

# GENTIUM

Vol. 3 (2), Feb. 2008



Public International Law Students United

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## **Tallinn Riot 2007 and Article 3 of the ECHR**

### **Introduction**

Human rights are inalienable rights of every human being, acquired by birth, independently of acts of law.<sup>1</sup> When they are codified in internationally accepted documents, they become fundamental rights, which must be respected at all times. However, “respected at all times” does not necessarily mean “always complied with” and, in certain cases, such as in times of public emergency, which threaten the life of the nation, a state can derogate and temporarily depart from some of their obligations and thus limit their human rights obligations. Such limitations are allowed only in cases provided by law and only within the necessary timeframes.<sup>2</sup>

Tallinn riot, sparked by relocation of the Bronze Soldier in April 2007, and the way Estonian police handled it, created a wave of complaints of alleged police brutality. Exaggerated by the Russian media, a public outcry was made to attract attention of the international community to illegality of police actions and numerous violations of Estonia’s inter-state laws, as well as internationally recognized human rights.

This essay will not touch upon the issue of less serious limitations, like freedom of expression or freedom of assembly, which have already become traditional practice in many states, when questions of national peace and security are concerned. Instead, attention will be concentrated on the alleged multiple infringements of Article 3 of the European Convention for Protection of Human Rights and Fundamental Freedoms (from hereinafter referred to as ECHR) and Article 4 of the European Charter for Fundamental Rights of the European Union (from hereinafter referred to as Charter), which prohibit torture and degrading treatment. A brief overview of the accusations will be given, contemporary position of the world society on the limits of torture and degrading treatment will be discussed and previous practice analyzed for the purposes of

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<sup>1</sup> Winston, M. E. The Philosophy of Human Rights. Wadsworth Publishing Company. Belmont, California, 1989. p. 7.

<sup>2</sup> What is international human rights law? Diakonia. Easy Guide to International Humanitarian Law in the Occupied Palestine Territory. Available online at <http://www.diakonia.se/sa/node.asp?node=994>.

determining, whether actions of Estonian police fall within the scope of Article 3 of ECHR / Article 4 of the Charter.

### **Was there a state of emergency?**

Since freedom from torture and degrading treatment is a universal right, which can not be derogated (see below), determining whether April Events constitute a state of emergency is necessary to ascertain if Paris Minimum Standards of Human Rights Norms in a State of Emergency of 1984 apply. Quite relative here are the 3 articles, which set out additional obligations for the State in that case, as well as in the negative sense define inhuman and degrading treatment. These are: article 6(3)(d) – *“every State shall conduct an impartial investigation by a competent authority whenever there is reason to believe that any act prohibited as aforesaid has been committed, whether or not a formal complaint is received”*, article 6(3)(e) – *“every State shall institute criminal, disciplinary or other appropriate proceedings against the alleged offender or offenders if investigation establishes that such offence is suspected of having been committed”*, and article 6(5) – *“every detainee shall be examined by a doctor soon after his arrest and his physical and mental condition duly recorded and signed by the doctor”*.

Article 15(1) of the ECHR allows derogations from human rights obligations “in time of war or other public emergency threatening the life of the nation”. Article 129 of the Estonian Constitution replaces the words “threats to life of the nation” with “threats to the Estonian constitutional order”, thus limiting dangers to the people only to political instability in the country. Both article 129 of the Constitution and international customs require state of emergency to be publicly announced before State can begin limiting the rights of its citizens. One may wonder, however, whether a country can derogate from its “human rights obligations” in case it finds itself in a similar to “state of emergency” conditions, but where it chooses not to announce the latter. The short answer here would be: it cannot. The entire legal notion of state of emergency resides on formal proclamation and without it, all limitations are contradictory to international law, no matter how grave *de facto* situation is. Since no such declaration was announced in Estonia during the April Events, Tallinn Riot should be qualified as a civil unrest,

during which no human right could be limited.<sup>3</sup> Paris Minimum Standards, therefore, do not apply.

### **What is torture, inhumane or degrading treatment?**

The right to freedom from torture was first introduced in the Universal Declaration of Human Rights (1948) in article 5, which proclaimed that “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”. Although UDHR itself was not legally binding, the wording of article 5 became source of legal obligation as it “travelled through time” unchanged, first to article 3 of the ECHR (1950), then to article 7 of the UN International Covenant on Civil and Political Rights (1976) with additional elaboration that “*no one shall be subjected without his free consent to medical or scientific experimentation*”, and finally to the article 4 of the Charter (2007) in its original form. When the ECHR was established, there was no understanding of the 3 terms, and drafters mostly relied on the argument that ECHR is a living instrument, to be interpreted in accordance with the understandings current within European society at the time of the alleged violation, and not limited to what was within the contemplation of the creators of the Treaty.<sup>4</sup> Nevertheless in 1975, the UN General Assembly chose to define the term “torture” in its Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in article 1(1), as follows: “*torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons*”. The UN Convention’s Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) article 1(1) provided a similar definition only adding that torture may also be committed “*for reasons based on discrimination of any kind*”.

In the *Ireland v. the United Kingdom* case, the ECtHR upheld the opinion previously expressed by the European Commission of Human Rights (from hereinafter Commission) that “*ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The*

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<sup>3</sup> Thus Estonian government did not have the right to derogate any human rights as it did, like limiting freedom of expression, by blocking the ability to leave comments on certain Estonian news portals in the internet during 27-30 April.

