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SPIS TREŚCI
INHALTSVERZEICHNIS
CONTENTS

| | |
|-------------------------|---|
| RENATA SKOWROŃSKA | 7 |
|-------------------------|---|

Kronika Polskiej Misji Historycznej
Chronik der Polnischen Historischen Mission
The Chronicle of the Polish Historical Mission

| | |
|-------------------------|----|
| RENATA SKOWROŃSKA | 15 |
|-------------------------|----|

Stypendyści oraz goście Polskiej Misji Historycznej
Stipendiaten und Gäste der Polnischen Historischen Mission
Fellows and Guests of the Polish Historical Mission

STUDIA I MATERIAŁY / STUDIEN UND MATERIALIEN /
STUDIES AND MATERIALS

| | |
|---------------------|----|
| WOLFGANG WÜST | 23 |
|---------------------|----|

„Zur Tortur vnd Peinlichen Frag”. Nowożytne praktyki karne w Norymberdze
w świetle uchwał rady oraz ksiąg wyroków w sprawach o przestępstwa
zagrożone karą śmierci
„Zur Tortur vnd Peinlichen Frag”. Frühneuzeitliche Strafpraxis in Nürnberg
im Spiegel der Ratsverlässe und Malefiz-Urteilsbücher
“Zur Tortur vnd Peinlichen Frag”: Early Modern Penal Practice in Nuremberg
as Reflected in Council Decrees and Judgment Books

| | |
|---------------------|----|
| LESZEK ZYGNER | 61 |
|---------------------|----|

Pławienie i procesy o czary w ustawodawstwie synodalnym metropolii
gnieźnieńskiej XVI–XVIII wieku (między normą prawną a rzeczywistością)
Kaltwasserprobe und Hexenprozesse in der Synodalgesetzgebung der
Gnesener Kirchenprovinz vom 16. bis 18. Jahrhundert (zwischen Rechtsnorm
und Realität)
Water-Ordeal and Witchcraft Trials in the Synodal Legislation of the
Metropolis of Gniezno in the 16th–18th Centuries (Between the Legal Norm
and Reality)

| | |
|---|-----|
| TOMASZ CIESIELSKI | 79 |
| Tortury i poniżające kary w prawie wojskowym w Rzeczypospolitej Obojga Narodów na tle krajów środkowoeuropejskich w XVII i XVIII wieku | |
| Folter und erniedrigende Strafen im Militärrecht der polnisch-litauischen Adelsrepublik (Rzeczpospolita) im Vergleich zu den Ländern Mitteleuropas im 17. und 18. Jahrhundert | |
| Torture and Degrading Punishment in the Military Law of the Polish-Lithuanian Commonwealth in Comparison With Central European Countries in the 17th and 18th Centuries | |
| MARIUSZ SAWICKI | 103 |
| Stosowanie tortur w procesach o czary w Rzeczypospolitej Obojga Narodów od XVII do XVIII wieku. Przyczynek do badań nad polskim sądownictwem doby nowożytnej | |
| Anwendung von Folter in Hexenprozessen in der polnisch-litauischen Rzeczpospolita vom 17. bis 18. Jahrhundert. Ein Beitrag zur Erforschung der polnischen Justiz der Frühen Neuzeit | |
| Use of Torture in Witchcraft Trials in the Polish-Lithuanian Commonwealth From the 17th to the 18th Century: A Contribution to Research on the Polish Judiciary of the Modern Era | |
| DANUTA JANICKA | 123 |
| Stosowanie tortur w dawnej Rzeczypospolitej w XVI–XVIII wieku. Przyczynek do historii prawa | |
| Anwendung von Folter in Polen-Litauen (Rzeczpospolita) im 16.–18. Jahrhundert. Ein Beitrag zur Rechtsgeschichte | |
| Use of Torture in Polish-Lithuanian Commonwealth (Rzeczpospolita) in the 16th–18th Century: A Contribution to the Legal History | |
| FRANZISKA NIEDRIST | 143 |
| O kwestii wartości dowodowej przyznania się do winy – poszukiwanie śladów w austriackim prawie karnym | |
| Zur Frage der Beweiskraft eines Geständnisses – eine Spurensuche im österreichischen Strafrecht | |
| On the Question of the Evidential Value of a Confession – A Search for Clues in Austrian Criminal Law | |
| NINA KREIBIG | 169 |
| „Trujące katusze nie są najmniejszą siostrą bliźniaczą tortur!” Walka Friederike Kempner z izolatkami w więzieniach w XIX-wiecznych Prusach | |
| „Giftige Marter ist nicht die kleinste Zwillingsschwester der Tortur!” Friederike Kempners Kampf gegen die Einzelhaft im Preußen des 19. Jahrhunderts | |
| “Toxic Torture Is Not the Smallest Twin Sister of Torture!": Friederike Kempner's Fight Against Solitary Confinement in 19th-Century Prussia | |

| | |
|---|-----|
| ELŻBIETA ALABRUDZIŃSKA | 197 |
| Kościoły protestanckie w polityce bezpieczeństwa państwa polskiego w latach 1937–1939 | |
| Evangelische Kirchen in der Sicherheitspolitik des polnischen Staates in den Jahren 1937–1939 | |
| Protestant Churches in the Security Policy of the Polish State in the Years 1937–1939 | |
| PHILIP CZECH | 217 |
| O dynamicznym rozwoju zakazu tortur przez Europejski Trybunał Praw Człowieka w drugiej połowie XX wieku | |
| Zur dynamischen Weiterentwicklung des Folterverbots durch den Europäischen Gerichtshof für Menschenrechte in der zweiten Hälfte des 20. Jahrhunderts | |
| On the Dynamic Development of the Prohibition of Torture by the European Court of Human Rights in the Second Half of the 20th Century | |
| MARTA BARANOWSKA / PAWEŁ FIKTUS | 251 |
| Międzynarodowy Pakt Praw Obywatelskich i Politycznych z 1966 jako przyczynek do debat o torturach w polskiej publicystyce prawnofilozoficznej lat 1977–1980 | |
| Der Internationale Pakt über bürgerliche und politische Rechte von 1966 als Beitrag zu den Debatten über Folter in der polnischen rechtsphilosophischen Publizistik der Jahre 1977–1980 | |
| The International Covenant on Civil and Political Rights of 1966 as a Contribution to Debates on Torture in Polish Legal and Philosophical Publications in 1977–1980 | |
| KATARZYNA GRYSIŃSKA-JARMOŁA / AGNIESZKA WEDEŁ-DOMARADZKA | 273 |
| Międzynarodowy system prewencji i ochrony przed torturami a Polska. Aspekty historyczne i prawne | |
| Das internationale System zur Prävention und zum Schutz vor Folter und Polen. Historische und rechtliche Aspekte | |
| The International System of Prevention and Protection Against Torture and Poland: Historical and Legal Aspects | |

