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AN ASSESSMENT OF THE ISSUE OF REPARATION CLAIMS RAISED BY THE REPUBLIC OF POLAND IN THE LIGHT OF INTERNATIONAL LEGAL INSTRUMENTS (1945 - 2000)

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This article provides a voice in the debate and is a sui generis summary of doctrinal views on war reparations intended to expound the views of representatives of the doctrine of international law, including, in particular, Professor Mariusz Muszynski, with regard to Poland's claims to reparations from Germany which have been debated over the past several decades.

This article was written on the basis of a publication authored by professor Mariusz Muszynski entitled „The Effectiveness of the Declaration of the Government of the Polish People's Republic Made on 23 August 1953 Regarding the Relinquishment of Reparations: Deliberations in the Light of International Law"
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REPARATIONS

The issue of reparations, potentially due and owed to Poland on account of World War II started by the Third Reich, has not been adequately investigated by past or present historiographers. That may have been so due to the current geopolitical situation and the scope of manouvre of the Polish People's Republic which, between 1945 and 1991, had no power (or intent) to storm the position of the USSR, the actual political power in that region of the world, regarding the claims to reparations from Germany. Neither did it have power to change the political climate that stymied Poland's efforts to institute claims against Germany.

The issue of war reparations – ostensibly resolved by the Declaration of the Polish Government in 1953, and by the Two Plus Four Agreement - returned, and with a vengeance, before Poland's forthcoming accession to the European Union and the Treaty of Accession, signed on 16 April 2003. The issue was brought into focus because of claims pursued by the Federation of Expellees in Germany (*Bund der Vertriebenen*, BdV) and its President, Erika Steinbach. The claims in question were associated with German property and assets seized by Polish people at the end of World War II and the territorial re-establishment or redrawing of the borders of the Third Reich. On 10 September 2004, the Polish Sejm adopted an extremely important resolution in which it was asserted that, *inter alia,* Poland had not received the adequate financial compensation for the German war of aggression and the consequent destruction of Poland. It was further argued that Poland had no financial obligations towards the citizens of the German Federal Republic on account of World War II and its consequences. The Polish governing elites were concerned that, as a result of the Treaty of Accession 2003 and the incorporation of Poland into the EU structures in 2004, the Potsdam Agreement would be revised on the initiative of the Federation of Expellees. The atmosphere of those days was effectively conveyed by Lech Kaczynski, then the Mayor of the City of Warsaw, who strongly responded to the outrageous claims made by the Federation of Expellees. In 2004, Lech Kaczynski ordered an analysis, according to which the loss of the war alone for the capital was estimated at US$ 45.3 billion. Lech Kaczynski declared that "if the Prussian Claims Society commences proceedings to investigate claims against Poland, then we will institute similar proceedings against Germany".

At that time Germany's position was very coherent with respect to that issue and, in a general manner, it was argued that there was no possibility that Poland might prosecute its claims to reparations. The German doctrine held that the contention was founded on fundamental laws which excluded the possibility of seeking reparations, namely the legal instruments mentioned above: the Resolution of the Council of Ministers dated 23 August 1953, in which the then Polish government addressed the USSR's decision concerning the formal relinquishment of reparation payments; and the Treaty on the Final Settlement with Respect to Germany (the so-called Two Plus Four Agreement) concluded on 12 September 1990. Paradoxically, the Treaty in question was used by the leading German politicians as the final settlement of claims to war reparations, while the Federation of Expellees continued to formulate their claims on behalf of displaced Germans for restitution of property on the basis of the said Treaty.

The core issue underlying the conflict seems to have been connected with Poland's perception of the issue of seizure of German private property after World War II. The implication is that Poland adopted a view developed by the Soviet and Communist doctrine, according to which the Polish state had acquired [German] private property without compensation as war reparations in accordance with the Potsdam Agreement alone.

That categorical approach adopted by Poland (or, more specifically, by the Polish political elites) with respect to the issue of German property and war reparations should be considered reasonable. It originated from the general concept of *vae victis* (Latin for "woe to the vanquished"), supported by the theories championed by Carl von Clausewitz, Simon Rundstein or Philipp Burnett, which may easily be reduced to the assertion that war of aggression waged by one State against another warrants indemnification for the destruction caused by war operations conducted by the aggressor within the territory of the State which had been attacked.

It may further be reasoned that Germany had violated the 19th and 20th century laws and customs (especially, Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907), according to which a belligerent party "shall be liable to pay compensation" and "shall be responsible for all acts committed by persons forming part of its armed forces".

