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The Choice of the Paradigm of Discussion on the Right of Poland to Obtain Compensation From Germany Because of the WWII Aggression and Occupation

Abstract. The text is devoted to the choice of the paradigm of discussion on the right of Poland to obtain compensation from Germany in connection with the Second World War. In the opinion of the author the main failure of the hitherto discussion on the rights of Poland vis-a-vis Germany is a very infrequent reference to the rules on state responsibility. They are simple and lead to a very simple conclusion – namely the obligation of international law to pay a compensation which would wipe out all the consequences of the breach of international law. The author analyses in more detail the influence of the Potsdam Agreement and the 1953 declaration of the government of the Polish People's Republic. In his opinion the Potsdam Agreement had no adverse effect on the scope of the Polish rights. While it is impossible to deny such an influence of the 1953 declaration, the author shows that even on a very wide interpretation it cannot be seen as a definitive end of all rights of Poland. The main message is that it is the set of psychological errors on the Polish side which make the discussion on the Polish rights so difficult and unfruitful.

Keywords: state responsibility, aggression, occupation, Potsdam Agreement, 1953 declaration, Second World War

1. Introductory remarks

The topic of German reparations due to Poland reappears from time to time in the discussion of politicians, lawyers and journalists in Poland. Despite the political

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character of the matter, there is no doubt that it deserves a careful legal analysis as well.

The state of the hitherto discussion of those matters in Poland is all but satisfactory. It is actually dominated by the examination of the so called 1953 declaration of the Council of Ministers of the Polish People's Republic on waiver of claims. Sometimes a more elaborated reference to the Potsdam Agreement is supplemented to it. Both elements are the subject of a considerable number of publications. (Barcz & Kranz, 2019; Czaplinski & Łukańko, 2009) On the other hand the examination of what was at least the original set of rights of Poland is so far almost completely absent in the Polish and international discussion. One can suspect that the reason or one of the reasons is the following idea – 'What is the sense of dealing with the rights of Poland when Poland effected a waiver of those rights?'. One can hardly deny some rationale to such doubts if we were able to confirm the existence, legal force and the complete scope of such a waiver (such a confirmation being in my opinion impossible). All the same this attitude of the Polish legal scholarship leads to a peculiar situation. A considerable group of authors is ready to discuss a possible waiver but almost none of them is ready to dwell on the matter of what could have been waived. The associations with 'white spots' or auto-censorship are inevitable in such a case. In fact the most important matters simply escape the legal analyses. This is the situation which can be hardly acceptable for an international lawyer.

The present text is aimed to give justice to those matters. In this sense its task is to distinguish important questions from the ones which are less important, to show the reasons and their effects and to put the former before the latter as the logic requires to do. It goes without saying that the present text is not aimed to exhaust the matter. It would be difficult to do this even with a voluminous book. That is why the regulation of German reparations in relations with other states (especially the Western Allies) will not be discussed at all. It is not my ambition to dwell on all numerous elements of the Polish-German relations which may have influence on the question of claims. The present text is rather to show the paradigm – to see the source of possible Polish rights and the probable sources of their probable extinction – that is the Potsdam Agreement and the 1953 declaration. The text will have to refer to (and in the second part even to concentrate on) the debate itself – which I perceive as a problem in itself. In this respect it will be necessary to depart from normal instruments of legal analysis and look behind them. However risky it may be, the victims of the II World War really deserve this, as in my opinion the present state of debate is a very bad service to their memory.

2. The rules on state responsibility and international law

It seems to me that the greatest failure of the present state of debate on possible Polish rights vis-à-vis Germany is the lack of references to the rules on state responsibility. In my opinion, they should be the main point of departure for the assessment of the German actions and omissions with respect to Poland, the Polish territories, Polish nationals, Polish firms and Polish interests in the years 1939–1945.