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THE INTERNATIONAL SYSTEM OF PREVENTION AND PROTECTION AGAINST TORTURE AND POLAND HISTORICAL AND LEGAL ASPECTS

INTRODUCTION

The use of torture was commonplace almost until the mid-18th century, banned only in Prussia in 1746, Austria in 1776 and Russia in 1801. In the 19th century, such a decision was taken in most countries in Europe and the United States.¹ In Poland, torture was legally permissible until 1776.² There were two main reasons against the practice of torture: humanitarian, and the growing awareness that confessions extracted in this way had nothing to do with the truth. A return to the practice of torture occurred in the twentieth century, which was significantly related to the operation of totalitarian regimes in many countries. Initiatives taken at that time to guarantee human rights at the supra-state level were effectively thwarted, largely by

¹ Biśta: *Zakaz*, p. 57.

² Poland was the fourth country in Europe where torture was completely abolished. For more on the history of torture in Poland, see: Klementowski / Skrętowicz: *Z dziejów*, pp. 374–376.

the governments of the countries in question.³ The universal prohibition of torture and ill-treatment in times of war and peace was only introduced in 1984 by a United Nations resolution.⁴ This prohibition cannot be abrogated (e.g. in connection with the imposition of states of emergency) nor can reservations be formulated to limit it. Furthermore, it is considered to have the status of an *ius cogens* norm and belongs to customary law.

This is not the only document in which the prohibition appears; nevertheless, it represents the culmination of the work undertaken by the international community after the Second World War, when extensive discussions were held on guaranteeing the effectiveness of human rights systems. Today, several types of human rights acts can be distinguished, which together constitute a system of protection against torture and other cruel treatment. Among them, we can distinguish general universal acts, universal specific (dedicated) acts, regional general acts and regional dedicated acts. Poland has adopted all of these.

1. ACTS OF THE UNIVERSAL HUMAN RIGHTS SYSTEM – GENERAL *UNIVERSAL DECLARATION OF HUMAN RIGHTS* (1948)

Poland was the fourth country in Europe in which the prohibition of torture was included in what is regarded as a fundamental (though not having treaty status) first post-war document on individual rights, the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly in 1948. In Article 5, it states: “No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment”.⁵

The roots of the prohibition of torture can be traced back to the Charter of the United Nations, a policy document of the United Nations (1945) whose purpose was intended by its founders to be the maintenance of world peace and the promotion of international cooperation and human rights. The document mentioned above stated that faith “in the fundamental human rights, dignity and worth of the individual should be restored” and that the United Nations would promote “universal respect for and preservation

³ Jaskólska: *Powody*, p. 27.

⁴ *Convention against Torture*.

⁵ *The Universal Declaration*, Art. 5.

of human rights and fundamental freedoms for all without distinction of race, sex, language or religion”⁶ Although the charter did not specify human rights, its provisions signaled the United Nations’s position and empowered the organisation to take further action.⁷

The experience of the Second World War and the scale of the mass crimes committed at that time proved unprecedented. The use of repression on an extensive scale, persecution, torture, slave labour and the extermination of entire groups of people, including civilians, constituting brutal violations of human rights, made it clear that more attention needed to be focused on the protection of human rights against various types of cruel and inhuman treatment, raising awareness of the meaning and role of human rights and, above all, seeking measures to prevent such cases in the future.⁸ Intra-state solutions were failing, and the growing realisation that human rights violations by any state against its citizens due to their consequences could pose a threat to the entire international community made it necessary to establish universal norms and standards that would protect the fundamental rights of every human being, regardless of nationality, religion or origin. The solutions adopted were to be solutions at a supra-state level.⁹ The atrocities of the Second World War, however, were only the immediate impetus that finally mobilised the international community to make an effort to develop and promulgate a universal pattern of behaviour. They only reinforced the natural need to show that human rights exist and must be respected and realised.¹⁰ Of course, it was realised that the proclamation of human rights alone could not be a sufficient guarantee. However, it must be one of the necessary conditions to protect humanity from further “acts of barbarism” and torture.

Work on the *Universal Declaration of Human Rights* began in 1946 with establishing the United Nations Commission on Human Rights, which included representatives of 18 government delegations (including Charles Malik from Lebanon, Peng Chun Chang from China, René Cassin from France and delegates from the Union of Soviet Socialist Republics and

⁶ *United Nations Charter*, Art. 1.

⁷ Kuźniak: *Powszechna*, p. 42; Skupiński: *Zakaz*, p. 220.

⁸ Jaskólska: *Powody*, pp. 28–33.

⁹ Zajadło: *Uniwersalizm*, p. 18; Skupiński: *Zakaz*, p. 218; Kuźniak: *Prawa*, p. 173.

¹⁰ More: Morsink: *The Universal*, pp. 36–91.

Western countries). The Commission was chaired by the United States of America representative Eleonora Roosevelt, widow of United States of America President Franklin D. Roosevelt. The diversity of the members' nationalities was crucial to ensure that the drafted Declaration would ultimately act as an universal document. The end of hostilities meant that the objectives and priorities of the powers changed. The adherence to different ideological, political, and legal systems was reflected broadly in their position on the issue of human rights. The political, religious or social traditions of individual states were not insignificant. These divisions quickly became apparent during the United Nations Commission on Human Rights negotiations between 1946 and 1948. Three fundamental problems emerged during the discussions: what form the document should take, the relationship between the individual and the state, and what type of rights should be included. The countries of the so-called Eastern Bloc, led by the USSR, emphasised social and economic rights, while the Western countries stressed the importance of civil and political rights.¹¹ The drafters of the Declaration agreed that both the content and the title should express the universality of human rights. In the end, provisions with strong worldviews and philosophical connotations were abandoned, and general and most basic formulations were adopted, deliberately omitting contentious or controversial issues. The proposed form was intended to enable the document to be adopted relatively quickly. It was realised that if it were to be a legally binding instrument, its adoption would probably be impossible in the political conditions of the time.¹²

Poland was one of 51 countries involved in the process of drafting the document. Initially, the work on the prohibition of torture was carried out with the aim of regulating this issue together with the prohibition of slavery under Article 4. The input from the Polish delegates was dominated by references to the experience of the Second World War and how individuals were treated at that time.¹³ Emphasis was placed on the need to explicitly condemn fascism, in particular, to point out that its basis was the violation

¹¹ More: Jaskólska: *Powody*, pp. 17–39.

