

Reply of Poland to the joint message from the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

With regard to the request of information no. 1.: Please provide any additional information and/or comments you may have on the above mentioned issues.

We would like to kindly remark that the position submitted by experts is incomplete. Page 2 of the submitted position lacks the full content of Art. 55a(3). While referring to the matter in question, the full content of Art. 55a(3) should include:

“A perpetrator of a prohibited act described in (1) and (2) does not commit an offence, if he/she perpetrated that act in the course of artistic or academic activity.”

With regard to the request of information no. 2.: Please provide detailed information on measures taken by your Government to ensure that the abovementioned Act and the amendment to Article 55a is strictly compatible with Your Excellency’s Government’s obligations under international human rights law and standards, especially under Article 19 of the ICCPR and Article 4 of the ICERD.

In the context of issues raised by UN special procedures representatives relative to the compliance of adopted solutions with Art. 19 of the International Covenant on Civil and Political Rights and Art. 4 of the Convention on the Elimination of All Racial Discrimination, We would like to present the following analysis:

Re 2.1

The introduced regulation provides for a criminal sanction for statements for which two characteristics are true at the same time. They have to be public statements – which does not introduce sanctionability of private statements which are not addressed to a wide, non-specific audience – and at the same time, in every case, which should be heavily stressed, statements contrary to the facts. The latter premise is particularly important for the application of the introduced regulation and its fundamental compliance with international legal standards on freedom of speech, as it does not permit pressing criminal charges against statements expressing views outside of academic consensus. Therefore, it is not possible to bring legal action against contentious statements referring to disputable facts, of which it is academically justified to have different opinions and points of view. Such statements will never result in sanctions provided for in Art. 55a of the Act. It is, therefore, possible to hold free public and political discussions. Incidentally, in connection to the above, I would like to remark that while referring to the existence in national law of terms which relate to the evolving social assessment criteria, the European Court of Human Rights did not find a breach of the legality requirement (e.g. *Markt intern Verlag GMBH and Klaus Beermann v. Germany*, judgement of 20 November 1989, application no. 10572/83, Series A. 165, par. 29; *Tammer v. Estonia*, judgement of 6 February 2001, application no. 41205/98, ECHR 2001-1, par. 37-38).

Sanctioning unintentional character of an offence does not include every act that was committed by an offender not being fully aware of criminal law regulations penalizing the matter in question. Pursuant to Art. 9 § 2, a prohibited act is committed without intent where the offender does not intend to commit it, but does so out of a failure to exercise due care under the circumstances, even though the possibility of committing the prohibited act was foreseen, or could have been foreseen. In the matter in question, of particular pertinence is the breach of the principles of prudence relevant for a given group of people. The standard of due diligence is different for a journalist and an average

person. These standards are established by the doctrine and case law and do not allow public authorities to decide which behaviour is to be considered as unintentional.

The introduced regulation also provides for two justifications in law. Firstly, statements expressed within the framework of academic activity will not be penalized. This important provision allows for a free public debate, as the academic activity can also include press discussions taking place publicly. As part of such discussions, researchers will be able to make statements that are contrary to established facts, which is a natural part of free academic discussion and the pursuit of the truth. Referencing controversies and doubts, covering academic research, and writing about dishonourable facts for Poles in commentaries and historical papers will not be penalized. No one limits journalists' freedom of speech in that respect. As long as we are not dealing with an obviously false statement, e.g. that death camps were Polish or that Poles systemically murdered Jews.

The second legal justification is artistic activity. Behaviour consisting in the preparation of a play, painting or a film, in which established facts concerning historical events during World War II are contested, or the victims are presented as perpetrators, or the significance of assessment of actions are presented contrary to facts, is not going to be penalized.

Therefore, it can be concluded that opinions expressed on historical events are not going to be penalized. The freedom of academic and artistic activity is thus guaranteed.