The basic question is why are they absent in this debate. It seems that the number of crimes, the cruelty of treatment of individual persons and entire groups of people may frighten many lawyers. The truth is that there are many topics which are more easy, more pleasant and more promising. It is however the fate of scholars to take up topics which are difficult, unpleasant and not necessarily very promising. Lawyers may also believe or pretend to believe that the topic is too easy to deserve their time and absorb their skills. They may claim that it is obvious that the German acts and omissions were contrary to the law. If so, the question is – why is it so difficult to formulate such an easy answer and in particular to apply to it the rules which are known to each student of law after the basic course of public international law. It is rather an indication that the topic is only apparently easy.

That is why it is worthwhile to start it with a reference to the very idea of state responsibility.

There is no doubt as to the central position kept by the rules on state responsibility in general international law (Dupuy, 1989–1990, p. 108; Crawford, 2010, p. 20). It is a most interesting question whether they are customary norms or general principles of law. For many authors this problem is of secondary importance or is not attributed the ‘either-or’ character. For example Berber (1964, p. 4) attributes to the rules of state responsibility the nature of both customary rules and general principles. Several authors advocate the customary nature of the rules of state responsibility (Ross, 1947, p. 241; Quoc Dinh, Daillier & Pellet, 1994, p. 730). Marek called it another branch of customary international law, and one particularly ill-suited to codification (Marek, 1978–1979, p. 460). Ago, the Special Rapporteur of the International Law Commission, wrote in his second report on state responsibility ‘whatever its justification may be, the important thing to note here is that the fundamental rule, despite certain variations in its formulation, is expressly recognized, or at least clearly assumed by doctrine and practice unanimously.’ (Second report on State responsibility, p. 180, para. 13). What is meant here is the rule according to which a state is responsible for breaches of its obligations of international law.

What is even more important is the fact that if there are no rules on responsibility in international law there is no international law at all. This idea could be attributed to many lawyers (Ross, 1947, p. 241, Balcerzak, 2015, p. 322).. For example, for Charles de Visscher responsibility is a corollary of the equality of states (Quoc Dinh,

Daillier & Pellet, 1994, p. 730). The above-cited report of Ago referred to this matter in a longer passage

‘A justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects. For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order. (...)’ (Second report, pp. 179–180, para. 13)

Law makes sense if its breach gives rise to adverse effects for the perpetrator. These effects should emerge at least in the field of law. This can justify the widely accepted division of rules into primary and secondary ones (Berber, 1964, p.2).

The same is true with respect to the fundamental obligation inherent in the very notion of ‘state responsibility’. It is to be found in the fragment of the famous PCIJ judgment given in the Chorzów Factory case. According to it:

‘The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’²

That is why the fact of very infrequent references or a complete absence of references to the rules of state responsibility in the context of the Second World War may be astonishing. Gelberg (1971) is a kind of exception in this respect. Even his remark according to which the military collapse of the Third Reich was an ‘objective precondition of responsibility of Germany for aggression against Poland’ and other states (Gelberg, 1971, p. 51) rather refers to realities than to law, however.

3. *Prima facie* assessment of the application of the rules of state responsibility to German aggression on and occupation of Poland

There are two conditions of responsibility of a state in international law, they are namely: a violation of a norm of international law and the attribution of that violation to a given state. These conditions are in no case a novelty, they were recognized in 1939 as well as nowadays. In fact the German aggression on Poland and the occupation of the Polish territory brought about millions of acts which require the examination from the perspective of these rules. The most serious of them were connected with the death of 6 million Polish nationals, the majority of them being simply murdered by the German state and its officials. There were also

2 PCIJ Publ. Serie A, No 17, p. 47.

millions of acts of deprivation of liberty, dignity, property and so on. The size of the present text makes it impossible to refer to each and every of those millions of acts and omissions. It will be probably also the fate of the any publication on this topic, however voluminous. All the same a few basic indications are relatively easy to be made.

First of all two groups of primary rules of international law are of importance for the present topic. They are namely the norms of *ius ad bellum* (branch of international law regulating the right to use force) and *ius in bello* (branch of international law regulating the modes of conducting armed conflicts and occupation).

