the Communist Party of Czechoslovakia; the analysis and documentation of the reasons for the liquidation of the democratic regime, and of the active support for and resistance against the dictatorships, as well as the documentation of Nazi and communist crimes. Through and together with its subordinate entity, the Security Services Archive which administers over 18 km of files, the Institute acquires relevant documents, ensures their digitisation and makes them accessible to the public. The Institute's further mission is to raise awareness, disseminate information and educate the public, in cooperation with like-minded institutions and persons at home and abroad.

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About the working group on the Platform of European Memory and Conscience

The working group was founded on the eve of the Czech EU-Presidency in November 2008 in Prague by the Office of the Government of the Czech Republic in cooperation with the Institute for the Study of Totalitarian Regimes. It was convened in response to calls formulated by the European public hearing "Crimes committed by totalitarian regimes" during the Slovenian EU-presidency on 8 April, 2008 and the Prague Declaration[1] of 3 June, 2008. The Institute is the coordinator of the working group which today counts about 36 governmental and non-governmental institutions and organisations from 18

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1 In: European Conscience and Communism, proceedings of the international conference, ed. by Neela Winkelmann-Heyrovská and Martin Mejstřík, Martin Mejstřík Praha 2009. See also www.praguedeclaration.org.

European countries. The Platform received an endorsement by the European Parliament which in its resolution on European conscience and totalitarianism of 2 April, 2009 calls for the establishment of a Platform of European Memory and Conscience to provide support for networking and cooperation among national research institutes specialising in the subject of totalitarian history, and for the creation of a pan-European documentation centre/memorial for the victims of all totalitarian regimes. The foundation of the Platform of European Memory and Conscience has been further supported by conclusions of the EU Council in 2009[2] and 2011[3]. The official establishment of the Platform of European Memory and Conscience is planned for October, 2011.

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2 Conclusions of the General Affairs and External Relations Council of the EU of 15 June, 2009 (p. 17)

3 Conclusions of the Justice and Home Affairs Council of the EU on the memory of the crimes committed by totalitarian regimes in Europe of 9-10 June, 2011 (point 9.)

Partner institutions from the working group on the Platform of European Memory and Conscience participating in the conference

Memorial, RU

Institute of historial memory, EE

Museum of Occupation of Latvia 1940-1991, LV

International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania, LT

Branch State Archive of the Security Service of Ukraine, UA

Ukrainian institute of National Memory, UA

Institute of National Remembrance, PL

Nation's Memory Institute, SK

Institute for the History of the 1956 Hungarian Revolution, HU

BStU, DE

Study Centre for National Reconciliation, SI

Institute for the Investigation of Communist Crimes, RO

Hannah Arendt Centre Sofia, BG

Center for Peace and Democracy Development, RS

ÚSTR, CZ

CRIMES OF THE COMMUNIST REGIMES

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