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THE DEFINITION OF PROTECTED GROUP IN THE CONTEXT OF APPROACH TO GENOCIDE UNDER INTERNATIONAL CRIMINAL LAW AND POLISH CRIMINAL LAW

Abstract

The study seeks to define the group of people protected under the provisions on genocide both in the Polish criminal law and international criminal law. The provisions of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, the Rome Statute of the International Criminal Court and the Statutes of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia and the International Criminal Tribunal for Rwanda contain a very similar definition of genocide. Killings and other acts listed in that legislation, committed in order to exterminate all or part of national, ethnic, racial or religious groups as such are prohibited as genocide. Similar conduct was prohibited in the provision of Article 118 of the Polish Penal Code. However, the protected group has been identified differently. It has been defined much more widely in Polish criminal law than in international law. A perpetrator of genocide acts with the purpose to exterminate all or part of a national, ethnic, racial, political or religious group or a group with a specific worldview. There are two important differences: the first is that international law acts prohibit intentional conduct while Article 118 prohibits purposeful conduct. The second difference is a much narrower definition of groups protected by international regulations. They do not protect a political

group and a group with a certain worldview. This study analyses the consequences of this distinction, in particular the possibility of classifying the conduct aiming against a political group and a group with a particular worldview.

KEYWORDS

genocide, political group, group with a certain worldview

SŁOWA KLUCZOWE

ludobójstwo, grupa polityczna, grupa o określonym światopoglądzie

This paper aims to analyse the differences in approaches to a group protected from the crime of genocide under international law and Polish criminal law. At the start, it may be stated that the provisions of international law lack protection of political groups and groups with a specific worldview, which is the case for Article 118 of the Polish Penal Code. The paper will attempt to specify the existing differences and point out whether any of these approaches can be considered better suited to the needs of criminalisation, and whether there is a need to make any corrections in any of the indicated provisions. As a working hypothesis, it can be stated that the regulation of Article 118 of the Polish Penal Code, as broader, better meets the needs of criminalisation than Article 7 of the Statute of the International Criminal Court¹ and other provisions describing the crime of genocide in international law.

The statutory elements of genocide under international law are determined in various legal acts. The oldest is the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide² and other international law instruments, followed by, among others: the Charter of the International Military Tribunal of 8 August 1945, Article 6(c) of which does not mention genocide, addressing crimes against humanity in general, but the concept of genocide is derived from its wording³. Although it is deprived of binding force, it may be

¹ Hereinafter ICC.

² United Nations, Treaty Series, vol. 78, p. 277.

³ As in: J. Sawicki, *Zbrodnie przeciw ludzkości a przestępstwa prawa pospolitego*, 'Państwo i Prawo' 1947, No. 9, p. 78; J. Waszczyński, *Zbrodnie ludobójstwa a polskie prawo karne*, 'Acta Universitatis Lodzensis. Folia Iuridica' 1982, Vol. 10, p. 7; D. Drózd, *Zbrodnie ludobójstwa w międzynarodowym prawie karnym*, Warsaw 2010, p. 40. Cf. also R. Lemkin, *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress*, Washington 1944, p. 75; E. Socha, *Zbieżność a komplementarność jurysdykcji międzynarodowych trybunałów karnych i sądów krajowych*, Wrocław 2004, p. 21; *idem*, *Wpływ procesu norymberskiego na*

helpful to mention the UN Resolution 96(I) of 11 December 1946 on the crime of genocide, which was at least partly the basis for the definition of genocide adopted in the 1948 Convention⁴. The definition of genocide developed in relation to the definition contained in the 1948 Convention is contained in Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia of 25 May 1993⁵, Article 2 of the Statute of the International Criminal Tribunal for Rwanda of 8 November 1994⁶, Article 4 of the Law on Extraordinary Chambers in the Courts of Cambodia⁷, and Article 6 of the Rome Statute of ICC. The common position of the EU of 22 June 2001 should also be kept in mind⁸.

Article II of the 1948 Convention states that genocide includes acts listed in the provision, committed with the intent to exterminate national, ethnic, racial or religious groups as such, whether in whole or in part. Identical regulation in this regard is contained in Article 4(1) ICTY, Article 2 ICTR and Article 6 ICC, which specifies the implementation activities, but does not change anything regarding the scope of protected groups.

The regulation of Polish criminal law is broader. Article 118(1) of the Penal Code states that genocide is committed by anyone who acts with the purpose of exterminating, in whole or in part, a national, ethnic, racial, political, religious group or a group with a particular worldview.

Central to all definitions of genocide is the concept of a group, along with pointing to specific groups. The very concept of a group does not raise much controversy – it is a group of people⁹ with a certain degree of permanence¹⁰ and organisation, where neither the permanence nor organisation must be substantial¹¹. Membership may be temporary, the group may not be very cohesive, the

prawo międzynarodowe w zakresie ścigania i karania zbrodni ludobójstwa, 'Wojskowy Przegląd Prawniczy' 2007, No. 2, p. 7 ff.; I. Topa, *Międzynarodowa współpraca państw w wydawaniu przestępców. Zagadnienia materialnoprawne*, 'Prokuratura i Prawo' 2008, No. 4, p. 131; K. Stasiak, *Trybunały umiędzynarodowione w systemie międzynarodowego sądownictwa karnego*, Lublin 2012, p. 135.

⁴ Cf. W.A. Schabas, *Genocide in International Law: The Crimes of Crimes*, Cambridge 2009, pp. 57–58; D. Dróżdż, 2010, *op. cit.*, pp. 46–47.

⁵ Hereinafter ICTY.

