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The Emergence of the Polish State in 1918 in the Light of International Law

The author presents the issue of the rebirth of Poland in 1918 from the perspective of international law. It was quite an important subject of legal studies conducted 100 years ago. Today this matter has been forgotten and, therefore, it is worth reminding of it from a new temporal perspective.

The subject-matter, on which this article is based is provided by the most significant analyses performed by the representatives of the Polish scholarship of the interwar period, including in particular the works of the following professors: C. Berezowski, S. Hubert, Z. Cybichowski, W. Komarnicki, S. Bukowiecki, and documents of that period and stances and opinions of some leading foreign international jurists.

While it would be easy to present the views expressed by authors, it is difficult to discuss the subject itself because the stances taken by the representatives of scholarship about it are not uniform. One may even say that they are confrontational. The said contradiction also follows from the incoherent international practice and the internal practice of the authorities of the Second Republic of Poland.

The article not only collects and presents those contradictions but also indicates their significance and practical results. On the other hand, it aims at reconciling them, though perhaps not at the legal level, which is impossible in principle, but rather at the political level, which considers an additional aim that appeared after 100 years. It is – as stressed in summary – the need to promote Polish history (the State's image) abroad. Hence, the text was written in English.

The article discusses the following matters: the historical and legal background of the reconstructed Polish statehood; the conception of the emergence of Poland as a new State; the conception of the continuity of the statehood that had existed before the partitions (the end of occupation); the approach of the domestic judiciary to the issue of the Polish statehood; the stance taken by the allied forces: recognition and treaty solutions; the issue of Polish borders; the succession of debts incurred by the partitioners; the succession of nationality. Thus, as far as possible – within limits imposed by editorial requirements – the text constitutes a complete analysis of the issue.

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Key words:
Polish State; Polish State Emergence of State; Emergence of State International Law; International Law Succession; Succession Continuity; Continuity 1919; 1919 I. World War; I. World War

https://doi.org/10.36128/priw.vi37.267

1. Introduction

To present the issue of the rebirth of the Polish State in 1918 from the perspective of international law is both easy and difficult. It is easy, as there exist numerous scholarly papers published as early as the interwar period. The said matter was discussed not only by the representatives of the Polish legal doctrine but also by some leading experts on international law from other states, including distinguished jurists such as *inter alia* Georg Scelle (1878-1961) or Robert Redslob (1882-1962). In particular, German scholars authored numerous analyses, and such professors studied the matter under

discussion as Erich Kaufmann (1880-1972), Walter Recke (1887-1962), Walter Schaetzel (1890-1961)[1].

It is, however difficult for a different reason. Namely, scholars did not speak with one voice. Even in Poland, they disagreed about the fundamental issues, which led to the development of two key currents. As represented by Professor Cezary Berezowski and his students, if only to mention Professor Wojciech Góralczyk, the first one recognised that the Polish State was new. They thus rejected the continuity of the statehood of the First Republic from before the partitions and confirmed the collapse of the State in 1795 as a result of actions taken by Russia, Austria, and Prussia. The second current, as represented by Professor Ludwik Ehrlich and his students, including Professor Stanisław Hubert, rejected the collapse of Poland in the eighteenth century. This meant that in 1795-1918 Poland was occupied by three neighbouring powers, and in the sense of statehood, the Second Republic of Poland was the same State as the First Republic of Poland.

The practice of States did not facilitate the unification of the aforementioned stance either. The behaviour of victorious allies and the conduct of the States neighbouring Poland, and even of the Polish authorities themselves, were so diverse or even contradictory that even today, after a lapse of hundred years, the said task has not become easier.

At this point, it is also noteworthy that, from the point of view of international law, the title itself may suggest that one advocates Professor Berezowski's conception, given that it contains the phrase 'the emergence of the Polish State'. For an international jurist, this unambiguously means building a new State and severing the institutional, systemic and axiological continuity with the predecessor (the First Republic of Poland) – even if there exists actual continuity of the national identity of the State's builders as well as territorial continuity.

Under those circumstances, and so to speak contrary to the titular suggestion, I will attempt to present the whole context, that is to say, to clarify both main theoretical concepts and describe the State practice in the light of those concepts.

To begin with, I would like to emphasise why it is so important to argue for one of the said concepts. That importance follows from the fact that the emergence of a State is related to certain legal consequences or the lack thereof[2]. The former case occurs when a State emerges secondarily because of

1 For studies concerning the collapse and emergence of the Polish State in German literature, see: Wacław Komarnicki, „*Upadek i wskrzeszenie państw polskiego w literaturze niemieckiej" Rocznik Prawniczy Wileński*, Vol. II (1929): 241 et seq.

