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# COMMENTS ON THE LEGAL OPINION ON WAR REPARATIONS

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# Comments on the "Legal opinion of the Sejm Bureau of Research of The Chancellery of the Sejm on Poland seeking compensation from Germany in connection with international agreements for damage suffered during World War II" prepared by Robert Jastrzębski, with a summary of the most important theses of the opinion.

## I.

This paper constitutes an attempt at taking a position on the theses presented in the "Legal opinion of the Sejm Bureau of Research of the Chancellery of the Sejm on Poland seeking compensation from Germany in connection with international agreements for damage suffered during World War II" prepared by the Sejm Bureau of Research of the Chancellery of the Sejm" (document reference number BAS-WAP – 1455/17), prepared by a Legislation Expert in the Sejm Bureau of Research, dr. hab. Robert Jastrzębski, at the request of an MP of the Parliamentary Club Law and Justice [*Pl.* Prawo i Sprawiedliwość], Mister Arkadiusz Mularczyk. The value of this opinion is of particular significance in the context of the dispute, which spreads further and wider, pertaining to the legitimacy of formulating conclusions of the Polish government on Germany paying Poland (and also Polish citizens) the reparations and compensation due in connection with the military operations and extermination activities performed by Germany in the territory of the Republic of Poland during World War II. The findings contained in the opinion appear to confirm, to a great extent, the overall assessment represented, among others, by dr hab. Mariusz Muszyński and prof. dr hab. Jan Sandorski, according to which Poland is entitled to benefits from Germany in connection with the German aggression during World War II.

## II.

First of all it ought to be stated, beyond any doubt, that the so called Third Reich, and also its legal and moral successor, namely the contemporary Federal Republic of Germany, is fully responsible and liable for having contrived the greatest armed conflict in the history of mankind, i.e. World War II. The ruling party of the time, NSDAP [*National Socialist German Workers' Party*], under the leadership of Adolf Hitler, came to power in a legal manner, almost fully enjoying the approval of the German nation. Shortly thereafter Germany, supported by other allied countries, brought about a war which spread across almost every nook and cranny of the world, causing major human and property losses, for causing of which Germany is responsible as a state and a nation.

A thesis advanced in such a manner, derives its support not only from equity standards, but it is also backed up by sound arguments legal in nature, in particular the legal standards pertaining to indemnification, as well as those pertaining to the fact that war crimes and crimes against humankind are not subject to the statute of limitation.

The large-scale military activities against Poland in September 1939, which brought about significant losses, eventually constituted merely a small fraction of destruction brought along with the German occupation and the related extermination of the Polish population and other nationalities then residing in the territory of the Polish state.

In the light of the foregoing opinion, the material losses suffered by Poland as a consequence of the military activities of Germany ought to be appraised at the total value of more than 258 billion of pre-war Polish zlotys (according to the value as at August 1939, which after conversion corresponds to the equivalent

of 49 billion of American dollars of the time). Whereas, if contemporary estimations are taken into consideration, referring to this end to a fragment of an interview given by Grzegorz Kostrzewa-Zorbas, PhD, to a current affairs portal "wPolityce.pl", then according to the U.S. Federal Reserve Board the amount of 49 billion American dollars from August 1939 corresponded to the amount of 845 billion American dollars (USD) in August 2014. The amount representing the value of destruction brought about by World War II and suffered by Poland during that time is simply inconceivable, even in the contemporary times. The hitherto benefits paid out by Germany (e.g. as part of the established Foundation for Polish-German Reconciliation, which should not be literally treated as either compensation or reparations), do not constitute even one percent of the value of the appraised damage.

It ought to be pointed out that already the fourth Hague Convention, pertaining to the laws and customs of war on land dated 18th October 1907 in Article 3 provided for a principle according to which "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation". This obvious rule of international law, which follows from a meta-standard, namely the principle of equity, establishes a moral and indicates the legal obligation of Germany to redress the damage suffered by Poland. Of course, one must not also forget that it was merely and exclusively the material damage which had been appraised. However, a value which is absolutely impossible to appraise is the death of more than 6 million people, in the major part being anonymous people who, had they been given the chance to live, would have written their own, unique and invaluable stories.

However, returning to the core of the problem of German compensation, it is fitting to point out at the very beginning that it is not possible to propose a universal definition of the notion of "reparations". Undoubtedly, it is a benefit which, in the first place, is supposed to redress damage inflicted by the belligerent party, and which constitutes a sort of reimbursement of expenses related to fighting a war, imposed upon the defeated party.