At this point the question of Germany's responsibility for Nazi crimes presents itself. During the intewar period, Germany developed probably one of the most nefarious political systems ever designed in modern history, the repercussions of which are still keenly felt. The German doctrine quite unjustifiably attempts to reason that Nazi crimes go beyond the framework and regulations of international law. However - considering the horrific nature of WWII, which was an all-out "total war" where cruelty permeated every aspect of a person's life, its effects extending to the farthest reaches of the Pacific Ocean - the Anti-Hitler Coalition was compelled to intervene, during and after the war, in the existing legal order, creating new norms of international law and new international organizations to restore and keep international law and order (as was exemplified by the United Nations Organization founded on 24 October 1945).

Accordingly, Poland's right to reparations from Germany, to which Poland is indisputably entitled, a right which arises from the established norms of international law, to be exercised after the end of the war, requires to be regarded as absolutely incontestable, with regard to the unquestionable international personhood of the Republic of Poland. However, Poland's personhood was violated at the Yalta Conference where Poland was given no chance to express its view with regard to reparations. After all, at Yalta, Poland was represented by Soviet dignitaries and Joseph Stalin himself, who decided to determine the amount of the reparation payments. A rough estimate of the sum of reparations prepared by the diplomatic staffs of Churchill, Roosevelt and Stalin was US$ 20 billion, out of which half of the sum was automatically paid to the USSR. The Soviets were supposed to pay sums due to Poland from their own share of reparations in accordance with the provisions of the Agreement of 16 August 1945.

For the sake of brevity, one may venture the assertion that the reparations to which the Polish State was entitled, had their rationale in the implicit or tacit norms of international law (customs), and in the regulations of international law arising from various treaties and conventions. Accordingly, the USSR's relinquishment of the right to collect the reparations or its failure to meet the obligation to pay reparations required under the terms of the Agreement of 16 August 1945 is of no avail or consequence for the purposes of this discourse. It should be added that the Potsdam Agreement, a tangible expression of the decisions taken at Yalta, need not be regarded as a multilateral agreement which has successfully settled the claims of all the States affected by the war of aggression waged by Hitler's Germany. It may, however, be concluded that the Yalta Agreement was transitional and provisional by nature, and merely designed to lay down some preliminary principles and regulations in compliance with which the new German State would satisfy the claims advanced by those States as soon as the new German government was established and authorized to take binding decisions relating to this question, which in turn was a *sui generis* foundation for agreements to be made at Potsdam.

Given the political and legal circumstances of the case, it is now necessary to address the substance and the essence of the Resolution of the Council of Ministers of 23 August 1953, regarding the discontinuance of reparations payments from the GDR. The historical background of the Resolution was the Protocol Concerning the Discontinuance of German Reparations Payments and Other Measures to Alleviate the Financial and Economic Obligations of the German Democratic Republic Arising in Consequence of the War concluded on 22 August 1953 between the USSR and the GDR, as a consequence of which – upon a consultation with Boleslaw Bierut's Cabinet – the government of the USSR declared that it no longer requested the payment of war reparations by the GDR as of 1 January 1954. One day later, the Polish government adopted the Resolution referred to above at a special meeting.

At this point it would be altogether unreasonable to look upon the Declaration-Resolution as an international agreement concluded between Poland and the GDR. Although there was an exchange of letters between the Council of Ministers of the Polish People's Republic and the Prime Minister of the GDR, Otto Grothewol, any such exchange of letters must on no account be regarded as a consensus between the highest authorities of those States. The Prime Minister of the GDR merely expressed his appreciation for the decision taken by Poland, and emphasized the importance of the Trade Agreement between the two States. That, however, may under no circumstances be regarded as an exchange of affirmative declarations of intent which resulted in the conclusion of an international agreement.

It would be equally debatable if one endeavoured to regard the said resolution as a declaration made by the government which was a unilateral act within the meaning of international law and which had *erga omnes* effects for international community of nations. All things considered, the said Resolution was indisputably adopted under the overwhelming influence of the USSR which repeatedly curtailed the independence of Poland in the post-war period through political clout and string-pulling. Consequently, it must be said it was done contrary to the principle of the equality of the Parties, the fundamental principle of international law. At the time of the Resolution came into being, Poland was not an equal partner in international relations. Nonetheless, Germany is seeking to interpret the said resolution as Poland's effective relinquishment of its rights to war reparations. The institution of relinquishment of particular rights must be traditionally listed among unilateral declarations of intent which on the grounds of international law must meet the following requirements:

1. **The declaration shall be made by a competent authority (or on behalf of a competent authority) in such manner that there shall be no doubt that it may be attributed to a particular State;**
2. **The declaration shall be unilateral and entail no bilateral or multilateral obligations;**
3. **The declaration shall be made publicly and have *erga omnes* effects; it shall also be unconditional and definitive;**
4. **The State shall express an unrestricted intention to be bound by the content of the declaration.**

Moreover, an additional formal requirement must be met, i.e. the declaration must be made in a manner free from defects.