⁶ Hereinafter ICTR.

⁷ With a reference to the Convention of 9 December 1948.

⁸ O J L 155, 12.06.2001, as amended

⁹ M. Ch. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Dordrecht 1992, p. 85; A. Cassese, *International Criminal Law*, Oxford 2003, p. 107; D. Dróżdż, 2010, *op. cit.*, pp. 140–141; J. Jurewicz, *Jurysdykcja przedmiotowa Międzynarodowego Trybunału Karnego*, Łódź 2008 p. 17 ff.; P. Quayle, *Unimaginable Evil: The Legislative Limitations of the Genocide Convention*, 'International Criminal Law Review' 2005, No. 5, p. 367; A.A. Alves, *Current Developments*, 'International Criminal Law Review' 2003, Vol. 3(1), p. 40.

¹⁰ ICTR judgement, 2 September 1998, *Akayesu* (ICTR-96-4-T), hereinafter: *Akayesu*.

¹¹ J. Sawicki, *Ludobójstwo. Od pojęcia do konwencji. 1933 – 1948*, Kraków 1949, p. 95; M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warsaw 2014, p. 527.

important thing is that it can be quite clearly distinguished. Looking at the issue in teleological terms, it can be considered that it is a large group¹². However, the literal interpretation of relevant provisions does not contain such a requirement¹³, so it cannot be ruled out that even an act directed against a group consisting of a few persons will meet the criteria of genocide¹⁴. This provides a different perspective on the teleological arguments provided by Schabas. Genocide is directed against the existence of the group as such. It is indeed about conduct on a scale that can threaten the existence of the group, but it cannot only accommodate a numerous group¹⁵. There is no reason why a group made up of even only a few people should not be protected, as long as it is national, etc. and meets the requirement of relative permanence¹⁶.

The basic difference between the provisions of the above-mentioned acts of international law and Article 118 of the Polish Penal Code, however, lies not in the definition of what a group is, but in what kind of group it is. Acts of international law refer to a national, ethnic, racial, and religious group. The Polish Penal Code refers to a national, ethnic, political, religious group or a group with a particular worldview. Under Polish criminal law, the perpetrator of genocide may aim to exterminate, in whole or in part, a political group or a group with a particular worldview, which is not mentioned in international law. In order to examine whether the political and worldview-specific groups referred to in Article 118 of the Penal Code fall within any of the groups indicated in international law, it is necessary to look first at the groups that are common to both systems.

Let us begin with the national group. It is a concept similar to the concept of nation but does not mean exactly the same. It comprises people who identify as members of the same nation¹⁷. This statement requires some clarification. National group membership can be perceived in two ways. Two views may be

¹² W.A. Schabas, 2009, *op. cit.*, p. 122.; D. Drózd, 2010, *op. cit.*, pp. 141–142.

¹³ A. Cassese, 2003, *op. cit.*, p. 107.

¹⁴ *Ibidem*, p. 107.

¹⁵ Another issue is what “numerous” group is. The element of interpretation margin in the approach proposed by Schabas seems to relativise grounds of liability too much.

¹⁶ It is worth mentioning, as a side note, that the smaller the group, the easier it is to fulfil the elements of genocide in relation to it. It is true that genocide does not include the destruction of a group as such, but only a conduct involving, for example, killing group members aimed at extermination of the group, but it seems that we are dealing here with behaviour that should potentially carry a certain potential for destruction of the group. Perhaps it would be a bit of an exaggeration to say that genocide is a crime characterised by potential, i.e. one that consists in taking actions potentially capable of producing a specific result. However, it should be assumed that it must be about conduct of a certain, relatively serious scale. If this assumption is correct, it means that a conduct committed against a small group may more easily be considered genocide than when it is committed against a large group. There is no need to go deeper into detail as this problem is beyond the main subject of the study.

¹⁷ As proposed by M.Ch. Bassiouni, 1992, *op. cit.*, p. 85; A. Cassese, 2003, *op. cit.*, p. 107; D. Drózd, 2010, *op. cit.*, pp. 140–141; M. M. Kulik, 2014, *op. cit.*, p. 527. Cf. *Akayesu*.

taken: that membership of a group is either determined by the members' conviction that they are part of the group, or that it is not how the members perceive themselves, but how they are perceived by external observers, perpetrators in particular. It is possible that these perceptions are not mutually exclusive, but rather complementary. On the one hand, as a rule, the cementing element of a group is often (not always, perhaps) a sense of belonging to the same nation¹⁸. On the other hand, if the perpetrator did not regard the group as national, he could not have acted towards its extermination and therefore could not have fulfilled the statutory elements of genocide.

It is worth stopping at this point for a moment, because the objective and subjective approaches to national groups are significant for the understanding of the differences between international and Polish regulations. The assumption made above that it would not be possible to speak of genocide in a situation where a group, a national one in this case¹⁹, is not recognized as a group by the perpetrator, seems indisputable. One can doubt whether the sense of belonging typical of members of that group is constitutive for a national group. Isn't it enough for a group to be seen as such from the outside? There is some doubt about this. On the one hand, it can be assumed that it does not matter for the statutory criteria to be met whether the victims consider themselves members of the group, but on the other, self-awareness can be considered as a constitutive element at least in the case of some groups (including certainly national ones). While membership of a racial group can be established by external observation, the characteristic of a nation is to show internal, self-awareness properties. Regardless of the multitude of definitions of a nation, often devised to achieve current political goals²⁰, it is certain that the constitutive feature of a nation is national consciousness. It is even conceivable that it is the element that decides about being a nation, and only attributing to it some objective features is controversial²¹, and even if one considers that there are some objective features of nations²², they nonetheless must be linked with national consciousness. If such objective features exist, most certainly they predate the development of national consciousness. And it is the element that makes a nation, regardless of what it encompasses. One could argue

¹⁸ As discussed further herein.