Lege non distinguente any state is responsible for violations of any norm of international law. All the same the coincidence of the two sets of norms create certain interesting problems. The size of the present text makes it impossible to dwell on them but their presence is a good proof that the topic is in no case easy and really deserves the doctrinal attention.

The task of *prima facie* establishment of violations is especially easy with respect to *ius in bello*. The main point of reference is the 1907 IV Hague Convention respecting the Laws and Customs of War on Land. Germany ratified it in 1909, Poland acceded to it in 1925³. Mention should be made of the fact that also Russia ratified this act in 1909⁴. This mention is important as the convention includes the so-called ‘*si omnes*’ clause. IV Hague Convention is especially important because of its annex, namely Regulations concerning the Laws and Customs of War on Land.

What deserves special attention is art. 43 of the Regulations, according to which ‘the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.’

Art. 46 provides that, ‘family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated.’

The best commentary to the German practice in this respect is a fragment of the diary of Hans Frank (since 12 October 1939 the head of the so-called General Governorate). According to it, ‘Poland shall be treated like a colony; the Poles will become the slaves of the Greater German World Empire.’ (Nurnberg Judgment, 1946, p. 497) The practice confirmed those assumptions to the maximum. As the International Military Court noted, this occupation policy was based on the complete destruction of Poland as a national entity, and a ruthless exploitation of its human and economic resources for the German war effort.’ (Nurnberg Judgment, 1946, p.

3 <https://ihl-databases.icrc.org/ihl/INTRO/195>.

4 https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=RU.

497) The most serious crime (or rather a set of crimes) had to do with the creation of several concentration camps. (Klaffkowski, 1968, p. 15) Millions of Polish citizens lost their lives in them. One should also mention 1 million of Polish nationals who were deported from the Polish territories illegally annexed by the Third Reich (Skubiszewski, 1968, p. 66). Also the situation of forced workers and victims of pseudo-medical experiments was deplorable and *prima facie* in violation of general international law.

Mention must be made in this context about the preamble to IV Hague convention. According to it: ‘Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.’

It is so-called Martens clause. There is no doubt to its binding force, despite it being situated in the preamble.

There would be no doubt that any violation of *ius in bello* gives rise to responsibility of a state whose officials violated its provisions. Art. 3 of IV Hague convention gives an additional safeguard in this respect. According to it, ‘A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.’

As regards *ius ad bellum* one should underline that it underwent a fundamental change not long before the outbreak of the Second World War. The right to resort to war was treated for hundreds of years as a basic consequence of state sovereignty. That is why it would be difficult to overestimate the importance of the 1928 Briand–Kellogg Pact (anti-war pact). (League of Nations Treaty Series, 1929, vol.94, No. 2137) Both Poland and Germany were its signatories, the entry into force of the treaty was dependent on the ratification by all of them, what actually took place. 24 July 1929 was the date of the deposit of the instrument of ratification by the last signatory to do so, so this date is indicated as the day of entry into force of the treaty.

It must be stated that the Polish legal doctrine looked at the prohibition of the use of force as a customary rule of law already before the outbreak of the Second World War. What would be the reason thereof was a very quick and wide approval of the Briand–Kellogg Pact. We can see a great similarity between such an instant rule and other rules prohibiting or condemning some activities treated as contrary to the law. In any case the proof of the presence of such a customary norm is in no case a prerequisite of the German responsibility. Also the answer to the question whether the German denunciation of the 1934 Germany-Polish treaty on non-aggression was legal or not is not decisive for the German responsibility.

The aggressive character of the Second World War could give rise to no doubts. It was already on 22 August 1939 that Adolf Hitler made precise the aims of war against Poland. As he put: ‘ The aim is elimination of living forces, not the arrival at a certain line. Even if war should break out in the West, the destruction of Poland shall be the primary objective.’ (Nurnberg Judgment, 1946, p. 432)

The automatic result of German breaches is the unequivocal obligation to pay compensation. Its size is to wipe out all results of a breach. It is a complete misunderstanding to believe that a possible peace treaty is a source of such an obligation. That is why an answer to the contrary in the opinion of the Bundestag (2017, p.7) is both mistaken and/or formulated *male fides*. The novelty of the Briand-Kellogg Pact makes it especially futile to refer to old peace treaties as arguments on the actual lack of state responsibility for aggression. As was said, the lack of state responsibility means the lack of international law. In practice a peace treaty may be a concretization of that obligation. Additionally it may be a waiver of claims (if a compensation negotiated in a treaty is lower than actual losses) or a self-sufficient basis of a new claim (if a compensation negotiated in a treaty is higher than actual losses and only with respect to this extra element).