The said Resolution conspicuously fails to meet the requirement of unilaterality because of the powerful influence of the USSR which pulled the strings behind the scenes and dictated to the Polish government how it was to be formulated. The said Resolution was adopted following a decision that evinced the evidence of political and economic coercion exerted by the Soviet Politburo. That being so, we need to answer the question if it is possible to speak about the Polish government's intention to adopt the said Resolution, knowing that the Polish government was actuated by the motives and interests of the USSR. Since the action which resulted in the adoption of the Resolution was compelled by the political situation created by the USSR, it is necessary to answer the question whether or not the Polish government had an intention to adopt that or some other resolution. In view of this, it must be denied that such an intention existed because it is more than likely that the Polish government would never have adopted the Resolution if it had not been pressured by the USSR, because that decision was not requisite for the properly understood raison d'état of the Polish state.

The character of the Resolution was determined not only by the structure of the declaration issued as a resolution (which required to meet certain specified standards/norms as we have described hereinabove), but also by the conduct of the Federal Republic of Germany (the FRG) in subsequent years after the publication of the Resolution. The FRG eagerly sought legal arguments which would secure the effectiveness of the Resolution at a time when Poland and Germany were trying to normalize their mutual relations. The evidence of the FRG's tendency to deny the existence of Polish claims for reparations may be demonstrated by Germany's attempt to interpolate in the draft of the treaty on the foundations of normalization of Polish-German relations, dated 22 April 1970, the following sentence: "Either party agrees not to raise claims arising out of WWII against each other". The mere suggestion that the sentence might be inserted in the legal instrument was immediately rejected by Poland. However, the very fact that the Germans endeavoured to find a way to endorse the Resolution so that it could be construed in a manner more convenient to Germany undeniably proves that the

declaration expressed in the Resolution was considered insufficient to resolve the issue of reparations even for the FRG. It warrants the conclusion that the process of normalization of Polish-German relations did not signify a definitive settlement of the issue of reparations due to Poland, and was solely a prelude to the formulation of claims for damage inflicted by Nazi Germany which has not been repaired so far.

Importantly enough, in the Protocol between the USSR and the German Democratic Republic (the GDR), or in the Resolution, no reference is made to abandonment, relinquishment or renouncement of reparation payments *sensu stricte*. However, there is a reference to a "discontinuance" which should be construed as a cessation of activity which may be thereafter resumed. In investigating the process of devising the Protocol and the Resolution it must be borne in mind that there was a wave of strikes that swept through Germany in the early fifties of the 20th century. It was caused by a barbaric dispossession of German people from property considered valuable to indemnify the USSR for the losses it suffered during WWII. Almost all consumer goods available on the territory of the GDR were immediately shipped to the USSR, which led to a growing discontent among the East Germans. Trying to defuse the dangerous situation, the Soviet government decided to discontinue the collection of reparation payments from Germany. It is possible to say that the discontinuance of reparation payments was a response to the USA, Great Britain and France terminating the collection of reparation payments from the FRG six months earlier under the terms of an agreement concluded by them. The same purpose was explicitly expressed in the operative part pf the Protocol.

The foregoing conclusions are important to the analysis and interpretation of the Potsdam Agreement. Germany repeatedly insisted that the Potsdam Agreement became the foundation for the peace treaties, but, in view of the foregoing considerations, this view is patently wrong. As argued earlier, the Potsdam Agreement was prelusive and provisional by nature; it was designed to broaden and specify agreements to be reached at the Yalta Conference, and to consolidate the status quo until a new German government was established and authorized to eventually settle the issue of reparations (which extends to the actual reunification of Germany and the appointment of a united government of the FRG and the GDR). The German position was in keeping with the tendencies reflected in international law, according to which the question of reparations may be settled between the parties concerned under the terms of a peace treaty, a reciprocal treaty or by virtue of a judgement rendered by an international court. This view endorsed by the FRG and the GDR was very convenient in the context of the Resolution adopted by the government of the Polish People's Republic. Since the issue of reparation payments had (as argued by Germany) been settled by the Potsdam Agreement, and, consequently, the Council of Ministers of the Polish People's Republic had allegedly relinquished the claims by virtue of the Resolution, it followed that Poland may not pursue any claims. However, as argued earlier, that conclusion was based on false premises leading to the misconstruction of the Resolution as a declaration of relinquishment of the right to war reparations, which is absolutely unacceptable.