¹² *Ibidem*, pp. 42–47.

¹³ *Draft international declaration of human rights*, Polish statement: Kalinowska (Poland).

of human rights and contempt for human dignity.¹⁴ It was also stressed that the establishment of the Human Rights Commission should be welcomed. Attention was also drawn to the unclear status of the *Universal Declaration of Human Rights* and the fact that work on the *International Covenant on Civil and Political Rights*, which would already be a treaty, could not be completed in time.¹⁵ Despite the discussion during the preparatory work on the definition of torture as such, Poland did not present its position. Rather, such a need was presented by non-European states.¹⁶ It is worth noting that the Polish delegates constituted a group of representatives of States elected to the subcommittee whose purpose was to examine the entirety of the *Universal Declaration of Human Rights* from the point of view of layout, coherence, uniformity and style and to approve possible amendments.¹⁷ In the end, the delegates decided to separate the issues of slavery from those of torture and inhuman and inhumane treatment and punishment. The *Universal Declaration of Human Rights* was adopted with eight abstentions, including the Soviet Union and countries under its influence, Poland being one of them. No country voted against it.¹⁸

The *Universal Declaration of Human Rights* was an expression of purely moral and ethical principles, without international sanction. It expressed the prohibition of torture; it also prohibited punishment and treatment in a cruel, inhuman or degrading manner but lacked a definition of the terms mentioned. Nevertheless, shortly after the Declaration, the issue of protection against torture and other inhumane treatment began to appear in subsequent international instruments.¹⁹

¹⁴ *Report of the third session of the Commission on Human Rights*, Polish statement: Katz-Suchy (Polska).

¹⁵ *Draft international declaration of human rights*, Polish statement: Katz-Suchy (Polska).

¹⁶ Morsink: *Article by Article*, p. 51.

¹⁷ *Report of Sub-Committee 3 of the Third Committee submitted by Dr. Guy Pérez Cisneros*.

¹⁸ *Hundred and Eighty-Third Plenary Meeting of the General Assembly*.

¹⁹ Kuźniar: *Prawa*, p. 66; Skupiński: *Zakaz*, pp. 220–221.

2. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

In parallel with the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* was being written, which was no longer controversial in terms of its binding force. Controversies arose due to the number of documents, as it soon became apparent that it was not possible to prepare a single draft encompassing all types of human rights and fundamental freedoms. Western countries wanted separate documents into economic and social issues, unlike the communist countries. In addition, Western countries placed more emphasis on civil and political rights (freedom of speech, the right to a fair trial and freedom of assembly), while Eastern Bloc countries promoted economic, social and cultural rights (the right to work, health care and education).²⁰ The political and international backdrop to the years of work was the Cold War, which did not facilitate the negotiation of documents intended to be binding agreements. In the end, it was agreed that two separate pacts would be prepared: one covering personal and political issues and the other economic, social and cultural points. Both documents were to be enacted simultaneously and submitted for signature at the same time. The Commission on Human Rights completed its work on the draft Covenants in 1954 and submitted them to the General Assembly. The largest number of amendments were made by representatives of Western countries.²¹

The regulation relating to the prohibition of torture is included in Article 7 from the outset. By analogy with the *Universal Declaration of Human Rights*, this prohibition is regulated together with the prohibition of inhuman and degrading treatment and punishment. The prohibition of torture is considered absolute; there are no exceptions to it, and it is not subject to suspension.²² It should be noted that the *International Covenant on Civil and Political Rights* itself does not contain any definition of what torture is.²³ However, indications from the preparatory work suggest that

²⁰ Kuźniar: *Prawa*, p. 102. On the political and ideological disputes accompanying the work on the pact project see: Symonides: *Międzynarodowa*, pp. 36–43.

²¹ Kuźniar: *Prawa*, p. 103.

²² Nowak: *UN Covenant*, p. 157.

²³ Joseph / Castan: *The International Covenant*, p. 226.

it includes both physical and psychological aspects.²⁴ The lack of definition did not mean that the prohibition was not concretised at all. The Covenant contained a richer set of basic rights for defendants and those deprived of their liberty, i.e. persons who were particularly vulnerable to cruel treatment. This constituted an automatic strengthening of the protection against torture.²⁵

Poland was involved in the work on the content of Article 7 at a later stage when the content had already been proposed and discussions were taking place on possible additions. An analysis of the preparatory work indicates that, to a large extent, the representative of the Union of Soviet Socialist Republics took the burden of negotiating the content of the regulations.²⁶ At the same time, the discussions did not so much concern the prohibition of torture as “cruel or inhuman punishment or to cruel or inhuman indignity”. Poland’s activity was limited to the adoption of amendments concerning the second part of this regulation. The idea here was to maintain the unity of Article 7 without adding unnecessary detail to its content. Poland, like the other states, opposed such solutions and voted in favour of adopting the content of the article without them.²⁷

Eventually, the *International Covenant on Civil and Political Rights* was adopted on 15 December 1966. The document entered into force on 23 March 1976,²⁸ Poland ratified it on 18 March 1977.²⁹ The fact that the document was adopted unanimously was one of the most significant achievements of the United Nations. The event is widely regarded as a milestone in the development of international human rights law, with the adopted legislation often described as a global constitution for the protection of human rights. In legal terms, the Covenants are an international agreement and, in relation to the Declaration, represent a step

²⁴ *Annotations on the text of the draft International Covenants on Human Rights.*

²⁵ Skupiński: *Zakaz*, pp. 227–228.

²⁶ The content of the preparatory work documents includes information on both the membership and the activities of that representative: (i.a. E/CN.4/AC.1/SR.3, 23, 30; E/CN.4/AC.3/SR.2; E/CN.4/SR.37, 36, 92, 141; E/CN.4/353/Add.1 and 10).

²⁷ *Draft International Covenants on Human Rights 1958; Report of the 3rd Committee 1984.*

²⁸ Resich: *Pakty*, p. 20.