Furthermore, the apportionment of burden of proof becomes particularly important. In the case of other criminal law provisions, e.g. Art. 212 in connection with Art. 213 of the Criminal Code, which regulates slander, the burden lies with the accused. The criminal code states that the offence is not committed if the allegation is true. Therefore, the burden of proof is reversed and it is the defendant who has to prove that his/her statement was fully justified. The introduction of the premise of "attribution of liability contrary to facts" without transferring the burden of proof results in the prosecutor having to prove with precision that the attribution of liability contrary to facts actually took place. The introduction of the provision in such wording constitutes a clear reference to the available historical knowledge. It causes the prosecutor to appoint an expert in order to determine historical facts and the admissibility of criminal proceedings.

The adopted regulation does not leave room for public authorities to decide independently which statements can, and which cannot, be liable to criminal sanction provided for by Art. 55a.

Re 2.2

Particular consideration should also be given to the clarification by the introduced provision of the category of crime, the accusation of which made against the Polish Nation is to be penalized. By referencing Art. 6 of the Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, the proposed norm was limited to systemic crimes. Therefore, it cannot be applied to the discussion about individual perpetrators of criminal acts – it will be applied in the case of accusation of a crime of systemic character, e.g. genocide. The reference to Art. 6 of the Charter of the International Military Tribunal is conclusive in its legal sense. It clearly specifies that the provision of the act refers to questioning of crimes historically proven beyond any reasonable doubt and not to those which are still being researched by historians.

Another premise clarifying the adopted regulation, apart from a clear reference to Art. 6 of the Charter of the International Military Tribunal, is a statement that it is the Nation that is assigned the responsibility. It means that the statements concerning individual perpetrator or groups of perpetrators will not be penalized. The term of Nation itself was defined in the preamble to the Constitution of the Republic of Poland, according to which the Nation is made up of all the citizens. The term of Nation is also used in Polish criminal law, as it is mentioned in Art. 133 of the Criminal Code penalizing the insult to the nation of the Republic of Poland. Also, the case law correctly indicates that "Polish Nation" should be understood to mean all persons of Polish nationality as well

as all citizens of the Republic of Poland (decision of the Regional Court in Czestochowa of 31 October 2017, II KP 641/17).

The criminal law provision is therefore sufficiently clear in order to guarantee full protection of freedom of speech.

With regard to the request of information no. 3.: Please provide detailed information about the objective of the aforementioned Act and the amendments.

The purpose of the amended act on the Institute of National Remembrance is to protect the Polish State and Nation as a whole from being falsely accused of the involvement in German crimes and not to cover up the responsibility of individuals or groups of people. The new law is to protect the historical truth and memory of the victims of German crimes: Jews, Poles and representatives of other nationalities. As the emigration courier of the Polish Government in London, Jan Karski who was alarming the American President Roosevelt, other states' leaders and the whole world about the tragedy of Jews, put it and used to remind it throughout his whole life: "Mankind should not forget what the Holocaust is".

The same world, failing at that time to hear Karski's dramatic appeals and rejecting the requests of the Polish government for bombing the railways used by Germans to transport Jews to Auschwitz to face death, nowadays is generously casting terms like "Polish death camps". It mendaciously attributes to Poles as a nation the involvement in the Holocaust. That is why, although more than 70 years have passed since the war ended, we, the Poles, cannot afford silence. Those camps were not Polish, they were German, and almost every Polish family, suffered during the war because of Germans.

The new law is to prevent the possibility of blurring the line between offenders and victims of crimes. It is to prevent the questioning and trivializing German crimes.

The purpose of this act is not to conceal the facts or deny the accounts of the history witnesses. The Poles generally behaved righteously as a nation but it does not mean that there were no Poles who - out of fear or for profit - committed vile acts. We are not going to deny it, nor even more, punish for that. The purpose of the act is care for the historical truth and not restricting academics, including historians. The act explicitly states that it does not apply to the academic, nor artistic activity. Neither to journalistic one, if we understand it as referring to certain controversies and doubts in comments and historical articles, reporting on scientific research or describing facts that are disgraceful for the Poles. No one is limiting the freedom of speech nor journalist freedom in this respect. As long as we are not dealing with an obviously false statement like that e.g. that extermination camps were "Polish".

The law is to protect the undisputable and unquestioned truth. The truth which is obvious for the majority of Poles and, nevertheless, sometimes it is being challenged.