<sup>4</sup> Evans, M. D. Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Oxford University Press. Oxford, 1998. p. 73.

*assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim etc.*"<sup>5</sup> As the Commission revealed in the *Greek* case, "*all torture must be inhuman and degrading treatment, and all inhuman treatment also degrading*",<sup>6</sup> thus article 3 (article 4 of the Charter) sets a three-tier system, where the notions vary in aggravation. Torture denotes deliberate inhuman treatment causing very serious and cruel suffering, inhuman treatment or punishment causes intense physical and mental suffering and degrading treatment arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical or moral resistance.<sup>7</sup> The distinction between the three is important to determine the amount of compensation, however, as practice shows, the minimum standard for articles 3 / 4 is set very high, with ECtHR finding "full" torture only in few its cases. Blows with fists or feet or batons or other weapons, have generally been deemed insufficient to justify use of the terms "severe ill-treatment" or "torture", even if such blows have apparently been inflicted either with the intention of causing pain or purposefully with a view to extracting information. Physical ill-treatment has been described as torture when, e.g. evidence has been found of the use of specialized techniques (suspension of the victim, beating of the soles of the feet, hosing with pressurized water etc), the use of specialized instruments, or special forms of preparation (such as blindfolding or covering the victim's head with a blanket, or officer's faces being masked, to prevent the victim seeing his or her tormenters).<sup>8</sup> There is no doubt about the fact that article 3 (article 4 of the Charter) does not refer exclusively to the infliction of physical, but also of mental suffering. The Commission defined the latter as covering "the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault".<sup>9</sup> However not every measure taken by a public authority that has emotional consequences of any kind for the individual falls within the scope of inhuman treatment but only such measures as "inflict severe mental or physical suffering on an individual".<sup>10</sup>

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<sup>5</sup> *Ireland v. the United Kingdom*, ECtHR judgment of 1978, § 162.

<sup>6</sup> *Greek* case, opinion of the European Commission of Human Rights of 1969, § 186.

<sup>7</sup> Davis, H. *Human Rights and Civil Liberties*. Willan Publishing. Devon, 2003. p. 75.

<sup>8</sup> Evans M, Morgan R. *Protecting Prisoners: The Standards of the European Committee for the Prevention of Torture*. Oxford University Press. Oxford, 1999. pp. 34-35.

<sup>9</sup> Dijk P., Hoof G.J.H. *Theory and Practice of the European Convention on Human Rights*, 2<sup>nd</sup> edition. Kluwer Law and Taxation Publishers. Boston, 1990. p. 228.

<sup>10</sup> *Ibid.* p. 229.

Freedom from torture and degrading, inhuman treatment is a non-derogable right included in the ECHR article 15(2). The Court numerous recited in its judgments that this right is absolute and can never be limited, e.g. in *Assenov and Others v Bulgaria* judgment ECtHR held that “*even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment*”.<sup>11</sup> That means, that this freedom is entitled to a person irrespective of what he has done or has been accused of doing.<sup>12</sup> Today many scholars commonly accept that the prohibition of torture and degrading treatment has become part of customary international law. The International Law Association (ILA), moreover, considers that the obligations contained in the UN Declaration on Protection from Torture are obligations *erga omnes*. The treaty provision in this regards has acquired the character of *jus cogens* from which there can be no derogation in any circumstances in terms of article 53 of the Vienna Convention.<sup>13</sup>

### **Tallinn Riot: accusations and excuses**

According to the information available on Wikipedia, the chairman of the Constitutional Party Andrei Zarenkov claimed during the riot that detention centers were overcrowded. “People were forced to squat for hours or lie on the concrete floor with their hands tied behind their backs. Police used plastic handcuffs which caused great pain,” he said.<sup>14</sup> Among other complains circulating in the media were severe beatings both during arrests and in police custody allegedly with batons and feet, employment of Russian-unfriendly skinheads into Kaitseliit (voluntary military national defense organization, which was assisting police forces during arrests and was deployed to guard some of the detention centers). Some claim that the handcuffed rioters were put in places, where their face would sink into mud and that officers sometimes just sat on their bodies. The police refuted the charges of ill treatment of the detainees, the Estonian Chancellor of Justice visited all detention centers, and found no signs of violations of the Constitution, nor any detainees who would support claims of police brutality or make complaints.<sup>15</sup> The International Helsinki Federation for Human Rights was one of the many to send an address to the Estonian

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<sup>11</sup> *Assenov and Others v Bulgaria*, ECtHR judgment of 1998, § 93.

<sup>12</sup> Ovey C. Prohibition of Refoulement: The Meaning of Article 3 of the ECHR. Registry of the European Court of Human Rights. Available online at <http://www.ecre.org/elenahr/art3.pdf>.

<sup>13</sup> Chowdhury S. R. Rule of Law in a State of Emergency. St Martin's Press. New York, 1989. p. 189.

<sup>14</sup> Echo of the Bronze Night. Wikipedia. Available online at [http://en.wikipedia.org/wiki/Echoes\\_of\\_the\\_Bronze\\_Night](http://en.wikipedia.org/wiki/Echoes_of_the_Bronze_Night). Extracted on 1 Dec 2007.