In accordance with the wording of the opinion, hints pertaining to how to comprehend the notion of reparations can be already found in the international law act which concludes World War I. At this point Article 232 of the Treaty of Versailles, dated 28th September 1919, ought to be quoted: "The Allied and Associated Governments recognize that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage. The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air, and in general all damage as defined in Annex I hereto. (...)".

In chapter IV of the so called Potsdam Agreement dated 1945 , in accordance with a fragment of the said opinion, the reparations from Germany on account of the waged war, were defined in the following manner: "reparation claims shall be met by removals from occupation zones, whereby reparation claims of the USSR shall be met by removals from the zone of Germany occupied by the USSR and from appropriate German external assets. Furthermore, it was agreed that reparation payments to the USSR would be made in the form of industrial capital equipment supply from the western occupation zones". Reparations, in accordance with the postulates of the representatives of the doctrine of international law (A. Klafkowski, Sz. Rundstein) as a compensation benefit, ought to also conform to certain standards and severity: they should be based on peace treaties, constitute a certain conglomeration of private law claims, as well as constitute reimbursement of expenses incurred in connection with war operations. However, the indemnification obligation itself exists irrespective of the concluded and binding treaties, since as such they govern the particulars pertaining to the nature and value of the incurred damage, as well as the manner of remedying the same. Whereas, the obligation to redress the inflicted damage follows from the unwritten standards of common law which, as we know, determine international law in a significant manner.

Admittedly, the Polish reparation claims were supposed to be satisfied from the pool awarded to the USSR by virtue of the treaties governing the situation in the international arena following the end of World War II, but in reality, both the arrangements made in Yalta, which were included in the Potsdam Agreement, as well as the provisions of the "*Agreement* between the Provisional Government of National Unity of the Republic of Poland and the USSR Government on *indemnifying the damages caused* by the *German occupation* dated 16th August 1945", have been illusorily effective and by no means have they compensated for the Polish claims with respect to indemnification. In principle, the said agreement was, first of all, so to speak imposed by the USSR, and second of all, it established a reciprocal benefit for consideration (in exchange for the compensation due to the USSR, Poland was under the obligation to provide a return benefit in the form of making coal deliveries in a specified limit and at a specified price), the basis of which had not been the fact of inflicting damage, and third of all, it failed to further provide for the mutual claims between the actual and original parties to the "delictual relationship", namely Germany, i.e. the aggressor inflicting the damage, as well as Poland, being the "aggrieved party" as a consequence of the German aggression.

**III.**

Taking into consideration the aforementioned arguments, the issue which should be raised at this point is the nature of the resolution – the statement of the Council of Ministers dated 23rd August 1953 on the Polish People's Republic waiving its right to war reparations, in fact pertaining to discontinuing or ceasing to collect reparations from the GDR, rather than a complete statement of the Polish authorities in scope of waiving reparation claims. A crucial issue when analysing the meaning and the nature of this resolution is the "Protocol on discontinuing to collect German reparations and on other means of reducing the financial and economic liabilities of the German Democratic Republic connected with the consequences of war dated 22nd August 1953", concluded between the USSR and the GDR, as a consequence of which - following consultations with the government of the time of Bolesław Bierut – the USSR government obliged itself to cease, as of 1st January 1954, to collect reparation benefits from the GDR. Therefore, the suspension of reparation claims by Poland was merely a certain fragment of a broader foreign policy planned by the USSR with respect to the DGR in which, for obvious reasons, Poland had to participate.

At this point one should categorically refuse, in accordance with the observations of M. Muszyński and J. Sandorski contained in the papers pertaining to this issue, to view this statement-resolution as an international agreement concluded between Poland and the GDR. In the scope concerning the resolution itself, it is a fact that indeed correspondence has been exchanged between the Council of Ministers of the Polish People's Republic and the Prime Minister of the GDR, Otto Grothewol, however the said exchange should not be perceived in this case as an implied agreement, within any scope, between the highest authorities of these countries. In his letter the Prime Minister of the GDR merely paid his respects in connection with the decision of Poland, also emphasizing the significance of the commercial agreement connecting both parties. By no means could this be considered to constitute an exchange of unanimous declarations of will resulting in concluding an agreement.

What is also highly debatable is the recognition of the said resolution as a declaration of the government which, within the meaning of international law, is a unilateral act that produces *erga omnes* effects with reference to international law entities. First and foremost, the said resolution was undoubtedly adopted under pressure placed by the USSR. Therefore, the fulfilment of the fundamental principle of international law, namely the equality of the parties, is out of the question, since at the moment of adopting this resolution Poland did not act as a partner of international relations enjoying equal rights.