2 Wacław Komarnicki, *Polskie prawo polityczne (Geneza i system)* (Warszawa: Wydawnictwo Sejmowe, 2008), 9 (reprint of the position of 1922).

the collapse or dismemberment of another State. Also, the process of rebuilding statehood after a period of occupation has its specificity[3]. Differences in that regard concern not only external or interstate relations, thereby determining at the very beginning in an individualised manner a certain framework for the nascent statehood and the situation and legal position of people resident in such States. What is concerned here are *inter alia* matters of boundaries, State property, international treaties, nationality, State debts, but also pensions and allowances, private property, including such important aspects as the issue of property confiscated by partitioning States, etc.

The subject mentioned above matter has been forgotten by the present-day study and teaching of international law. Hence, it is worth reminding of it and at the same time reviving the publications of the representatives of the doctrine of the interwar period, in particular papers written by Polish professors: C. Berezowski, S. Hubert, Z. Cybichowski, W. Komarnicki, S. Bukowiecki.

2. The historical and legal background of the issue of the reconstructed Polish statehood

In this chapter, I will present legal actions taken by Russia, Prussia, and Austria, which was to provoke the collapse of Poland's statehood. A short description of the said actions is based on related (political and military) actions falling outside the legal framework, which undoubtedly affect their assessment. It is on purpose that I do not apply here terms and phrases that are unambiguous for international law, such as, e.g. 'the collapse of a State', as they convey the legal assessment of the results of those actions. And that is related to the stance concerning the legal formula of the State's rebirth in 1918.

The treaty of 8 June 1762 concluded by Russia and Prussia is considered to be founding the entire process of conquering Poland's territory and establishing a bilateral political alliance. In a secret article concerning Poland, the parties to the treaty provided that their interests required that the principle of the free election of kings and the elimination of hereditary succession to the Polish throne be the foundation of Poland's constitutional system. The importance of that interest was emphasised not only by classifying the said provision as 'secret' but also by assuming a mutual obligation that, if necessary, the Russian tsar and the Prussian king would resort to the use of force to

3 Zygmunt Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego* (Warszawa: Wydawnictwo Seminarium Prawa Publicznego Uniwersytetu Warszawskiego, 1933), 175 et seq.

provoke such development. Thus, the said treaty created the basis for interference with Poland's internal affairs[4].

In turn, on the part of Austria, the act determining the relation to Poland, and as a result of a series of actions was the declaration of 16 March 1764 issued by Empress Maria Theresa. Although the empress confirmed the recognition of Poland's sovereignty, she made a proviso that the principle of the free election of kings may not be limited. Only a ruler elected in this way would be recognised by her. She also announced the possibility of intervention.

The occupation of Poland's territory took place in three stages, called by historians the Partitions of Poland. From the perspective of international law, this was a gradual conquest of territory.

The legal basis for the First Partition of Poland was provided by three treaties having the same content concluded by Russia with Prussia, Russia with Austria, and Austria with Prussia. This took place on 25 July 1772. Under those treaties, each of the aforementioned States was entitled to annex to its territory certain parts of the territory of the Kingdom of Poland. Notably, Poland was not a party to those agreements, so we do not deal here with territorial cession. Those were simply written arrangements concerning the division of Polish territory. As a result, Polish authority, that is to say, the ability to exercise territorial sovereignty, was removed from territories embraced by actual military action.

Military action was also justified by the Austrian empress and the Prussian king under unilateral declarations. Maria Theresa's declaration was issued on 11 September 1772. The empress declared that she exercised her rights arising from the treaties of 25 July 1772 and occupied certain territories. The king of Prussia issued a similar declaration on 13 September 1772.

The partitioning powers also committed themselves in the treaties of 25 July 1772 to collaboration forcing Poland to conclude with them agreements confirming their enforced territorial acquisition. The need for such a regulation was also confirmed by both aforementioned unilateral declarations of the rulers of Austria and Prussia. As a result of this, on 18 September 1773, Poland concluded with Russia, Austria, and Prussia relevant treaties. Their subject matter was above all related to the cession of specific parts of the territory.

Out of the latter group of treaties, the treaty concluded with Russia is particularly noteworthy. It namely indicated the key constitutional elements of the Polish State, as well as the obligation to consult the ministers of the

4 See: Cezary Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów* (Warszawa: Wydawnictwo Sejmowe, 2008), 79 (reprint of the edition of 1934).

three powers while formulating the content of the Polish constitution. The tsaritsa of Russia herself was the guarantor thereof.