<sup>15</sup> Jõks: mulle pole esitatud ühtegi kaebust. Eesti Päevaleht. Available online at <http://epl.ee/artikkel/384174>.

government calling for an objective investigation of cruel treatment by police in oppressing riots in the country and guarantee that international standards would be observed in future.<sup>16</sup> However, according to an official statement of the Estonian Legal Information Center for Human Rights (from hereinafter referred to as LICHR), country's highest political leaders (prime minister, minister of justice, minister of the interior) only declared that during the repression of the mass disturbances there were no and could not have been any legal violations by police, despite all the information on excessive use of force appeared immediately in mass media, including photos and video recordings,<sup>17</sup> while the prosecution up until now kept rejecting most of the applications to start criminal investigations on the matter, and initiated only a few trials "for show".

### **Violence during arrests**

During the Riot, the LICHR maintained a working "hot line", where people could complain about police actions. On June 4, 2007 LICHR published a report (from hereinafter Report), which today remains the most detailed collection of the unofficial witness testimonies available to the public on the matter. According to this document one of the witnesses reports: *"I stood near the food store, when police all of a sudden attacked the peacefully standing people and began using force and special devices – tear gas, rubber slugs etc. Because there was a throng of people milling around and about, I could not leave the scene of events. I got wounded in my right hand in the area of wrist, a wound on my cheek, in head and in my left shoulder as a result of multiple strikes with truncheon"*.<sup>18</sup> When talking about article 3 of the ECHR (article 4 of the Charter), one must remember basic principle set out by the Court in *Tyrer v. United Kingdom* case – that *"the suffering occasioned must attain a particular level before a punishment can be classified as "inhuman" within the meaning of Article 3."*<sup>19</sup> Certain types of treatment may be acceptable because they are adopted commonly among all member states, whereas judicial corporal

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<sup>16</sup> International Helsinki Federation Calls Estonian Government to Investigate Police Actions. Regnum News Agency. Available online at <http://www.regnum.ru/english/821228.html>.

<sup>17</sup> Access to justice in Estonia. The events of April 26-29, 2007 in Tallinn. Statement of the LICHR. Available online at [http://www.osce.org/documents/odhr/2007/10/26864\\_en.pdf](http://www.osce.org/documents/odhr/2007/10/26864_en.pdf).

<sup>18</sup> Complaints regarding the actions of law enforcement bodies in the process of mass disturbances in Tallinn on 26-29 April 2007. Report on work of the «hot line» of the LICHR. June, 2007. Available online at <http://www.lichr.ee/new/apr-eng.doc>. p. 4.

<sup>19</sup> *Tyrer v. United Kingdom*, ECtHR judgment of 1978, § 29.

punishment would be considered to be contrary to article 3.<sup>20</sup> Article 14 of the Police Act states, that special equipment, truncheons and gas weapons are allowed, but police must consider the nature of each offence, person and situation before using it and must avoid causing more harm to the health of the person than unavoidable. A similar situation to the one above was described in the *Hurtado v. Switzerland* case, where the arrest involved use of a stung-grenade and the applicant had been forced to the ground, handcuffed and hooded. He had allegedly also been beaten. The court ruled that the circumstances of the arrest did not give rise to a breach of article 3.<sup>21</sup> The same minimum standard applies to the story, described by the witness, that is, police can use any means during legal arrest, as long as they remain necessary and proportionate to the threat coming from the arrested, therefore in such cases, one cannot speak of degrading or inhuman treatment.

Another witness reports: “*On the sidewalk behind the underground crossway, we were stopped by people in black uniform. The squad blocked our way and sprayed gas at us, without warning. Then a policeman threw us down and clasped our hands behind our back with a plastic strip. I attempted to turn myself on my side, so that I could spit dirt out of my mouth. A policeman came running to me and started kicking me with feet, ordering me to lie still. It was then, evidently that a finger of my right hand was broken*”.<sup>22</sup> Article 3 / 4 imposes both a negative obligation on a State to refrain from inflicting torture or inhuman and degrading treatment on its subjects and a positive obligation to guard against their becoming the victims of such treatment at the hands of others.<sup>23</sup> Once a person gets into the hands of the police, the latter becomes fully responsible for what happens to him. The borderline in such cases lies between two cases – *Tomasi v. France*<sup>24</sup> and *Klaas v. Germany*.<sup>25</sup> If one analyzes them together, the answer, whether the Court can conclude if the ill-treatment falls within the article prohibiting torture and degrading treatment, depends on whether the injuries have been made during the period of custody or during arrest. In a similar case *Peleckas v. Lithuania*<sup>26</sup> the ECtHR established, that a fractured elbow and a number of scratches and bruises is already a treatment which could fall under article 3. The Court

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<sup>20</sup> Foster S. Human Rights and Civil Liberties. Pearson Education. Upper Saddle River, New Jersey, 2003, p. 63.

<sup>21</sup> *Hurtado v. Switzerland*, ECtHR judgment of 1994. §§ 7,12.

<sup>22</sup> *Supra* note 19. p. 10.

<sup>23</sup> Harvey C. J. Human Rights in the Community: Rights as Agents for Change. Hart Publishing. Oxford, 2005. p. 143.

<sup>24</sup> *Tomasi v. France*, ECtHR judgment of 1990.

<sup>25</sup> *Klaas v. Germany*, ECtHR judgment of 1993.

<sup>26</sup> *Peleckas v. Lithuania*, ECtHR decision as to the admissibility of 2003.

took into account the applicant's argument that no charges for disobeying police orders were brought against him (the same fact could be brought up by the Estonian witness), however the ECtHR found it to be insufficient to talk about violation of the prohibition of torture and degrading treatment, because there was not enough evidence. Since *de facto* custody begins once a person has been immobilized and handcuffed, the alleged kicks would be degrading treatment, if one manages to prove that the policemen were indeed beating persons in helpless state.