It ought to be noted that the stance presented by J. Sandorski or M. Muszyński is much more legitimate and convincing. The minor significance of this resolution-statement, the enormous pressure exerted by the USSR, as well as the political background at the moment of adopting the resolution, the defectiveness of the resolution itself as a legal act, as well as the statement lacking a bilateral element lead to a conclusion that the statement itself has not been binding upon the consecutive Polish governments, as well as that Germany is not authorised to present a thesis according to which the said resolution repealed the obligation of Germany with respect to regulating the issue of reparations.

A far less convincing is the argumentation of the proponents of the thesis whereby the said resolution in fact constituted a way of waiving claims by the Polish government. First of all, the representatives of this position fail to take into consideration a series of factual circumstances which do not confirm such comprehension of this resolution. The fact that the authorities of the GFR did not treat the said resolution seriously, according to M. Muszyński, is supported by the search for the legal tools which would have made it possible to sanction the said resolution and to make it become "rooted" within international law by virtue of concluding an appropriate treaty that would confirm the waiver by Poland of reparations in the international arena. An expression of this were the attempts at concluding a treaty (agreement) on the normalization of the Polish-German relations in 1970, described in more detail by M. Muszyński in his work entitled "*Skuteczność oświadczenia rządu PRL z 23 sierpnia 1953 roku w sprawie zrzeczenia się reparacji: rozważania w świetle prawa międzynarodowego*"[1] [*"Efficiency of the statement of the government of the Polish People's Republic of 23rd August 1953 on waiving reparations: deliberations in the light of international law"*]. At that time Germany strove to include in the content of the said international agreement a statement that "Both parties do not lodge any claims against each other which originate from World War II". What is of significance is the fact that Poland rejected the proposal of such a solution, and in the Polish version of the treaty there is no mention of the same or similar wording (unlike in the German version, where the statement regarding the waiver is contained in the annex). The fact of concluding the said treaty itself also cannot be perceived as a waiver of claims against Germany (back then the GFR and the GDR). Whereas, the attempt made at normalization of relations between Poland and the GFR, cannot determine the issue of waiving claims between Poland and Germany.

**IV.**

The bipolar division of the international political scene into two opposing blocks has, for a long time, thwarted the possibility to conclude the proper agreements between Poland and Germany in scope of compensation for World War II. The division of Germany itself has actually made it impossible to assign the responsibility either to the GFR or to the GDR. For it was difficult to determine to which of these state entities one should ascribe the indemnification liability for the damage inflicted by the Hitler's Germany, as well as to establish the rules according to which such attribution would be made. Of course, in the period of the Cold War it was impossible for the GFR and the GDR to arrive at any agreement regarding a joint articulation and determining a sort of joint and several liability for the damage inflicted by the Third Reich. The division between these two state organisms was too heavily politicized, so as to demand this from these entities.

[1] M. Muszyński, *Skuteczność oświadczenia rządu PRL z 23 sierpnia 1953 roku w sprawie zrzeczenia się reparacji: rozważania w świetle prawa międzynarodowego,* „Kwartalnik Prawa Publicznego" 2004, nr 4/3, s. 43–79; http://bazhum.muzhp.pl/media/files/Kwartalnik_Prawa_Publicznego/Kwartalnik_Prawa_Publicznego-r2004-t4-n3/Kwartalnik_Prawa_Publicznego-r2004-t4-n3-s43-79/Kwartalnik_Prawa_Publicznego-r2004-t4-n3-s43-79.pdf).

## V.

The said opinion unambiguously indicates that the situation has changed completely in connection with the German reunification and the collapse of the USSR. Back then Germany strove to conclude the issue of World War II and to settle with the past of the last fifty years. As accurately observed, the most important manifestation of this was the initiation of talks regarding the so called Two Plus Four Agreement which, however, in principle constituted a general conclusion of the issue of World War II. The treaty itself regulated the issue of the German reunification (also of Berlin itself), withdrawal of the Soviet army from the territory of Germany, or the final shape of the borders. It is no use to try and find in this important document provisions pertaining to the issue of reparations itself. To this end the author of the opinion quotes Article 35 of the Vienna Treaty on the Law of Treaties dated 23rd May 1969, which provides that "an obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation". This means that if the contracting parties would really want a certain matter to be regulated, they should articulate this in the wording of the treaty in a manner as explicit as possible, which leaves no doubts as to the will-dependent nature of the parties. In the light of this, it is not possible to defend a thesis according to which the Two Plus Four Agreement also regulated the indemnification obligation of Germany, since there are no arrangements in this respect in the treaty itself. However, even if the will to regulate this issue would follow from the very wording of the provisions of the treaty, then Poland was not a party thereto, and as a consequence Germany cannot in any extent demand that Poland acknowledges that the treaty also regulated the matters of the Polish claims, since it was impossible for Poland to express its will in this respect, which would be included in the treaty. Indeed, Poland was a party to another act of international significance elaborated together with Germany, so to speak on the basis of talks pertaining to concluding the Two Plus Four Agreement, i.e. a separate German-Polish Border Treaty dated 14th November 1990, however, this treaty also failed to regulate in any way the issues of Polish reparation claims against Germany.