¹⁹ However, this applies *mutatis mutandis* to any other group whose extermination is sought by the perpetrator of genocide.

²⁰ Which means that different answers are given to the question of what a nation is, depending on who, when and why asks and answers this question. See M. Barwiński, *Pojęcie narodu oraz mniejszości narodowej i etnicznej w kontekście geograficznym, politycznym i socjologicznym*, 'Acta Universitatis Lodzensis. Folia Geographica Socio-Oeconomica' 2004, No. 5, p. 59, M. Waldenberg, *Narody zależne i mniejszości narodowe w Europie Środkowo-Wschodniej. Dzieje konfliktów i idei*, Warsaw 2000, pp. 20–24; A. Banaszkiewicz, *Naród – pojęcie nieo określone*, 'Studia Administracyjne' 2018, No. 10, pp. 6–7.

²¹ A. Banaszkiewicz, 2018, *op. cit.*, p. 7.

²² Which I consider a wrong approach.

whether a necessary component of this consciousness is the perception of a given territory as their own, the extent of the necessary knowledge about their own historical past and cultural identity, or (and if so, to what extent) the latter must be related to the ability to situate their own culture vis-a-vis universal values, or it is necessary to have an idea of their own state²³. Definitely, it is consciousness that builds a nation²⁴. The element of consciousness is also common to the national group, which includes people belonging to one nation. This group may encompass all or part of a nation, and it is bound together by some physical distinction and identification with the nation.

The above statement is important for further reflections, in particular for comparing the concept of a national group with the concept of a political group. It can be concluded that international regulations that penalise genocide do not delineate the concept of protected group sufficiently because of the lack of protection for political groups. How else can one explain the tendency towards a broader understanding of a national group? An example here may be seen in the position of Nersessian, who believes that the criterion of belonging to a national group is birth and citizenship, which results in, among other things, the fact that a person can belong to two national groups simultaneously, but at the same time it means that it is not consciousness that decides about belonging to a nation. Objective features do²⁵. The element of citizenship as a criterion of national affiliation is also indicated by the ICTR in the Akayesu case judgement, assuming that Rwanda was a case of “self-genocide” (the perpetrators committed murders of citizens of their own country)²⁶. This position is in fact based on a specific understanding of nation, not ethnic but political.

It is also known in judicial decisions of the Polish Constitutional Tribunal and in the Polish constitutional law scholarly opinion. The Constitutional Tribunal has expressed the view that the reference to the Polish Nation in the preamble of the Polish Constitution refers not to its ethnic, but political notion. The nation in the preamble of the Polish Constitution (which defines the legal relationship of the community to the state) means the community formed by the citizens of the Republic of Poland²⁷. Such an approach can and should be considered as a certain simplification, but it is otherwise justified in the light of the provisions of the Constitution. The intuition that the nation usually identifies with the state and strives to create and maintain its own state is correct²⁸. However, the fact that the

²³ A. Banaszkiewicz, 2018, *op. cit.*, p. 10.

²⁴ J. Wiatr, *Naród i państwo. Socjologiczne problemy kwestii narodowej*, Warsaw 1973, p. 213; B. Anderson, *Wspólnoty wyobrażone*, Kraków 1997, p. 19.

²⁵ D. L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, ‘Texas International Law Journal’ 2002, Vol. 37(2), p. 261.

²⁶ *Akayesu*.

²⁷ Judgement of the Constitutional Tribunal of 31 May 2004, ref. no. K 15/04, Dz. U. (Journal of Laws), No. 130 item 1400.

²⁸ See above

nation is aiming to create a nation-state is one thing, and the fact that the citizens of a state can belong to different nations is another. Wołpiuk notes that if the legislature consistently used ethnic, political, or social anthropology criteria to construct the constitutional concept of a nation, members of the nation could be considered different groups of citizens, distinct in terms of their personal composition, and the use of the criterion of citizenship to reconstruct the constitutional understanding of the concept of nation is the most effective tool to determine the numerical composition of the nation²⁹. Even more important is what Granat states. In the Polish Constitution, the nation is understood as personification fiction regarding the community of citizens³⁰. It allows for proper empowerment of the generality of citizens towards the state while retaining the confirmation of its national character. While confirming that the state is a national concept, the legislature at the same time provides for the empowerment of national minorities. The mention included in the preamble of the Polish Constitution³¹ refers to the nation as a historical community which forms the essence of the state, and on the other hand, fictionally and only for the purpose of empowerment, considers minorities members of the nation, making the state also their good, shared with the rest of the citizens. This, in turn, means that invoking the generality of citizens is only one aspect of the understanding of the concept of a nation, referred to in the preamble of the Constitution. The constitutional definition of a nation cannot be used in the Penal Code context; first, because of its ambiguity, and second, due to the fact, rightly stated by Granat, that we are not dealing here with a statutory definition, but with a fiction for the purpose of personalising the sovereign. For obvious reasons, this definition cannot affect the way in which international courts understand the national group. In other words, the understanding of nation as a generality of citizens has no universal value, but merely serves to operationalise the concept of the sovereign in the state.