What compensation would wipe out the consequences of the loss by Poland of 6 millions nationals and complete destruction of infrastructure, industry, transportation, stealing by Germany and Germans of property, money, gold and artistic treasures? There is no doubt that this amount is huge. This is not the task of the present author to count it. It is his task, however, to call as a complete legal nihilism and barbarism the following reasoning – ‘if there is no possibility to give justice to the past, we will pay nothing and you have the right to demand nothing’.

That is why the most pressing question is whether Poland preserved that right or may-be it was lost or reduced because of some legal instruments. As was said two such instruments will be touched upon. The first of them is the Potsdam Agreement.

The importance of the Potsdam Agreement

It is impossible to discuss the topic of legal effects of the Second World War in isolation from the 1945 Potsdam Agreement.

Barcz (2017, p. 24) underlines its importance for Poland „in at least three areas: the establishment of the border between Poland and Germany, deportations of Germans from the former German territories and reparations from Germany.”

Reparations from Germany is the very title of chapter III of the Potsdam Agreement. According to its point 1, Reparation claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R., and from appropriate German external assets.

Its point 2 provides that ‘the U.S.S.R. undertakes to settle the reparation claims of Poland from its own share of reparations’.

Point 3 refers to ‘reparation claims of the United States, the United Kingdom and other countries entitled to reparations’, They were to be met from the Western Zones and from appropriate German external assets.

Point 4 applied to additional reparations for the U.S.S.R. from Western Zones. The latter were regulated in more detail in points 5–7. They do not need to be discussed here.

On the other hand three last points of chapter III deserve our attention though they did not refer to Poland.

According to point 8, ‘the Soviet Government renounces all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets in all countries except those specified in paragraph 9 below.’

On the other hand point 9 referred to waiver on the side of the U. K. and the USA as regards shares of German enterprises which were located in the Eastern Zone of occupation in Germany, as well as to German foreign assets in Bulgaria, Finland, Hungary, Rumania and Eastern Austria.

Last but not least mention must be made of point 10. According to it, ‘the Soviet Government makes no claims to gold captured by the Allied troops in Germany’.

Summing up, the only provision referring to Poland is the above-cited point 2. Points 1, 8 and 9 could serve as a context for this regulation.

What is its practical effect for Poland? It is a kind of obligation of the Soviet Union. From the Polish perspective it can be read as *pactum in favorem tertii*. It actually allowed Poland to obtain whatever in the situation of the defeated Germany being occupied by the Allied Powers. As is known, such provisions require approval of a beneficiary. There is no doubt that Poland made such an approval.

It would be a misunderstanding to see in this provision an element of exoneration of Germany from responsibility of international law. Firstly it would be very bold to assume such a definitive exoneration in the wake of a probable peace treaty. All the more there is nothing in the text of the Potsdam Agreement which would justify such an interpretation. The name ‘Germany’ as a subject of rights or obligations does not appear here at all. There is nothing suggesting that there was an attempt of the Soviet Union becoming a subject responsible for breaches of international law committed by Germany and Germany freed from all responsibility.

In fact nobody asked Poland to effect any waiver and no waiver was effected. Nothing in the agreement suggests such waiver to have been contemplated by the parties in whatever way.