### **Violence and maltreatment in custody**

One of the witnesses claims that he and another 6 people put in a cell meant for two, which made it difficult for them to breathe.<sup>27</sup> Custody is a short term detention. Consequently, physical conditions cannot be expected to be as good in police establishments as in other places of detention where persons may be held for lengthy periods. However, according to the 2<sup>nd</sup> General Report on the CPT' activities covering the period 1 January to 31 December 1991, certain elementary material requirements should be met. All police cells should be of reasonable size for the number of persons they are used to accommodate, and have adequate lighting and ventilation; preferably, cells should enjoy natural light. Further, cells should be equipped with means of rest (e.g. a fixed chair or bench), and persons obliged to stay overnight in custody should be provided with a clean mattress and blankets. Persons in custody should be allowed to comply with the needs of nature when necessary in clean and decent conditions, and be offered adequate washing facilities. They should be given food at appropriate times.<sup>28</sup> The ECtHR has proven to be most reluctant to find prison conditions to be in breach of article 3, since now the Council of Europe has expanded to include most of the former Soviet Union, including some very poor countries, and it would place too great a burden on States.<sup>29</sup> Therefore trying to prove that Estonian police violated article 3 (article 4 of the Charter) by not providing clean mattress or accommodating more than allowed number of people would be vain. However, prohibition to use the toilet for a certain period of time may very well constitute such violation. According to the Report, many people were refused the benefit of a toilet (but not all), e.g. one witness describes: "*I asked permission to go to the toilet but the policeman gave me a swinging blow*".<sup>30</sup> Although the Court

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<sup>27</sup> *Supra* note 19. p. 13.

<sup>28</sup> Prevention of Torture. A digest of cases of the European Committee for the Prevention of Torture and the United Nations Committee Against Torture. Open Society Institute / Constitutional and Legal Policy Institute. Hague, 2001. p. 72

<sup>29</sup> *Supra* note 13.

<sup>30</sup> *Supra* note 19. p. 18.

rejected most of the claims in *Hurtado v. Switzerland Case* (see above), one aspect of his claim that actually succeeded was that he had to continue wearing his soiled clothing.<sup>31</sup> The court concluded that this was degrading within the meaning of the article 3 of the ECHR, therefore if at least one of the prisoners at the detention facilities during the Bronze Unrest had to defecate in his trousers because the police would not let him to the toilet, and was forced to wear them for at least a short period of time, this would amount to degrading treatment. Another important claim sustained in the *Hurtado* case was that failure to provide necessary medical treatment is also contrary to article 3 of the ECHR. During April Riot, however, as even the Report admits, medical treatment was provided (although in a strange manner). Thus one can not suppose that article 3 was infringed in this aspect.

Many detainees complain that they were forced to squat, with their hands handcuffed, which caused physical torment. One witness recalls: *“I together with other detainees were forced by the police operatives, by use of coercion, to squat or knee down during almost 6 hours on the cold concrete floor, while my hands were fettered with handcuffs. I was forbidden to stand to stretch my legs. When I or someone else from among detainees made an attempt to stand up, we were given a savage beating”*.<sup>32</sup> Another claims: *“We were brought to D-terminal, we were seated on concrete, the handcuffs were removed after approximately 3 hours. Beside me a man was lying down, motionless, his hands in handcuffs had gone blue. Another man asked that his handcuffs should be taken off – his hands had gone numb. Two policemen approached him and tightened the straps up, instead. The man cried: «It hurts, what are you doing?!» Then policemen grabbed him from the scruff of his neck and dragged him to the corner, where they gave him a beating with truncheons”*.<sup>33</sup> One cannot avoid to see a similarity of these complaints with the *Ireland v. United Kingdom* case,<sup>34</sup> where alleged violation of the prohibition of torture and degrading treatment centered around the application of the so-called “five techniques”, which involved firstly, obliging the interrogated persons to stand for a long period on their toes against the wall – that is in unnatural position, which aroused physical suffering, in the Tallinn Riot case being forced to sit crouched delivered the same effect, therefore this is comparable, secondly, deprivation of sleep and sufficient food and drink, similar effect was also allegedly (see Report) achieved in the Estonian detention centers. Other 3 techniques employed by the UK police –

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<sup>31</sup> Arnheim M. *The Handbook of Human Rights Law*. Kogan Page. London, 2005. p. 106.

<sup>32</sup> *Supra* note 19. p. 15.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Supra* note 6.

deprivation of sleep, covering with black hoods and subjecting inmates to constant intense noise can easily be superseded by Tallinn Riot's graver beatings of handcuffed persons, bad cell conditions, deprivation of water and failure to provide necessary conditions for "natural needs", therefore if one takes all the incidents as a whole, a conclusion can be made that police has violated the right to freedom from torture and degrading treatment of the persons placed in custody during the Tallinn Riot. However, this conclusion cannot be valid taken the current situation and timing, since Irish prisoners were subjected to inhuman treatment for a long period, while Estonian rioters were put in these conditions for only 1 day and unlike the Irish, posed a threat (although not very serious) to the police, would they be let to start rioting in the detention center.