Getting back to Nersessian's approach, it should be noted that the concept of making national affiliation dependent on citizenship may be regarded as contrary to the right of man to identify with a certain nationality³². This will be the case if the citizen does not identify with a nation that created a state. In a sense, such a perspective violates the rights of national minorities, so must be rejected. If so, then killing a member of a group of citizens of a state for being citizens of the state is not killing a member of a national group. This is an important statement in the context of further discussion herein. Identifying a nation as a community of people of the same nationality, acceptable as a certain fiction on a constitutional

²⁹ W.J. Wołpiuk, *Naród jako pojęcie konstytucyjne*, 'Studia Iuridica Lublinensia' 2014, No. 22, p. 382 ff.

³⁰ M. Granat, *Konstytucyjne zasady ustroju*, (in:) L. Garlicki (ed.), *Polskie prawo konstytucyjne*, Warsaw 1998, p. 118.

³¹ A. Banaszkiewicz, 2018, *op. cit.*, p. 16. Cf. L. Garlicki, 1998, *op. cit.*, p. 55.

³² See M. Kulik, 2014, *op. cit.*, p. 527.

basis, is not sufficient for the purposes of establishing grounds for criminal liability. Such a meaning of the concept of nation goes beyond the scope of designates of the word “nation”. Constitutional law scholars accept association of nation with citizenship as a kind of symbol that remains rooted in a traditional way and that binds nationality to national consciousness.

It would therefore be unjustified to refer the concept of a national group to a group of citizens of a given country in determining grounds for criminal liability by extending the definition of genocide contained in the provisions of international acts which penalise it³³. This means that an action to exterminate all or part of a group of citizens of a country is not *ex definitione* an action to exterminate a national group.

It is not an attempt to exterminate an ethnic group either. An ethnic group is generally narrower than a national group. Most often it is a subgroup within a nation, but it may not identify with any nation³⁴. This is kind of a controversial issue: whether the existence of an ethnic group is determined by self-awareness of members of the group (as is the case with a national group) or an ethnic group is one which does not identify as such, but is perceived that way by others³⁵. Assuming that the main criterion for the distinction of an ethnic group is the community of language and/or culture³⁶, we can conclude that the sense of belonging to an ethnic group is not its constitutive feature. But on the other hand, there are views that even the lack of a separate language and cultural distinctiveness does not preclude the group from being considered ethnic. It may be regarded as such if its members have a sense of belonging to it³⁷.

³³ In the context of Article 118 of the Polish Penal Code, another argument is that in addition to the national group, it also refers to the political group. As discussed below, a group of citizens of one state is a political group. Obviously, this argument does not work in the sphere of international law. That is why this argument is not invoked in the main course of argumentation. The mere understanding of the concepts of a national group and a nation is sufficient to conclude that citizenship is not constitutive of this group. This does not rule out using it as an auxiliary argument. After all, the definition of crimes against humanity other than genocide (Article 8 of the ICC Statute), which includes an attack against any group that may be defined, the list of examples of groups in question includes groups covered by Article 188 of the Penal Code, but not covered by Article 6 of the ICC Statute and other provisions of international law regarding genocide – namely the group with a specific worldview and the political group. This question will be briefly discussed further herein, because it will be important for conclusions.

³⁴ Cf. M. Shaw, *What is Genocide?* Cambridge 2007, p. 65 ff.; L. May, *Genocide: a Normative Account*, Cambridge 2010, p. 105 ff. Cf. *Akayesu* and ICTR judgement, 21 May 1999, *Kayishema and Ruzindana* (ICTR-95-1-T), hereinafter: *Kayishema and Ruzindana*.

³⁵ *Akayesu*; *Kayishema and Ruzindana*; ICTR judgement, 6 December 1999, *Rutaganda* (ICTR – 96 – 3 – T); of ICTY judgement, 2 September 1999, *Jelisić* (95-10-T), hereinafter: *Jelisić*.

³⁶ D. Drózd, 2010, *op. cit.*, p. 153; Cf. *Akayesu*.

³⁷ F. Harhoff, *The Rwanda Tribunal: A Presentation of Some Legal Aspects*, ‘International Review of the Red Cross’ 1997, Vol. 79(321), pp. 67–68; D. Drózd, 2010, *op. cit.*, pp. 153–155; M. Kulik, 2014, *op. cit.*, pp. 527–528; *Akayesu*; *Kayishema and Ruzindana*; ICTR judgement, 21 February 2003, *Ntakirutimana and Ntakirutimana* (ICTR-96 – 10 and ICTR – 96-17-T).

Thus, we can see divergent trends in the understanding of this group. And perhaps both are valid, and not necessarily mutually exclusive. The cultural and possibly linguistic differences determine the ethnic distinctiveness of a group even in the absence of awareness of it. On the other hand, the mere awareness of difference may in some cases determine that one is dealing with an ethnic group, even though cultural or linguistic differences are not perceptible to the outside observer. In this sense, both of the above-mentioned approaches are true. Of course, in cases where distinctiveness is determined or co-determined by awareness of distinctiveness, the content of this awareness must be taken into account, as in some cases, awareness of ethnic distinctiveness does not have to be necessarily located far from national consciousness, which is a constitutive element of a national group.

It is also worth noting that where awareness is concerned, it is about the awareness of members of the group and not of the perpetrator. The conviction, known from the case law, that a person's membership of an ethnic group can be determined solely by an assessment made by the perpetrator³⁸ does not seem to be right. With such an approach, it is the perpetrator who defines the group, which waters down the very concept of the group³⁹. Seeking to define the group in this way is an attempt to extend protection, but this attempt does not withstand confrontation with basic requirements for the attribution of criminal liability. There is a misunderstanding here. It is clear that the perpetrator must be aware that he or she is attacking a member or members of the group, and must do so with the aim of exterminating the group in whole or in part. However, this is a question of the extent of the perpetrator's intent or lack thereof, not whether he/she objectively carried out an attack on the group⁴⁰.