²⁹ Oświadczenie rządowe z dnia 23 kwietnia 1977 r.

forward by giving normative form to the ideas expressed in the Declaration by putting them in legal terms, and the solutions contained therein provided inspiration for subsequent undertakings in this direction in the international arena.³⁰

Two option protocols were adopted to the *International Covenant on Civil and Political Rights*. The first was adopted on 16 December 1966 in New York (entering into force on 23 March 1976) and concerned the possibility of submitting communications to the Human Rights Committee.³¹ Poland did not actively participate in its preparation, joining it only after the political changes, on 7 November 1991.³²

Since then, 10 communications have been submitted with respect to Poland, but only one referred to the issue of torture. This was a communication filed by citizens of the Russian Federation of Chechen origin. They alleged a violation of Article 7 of the *International Covenant on Civil and Political Rights* by refusing to accept their asylum applications and returning them to Belarus, which could have resulted in their transfer to the Russian Federation, on whose territory they could have been subjected to torture or inhuman or degrading treatment. In the view of the Human Rights Committee, Poland violated its obligations under article 7 of the *International Covenant on Civil and Political Rights* in this case.³³

The Second Optional Protocol was adopted on 15 December 1989 in New York (entering into force on 11 July 1991), which Poland ratified on 4 April 2014.³⁴ The Protocol prohibits the use of the death penalty on the territory of countries that have ratified it.

³⁰ Andrzejczuk: *Prawa*, pp. 131–132.

³¹ *Optional Protocol to the International Covenant*.

³² Oświadczenie rządowe z dnia 25 listopada 1993 r.

³³ *Views adopted by the Committee*.

³⁴ Oświadczenie rządowe z dnia 29 kwietnia 2014 r.

3. ACTS OF THE UNIVERSAL HUMAN RIGHTS SYSTEM – ACTS DEDICATED TO SPECIFIC GROUPS OF ENTITIES

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (1984)

The primary universal document for the regulation of the prohibition of torture is the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the United Nations General Assembly in 1984.³⁵

The Convention was the result of years of work initiated by the unanimous adoption by the United Nations General Assembly on 9 December 1975,³⁶ of the *Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment*.³⁷ The Declaration condemned and rejected torture and other inhuman treatment as crimes against human dignity. Its drafters appealed to states not to permit or tolerate such acts at home, while stressing that a state cannot justify the use of torture by exceptional circumstances, such as a state of war or the threat of war. On the same day, resolution 3453 was adopted as a supplement to the Declaration.³⁸

This action was a reaction to the increasing reports of torture since the early 1970s, including as an institutionalised, administrative state practice. An important contribution to the work was made by non-governmental organisations concerned with human rights, or simply the protection of human beings, led by Amnesty International, founded in 1961, and the International Committee of the Red Cross.³⁹

³⁵ *Resolution of 10 December 1984, no. 39/46.*

³⁶ Two years earlier, on 2 November 1973, on the initiative of the Sub-Commission on Prevention of Discrimination and Protection of Minorities operating at the UN Commission on Human Rights, a resolution (3059) was adopted, devoted to the issue of torture and other cruel, inhuman and degrading treatment or punishment. A year later, on 6 November 1974, another resolution (3218) appeared, which addressed the problem of the need to provide guarantees of protection against torture, see: Skupiński: *Zakaz*, pp. 229–230.

³⁷ *Resolution 3452.*

³⁸ Skupiński: *Zakaz*, p. 236.

³⁹ Daranowski: *Konwencja*, p. 97–98.

Poland, during its participation in the meeting, supported the Declaration,⁴⁰ which signified general acceptance of the idea of creating and accepting convention obligations.

The year 1977 brought the next four resolutions (32/62, 32/63, 32/64, 32/65), speaking about the need for further actions and efforts to ensure adequate protection, indicating the necessity of adopting a convention on the matter. The Commission on Human Rights was obliged to prepare a relevant draft, within which a working group was established. In terms of work performed on the above-mentioned resolutions, Sweden stood out.⁴¹

Work on the Convention began in 1978 when the procedure for the draft Convention prepared by Sweden⁴² and the International Association of Penal Law⁴³ was initiated. This procedure took place in the Commission on Human Rights with the active participation of the Economic and Social Council, which mandated the Commission to set up a working group to draft the final text of the Convention. Further proceedings included the referral by the General Assembly of the work on the Convention to the Third Committee, as well as the adoption of a report approving the work of that Committee with an indication of high priority for the work on the Convention. During the period 1979–1984, periodic meetings were held both within the Working Group and the sessions of the Commission on Human Rights to review the work on the content of the Convention. During this period, the General Assembly requested that work on the final text of the Convention be accelerated on several occasions.⁴⁴ The basis for the work of the Working Group was mainly the text prepared by Sweden, and almost all articles from the draft were adopted. Only the proposals relating to the reporting of State parties, the consideration of the reports of the Committee against Torture, and the authorisation of the Committee to initiate an investigation following credible indications that torture is systematically practised in the territory of a state party were excluded.⁴⁵

⁴⁰ *Resolution 3452.*

⁴¹ Skupiński: *Zakaz*, p. 237.

⁴² *Letter dated 78/01/18 from the Permanent Representative of Sweden.*

⁴³ *Question of the human rights.*

⁴⁴ *Resolution 34/167; Resolution 35/178; Resolution 36/60; Resolution 37/193; Resolution 38/119.*

⁴⁵ *Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1983, Art. 19, 20.*

A working draft of the Convention⁴⁶ was adopted and subsequently transmitted to the General Assembly through the Economic and Social Council and with a dossier of comments submitted at meetings of the Commission on Human Rights. During the 39th session of the General Assembly, the draft Convention was considered together with the comments of states, the content of the solutions to reports, and the initiation of proceedings against states, which posed negotiating difficulties, and was informally consulted. After approval in the Third Committee, the text was transmitted to the General Assembly, which adopted and opened for signature the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* on 10 December 1984.⁴⁷ Crucially, the text of the Convention included a definition⁴⁸ of the concept of torture:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions⁴⁹.

The Convention not only provides a precise and broad legal definition of torture but also a realistic account of it and sets out a catalogue of rights and obligations for states to prevent torture and to prosecute perpetrators of these crimes. Due to the nature of the document, this catalogue was binding in nature.⁵⁰

⁴⁶ *Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984.

⁴⁷ *Convention against Torture*.

⁴⁸ Although the first definition of torture was already included in Article 1 of the *Declaration on the Protection*, the 1984 Convention supplemented and expanded the content of the definition, making it more comprehensive. Bišta: *Zakaz*, p. 60.

⁴⁹ *Convention against Torture*, Art. 1.

⁵⁰ Łopátka: *Międzynarodowe*, p. 27.