### **Conclusions**

In the beginning of this essay a question was raised whether actions of Estonian police during the civil unrest in Tallinn in April, 2007 constitute violation of article 3 of the ECHR or article 4 of the Charter. According to the Report, allegations can be divided into 4 groups – violence during initial arrest, violence after a person has been incapacitated during arrest, violence to persons held in custody and maltreatment of persons held in custody. As was established, the prohibition of torture could be infringed in the 2<sup>nd</sup> and 3<sup>rd</sup> scenario, if one manages to prove beyond reasonable doubt that violence took place *after* the a person has been apprehended and it did not result from his own behavior. Article 3 of the ECHR / Article 4 of the Charter is certainly infringed in case one or more of the detainees was deprived access to bathroom and because of that was forced to defecate in his clothes, and had to stay in them.

### **Third Reich Through the Prism of International Law and International Law in the Eyes of the Nazis**

Defining public international law is almost impossible. The formal answer to the question “*Droit international – qu’est-ce que c’est?*” would be “a set of norms which govern relations between states, resulting from treaties, agreements and customs”, however most international scholars and practitioners would agree that it is something much more tricky and complex. International law is a phenomenon with no face, it is a subject with no form. One could bring up the story of the blind men and the elephant, seeing how different states tend to see “the law of nations” differently and argue about its interpretation. Despite the ironical similarity however, the “elephant” does not exist *per se* and nobody can suddenly “see the whole picture”, for international law was and remains a product of collective imagination. Of course a *core* of legal relations between states has been established by today, but when it comes to speaking about *universally* recognized principles, endless disputes emerge time and time again, heated by cultural differences. Therefore it would be more appropriate to compare international law with Mirror of Erised (rather than the “elephant”), which instead of the reality shows only what one wants to see. But not only is international law different in different places, it also manages to evolve asymmetrically, thus the time-factor is very important when discussing international law as well.

In this essay two aspects of the same question will be discussed simultaneously, namely what was the Nazis’ perception and interpretation of international law of the time and how do we evaluate Nazis’ deeds through the prism of contemporary legal science. For the sake of originality when discussing the first aspect, this essay will not touch upon Carl Schmitt’s legal philosophy, which the Third *Reich* supposedly adopted, since it has already been thoroughly reviewed, criticized and commented upon by Anthony Carty,<sup>35</sup> John H. Herz,<sup>36</sup> Martti Koskenniemi,<sup>37</sup> and other authors.

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<sup>35</sup> See Anthony Carty, Carl Schmitt’s Critique of Liberal International Legal Order Between 1933 and 1945, *Leiden Journal of International Law*, No. 14, 2001, pp. 25-76.

<sup>36</sup> See John H. Herz, Realism and the Fragility of International Order, *Review of International Studies*, No. 31, 2005, pp. 285-306.

Instead a set of problems of international law, which are quite relevant today, will be analyzed one by one on the example of the Nazi Germany.

Since international legal science has always been not devoid of politics, it was sentenced to become subject of nazification after Hitler took up the post of German chancellor in 1933. Already a few years after the NSDAP gained power, even before the war broke loose, international scholars were pointing out suspicious changes in the composition of professors, judges, attorneys and other employees involved in legal professions. German universities, which once were a bastion of free thought and liberalism, turned into political entities under close observation. Professors were dismissed because of “non-Aryanage”, having “non-Aryan wife”, political unreliability, interest of the service, and simplification of the administration.<sup>38</sup> In the end the Party had created a fully controllable legal system within the State borders, which on one hand was protected by sacred and unbreakable (at that time) principles of sovereignty and non-intervention from the outer States and, on the other, provided NSDAP full legal control over its subjects.

To fulfil its aggressive ambitions and *Führer's* promises of “Lebensraum”, domestic politics had to be expanded onto the international arena. Of course this could not have been done in an instant rough manner of protruding racial and biological legal theories, for this would never have been accepted by majority of States or scholars. The Third *Reich* had to choose a wiser way of slowly, but actively promoting ideas of self-determination of peoples. It should be noted that to some extent this played on the Nazis' hand, as the world community just for this reason, chose to ignore open violations of the Versailles Treaty (like un-demilitarization of Rhineland in 1936, exceeding allowed limits of *Wehrmacht* etc.) and in an easy state of mind surrendered Austria and Sudetenland. “Self-determination” came even in a collective form of helping Franco's army to achieve victory during the Spanish civil war in 1936-1939.

A question should be asked at this point - did Germany or its state officials violate international law before the start of the WWII on September 1<sup>st</sup>, 1939? Three possible hypotheses can be brought up here: Germany violated international law by 1) acting in breach of Versailles Treaty;

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<sup>37</sup> See Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge University Press, Cambridge 2001, pp. 413-494.

<sup>38</sup> As pointed out by Charles Cheney Hyde already in January 1939, *The Nazi Proscription of German Professors of International Law*, *The American Journal of International Law* Vol. 33, No. 1, 1939, p. 114.

2) perpetrating crimes against peace (in the modern times also known as aggression) towards Austria, Czechoslovakia or other countries; 3) by performing crimes against humanity against its own citizens or *de bene esse* violating human rights as we know them today.

It is true that in the early years all efforts of the international lawyers of the Third *Reich* were channeled towards fighting Versailles Treaty and proving its invalidity in the eyes of the entire world. Without doubt, one could easily question an international treaty, which was signed by Germany in the conditions it was in after the end of the WWI. Nazis sought to emphasize that the agreement was concluded in bad faith and only because Germany was in state of emergency at that time, therefore it was no less than “enforced” upon the German people by the Allies. On the other hand if one thinks logically, “unfair” peace agreements, where a victorious country(-ies) would establish conditions of the treaty, have been traditional practice of States for centuries, thus, even if the WWI was a war which “the world has never seen before” and most of the world seemed to acknowledge its unfair terms during the 1933-1939 period, it is still insufficient to speak of Versailles Treaty’s *mala fide* and Germany must have complied with it.