But the views that confuse an ethnic group with a racial group are deceptive, in my opinion⁴¹. The latter is not a cultural category, but a biological one. It encompasses people belonging to the same race⁴², and therefore a group com-

Cf. ICTR judgement, 15 May 2003, *Semanza* (ICTR-97-20-T); ICTR judgement, 3 December 2003, *Nahimana, Barayagwiza and Ngeze* (ICTR – 99-52-T); *Jelisić*.

³⁸ *Kayishema and Ruzindana*.

³⁹ N. H. B. Jørgensen, *The Definition of Genocide: Joining the Dots in the Light of Recent Practice*, 'International Criminal Law Review' 2002, No. 1, p. 288 ff.; J. Jurewicz, 2008, *op. cit.*, pp. 17–18.

⁴⁰ It should be added that when the perpetrator commits an attack on a group which he mistakenly identifies as one of the protected groups, and which in fact is not, nothing prevents charging him with an attempt to commit an act, which under Polish criminal law will be an ineffective attempt due to the lack of an object capable of committing a prohibited act on it (Article 13(2) Polish PC).

⁴¹ See F. Kabatsi, *Defining or Diverting Genocide: Changing the Comportment of Genocide*, 'International Criminal Law Review' 2005, No. 5, p. 391; W.A. Schabas, 2009, *op. cit.*, p. 147.

⁴² D.L. Nersessian, 2002, *op. cit.*, p. 260; D. Drózdź, 2010, *op. cit.*, p. 158; K. Wierczyńska, *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc*, Warsaw 2010, p. 43; *Kayishema and Ruzindana*. Cf. also *Akayesu*. D. Drózdź notes that the racial

posed of people distinguished by hereditary physical traits⁴³, sometimes identifiable and identified with a geographical region⁴⁴, although not identifiable just with human skin colour⁴⁵. In the context of the subject-matter hereof, an important historical factor concerning the understanding of the concept of racial group should be noted. During the work on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, this concept was interpreted very broadly, sometimes equating practically each of the groups listed in the convention with racial groups⁴⁶. This approach seems to be outdated, especially in the context of distinguishing other groups in criminal law and international law, but it is still present⁴⁷. It is worth mentioning the proviso stated by Drózdź, who notes that pursuant to Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁸, it is also possible to defend a broader understanding of the concept of race⁴⁹. The point is, however, that in determining grounds for criminal liability (and this is what we are talking about now) a strict interpretation is justified, which means that race should be understood in strict terms. Especially so, which is of particular significance to this study, a group of people who are citizens of a given state cannot be considered a racial group.

The last group referred to in international law defining genocide – a religious group – is the same case. A religious group is a group professing one and the same religion⁵⁰, provided that the term is interpreted broadly without limiting it to traditional religions⁵¹. It is not quite clear how to approach groups composed of non-believers. For example, Nersessian states that such a group usually consists of dissidents from various religious groups. He notes that such a group shares a system of beliefs and practices shared by its members⁵². Such an interpretation allows

group is sometimes mistaken for the ethnic group. D. Drózdź, 2010, *op. cit.*, p. 152. As in e.g. D.M. Amann, *Group Mentality, Expressivism, and Genocide*, 'International Criminal Law Review' 2002, Vol. 2(2), p. 109.

⁴³ Considering however that racial traits may be subject to change, which allows perceiving race not only as a set of certain physical traits but also as a process. Cf. K. Wierczyńska, 2010, *op. cit.*, p. 42.

⁴⁴ *Akayesu; Kayishema and Ruzindana*.

⁴⁵ K. Wierczyńska, 2010, *op. cit.*, pp. 42–43.

⁴⁶ W.A. Schabas, 2009, *op. cit.*, pp. 139–140; D. Drózdź, 2010, *op. cit.*, p. 158.

⁴⁷ W.A. Schabas, 2009, *op. cit.*, 143. Cf. ICTR judgement, 7 June 2001, *Bagilishema* (ICTR – 95 – 1A-T).

⁴⁸ United Nations, Treaty Series, vol. 660, p. 195

⁴⁹ D. Drózdź, 2010, *op. cit.*, p. 159.

⁵⁰ W.A. Schabas, 2009, *op. cit.*, p. 148; D. Drózdź, 2010, *op. cit.*, p. 160.

⁵¹ D. Drózdź, 2010, *op. cit.*, p. 160. Cf. J. Kędzierski, *Przestępstwa przeciwko religiom i wyznaniom w polskim prawie karnym – de lege ferenda*, 'Palestra' 2007, No. 7–8, p. 71; M. Kulik, 2014, *op. cit.*, p. 529.