Polish involvement in drafting the Convention, as well as in other documents related to the sphere of human rights, took its legitimacy from the experience of the Second World War. Poland participated in the work on the Convention from the very beginning as a member of the Working Group,⁵¹ which boiled down to supporting the initiatives of the Eastern Bloc countries, including the amendments of the Ukrainian Soviet Socialist Republic concerning the redaction of Articles 19 and 20 of the Convention.⁵²

Polish participation was also accentuated procedurally, as the rapporteur of the Third Committee was Mr Grzegorz Połowczyk.⁵³ Certain aspects of manifesting the equality of states with each other can also be highlighted. This was evidenced by Poland's negative stance towards Sweden's proposal to increase the frequency of meetings, its rejection being determined by the fact that Sweden rejected the proposal for inter-sessional meetings proposed as part of work on another convention: the *Convention on the Rights of the Child*.⁵⁴

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* entered into force on 26 June 1987; today, this day is celebrated as the International Day in Support of Victims of Torture. Poland ratified the Convention on 26 July 1989.⁵⁵ The Convention is one of the most important instruments of international human rights law, representing an important step towards the legal prevention and combating of torture. It provides international monitoring mechanisms and obliges states to implement domestic legal measures to protect individuals from torture. It has great symbolic and practical significance, contributing to the development of international standards for the protection of human rights and the prevention of torture worldwide. It has also provided the impetus to intensify work and enact similar documents regionally.

Within the Convention system, Poland is also a signatory to the Optional Protocol to the *Convention Against Torture and Other Cruel, Inhuman*

⁵¹ *Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1980; *Report of the Working Group on a Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1979.

⁵² *Report of the 3rd Committee* 1984.

⁵³ *Ibidem*.

⁵⁴ *Economic and Social Council – Commission on Human Rights* 1979.

⁵⁵ *Convention against Torture*.

or *Degrading Treatment or Punishment*, which aims to prevent torture through a system of regular inspections and monitoring. Poland acceded to this system in 2002 after preparatory work on the protocol starting in 1992. The debate on the prepared content of the document took place in January 2002. In this debate, Poland supported the idea and content of the prepared regulations.⁵⁶ The proposed text was also accepted by Poland in April 2002, as was the final content in November 2002.⁵⁷ In the discussion on the text of *The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Poland was already included in the position presented by the EU and its member states (even though formally, it was not yet a member). Thus, it was an advocate for the introduction of a so-called “two-pillar system”, i.e. a mechanism that would include a combination of an international visiting mechanism and national ones, as well as the need to develop systems to assist States in fulfilling their obligation to prevent torture, in accordance with Articles 2 and 16 of the Convention.⁵⁸

It also supported the idea of ensuring that national mechanisms have adequate ways and means to function independently and indicated that they should be established on the basis of the Principles relating to the status and functioning of national institutions for the promotion and protection of human rights (the “Paris Principles”). Those implementing these mechanisms should also be guaranteed access to all places where persons have been deprived of their liberty, as well as full freedom to interrogate persons held in these places without witnesses. It is also necessary to ensure that there is no repression of persons who come into contact with the national counter-mechanism.⁵⁹

It should be emphasised that Poland’s participation in the Convention system entails a formal obligation to submit regular reports on the implementation of its provisions, including measures taken to prevent torture and to address any identified cases or risks. The Convention entered into force with respect to Poland on 15 August 1989; hence, since then, this

⁵⁶ Nowak et al.: *The United Nations*, p. 722.

⁵⁷ Ibidem, pp. 722–723.

⁵⁸ *Report of the working group on a draft optional protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002.*

⁵⁹ Ibidem.

obligation has existed. So far, Poland has submitted an initiating report and seven periodic reports. In these reports, there is no indication of specific actions that could be considered as worrying in the matter of torture. Instead, they contain regulations indicating the existence of a system of prevention, accountability and assistance in the event that the existence of torture is identified. This includes, for example, the compulsory production of medical records and identification of the occurrence of torture when examining migrant asylum seekers.⁶⁰ The reports also reveal the steps Poland is taking to have adequate legislation to hold perpetrators of torture accountable and the existence of a training system for various types of services that may encounter the problem of torture in their work. For example, “The aim of the project is to provide police officers with training at sites of torture and genocide used by Nazi Germany, e.g. at the Auschwitz-Birkenau Museum and Memorial Site or working with artefacts related to torture and genocide of the Stalinist regime (Katyn Museum in Warsaw). The police service cooperates on a permanent basis with the POLIN Museum of the History of Polish Jews. As part of measures to ensure the broad protection of children’s rights, the RPD decided on 6.12.2020 to launch a 24-hour hotline and online chat service for children and young people as a free psychological support service”,⁶¹ or the running of the “Crime Victims Week” programme.⁶² In most cases, the reports identified procedural deficiencies in the handling of cases involving cruel, inhuman, or degrading treatment or punishment.

As far as The Optional Protocol to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* activities are concerned, Poland was visited only once by the Subcommittee on Prevention of Torture. The report of that visit highlighted overcrowding in prisons, the treatment of migrants and asylum seekers (including conditions in detention centres) and access to health care in detention.⁶³

⁶⁰ *Eighth periodic report submitted by Poland under article 19 of the Convention 2023.*

⁶¹ *Ibidem.*

⁶² *Consideration of reports.*

⁶³ *Visit to Poland undertaken from 9 to 18 July 2018.*

4. CONVENTION ON THE RIGHTS OF THE CHILD (1989)

The document dedicated to ensuring the protection of children is the *Convention on the Rights of the Child*, adopted by the United Nations General Assembly on 20 November 1989.⁶⁴ The tradition of the international community's work towards ensuring adequate protection of children's rights dates back to the 1920s⁶⁵ and the aforementioned Convention was preceded by the *Declaration on the Rights of the Child*, which was adopted by the United Nations General Assembly in 1959.⁶⁶

The principles contained in the *Declaration of the Rights of the Child* were inspired by the Polish physician and educator J. Korczak. They reflect Korczak's approach to the idea of the rights of the child, not treating the child as a future human being but as a fully-fledged subject of law deserving protection and respect. The Declaration enshrines the principle, inter alia, that children have the right to receive protection and assistance from neglect, exploitation and cruelty and that a child should not be trafficked in any form. The adoption of the Declaration as a first step gave an idea of the international community's approach to the topic and their possible readiness to adopt a binding document.⁶⁷

During preparations for the 20th anniversary of the adoption of the *Declaration on the Rights of the Child*, Poland submitted to the Human Rights Commission a proposal (and draft text) for the adoption of the *Convention on the Rights of the Child*.⁶⁸ The project, commissioned by the Ministry of the Interior, was prepared by Prof. Tadeusz Smoczyński within the Centre for Family Law and the Rights of the Child of the Institute of Legal Sciences of the Polish Academy of Sciences in Poznań. The chairman

⁶⁴ *Convention on the Rights of the Child*.