The fact that Germany, in general, acknowledges its liability for the war unleashed by the Third Reich, as well as the liability for damages ensuing in connection therewith, is of significance. Following the war Germany concluded a series of bilateral treaties and agreements settling the issue of damages. An example of the first of these is the Paris Agreement dated 14th January 1946, concluded right after World War II, as well as the Treaty of Bonn dated 26th May 1952. On the other hand, on 10th September 1952 Germany and Israel concluded the Luxembourg Agreement which regulated the issue of damages pertaining to compensation for the Holocaust crime committed by Germany. Germany, beyond all doubt, has acknowledged throughout the largest part of its contemporary history, the claims of the states which sustained damage during the war, and therefore there are no grounds to generally deny the indemnification liability of Germany.

## VI.

Bearing the foregoing in mind, in principle it is fitting to agree with the conclusions of the said opinion written by R. Jastrzębski. For certain, it ought to be assumed that the Yalta and Potsdam provisions have signalled the necessity for Germany to repay its indemnification obligations, undoubtedly existing on the basis of international law. They were in fact general in nature, however, defining them in greater detail was supposed to take place no sooner than when the losses caused by military operations would be estimated. Owing to their extent and scale, this issue could not have been specified in Potsdam.

It is a fact that "reparations" will not have their binding definition elaborated too quickly. However, the nature of reparations is unquestionable, where reparations as such aim at the settlement of the damage inflicted by the aggressor. The vagueness of this statement has both advantages, as well as disadvantages, since on the one hand it allows one to render this notion extremely broad-ranging and making it possible to adjust its meaning to the reality of a given war or the broadly comprehended military operations, however, on the other hand, the vagueness of the meaning of the notion of reparations makes it impossible to unambiguously

determine its actual, substantive content, so greatly desired from the point of view of international law theoreticians, for whom of importance is the seizure of the referent and the semantic layer hidden beneath the former.

The author of the opinion, however, has not decided to take an explicit stance pertaining to the nature of the resolution dated 23rd August 1953, merely juxtaposing the views of the individual participants of the doctrine-based dispute. At the beginning of this document it was indicated that one should rather concur with the opinion of the representatives of the doctrine who do not consider this resolution to constitute an important declaration of will as regards the waiver of rights to damages. It is fitting to notice that for international public law, the principle of equality of the parties is a fundamental principle, which allows international law entities, quite frequently weaker in terms of politics, economy and the military, to make binding declarations of will to other international law entities in conditions of complete freedom and respect for their sovereignty. Owing to this and bearing in mind the political situation in Poland and in the world in the years 1945–1991, the said resolution should be denied its validity.

Undoubtedly, what should be considered as correct is the conclusion formulated in the opinion that Germany has conducted a policy of dissociating itself from the matter of compensation with respect to Eastern Europe countries, which was first and foremost due to the economic factors - since, the scale of the compensation could cause a collapse of the economy of more than one European country. A priority for Germany was to regulate the issue of compensation with the western countries, in particular with Great Britain, France and the United States of America, at the same time diminishing the significance of the expectations and hopes of Eastern Europe regarding the settlement of the destruction and damage caused by the implementation of the Nazi policy concerning the "living space in the East".

**The presented conclusions and theses in an unambiguous manner impose the opinion regarding the inalienable and unexpired entitlement of Poland to demand compensation from Germany. This entitlement cannot be treated in any other way, since this would not comply with the international law standards and the general principle of equity, as well as the general principles of liability for the inflicted damage. Even if we assume that the resolution of 1953 is binding in nature, which owing to the foregoing deliberations appears to be impossible to defend, then in the light of the general justice-related standards it cannot be so that the codified law breaks the superior values, such as the aforementioned law of equity, as well as the liability for the damage inflicted by means of one's own acts or omissions.**


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