Speaking about the 2<sup>nd</sup> hypothesis, it should be mentioned that Kellogg-Briand Pact condemned only “recourse to war for the solution of international controversies” and the most “advanced” development of that time – “Convention for the Definition of Aggression”, which was signed in London on March 7<sup>th</sup>, 1933, did not include threats of going to war or military pressure in diplomacy as “aggressive” actions either. Even in the Nuremberg Charter, which stretched far beyond what as some believed was acceptable, Article 6(a) defines crimes against peace only as planning, preparing, initiating or waging “war of aggression”. Judges of the Nuremberg trials chose to avoid publicly accepting the position, that Germany’s actions in 1938-1939 were “crimes against peace”, however, as R. S. Clark points out,<sup>39</sup> in the *Ministries Case*, there was a conviction for the invasions of Austria and Czechoslovakia, since, as the prosecution stated, these were situations, where resistance was futile and weaker countries were forced to succumb without the necessity of a “shooting war”. This approach however, feels dubious, as the art of diplomacy, as the 20<sup>th</sup> century showed us, lies mostly within the ability to “walk” the thin “blade” on the borderline of war, without actually resorting to it, therefore Nazi Germany did not act

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<sup>39</sup> In Roger S. Clark’s Nuremberg and the Crime Against Peace, Washington University Global Studies Law Review, Vol. 6, No. 3, 2007, p. 536.

entirely illegally in this aspect, especially when one looks objectively upon the Nazis' self-determination-arguments mentioned earlier.

What concerns the crimes against humanity, today a position has been formed in customary law and legal scholarship, also upheld by the ICTR and ICTY decisions, that such crimes do not necessarily need to be committed during times of war, and can be brought up as soon as attacks against civilian population become systematic (when one can speak of such systematic regularity). Were Nazi attacks against Jews, sexual minorities, disabled persons and other groups targeted by Hitler's regime before the WWII systematic? Certainly. Even if one adopts a position that including racial segregation into crimes against humanity is a reckless and invalid move and it cannot possibly be an unambiguous evidence of illegality of the Third *Reich's* actions, the "light" mal-treatment of its own population accumulates into violation of what we today call human rights. Of course back in 1930-ies there were was no notion of human rights, however, since the defense during the Nuremberg trials constantly brought up arguments of *ex post facto* and *nullem crimen sine lege*, but they were simply overrode by the "higher justice" principle, one could bring this argument here as well. Indeed, why should there be a "moral obligation" to punish those who are responsible for the international crime of the Second World War, but no "moral obligation" to bring to justice those, who are responsible for crimes no less dire? The importance of doing this is also emphasized by the Nuremberg Charter, which, beside "inhumane acts" committed after the war, includes acts committed before the war in the crimes-against-humanity definition.

There is no doubt that the major part of international law violations fell on the time of war. After concluding the Molotov-Ribbentrop non-aggression pact on August 23, 1939, the path was free for the *Reich* to attack Poland, therefore triggering Britain's and France's commitments to enter the war with Germany.

Quite delicate is the question what importance did Molotov-Ribbentrop pact had from the international-law perspective. If war of aggression was subject of condemnation by the world community at that time, what attitude should the States have had for the treaty, which clearly encourages war of aggression by means of peace? Probably, the other countries should have remained neutral on the matter (as they mostly did, by the way), as unlike civil agreements, international ones cannot be void, even if they contradict the law. The only possible option for

the States therefore was to express their displeasure *post bellum*. As far as the Molotov-Ribbentrop pact goes, even minor diplomatic pressure was inapplicable, for countries would then be attacking a peace agreement, thus passively breaking the taboo of sponsoring and promoting war. What concerns the additional secret protocol, according to Meissner,<sup>40</sup> it violated the norms of international law of that time, which did not permit agreements at the expense of the independence of third countries. Though Germany and USSR were not explicitly bartering the States, determining so called “spheres of interest” showed their disrespect for the sovereignty of the countries listed in the protocol. Then again, this additional document could not be void just because it contradicted international law. Concluding secret agreements is not forbidden even now, but customary law formed a position, that they can not suppress *ultra vires* obligations, but even if Germany was obliged not to follow the “spheres of interest” policy in its diplomatic relations with Soviet Union, it could not have breached the original pact as it did on the 22<sup>nd</sup> June, 1941, for it was fully backed up by international law as a non-aggression treaty.

Despite the common misconception, there was not a single binding agreement for Germany, which would deprive it from a right to wage aggressive war, and it was too early to speak about customary law either. The Covenant of the League of Nations (of which Germany was not a member at that time) said that attack against any country is a matter of concern of the League and that in this case member states should impose financial sanctions. That was the harshest reaction available. There was no explanation given at the trials, why the Nuremberg suspects were accused of Crimes against Peace other than that “the other states expressed their condemnation of aggressive actions, therefore Germany should have known that it will be punished for its actions” and the above-mentioned “moral obligations to punish”.