⁶⁵ On 13 February 1923, the General Council of the International Union for the Aid of Children adopted the so-called Geneva Declaration, adopted on 26 September 1924 by the Assembly of the League of Nations. Its main goal is to implement the belief that "humanity should give the child the best it has" and ensure him "a happy childhood and the enjoyment, both in his own interest and in the interest of society, of the rights and freedoms [defined therein]"; *Geneva Declaration*, see Krawczak-Chmielecka: *O rozwoju*, pp. 11–15.

⁶⁶ *Resolution 1386*.

⁶⁷ Wiśniewski: *Geneza*, p. 13.

⁶⁸ More about the interest in protecting children's rights see: Wedeł-Domaradzka: *Wkład*, pp. 441–445; Hanyś: *Polska*, pp. 184–195.

of the working group set up by the Human Rights Commission to draft the Convention was Prof. Adam Łopatka.⁶⁹ The Polish initiative stemmed from a broad historical and moral context. As with other documents related to the protection of human rights, an important factor was the wartime experience to which Polish children were particularly exposed. However, the political context should not be forgotten. The 1970s in Poland were fraught with numerous social unrests and open speeches against the authorities, which the latter brutally suppressed. The proposal of the Convention was put forward less than a year after the ratification of the Human Rights Pacts, forced by international pressure and (illegal) opposition in Poland. This event should be interpreted as an effort to present Poland as a state committed to the protection of human rights. There were three important factors at play: firstly, the recognition of Poland as a country with significant experience in respecting children's rights resulting, inter alia, from the work of J. Korczak; secondly, the desire to present an initiative which would have a chance of being universally accentuated, given the unquestionable need in the international community for the protection of children's rights; and thirdly, perhaps the most important reason was the growing interest in children's issues at the United Nations.⁷⁰

Taking into account the fact that in 1976, the General Assembly adopted a resolution,⁷¹ by virtue of which 1979 was to be designated the Year of the Rights of the Child, the drafting of a legally binding document and its adoption at the end of the period of debate on the situation of children would be a spectacular public relations success for Poland. Contrary to the hopes of the Polish Government, work on the Convention did not proceed very quickly. In the opinion of Chairman A. Łopatka, this was due to a number of factors. Although the proposal was widely accepted, it still needed to be discussed. Discussions took place between countries from two different political blocs, besides which the number of actors involved was increasing.⁷² The document's final form differs from the Polish original because "a universal formula was sought to gain acceptance by most countries with

⁶⁹ Krawczak-Chmielecka: *O rozwoju*, p. 15; More: Smolińska-Theiss: *Dziecko*, pp. 101–123; Wedeł-Domaradzka: *Wkład*, pp. 446–452.

⁷⁰ Hanyś: *Polska*, p. 187.

⁷¹ *Resolution 31/169*.

⁷² Wedeł-Domaradzka: *Wkład*, pp. 447–450.

different political and economic systems, different cultures and religions”.⁷³ Finally, the *Convention on the Rights of the Child* was adopted by the UN General Assembly on the 30th anniversary of adopting the *Declaration of the Rights of the Child*, i.e. on 20 November 1989. It is the most extensive catalogue of children’s rights, and Article 37a includes the right of the child to be protected from torture, cruel, inhuman or degrading treatment and punishment. At the same time, the death penalty and life imprisonment without the possibility of early release were prohibited against children.⁷⁴

Poland ratified the Convention on 7 June 1991 with two reservations and its interpretation of some provisions.⁷⁵ As a signatory to the Convention, Poland is obliged to submit periodic reports on its implementation. The periodic reports submitted to the Committee on the Rights of the Child have not yet included issues related to torture.⁷⁶

On 25 May 2000, the possible scope of protection covered by the Convention was extended by adopting two additional protocols to it: on the involvement of children in armed conflicts (in force since 12 July 2002)⁷⁷ and on the sale of children, child prostitution and child pornography (in force since 18 January 2002).⁷⁸ Despite the lack of obligation, Poland ratified the protocols in 2005.⁷⁹ Unfortunately, Poland did not play a significant role in preparing the third protocol, which is essential from the perspective of the practical possibility of submitting communications to the Committee on the Rights of the Child, nor did ratify it.

⁷³ Czyż: *Prawa Dziecka*.

⁷⁴ *Convention on the Rights of the Child*, Art. 37a.

⁷⁵ The first concerned the possibility of establishing the data of his natural parents by an adopted child, the second the possibility of issues related to the possibility of conscription into military service. Poland withdrew from both in 2013, *Oświadczenie Rządowe z dnia 27 marca 2013 r.*

⁷⁶ *Concluding observations*, about the Polish child protection system, see: Banaszak et al.: *Prawo dziecka*, pp. 237–254.

⁷⁷ *Optional Protocol to the Convention on the Rights of the Child on the involvement of children*.

⁷⁸ *Optional Protocol to the Convention on the Rights of the Child on the sale of children*.

⁷⁹ *Oświadczenie rządowe z dnia 12 września 2006 r.*; *Oświadczenie rządowe z dnia 30 listopada 2006 r.*

5. ACTS OF THE REGIONAL HUMAN RIGHTS SYSTEM

THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1950)

From the perspective of the regional system of prevention and protection against torture, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, also known as the *European Convention on Human Rights*, is of significant importance. It was adopted on 4 November 1950 by the Council of Europe.⁸⁰

The motives that led to its adoption of the *European Convention on Human Rights* are similar to those that guided the *Universal Declaration of Human Rights*. The direct impulse was the experience of World War II, which highlighted the brutality and effects of the lack of protection of individuals against abuses of power and showed the need to build a new order based on human rights. An important role was played by the unification tendencies occurring in Western Europe at that time, including the establishment of the Council of Europe in May 1949 and the fact that its members – Western European states wanted to create a mechanism of cooperation in order to ensure peace and security after World War II.⁸¹ An essential element of this order was human rights, which also had to be provided with absolute protection in the international dimension.⁸² In the face of the Cold War that had been going on for several years and the political and ideological division of Europe into two blocs, Western Europe wanted to prevent future conflicts on the one hand and to distance itself from authoritarian regimes and promote liberal values such as freedom, democracy and human rights on the other. The attitudes, beliefs and visions of many European leaders, including Winston Churchill, were not without significance. They saw the need to create a new order in Europe based on cooperation, shared values and the protection of fundamental rights of individuals.⁸³ Meanwhile, the *Universal Declaration of Human Rights*, although it set standards for the protection of human rights in the world, was not binding, which undoubt-

⁸⁰ *Convention for the Protection.*

⁸¹ Ochwat: *Ochrona*, p. 274; Pazura et al.: *Konwencja*, p. 56–57.