It is especially important as many arguments in the public discussions suggest some dangers of ‘unbundling’ of the Potsdam agreement (the assumption being that demands of reparations mean the collapse of some package). In my opinion, such

remarks could be made in total abstraction for the text of the Potsdam Agreement and the nature of waiver. It is a good place to stress that waiver cannot be presumed (Pfluger, 1936, p.269. Bierzanek & Symonides, 1994, p.101; Dahm G., Delbrück J., Wolfrum R., 2002, p.771; Arbour, 1997, p.127, Degan, 1994, p. 227; Venturini, 1964, p.416; Skubiszewski, 1991, p.229; Ruzi , 1992, p.50, Suy, 1962, p.159). This presumption must be strictly distinguished from the possibility of effecting tacit waiver. So e.g. an express recognition can be a tacit waiver. In any case there is no slightest similarity of the above-presented provisions to anything that could be read as a waiver. In consequence as regards the Potsdam Agreement we have to do with the legend rather than true problem with the preservation of the Polish rights.

The question of waiver is especially important for the next point which must be mentioned, namely the 1953 declaration of the Council of Ministers of the Polish People's Republic.

The 1953 declaration

The „declaration of the Government of the Polish People's Republic concerning the decision of the Government of the USSR on Germany” of 23rd August 1953”⁵(hereafter called as the 1953 declaration) is a compulsory part of any discussion on the question of the responsibility of Germany towards Poland.

The declaration may be divided into three parts. The first one is an opinion approving the decision of the USSR “concerning the German case”⁶. There could be no doubt that it refers to the Soviet Union – GDR Protocol on the termination of collection of reparations and other measures aimed at relieving financial and economic obligations of the German Democratic Republic resulting from the war.

The second and the most interesting part of the Polish declaration includes the actual waiver. It reads as follows: ‘Considering the fact that Germans largely fulfilled their obligations to pay compensation and that improvement of the economic situation in Germany will act in the interest of its peaceful development, the Government of the People's Republic of Poland – willing to contribute to further settlement of the German problem in a peaceful and democratic way, and respecting the interests of the Polish nation and all peace-loving nations – decided to waive the collection of compensation payments for Poland from 1st January 1954’.

This final part of this declaration includes a comment that ‘the government of Poland entirely shares the belief of the USSR that the decisions made will considerably help German nationality not only to strengthen its economy but also to create circumstances necessary to restore its unity and to establish a united, peaceful and democratic German state, in which the Polish nation is vitally interested’.

5 Zbi r Dokument w 1953, no. 9, p.1830.

6 Zbi r Dokument w 1953, no. 9, p.1805.

The 1953 declaration has been the subject of several publications, including my own ones (Saganek 2009a, Saganek, 2009b). There is neither possibility nor sense to recapitulate them in this place. On the other hand a few words must be spoken about how the matter is discussed even by lawyers themselves and why this discussion is so difficult. In fact the reference to 'discussion' is too optimistic. What we have to do is an apparent discussion of lawyers, the best of them deciding to remain silent. Some others are ready to use insults and vulgar words to their opponents. It took me a few years to make an idea about the nature of difficulties surrounding the topic. As in many other areas a Kantian change of perspective seems to me a very promising path.

Firstly, lawyers often try to keep a cold eye on difficult matters, speaking in favour of eliminating political (or more generally extra-legal) aspects from the picture. As a rule this attitude is proper and allows to arrive at valuable conclusions (of course, limited to legal matters only). But there are situations in which this attitude is counterproductive, at least at a given stage of discussion. In my opinion this is the case with the topic of reparations in general and the importance of the 1953 declaration in particular.

That is why instead of eliminating extra-legal elements from the picture one should rather try to grasp all of them and call them with their proper names.

It would be a great oversimplification to say that one can distinguish the legal, the political and the psychological elements in this area. In fact one can identify several layers of the problem. The legal, political and psychological elements may appear in some of them at the same time and unbundling them may be very difficult. Some of those layers have to do with politicians, some of them with lawyers, journalists and so on, some of them with several groups at the same time.

The first element is connected with the fear of some lawyers to be associated with politicians (especially right-wing politicians). This element is of a psychological nature but has to do with politics as well. This element may speak in favour of avoiding the topic of reparations or alternatively – attributing the 1953 declaration a decisive importance.