If one remembers how the war started, interesting conclusions can be made. Polish troops (or disguised Germans – due to post-war propaganda, we will never know) crossed the German border, attacked and captured a radio-station. A parallel could be drawn here with regards to the recent Hezbollah-Israel conflict in 2006. Israel waged war in Lebanon, because two of its vehicles were attacked and the UN Security Council was not able to even condemn the war, because strong arguments of self-defense were raised. In a similar way, the attack against Poland

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<sup>40</sup> Boris Meissner, *The Occupation of the Baltic States from a Present-Day Perspective, The Baltic States at Historical Crossroads. Political, economic, and legal problems and opportunities in the context of international co-operation at the beginning of the 21<sup>st</sup> century*, 2<sup>nd</sup> edition, Latvian Academy of Sciences, Riga 2001, p.440.

was an act of self-defense, which simply went out of proportion, therefore by today's standards Britain and France did not have the right to announce war to Germany, and by doing so *they* committed a crime against peace in the form of war of aggression (by announcing war, according to the Convention for the Definition of Aggression of 1933). Once the whirlwind of the World War has been set in motion, other German attacks followed automatically and occupation of Poland was not illegal, but on the contrary, dictated by war-necessity (since Germany and Poland were at state of war). Therefore the first German "war of aggression" worthy of being called an international "crime against peace" (according to the Geneva Protocol of 1924 for the Pacific Settlement of International Disputes) was actually against Belgium.

If one participates today in major international criminal law schools, conferences, seminars on the WWII, there are high chances of coming across professor Benjamin Ferencz, who was the chief-prosecutor in the *Einsatzgruppen* case [*Einsatzgruppen* are military groups, which followed the advancing *Wehrmacht* units and exterminated "unnecessary elements" in local population – Slavs, Jews, gypsies etc] at the Nuremberg trials. His star-story is how one of the German commanders – Ohlendorf, sought to justify the exterminations as self-defense. Ohlendorf argued that Germany knew that the Soviet Union (despite the non-aggression pact) was preparing to attack Germany. So a pre-emptive strike was therefore necessary. It was "known" that Jews supported the Bolsheviks and that Gypsies were untrustworthy, hence they had to be eliminated. Since the children of victims might grow up to be enemies of the Reich they too had to be killed. According to Ferencz, that was the main logic behind the Nazis' actions. One can see two elements here: first, self-defense against a country and second, self-defense against a nation.

Back in 1940-s there was no article 51 of the UN Charter, all that international lawyers had at that time was a vague concept in customary law, which mainly derived from the famous *Caroline* case. The two elements brought out in this case were necessity and proportionality. Come to think of it, was there necessity in this case? To attack Germany or not, the Russians were massing tanks and troops along the border with the Reich. Was the response proportionate? In case USSR would mobilize and attack with its full potential at that time, Germany would risk total annihilation. So the amount of force Germany used during the *Barbarossa* plan was quite necessary and proportionate. Though there was no 100% certainty that the Russian would cross the border, indeed "waiting" could prove fatal for the *Reich*. The German strike came as an

aggressive move towards an equally aggressive country (USSR was even excluded from the League of Nations for its offensive attitude, namely for starting the Soviet-Finnish war in 1939).

Coming back to nowadays, it turns out that, for example, the USA intervention in Iraq and other interventions deemed “normal” in the modern world, are comparable to the Nazi attack on the Soviet Union. When the USA invaded Iraq they pronounced three goals: a) Elimination of weapons of mass destruction (that is an uncertain threat against them which is quite comparable to the threat Russian army posed at that time) b) second – freedom for Iraqi people (German troops marching into the USSR and the local population were briefed the same way – that they were liberating and liberated accordingly from the “evil communistic regime”, and c) elimination of Saddam’s regime – in Nazi case – of Stalin. So in a way Hitler’s attack against the Soviet Union by today’s terms should be considered an act of preventive self-defense, which the Security Council would “condemn” at best. Nuremberg judges taking into account the Molotov-Ribbentrop pact, thought otherwise, however.

The argument that self-defense can be extended to one nation protecting itself from another nation (a view, supported for example by Ernst Nolte) is an attempt to create an unparalleled innovation in the field of public international law, which should be rejected simply because of the absurdness of the idea, for self-defense on international level, has only been about states protecting themselves against other states and analogy in such matters is unacceptable.

By the time WWII started, the two sources of humanitarian law were Hague and Geneva conventions. Even though Soviet Union and some other countries involved in the conflict were not member of these conventions, nevertheless the world society urged Nazi Germany to keep up with these rules, because it has to that time become part of customary law. As it is now known, the Third *Reich* ignored these conventions to certain extent, but on the other hand kept searching for justification of their actions during war in international humanitarian law. One example here could be the so-called governments in exile of the occupied States, which commandeered leftovers of whatever army their countries had. The Nazis claimed them to be illegal combatants, due to the fact that they were not represented by any state, thus dealing with them most ruthlessly. Same fate awaited anti-Nazi partisans, who at that time had no protection from international law whatsoever against the merciless reprisals of the Third *Reich*. As Ohlendorf

claimed<sup>41</sup> during the trials, executions of agents, partisans, saboteurs, suspicious people, indulging in espionage and sabotage were absolutely in accordance with the Hague conventions.