⁵² D. L. Nersessian, 2002, *op. cit.*, p. 261. Cf. D. Drózdź, 2010, *op. cit.*, pp. 160–161; M. Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty Five Years Later*, 'Temple International and Comparative Law Journal' 1994, No. 8, p. 29; W.A. Schabas, 2009, *op. cit.*, p. 128.

a very broad definition of a religious group and its extension to include also political groups, which is probably far-fetched⁵³. An interesting position is contained in the ICTY's judgement of 14 December 1999, Jelisić case⁵⁴, which assumes, when analysing the method of identifying a group, that persons excluded from a particular group and thus, for example those who do not profess a particular religion, can therefore be regarded as a separate group. Thus, a separate group would be all who do not profess a particular religion⁵⁵. This position is questionable; moreover, the ICTY decided contrary to this view in its judgement of 31 July 2003 in the Stakić case⁵⁶. Also, the ICTR, in the Akayesu case, also found that a religious group is one that shares the same religion, faith or confession. Nevertheless, there is a position that a group centred around a spiritual ideal of an atheistic (non-religious) nature is also religious⁵⁷. This is an important point for further reflections. If we consider that a group of persons who identify themselves as members of a non-religious group (or an anti-religious group) is not a religious group, the attack on those people does not constitute genocide within the meaning of international law, but, by virtue of the reference in Article 118 of the Polish Penal Code to a group of people with a particular worldview, it may constitute genocide within the meaning of the latter provision. It seems that this understanding is reasonable. The extension of the concept of a religious group to a non-religious group is an interpretation that goes beyond the linguistic understanding of conventions and, as such, cannot be considered valid in criminal law based on the principle of *nullum crimen sine lege*.

In view of the foregoing, it should be noted that the definition of a protected group in provisions of conventions leaves out of the scope of protection political groups and groups with a particular worldview other than religion. This does not mean that these attacks do not constitute *iuris gentium* crimes. They are, at least because Article 7 of the ICC Statute defines crimes against humanity as acts directed against any identifiable group or community for political, racial, national, ethnic, cultural, religious, gender (within the meaning of Article 7(3) of the Statute) reasons, or for other reasons commonly considered unacceptable under international law, for any act previously designated, or for any crime falling within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, or other inhumane acts of a similar character intentionally causing

⁵³ Cf. D. Drózd, 2010, *op. cit.*, p. 161.

⁵⁴ *Jelisić*.

⁵⁵ Cf. N.H.B. Jørgensen, 2002, *op. cit.*, p. 288 ff.

⁵⁶ ICTY judgment of 31 July 2003, *Stakić*, (IT – 97-24-T). See also ICTY judgement, 1 September 2004, *Brđjanin* (IT – 99-36-T).

⁵⁷ As held by M. Lippman (in:) M. Cherif Bassiouni (ed.) *International Criminal Law. T.I., Crimes*, New York 1999, p. 598; J. Jurewicz, 2008, *op. cit.*, p. 17.

great suffering, or serious injury to body or to mental or physical health. However, attacks on such groups are not genocide within the meaning of the ICC Statute⁵⁸.

They are, on the other hand, genocide within the meaning of Article 118 of the Polish Penal Code, which recognises as genocide also the conduct directed against a political group and a group with a certain worldview.

A political group may be defined as a group adhering to a particular political ideology⁵⁹, but also as a group of individuals with politically defined affiliation. Persons who are citizens of one and the same state (which is a political organism) constitute nothing more than a political group. While an act against a political group constitutes genocide under Polish law, it is not so under international law⁶⁰. Only by accepting the concept of a nationality group as presented in the Akayesu case judgment, would such conduct be considered genocide under international law⁶¹. It is about committing acts tantamount to the act of genocide against state citizens of different nationalities, or even the same nationality, but not for the sake of destroying the nation, but for the sake of destroying the state. A classic example of such an act is the Katyn massacre, which involved the murder of people of different ethnicities, nationalities and religions, for whom the common denominator was Polish citizenship and the fact that they had held certain public functions in the structures of the Republic of Poland, and therefore two features of a strictly political nature. Perhaps the offences committed in Irpin or Bucha, provided that the international investigation confirms their commission and nature, can be an example of such an act too⁶².

⁵⁸ M. Płachta, *Międzynarodowy Trybunał Karny*, Kraków 2004, Vol. I, p. 379. Cf. M.P. Moloczniak, *Zbrodnia katyńska w świetle badań meksykańskich*, 'Przegląd Prawa Karnego' 2006, No. 25, p. 14. See also L.J. van Herik, *The Contribution of the Rwanda Tribunal to the Developments of International Law*, Leiden – Boston 2005, p. 133; W.A. Schabas, 2009, *op. cit.*, p. 134 ff.; D.L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity*, 'Stanford Journal of International Law' 2007, Vol. 43(2), p. 211 ff.; J. Quigley, *The Genocide Convention: An International Law Analysis*, Aldershot – Burlington 2006, p. 83; J.J. Paust, *Content and Contours of Genocide, Crimes against Humanity and War Crimes*, (in:) S. Yee, W. Tieya (eds), *International Law in the Past-Cold-War World: Essays in Memory of Li Haopei*, London – New York 2001, pp. 289–290; D. Drózd, 2010, *op. cit.*, p. 163.

⁵⁹ Cf. J. Sawicki, 1949, *op. cit.*, pp. 96–97 (opposing the idea of covering these groups with protection).

⁶⁰ Cf. A. Cassese, 2003, *op. cit.*, p. 96; W.A. Schabas, 2009, *op. cit.*, p. 154.

⁶¹ *Akayesu*. Schabas analyses whether the destruction of a group, even small but important in terms of quality, e.g. those holding position of authority, is an example of genocide. He notes that such a group is of a political nature and concludes that it would be necessary to determine that at the same time it belongs to the same nation. W.A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge – New York 2006, p. 170. This shifts the problem to the area of the classic definition of a national group.

⁶² P. Moloczniak, 2006, *op. cit.*, p. 14. This element – if the press reports are confirmed – also occurs to some extent in the alleged crimes committed in Irpin and Bucha, where – according to many indicators – the motive was the loyalty of the victims to the Ukrainian state. Perhaps,

Under Polish criminal law, a worldview group may also be the object of genocide, but the worldview encompasses every set of views on fundamental issues shared by members of a given group. Therefore, a group that adheres to an ideology or philosophy will be protected. There will also be no doubt that a group of people embracing atheistic or anti-theistic beliefs will fall into this category.