Such undisputable, historical truth is the fact that it was Germans who invaded Poland in 1939. And the fact that it was the Polish army in which, together with Poles, also several dozens of thousands of Jewish soldiers and officers served, was the first to take up arms to oppose Hitler's Nazi machine. Also the fact that it was Polish soldiers, including those of Jewish nationality, who spilled their blood to defend the Polish State, which is nowadays accused of the Holocaust by some people. Attacked by Germans and their coalition members from all sides, following weeks of defence fight, Poland lost the whole of its territory. The Government, which together with a part of our armed forces went to emigration, as well as the underground resistance movement, were not able to effectively protect not only their Jewish but also their Polish citizens. As a result of the war initiated by the Germans, more than 3 million of Polish Jews died and almost as many Poles. Despite losing our territory, we established the largest in Europe underground army and the only, across the occupied countries, underground institution that helped Jews, that is *Żegota*. The emigration government gave them

almost one and a half million dollars, which at that time was a very considerable amount of money for the Polish Government in Exile.

Another indisputable historical fact is also the fact that Germans did not manage to establish a collaboration government in Poland, like it was the case in the majority of European states under their occupation, the authorities of which assisted the Third Reich in the extermination of Jews. Some hundreds of thousands of Poles died in all German concentration camps. And it was Poles who were alarming the world about atrocities committed on their Jewish co-citizens. It was the underground National Army officer, Witold Pilecki, who let Germans imprison him in Auschwitz in order to make documentation of the Holocaust and send his dramatic reports to the West.

It is also the fact that despite the law introduced in the occupied Poland, which stipulated immediate death penalty for the whole families for helping Jews. It happened that during such executions Germans burned people alive in their houses. Despite such terror, Poles helped Jews on a large scale. In a situation when your own life and life of your children were threatened, it was an incredibly heroic act. An act that could not be compared to helping Jewish nationals in other occupied states, where such help was usually punished only with imprisonment. Nevertheless, among the heroes awarded by the Israeli Yad Vashem Institute with a "Righteous Among the Nations" medal for saving Jews, the greatest number are Poles, who represent more than one forth.

That is why Poles have a right to defend themselves from false allegations that, as a nation, they are jointly responsible for the Holocaust.

With regard to the request of information no. 4.: Please provide information about timeline that the Act will be introduced to the Constitutional Tribunal for its judicial review and assessment and detailed information about the procedure of examination and revision of an Act if the Constitutional Tribunal makes this decision.

The President of the Republic of Poland had already referred such an application, and it was received by the Constitutional Tribunal on 14 February 2018. On 15 February 2018, by the order of the President of the Constitutional Tribunal, the application was entered in the appropriate case register of the Tribunal as the case ref. no. K 1/18. For the consideration of the case, an adjudicating bench composed of five judges was indicated. Participants in those review proceedings are the Sejm and the Public Prosecutor-General (pursuant to Art. 42 of the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal, Journal of Laws – Dz. U. item 2072, hereinafter: the Constitutional Tribunal Act). The participants have been notified by the President of the Tribunal about the commencement of the review proceedings in the case ref. no. K 1/18, and they have been granted a 30-day time-limit for the submission of their written statements on the case (according to Art. 63(1) of the Constitutional Tribunal Act). Also, the Polish Ombudsman has been notified about the commencement of the proceedings (pursuant to Art. 63(2) of the Constitutional Tribunal Act), who may – within 30 days from the date of receiving the notification – inform the Tribunal about his participation in the proceedings and may submit his written statement on the case. The time-limit for the submission of the written statements by the participants in the proceedings expired on 19 March 2018.

The case ref. no. K 1/18 is currently being considered on its merits.

Information on the dates of the Tribunal's hearings is provided in Polish on the website of the Constitutional Tribunal (www.trybunal.gov.pl) in the following bookmarks: *Postępowanie i Orzeczenia* (Eng. Proceedings and Rulings) under *Wokanda* (Eng. Docket). The applicant and the participants in the proceedings are notified in writing of the above-mentioned dates by the judge presiding over the adjudicating bench in the aforementioned case.