One of the most controversial issues within the ranks of both Nazi officers and Nazi lawyers were the orders to avoid granting crashed airmen and commandos the prisoners of war status as well as to treat them as criminals, who “deserved only to be immediately slaughtered” (capture-and-execution by German civilians was only welcome). Since they wore military uniform and carried arms openly, they were exactly what legal combatants are, therefore according to the Conventions, were certainly supposed to enjoy the POW status. As Detlev Vagts highlights,<sup>42</sup> the Nazi lawyers also strongly argued that since Germany's own commando operations were the responsibility of the *Abwehr*, they would suffer the retaliatory moves of the enemy (this view was also supported by certain German generals). The orders were therefore not welcome, but still, nonetheless complied with firstly for the reasons of “banality of evil” described by Hannah Arendt and secondly because of fear of punishment for military disobedience, which was quite harsh in the Nazi Germany.

Other Nazi violations of the Geneva and Hague Conventions included murder and torture of prisoners, inhumane medical experiments on prisoners, forceful deportation of civilian population, use of POW labor, destruction of cities, towns and villages without military necessity, looting and destruction of works of art, of religious and social institutions and other actions described in article 6(b) of the Nuremberg Charter and article 1(b) of the Control Council Law No. 10. According to the Robert Jackson's Opening Address<sup>43</sup> at the Nuremberg Trials, Nazis performed these crimes for the purpose of “leaving Germany’s neighbors so weakened that even if she should eventually lose the war, she would still be the most powerful nation in Europe”.

The attempt to exterminate certain nations (such as Jews, Gypsies, Poles etc.) from the viewpoint of international law deserves special attention. Not only did it influence the creation of concept of genocide in the future, but it also approached the moral aspect of exterminations in a very profound way. Merciless attitude towards the “lower races” somehow co-existed with attempts to

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<sup>41</sup> The Verdict for Otto Ohlenberg at the *Einsatzgruppen* Trial. Available online at <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/verdictblobel.html>.

<sup>42</sup> Detlev Vagts, International Law in the Third Reich. *American Journal of International Law*. Vol. 84, No. 3, 1990, p. 698.

<sup>43</sup> Robert Jackson’s Opening Address for the United States at the Nuremberg Trials, Crimes in the Conduct of War, available online at <http://fcit.usf.edu/Holocaust/resource/document/DocJac12.htm>.

soften the moral pressure to the Nazi soldiers (e.g. there was a special order from Himmler to eliminate women and children only in “gas wagons”, so the soldiers, who were mostly married men, would not be compelled to aim at women and children, thus avoiding mental strain of the executions etc).

With its oppressive actions towards the “lower races” Nazis challenged moral principles of what we call today “basic human rights”. As it is today believed, every human being is considered to be equal to each other, despite the race. But are animals equal to human beings? No, they obviously are not. Animal law is actually dealt with on international level, but it is a part of international law, which is never brought into the light, because “there are far more stretching concerns”. During the Nazi regime, however, a separate notion of “*Untermenschen*’s<sup>44</sup> rights” (*sub-human rights* as opposed to *human rights*) developed, which is very similar to today’s concept of animal law. Should one compare – both animals today and the *Untermenschen* during the Nazi era were used for different kinds of experiments. The animals today are killed for food and fur, *Untermenschen*’s blood and organs were used as transplanting tissues during the war. Both animals today are subject to “death with smallest amount of pain”, and so did Nazis try to develop a painless way to dispose of the *Untermenschen*, which wouldn’t make them “resort to violent means”. So in a way, *Untermenschen* enjoyed similar rights to what animals “enjoy” (are subjected to) today. This theory needs further elaboration and research, however.

The German defeat in 1945 was followed by establishment of Nuremberg Tribunal, which was numerous mentioned throughout the essay. No international scholar would deny, that this tribunal set up a standard (or maybe the entire field) of international criminal law, which is still followed today. It was not without flaws, however, and as Konvitz commented,<sup>45</sup> “defied many of the most basic assumptions of the judicial process” and “constituted a real threat to the basic conceptions of justice which it has taken mankind thousands of years to establish”. The biggest flaw brought up about this tribunal is that it was a “court of victors”, where the Allies exempted themselves from punishment for the same deeds they were adjudicating, though on numerous counts Allied countries themselves violated international law (e.g. failure to keep up with the announced neutrality by the USA, incendiary bombings of civilian population etc.). What the scholars failed to see up to this point is that condemnation of being a member of the *Schutz*

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<sup>44</sup> The word “Untermenschen” is used here to describe sub-humans, who were “not worthy of living” according to the Nazi plans, not just people of non-Aryan heritage, whom some Germans believed to be “worse than Aryan”.

<sup>45</sup> Milton R. Konvitz, Will Nuremberg Serve Justice?, Commentary, Vol. 1, No. 3, 1946, p. 11.

*Staffeln* (SS) as a “criminal organization” is dictated purely by political reasons, therefore from the viewpoint of international law is nonsense. One can not be found guilty of being part of an organization, which was highly prestigious and elite, and absolutely did not show any signs of criminal nature (though it is doubtful that even now it can be called *criminal organization per se*), and even if one found out about certain criminal activities later, quitting SS was shameful and almost impossible for socio-political reasons.

Adolf Hitler and his followers forced revolutionary changes in international law: World Medical Association’s Declaration of Geneva came as a response to human experimentation, Geneva Conventions and humanitarian law as a whole was to be reviewed because of Nazis’ actions, the today’s list of crimes against humanity and war crimes consists entirely of deeds committed by the Germans, notion of Genocide would probably still be in its incipient stages if not for the Nazi extermination programs. The Third Reich became a major contributor to international law without realizing it. Nazis strongly influenced legal science in the negative sense, as Germany during the war years, became everything modern international law is not.