The same phenomenon may apply to a little different object. A given lawyer may be afraid of being looked not necessarily as an agent of a right-wing political party but as a national partisan. In this respect the ideal seems to be a complete impartiality. Unfortunately, this impartiality means mainly the readiness of the elites to distance themselves from the vital interests of their own state.

This phenomenon deserves a more accurate description by a specialist in the field of sociology, philosophy, psychology if not psychiatry. The present author can only deplore the very phenomenon and share his suspicion that its reason should be looked probably at the time of transition from socialism to a very defective market economy and democracy. If socialist lawyers were believed to write on the instructions of the Political Bureau of the ruling communist party, advocating the

interests of the Polish socialist state, the reaction is the tendency to distance himself/herself from the interests of the Polish state.

In my opinion both aspects could be qualified as a false objectivity error. Alternatively, they may lead to such an error from time to time.

The second element is connected with the fear of some lawyers and some politicians to be qualified as amusing, unserious or simply funny. There is a feeling that demanding huge money is not serious and may become the object of jokes. The more important this element is, the less discussion on it is visible. This is the best proof of its importance, however. Also this element is of a psychological nature but has to do with politics as well.

This last element tells a lot about the importance of media in the present debate. This importance will be visible in other aspects as well. The present author does not intend to conceal his critical and even very critical attitude to such media. He has however even much more critical attitude to politicians and academics who are ready to harm the interests of their mother country in order to get or preserve some popularity in the media.

This media element has a much wider scope of application. In fact, many persons believed by others and by themselves to belong to the elites seem to see the essence of the public affairs is the ability to give quick, smart and simple answers to difficult questions in the media. These answers are not to dwell on unwelcome or simply sad matters, not to demand anything from other states, not to speak about national interests in the proper meaning of the term, not to point at the necessity of hard and long-term work for the achievement of those interests and not to take into consideration the risk of not achieving them despite being allowed to it by the positive law. On the contrary, these answers are to respect the political correctness.

This sad picture has several side-effects. One of them is that a person advocating the legal duty of Germany to repair Poland its war losses is often said that if he/she thinks so, he/she has a moral duty to get those compensations himself/herself or present publicly an efficient, quick, cheap, easy and possibly secret plan to get those compensations. Alternatively, such a person is confronted with a demand to give justice to all injustices of the history of Mankind or at least of the last 100–2000 years of that history. Such counterarguments are usually sufficient to convince persons dealing with international law to tackle with other problems – either very technical (like tobacco or GMO in international law, the Luxemburg or Strasburg case-law, the WTO) or very detached from reality (like the systemic nature of international law, subjects of international law or its sources). Interesting and necessary as they are, they make the picture all the more pessimistic. It may lead to the conclusion that Poland has magnificent specialists of international law but their ambition is to do nothing for Poland. This is especially sad when confronted with very ambitious statements on international law being a system. Suffice to ask what is the value of

such statements if their authors have nothing to say in the face of a state having breached hundreds of norms of international law, having produced trillions of dollars of damage for Poland and having denied any real responsibility. The words on 'system of international law' seem in this context as a very cynical joke and very malicious irony.

The list of counter-claims to proponents of the German duty to pay compensation is longer. One of them has to do with an apparent duty to present the precise claim in dollars or euro. In my opinion, there is no such a duty. According to the Chorzów Factory judgment Poland has as a rule the right to compensation which will wipe out all the consequences of the German breaches.

The very examination of the 1953 leads to the confirmation of another phenomenon. I would call it a 'legal rollercoaster' or 'tiny-huge paradox'. It lies namely in the fact that the establishment of a simple and prima facie not very important fact may lead to completely different results. Let us imagine that one day it is proved that the 1953 act is affected by coercion. No waiver would be in place than. The question is what was not effected by the means of coercion in the Polish-Soviet relations at that time. Is the coercion connected with the overtaking of the entire power in a state and murdering the most valuable persons of the latter not sufficient?

Why not examining the public character of the declaration. Was it really an act in the meaning of the 1974 Nuclear Test judgment? It was no secret but not published officially. It was not sent to the FRG in any case. Was it conceivable that a Polish state wanted to get rid of its rights without the FRG having recognized the Polish western border.