In view of the foregoing considerations it must be concluded that the declaration of the Polish government produced at least two effects:

- **the collection of reparation payments from the GDR was discontinued, i.e. reparation payments that Poland had never effectively collected;**
- **a solemn endorsement of the relinquishment/renouncement/abandonment of reparations in the future was required, once a legal government by a reunified Germany had been established.**

At the time of finalizing the process of the reunification of Germany, German public opinion as well as German political and moral authorities (such as Gerhardt Schroeder and Erika Steinbach) almost unanimously assented that the issue of reparation claims must be settled during the negotiations preceding the Treaty on the Final Settlement with Respect to Germany (Two Plus Four Agreement) to be concluded on 12 September 1990. It was to have been widely recognized as the real peace treaty declaring the ultimate formal ending of World War II and the "cold war".

The FRG and the GDR were the only parties to that Treaty, whereas the former Allies were represented by the USA, Great Britain, France and the USSR. The Treaty explicitly laid down the prerequisites that no matters regarding the period of war or occupation which had not hitherto been settled under the terms of agreements and other treaties or per facta concludentia, were not to be resolved contractually. Clearly, this sort of stipulation by no means made the Treaty a peace

treaty because the Allied Forces were not composed only of the Signatory States of the Treaty. Besides, the Treaty made no reference to the issue of reparations, which revealed that even Germany had underestimated the problem. The political climate at that time (the grandiosity of the reunification of Germany after over 45 years of division) was not suitable for instituting claims by any of the Signatory States (let alone the States which were not party to the Treaty). The Two Plus Four Agreement should therefore be regarded as a makeshift peace treaty which failed to address all the concerns that a peace treaty is expected to address, in particular the issue of reparations for the war of aggression launched by Germany. All the more so that the Signatory States were not authorized to broker peace on behalf of other States.

SUMMARY

To reiterate the main points, it is necessary to conclude that:

1. **The Resolution of the Council of Ministers of the Polish People's Republic adopted on 23 August 1953 failed to satisfy the definitional elements of an international agreement (no equality of the parties), and of an unilateral declaration of intent to the extent necessary for Poland to relinquish the inalienable right to reparations. It would therefore be reasonable to treat the declaration itself as an action inspired by a political will designed to consolidate or unify the Eastern Bloc (in compliance with the wishes of the USSR), which was to be carried into effect under the pressure and effective control of the Soviet communist apparatus.**

2. **All the Polish governments after 1989 (except for a brief interval in 2004 and at the time of the German Federation of Expellees' escalation of demands) distanced themselves from the issue of reparations and thought it prudent to foster and cultivate good-neighbourly relations. Germany's strong commitment to the incorporation of Poland into the EU structures also hamstrung Poland and created a political climate that would foil the attempts of the Polish political elites to formulate explicit claims against Germany as the political and legal successors of the Third Reich. In the background there loomed the Two Plus Four Agreement, as an expression of Germany's will to reach a settlement of reparation claims. In the final analysis, the terms of the Treaty are not, from the legal point of view, binding upon Poland, because Poland was not party to the Treaty.**

3. **Neither the Two Plus Four Agreement nor the said Resolution of the Council of Ministers of the Polish People's Republic may be regarded as *the* definitive settlement of all the issues connected with the role Germany played in WWII. The Agreement's failure to address the issue of reparations and its nebulous terms designed only to normalize the relations between the FRG and GDR (United Germany) and the Unites States, Great Britain, the USSR (the Russian Federation) and France made it insufficient to determine the effectiveness of the Treaty with respect to Poland. The German government's stance that considers the Two Plus Four Agreement as a legal instrument which settles all the issues relating to the German war of aggression waged on Poland is completely unfounded and without merit.**

It is therefore deemed advisable and expedient in the way of *de lege ferenda* that the interested parties should entertain the possibility of concluding a separate agreement which would tackle the issue of reparation payments between Germany and Poland in a comprehensive manner. Until then, the Republic of Poland is free to exercise its right to formulate its claims for indisputably due reparations which have not hitherto been paid as a consequence of the intricacies of international law we have delineated above.

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