⁸² *Statute of the Council of Europe.*

⁸³ Podolska: *Rada*, pp. 13–14; Kuźniar: *Prawa*, p. 173; more: Nowicki: *Wokół*.

edly inspired the creation of more detailed, binding treaties also at the regional level, where it was easier to work out a compromise, if only because of the smaller number of entities participating in the talks.⁸⁴

The *European Convention on Human Rights* obliges states to respect certain rights and freedoms of individuals.⁸⁵ Following the example of the *Universal Declaration of Human Rights*, Article 3 provides for the prohibition of torture, inhuman or degrading treatment or punishment.⁸⁶ The Convention, like the Human Rights Covenants issued 23 years later, provides for the possibility of introducing certain restrictions or suspending certain rights in the interests of state or public security or in times of war, but under no circumstances may the right to life, the prohibition of torture or inhumane treatment, slavery and servitude be suspended.⁸⁷ The Convention entered into force on 3 September 1953.⁸⁸ It was one of the first documents to introduce international protection of human rights on such a broad scale and the first legally binding document in Europe, thus constituting the basis for the development of a European system of human rights protection. Demonstrating the commitment of Western countries to the protection of individual rights and the rejection of totalitarian regimes, it had great political significance in the context of the Cold War. The adoption of the Convention, containing ideas already mentioned in the Enlightenment concept of human rights, initiated the process of codification on a European scale in human rights, creating the best functioning system for protecting these human rights. By adopting the Convention, the governments of European countries took steps towards the collective guarantee of some of the rights contained in the *Universal Declaration of Human Rights*. The unique nature of the Convention resulted, inter alia, from the following: European legal proceedings before the institutions established by this document, i.e. the European Commission of Human Rights and the European Court of Human Rights. The control mechanism of the Convention is based on two fundamental assumptions, namely that it is possible to file a state complaint

⁸⁴ More about genesis and work on European Court of Human Rights see: Bisztyga: *Geneza*, pp. 31–50; Idem: *Europejski*, p. 60.

⁸⁵ Bisztyga: *Ochrona*, p. 125.

⁸⁶ *Convention for the Protection*, Art. 3.

⁸⁷ Kuźniar: *Prawa*, p. 176.

⁸⁸ *Convention for the Protection*.

and that the rights of the Convention directly protect an individual without the intermediation of domestic legislation.⁸⁹

Due to the fact that this act was processed in the post-war period within the framework of cooperation with Western countries, Poland did not participate in its preparation. However, its lack of involvement in the preparatory work does not mean that it did not operate within the framework of the human rights protection system, including freedom from torture. After the systemic transformation of 1989/1991, the Polish authorities made efforts to be admitted to the Council of Europe, which finally took place on 26 November 1991. The condition for obtaining membership was to sign the *European Convention on Human Rights*. Ratification took place on 19 January 1993,⁹⁰ and in May 1993, Poland signed the Declaration on the Recognition of the European Court of Human Rights Jurisdiction.⁹¹ On 1 September 2014, Poland ratified Protocol No. 13, adopted in 2002, concerning the total abolition of the death penalty.⁹²

For considerations concerning Poland in the *European Convention on Human Rights* system, the European Court of Human Rights case law is of significant importance. This Court ruled on cases against Poland initiated under Article 3 of the European Court of Human Rights, which prohibits torture and inhuman treatment and punishment. In most cases, this case law focuses on Poland in the sphere of inhuman and degrading treatment and punishment. However, there is one of the situations that is the subject of two complaints that can also be seen in the context of torture.⁹³ These cases are the cases of *Al-Nashiri v. Poland* and *Abu Zubaydah v. Poland* from 2014.⁹⁴ This case concerned the so-called “black sites” (secret detention facilities), in which both men were detained and, as they indicated, subjected to torture by the services of the United States of America. Poland was, therefore, sued for violating Article 3 of the European Court of Human Rights due to enabling these practices. The proceedings before the European Court of Human Rights ended with Poland acknowledging the

⁸⁹ Andrzejczuk: *Prawa*, pp. 133–134; Ochwat: *Ochrona*, pp. 275–277.

⁹⁰ Oświadczenie rządowe z dnia 7 kwietnia 1993 r. w sprawie ratyfikacji.

⁹¹ Ibidem.

⁹² *Protokół nr 13 do Konwencji*.

⁹³ Florczak: *Polska*, pp. 49–64.

⁹⁴ More Stefanovska: *State Secrets*, pp. 121–135.

violation of this article and the obligation to pay compensation. There was no unequivocal certainty that the men were staying on Polish territory, but due to an agreement with the American side, Poland refused to cooperate with the Court. This case is one of the most problematic in the history of proceedings against Poland before the Court due to the gravity of the alleged violations.⁹⁵

Since the adoption of the *European Convention on Human Rights* in 1950, the Council of Europe has been working tirelessly to create a mechanism that would ensure more effective monitoring of cases of torture and inhuman treatment. The Convention mentioned above prohibited torture but did not provide for a mechanism to prevent it in the form of systematic inspections. Growing awareness of human rights, pressure from non-governmental organisations, the need to counteract the practices of torture and inhuman treatment,⁹⁶ and the desire to create an effective preventive mechanism and the possibility of an effective response in the event of violations of the prohibition, all this meant that the member states of the Council of Europe were convinced that Europe needed an additional, regional tool that would introduce more detailed monitoring measures in the member states.⁹⁷ The work on a similar Convention that has been ongoing for many years at the UN forum would also be significant. Finally, on 26 October 1987, the Council of Europe adopted the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*,⁹⁸ which did not introduce new rights. Its primary purpose was to establish a mechanism for verifying states' compliance with the prohibition of torture, inhuman or degrading treatment or punishment, as set out in Article 3 of the *European Convention of Human Rights*. These tasks are the responsibility of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which focuses primarily on undertaking initiatives to examine, through visits, how prisoners are

⁹⁵ Jastrzębski: *Prawne*, pp. 66–67.

⁹⁶ One of the important reasons was the growing concern about cases of torture and inhumane treatment in Europe. Numerous cases of human rights violations occurred at that time, among others in Spain under Franco, Greece during the regime of the black colonels, and Portugal under Salazar, see: Słęcki et.al. (eds.): *Franco i Salazar*.

⁹⁷ *Europejska*, pp. 17–18.

⁹⁸ *European Convention for the Prevention of Torture*.

treated.⁹⁹ These studies are conducted in order to strengthen protection against torture or inhuman or degrading treatment or punishment. The Convention, as a regional mechanism, ensures more effective action and is currently one of the critical elements of the European system for the protection of human rights.