Proposals to grant protection to political groups were put forward when working on international genocide legislation, but they have not yet been implemented. The literature notes that a political group bears a similarity to a religious group, since both cases involve a community united on the basis of common views.⁶³ Arguments against granting protection to political groups include the relatively unstable nature of such a group⁶⁴, as well as the volitional nature of membership: it is the person concerned that decides about it and not objective circumstances⁶⁵. However, it is not a strong argument. Is it not the case for a religious group, or even – given the creative power of national consciousness – for a national group? It is difficult to assume that membership of a religious group is independent of the will of its member. Maybe at some early stage of human life, it is a question of a decision made by parents or guardians, but ultimately it is always a question of the will of the person concerned. The composition of a religious group does not have to be stable either. If a person chooses to take a religious worldview, he or she can also abandon it by ceasing to be a member of a religious group. Thus, a political group does not seem to differ significantly from a religious group in this respect, and this would justify a *de lege ferenda* extension of protection in international law to include worldview groups. Similarly, with regard to nationality groups, having a sense of belonging to a community, having a certain political awareness are determinants here. It is the consciousness that determines the membership of a group⁶⁶.

In international case-law, there is a tendency to establish group membership (even ethnic or racial) on the basis of subjective criteria, not on the basis of actual characteristics and beliefs of victims or even perpetrators⁶⁷. This is highly deceptive for all non-racial groups, and it seems that, for the purposes of establishing the grounds of responsibility, it cannot withstand criticism. Therefore, a broad inter-

however, the findings will lead to the conclusion that the motive was the presentation of national consciousness by the victims, which will bring the issue to the international definition of genocide. This issue depends on findings of the investigation to be most probably held.

⁶³ B. Whitaker, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 2 July 1985, E/CN.4/Sub.2/1985/6, <http://www.preventgenocide.org/prevent/UNdocs/whitaker/>, p. 19, (accessed 2.05.2023).

⁶⁴ W.A. Schabas, 2009, *op. cit.*, p. 44.

⁶⁵ B. Whitaker, 1985, *op. cit.*, p. 19.

⁶⁶ This was put most vividly by poet Julian Tuwim, who wrote: "I am Polish because I like it that way. This is a strictly private choice that I don't want to substantiate to anyone". J. Tuwim, *My, Żydzi polscy...We, Polish Jews*, Warsaw 2008, p. 7.

⁶⁷ Cf. e.g. Jelisić.

pretation of international rules aimed at recognising political and worldview-related groups as racial, national, ethnic or religious groups is highly questionable.

Therefore, the regulation of genocide in Polish criminal law, broader than in international law, is far more workable and universal. Unlike under international law, the Katyn crime is, and the crimes committed on Ukrainian citizens loyal to their country may be, genocide under Polish criminal law. Naturally, this does not mean that these behaviours are not criminalised in international law at all. In view of the definition of crimes against humanity other than genocide in Article 8 of the ICC Statute, conduct in order to destroy, in whole or in part, a political group and a group with a particular worldview are *iuris gentium* offences. These are crimes against humanity other than genocide.

Does it suffice? Theoretically, yes. However, the emergence of an extended interpretation of the concept of genocide in the jurisprudence of international courts and in the relevant literature demonstrates a significant moral need to call acts directed against political groups and groups with a specific worldview genocide, regardless of the possibility of holding them accountable under other provisions. The fact that they can be held accountable does not change the fact that, in a purely moral sense, it is important that they can be referred to as “genocide” and classified as the “crime of crimes”. This is possible under currently applicable Polish law, but not under international law.

It seems that the factor of moral and political condemnation, related to both categories of crime, is much stronger in the context of genocide than in the context of crimes against humanity other than genocide. This factor, although in a legal dogmatic sense may be considered secondary, is of paramount importance for moral and political assessments. Humanism and respect of the civilized world, as well as their absence or even their questioning, are invaluable “currency” in international relations. Certainly, the definition of genocide should not be overstretched, so as not to depreciate the “currency”. However, extending the international definition of genocide to include conduct directed against political and ideological groups will not devalue it, but rather make it more adapted to the actual needs.

REFERENCES

- Alves A.A., *Current Developments*, ‘International Criminal Law Review’ 2003, Vol. 3(1)
Amann D.M., *Group Mentality, Expressivism, and Genocide*, ‘International Criminal Law Review’ 2002, Vol. 2(2)
Anderson B., *Wspólnoty wyobrażone*, Kraków 1997
Banaszkiewicz A., *Naród – pojęcie niedookreślone*, ‘Studia Administracyjne’ 2018, No. 10