These dilemmas may lead to different reactions of lawyers and politicians. Some would like to help Poland (Muszyński, 2004), some would like to help Germany. The latter are in my opinion deplorable. Of course I have a lot of sympathy with the former but a wise policy cannot depend on them as such. A wise politician is able to freeze the 1953 situation – saying that none of his/her words may add anything to the 1953 situation. In any case if we are speaking about huge amounts of compensation, art. 89 of the Polish Constitution is unequivocal, granting the decision on them to the Parliament and not the prime ministers or ministers of foreign affairs, never mind how competent they feel themselves in international matters.

There is no possibility to get a unanimity among scholars as regards the importance of the 1953 declaration. There will be always those who will claim that the 1953 declaration is a definitive act. There will be always those who will show its deficiencies and lack of completeness. (Muszyński, 2004) The diversity of opinions in this area is the best proof of freedom of speech and academic research in Poland – as opposed to some countries touched by terror called ironically as 'cancel culture'. Nobody has intention to conceal the existence of the 1953 declaration, diminish its importance a priori or put into doubt its validity a priori. It would be a very bad service for law and legal studies. On the other hand, a person

calling himself/herself a lawyer should not conceal the existence of the other parts of the picture, diminish their importance a priori or exclude a priori any possible doubts as to the validity of the 1953 declaration. It is true that the latter must be proved. The same is, however, true of any attempts to interpret the 1953 declaration in a very extensive way. Just the contrary is the principle applicable with respect to unilateral declarations. There is no doubt that the 1953 had no influence on individual claims. The task for lawyers is to assess what are the consequences of the latter fact for the rights of diplomatic protection. I can also see no reasons why Poland should not refer to true objective facts of the PPR government being installed in Poland by military force and criminal acts of a foreign power. If not Poland as a state than the Polish lawyers should have enough skills and courage to tell the truth about the war and post-war period.

Actually academics can write what they feel. It is important however in which language politicians speak about the Polish rights. A few simple remarks should be made. Sometimes one can have the impression that a Polish politician has any obligation to repeat and strengthen the 1953 declaration. The truth is that he/she does not have any such obligation.

Secondly, one can have the impression that a victim state is behaving as if it was under some obligation to justify itself. No such obligation exists. It is the perpetrator state which is to regulate the matter.

Thirdly, one should be aware of the above-identified (and possibly some other) errors (possible errors) and not hesitate to call them with their proper name.

Fourthly, one should be able to work out terminology and narrative which is at least fully neutral to the legal interests of Poland. It goes without saying that the scope of original rights of Poland is very broad. It is also certain that if something could have influenced them it is only the 1953 declaration. Neither the 4+2 treaty, nor post-1989 statements by the executive (as opposed to the Parliament) can be seriously attributed such an importance. In any case the 1953 declaration did not deprive Poland of all its rights.

We can expect that one day the parties will conclude a reasonable treaty (Roth, 2020) on it or that such a day will never take place. Each scenario has its consequences.

Poland which is paid for its losses will be able to take more responsibility for international affairs. Poland with no satisfied claims has the right to be less attentive to such matters. Poland with satisfied claims will have to treat international law arguments very seriously. Poland which is not paid for its losses does not seem to have any duty to treat such references regarding the past as anything more than 'international law' phraseology or decoration. In any case a state blatantly breaching international law cannot expect protection for its claims and expectations.

Last but not least it must be underlined that we cannot assess the potential importance of the Polish claims. It would be very unwise to exchange them for

nothing or pocket money. At present we can see the Polish claims as a sword (demanding something) and as a shield (protecting from claims of other states). The changes in the contemporary world may however lead us to a situation in which huge, apparently ‘paper’ claims may give rise to very precise advantages.

Conclusion

The Second World War is a hole in the history of Poland. It should not be a hole in a memory and in the legal analyses as well. There is a need to fill what seems to me partly a hole and partly a very unbalanced and unjust way of presentation.

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