It is worth mentioning that the European Convention is different than the American and United Nations conventions because, as stated in its Preamble, it was included to enhance the protection of persons deprived of their liberty from torture, which is the purpose of the Committee as mentioned above.¹⁰⁰ The Convention was adopted in 1987, i.e. at a time when Poland was not yet a member of the Council of Europe, so it did not participate in developing its text but ratified it in 1994.¹⁰¹ Since then, Poland has been involved in the preventive system regulated by the convention and is subject to the Committee's examinations.¹⁰² Representatives of the Committee periodically visit Poland, from which reports are published. Poland has been subject to the visitation procedure eight times, one of which was not a periodic visit but an *ad hoc* one. The purpose of the *ad hoc* visit was to review the implementation of the Committee's long-standing recommendations concerning the treatment of persons in police custody. The conclusions formulated by the Committee primarily concerned taking action to reduce police brutality during detention. However, the findings and recommendations referred to ill-treatment and did not have the characteristics of torture.¹⁰³

The last periodic visit took place between 21 March and 1 April 2022. The report only referred to the issue of torture once. It indicated, as a hypothetical threat, a situation in which, after a change in Polish regulations on foreigners and the introduction of the possibility of not considering asylum applications for people who illegally found themselves on the territory of Poland unless they came from a country where their life and freedom were at risk. The Committee for the Prevention of Torture and In-

⁹⁹ Hołda: *Europejski*, pp. 679–689; Stańdo-Kawecka: *Cele*, pp. 110–113.

¹⁰⁰ Skupiński: *Zakaz*, p. 266.

¹⁰¹ *Oświadczenie rządowe z dnia 30 grudnia 1994 r.*

¹⁰² In relation to Poland, the year was 1995.

¹⁰³ *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 9 to 16 September 2020.*

human or Degrading Treatment or Punishment recalled here the principle of non-refoulement and the European Court of Human Rights case law emphasising that states “have an absolute obligation not to return a person to a country where there are reasonable grounds to believe that he or she would be exposed to a real risk of being subjected to torture or other forms of ill-treatment”.¹⁰⁴ Previous reports also did not indicate the existence of torture, and the government explained incidental notifications.

CONCLUSIONS

Poland’s influence and active participation in shaping international solutions to curb torture and punish its perpetrators have historically been limited, which can be attributed to two main factors. First, the large number of states involved in international negotiations at least weakened Poland’s influence. Second, it stemmed from the constraints imposed by the existence of the Soviet bloc, which limited Poland’s ability to negotiate independently and meant that Poland was not always perceived as an equal partner in the international arena. On the other hand, Poland found more significant opportunities to engage within regional systems, such as the European human rights system, in which fewer states participate, making active engagement more feasible. After undergoing political transformation, Poland joined this regional system, increasing its role and participation in human rights mechanisms, inter alia, through participation in the adjudication system and the shaping of its standards. Under the jurisdiction of the European Court of Human Rights, Poland has not encountered direct allegations of torture, with the notable exception of an “indirect” case related to the so-called “CIA prisons”.

Nevertheless, there have been reports of inhuman or degrading treatment and punishment, particularly about situations in detention centres. It should be emphasised that the international framework for the prevention and protection against torture includes a variety of mechanisms, some of which are limited to reporting and monitoring. In contrast, others have

¹⁰⁴ *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 21 March to 1 April 2022.*

quasi-jurisdictional powers. This diversity reflects the different levels of enforcement and effectiveness in the international system. Generally, universal human rights mechanisms are considered less effective than regional systems. For example, reporting processes in the universal system often end with recommendations, such as conducting effective proceedings. At the same time, the European Court of Human Rights has the power to issue legally binding verdicts.

MIĘDZYNARODOWY SYSTEM PREWENCJI I OCHRONY PRZED TORTURAMI A POLSKA

ASPEKTY HISTORYCZNE I PRAWNE

STRESZCZENIE

Tortury, powszechnie stosowane do końca XVIII wieku, były w Polsce legalne do 1776 roku. Ich późniejsze potępienie wynikało z przesłanek humanitarnych oraz świadomości niewiarygodności zeznań uzyskanych pod przymusem. W XX wieku, wraz z rozwojem reżimów totalitarnych, praktyka ta została wznowiona. Skuteczna walka z torturami wymagała reakcji międzynarodowej, czego efektem było powstanie systemu ochrony i prewencji opartego na aktach prawnych. Celem niniejszego opracowania jest ocena udziału Polski w kształtowaniu tego systemu oraz analiza funkcjonowania mechanizmów uniwersalnych i regionalnych w kontekście zobowiązań państwa.

DAS INTERNATIONALE SYSTEM ZUR PRÄVENTION UND ZUM SCHUTZ VOR FOLTER UND POLEN

HISTORISCHE UND RECHTLICHE ASPEKTE

ZUSAMMENFASSUNG

Folter, die bis zum Ende des 18. Jahrhunderts weit verbreitet war, blieb in Polen bis zum Jahr 1776 legal. Ihre spätere Verurteilung beruhte auf humanitären Beweggründen sowie auf dem Bewusstsein über die Unzuverlässigkeit von unter Zwang erlangten Aussagen. Im 20. Jahrhundert wurde diese Praxis mit dem Aufstieg totalitärer Regime wieder aufgenommen. Ein wirksamer Kampf gegen Folter erforderte eine internationale Reaktion, was zur Schaffung eines Schutz- und Präventionssystems auf der Grundlage rechtlicher Instrumente führte. Ziel dieser Ausarbeitung ist die Bewertung des Beitrags Polens zur Gestaltung dieses Systems sowie die Analyse der Funktionsweise universeller und regionaler Mechanismen im Kontext staatlicher Verpflichtungen.

THE INTERNATIONAL SYSTEM OF PREVENTION AND PROTECTION AGAINST TORTURE AND POLAND:

HISTORICAL AND LEGAL ASPECTS

SUMMARY

Torture, commonly practiced until the end of the 18th century, remained legal in Poland until 1776. Its later condemnation stemmed from humanitarian considerations and the awareness of the unreliability of testimonies obtained under duress. In the 20th century, with the rise of totalitarian regimes, this practice was revived. Effective combat against torture required an international response, which led to the creation of a system of protection and prevention based on legal instruments. The aim of this study is to assess Poland's contribution to shaping this system and to analyze the functioning of universal and regional mechanisms in the context of state obligations.

SŁOWA KLUCZOWE / SCHLAGWORTE / KEYWORDS

- Polska XX wieku; prawo międzynarodowe; historia praw człowieka; poniżające traktowanie; tortury
- Polen im 20. Jahrhundert; Völkerrecht; Geschichte der Menschenrechte; erniedrigende Behandlung; Folter
- Poland of 20th century; international law; human rights history; degrading treatment; torture

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