- Barwiński M., *Pojęcie narodu oraz mniejszości narodowej i etnicznej w kontekście geograficznym, politycznym i socjologicznym*, 'Acta Universitatis Lodzensis. Folia Geographica Socio-Oeconomica' 2004, No. 5
- Cassese A., *International Criminal Law*, Oxford 2003
- Cherif – Bassiouni M., *Crimes Against Humanity in International Criminal Law*, Dordrecht 1992
- Cherif Bassiouni M. (ed.), *International Criminal Law. T. I., Crimes*, New York 1999
- Drózd D., *Zbrodnia ludobójstwa w międzynarodowym prawie karnym*, Warsaw 2010
- Granat M., *Konstytucyjne zasady ustroju*, (in:) L. Garlicki (ed.), *Polskie prawo konstytucyjne*, Warsaw 1998
- Harhoff F., *The Rwanda Tribunal: A Presentation of Some Legal Aspects*, 'International Review of the Red Cross' 1997, Vol. 79(321)
- van Herik L.J., *The Contribution of the Rwanda Tribunal to the Developments of International Law*, Leiden – Boston 2005
- Jørgensen N.H.B., *The Definition of Genocide: Joining the Dots in the Light of Recent Practice*, 'International Criminal Law Review' 2002, No. 1
- Jurewicz J., *Jurysdykcja przedmiotowa Międzynarodowego Trybunału Karnego*, Łódź 2008
- Kabatsi F., *Defining or Diverting Genocide: Changing the Comportment of Genocide*, 'International Criminal Law Review' 2005, No. 5
- Kędzierski J., *Przestępstwa przeciwko religiom i wyznaniom w polskim prawie karnym – de lege ferenda*, 'Palestra' 2007, Nos. 7 – 8
- Kulik M., *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym*, Warsaw 2014
- Lemkin R., *Axis Rule in Occupied Europe: Law of Occupation, Analysis of Government, Proposals for Redress*, Washington 1944
- Lippman M., *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 'Temple International and Comparative Law Journal' 1994, No. 8
- May L., *Genocide: a Normative Account*, Cambridge 2010
- Moloczniak M.P., *Zbrodnia katyńska w świetle badań meksykańskich*, 'Przegląd Prawa Karnego' 2006
- Nersessian D.L., *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 'Texas International Law Journal' 2002, Vol. 37(2)
- Nersessian D.L., *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes against Humanity*, 'Stanford Journal of International Law' 2007, Vol. 43(2)
- Paust J.J., *Kontent and Contours of Genocide, Crimes against Humanity and War Crimes*, (in:) S. Yee, W. Tieya (eds), *International Law in the Past-Cold-War World: Essays in Memory of Li Haopei*, London – New York 2000
- Plachta M., *Międzynarodowy Trybunał Karny*, Kraków 2004
- Quayle P., *Unimaginable Evil: The Legislative Limitations of the Genocide Convention*, 'International Criminal Law Review' 2005, No. 5
- Quigley J., *The Genocide Convention: An International Law Analysis*, Aldershot-Burlington 2006

- Sawicki J., *Zbrodnie przeciw ludzkości a przestępstwa prawa pospolitego*, 'Państwo i Prawo' 1947, Vol. 9
- Sawicki J., *Ludobójstwo. Od pojęcia do konwencji. 1933 – 1948*, Kraków 1949
- Schabas W.A., *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge – New York 2006
- Schabas W.A., *Genocide in International Law: The Crimes of Crimes*, Cambridge 2009
- Shaw M., *What is Genocide?*, Cambridge 2007
- Socha E., *Zbieżność a komplementarność jurysdykcji międzynarodowych trybunałów karnych i sądów krajowych*, Wrocław 2004
- Socha E., *Wpływ procesu norymberskiego na prawo międzynarodowe w zakresie ścigania i karania zbrodni ludobójstwa*, 'Wojskowy Przegląd Prawniczy' 2007, No. 2
- Stasiak K., *Trybunały umiędzynarodowione w systemie międzynarodowego sądownictwa karnego*, Lublin 2012
- Topa I., *Międzynarodowa współpraca państw w wydawaniu przestępców. Zagadnienia materialnoprawne*, 'Prokuratura i Prawo' 2008, No. 4
- Tuwim J., *My, Żydzi polscy/We, Polish Jews*, Warsaw 2008
- Waldenberg, M., *Narody zależne i mniejszości narodowe w Europie Środkowo-Wschodniej. Dzieje konfliktów i idei*, Warsaw 2000
- Waszczyński J., *Zbrodnie ludobójstwa a polskie prawo karne*, 'Acta Universitatis Lodziensis. Folia Iuridica' 1982, Vol. 10
- Whitaker B., *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 2 July 1985, E/CN.4/Sub.2/1985/6
- Wiatr J., *Naród i państwo. Socjologiczne problemy kwestii narodowej*, Warsaw 1973
- Wierczyńska K., *Pojęcie ludobójstwa w kontekście orzecznictwa międzynarodowych trybunałów karnych ad hoc*, Warsaw 2010
- Wołpiuk W.J., *Naród jako pojęcie konstytucyjne*, 'Studia Iuridica Lublinensia' 2014, No. 22
- ICTR judgement, 2 September 1998, *Akayesu*, (ICTR-96-4-T)
- ICTR judgment, 21 May 1999, *Kayshema and Ruzindana* (ICTR-95-1-T)
- ICTR judgment, 6 December 1999, *Rutaganda* (ICTR – 96 – 3 – T)
- ICTY judgement, 14 December 1999, *Jelisić* (95-10-T)
- ICTR judgment, 7 June 2001, *Bagilishema* (ICTR – 95 – 1A-T)
- ICTY judgment, 31 July 2003, *Stakić* (IT – 97-24-T)
- ICTR judgment, 21 February 2003, *Ntakirutimana and Ntakirutimana* (ICTR-96 – 10 i ICTR – 96-17-T)
- ICTR judgment, 15 May 2003, *Semanza* (ICTR-97-20-T);
- ICTR judgment, 3 December 2003, *Nahimana, Barayagwiza, Ngeze* (ICTR – 99-52-T),
- ICTY judgment, 1 September 2004, *Brdjanin* (IT – 99-36-T)
- Judgement of the Polish Constitutional Tribunal, 31 May 2004, K 15/04, Dz. U. (Journal of Laws) No. 130 item 1400