Such a formula, called diplomatic intervention, clearly limiting Poland's political sovereignty, was subsequently strengthened by the provisions of the treaty of August 1791 concluded in Paris between Austria, Russia, Prussia, and Spain. Prussia and Russia committed themselves to acquire further territories of Poland, to dethrone the Polish king by forcing him to abdicate, and to submit the remaining territory under the rule of the Saxon elector.

As a result of the arrangements made in Paris, Russia launched military action (18 May 1792) by declaring war on Poland. The king of Prussia joined the war, who – which is noteworthy – should have helped Poland, because as of 29 March 1790 Poland and Prussia were parties to a treaty of alliance. The Prussian king breached it by declaring that he entered an alliance with Russia. In turn, on 14 July 1792, Austria and Russia signed a treaty of alliance, which also confirmed the validity of their bilateral agreement of 25 July 1772.

Actions taken by Russia and Prussia, known as the Second Partition of Poland, were legalised in treaties concluded with Poland. The treaty with Russia was concluded on 13 July 1793, and with Prussia on 25 September 1793. In both of them, Poland ceded further parts of her territory. However, the two powers relinquished any claims to the remaining part of the Polish State's territory and concluded 'perpetual peace' with Poland.

On 16 October 1793, Poland concluded a subsequent treaty with Russia. Its subject embraced a political alliance, though in reality, this was a further limitation of Poland's sovereignty. Limitations concerned the freedom to shape the constitutional system and to conclude international agreements (with the consent of Russia). The treaty also provided for the possibility to locate the Russian army on Poland's territory.

The resulting legal situation faced social opposition, the effect of which was an insurrection led by Kościuszko (1794). Although it was formally a revolution for Poland's independence and faced opposition on the part of the king and the Permanent Council, the proof of which was the royal proclamation of 2 April 1794, it spread across territories taken over by the partitioning States. Consequently, the three powers launched a battle against insurgents.

And again, as a consequence of those actions Russia, Prussia and Austria concluded relevant agreements. In the treaty of 3 January 1795, Russia and Austria committed themselves to confirm their territorial acquisitions and to offer the rest of Polish territory to Prussia in exchange for the guarantee of their own acquisitions. A relevant treaty between Prussia and Russia was concluded on 24 October 1795.

Thus, the territory of Poland disappeared, and when King Stanisław August Poniatowski renounced the crown on 25 November 1795, the highest authority exercising Polish sovereignty disappeared[5]. Did the State collapse in this way? Both main legal concepts lead to contradictory conclusions.

3. The concept of the emergence of Poland as a new State

The first concept concerning the emergence of the Polish State, that is to say, in the political sense the emergence of Poland as a new State, is an analysis based on three research methods: historical legal, comparative and dogmatic. It may be summarised in the following way: the Polish State collapsed in 1795 due to actions taken by Russia, Prussia, and Austria. The said collapse followed the norms of the law of nations. Aside from historical injustice and harm were done to the Polish nation, the question arises whether or not the collapse at issue conformed to international law. In the light of the standards which emerged in international law in the twentieth century, the said violation may have occurred. Still, in reference to the rules in force at the end of the eighteenth century in international relations among the States participating in the partitions – there was no such violation[6].

Which institutions of international law were applied then and led to the collapse of Poland? Per that concept, those were: international intervention and territorial conquest.

The notion of 'intervention' in international law means that one State influences the actions of another State in the sphere of actions not regulated in international law. What is concerned is influencing the powers of a State arising from the essence of statehood, that is to say from sovereignty. The said institution is also known today and has a negative context. Hence, we find a prohibition on intervention in the Charter of the United Nations.

In the eighteenth century, an international intervention was, however an element of the canon of international law. Following the conclusion of the treaties of Westphalia, it constituted an instrument for maintaining the political principle of equilibrium as the basis of the European international order[7]. That principle had a mathematical character. It came down to establishing an equal division of property among States, which was to guarantee peace. Based on that principle, States demanded an increase in their capacity

5 See: Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 83.

6 See: Cezary Berezowski, [in:] Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 83.

7 Wsiewłod Durdieniewski, Siergiej Kryłow, *Podręcznik do prawa międzynarodowego* (Warszawa Spółdzielnia Wydawniczo-Handlowa Książka i Wiedza, 1950), 62.

once such an increase occurred in a rival State. Austria was a case when she demanded part of Turkey once Russia took over part of Poland in 1792[8].

The said principle justified preventive wars and even became their natural justification[9]. One of the representatives of the then-doctrine, Johann Gottlob, perceived the principle of equilibrium and intervention in such an orthodox manner that he claimed that States should oppose such actions of other States, which at the stage of internal reforms lead to the strengthening of their power in an unjustified manner. Gottlob's thoughts were specified even more by Friedrich von Genz, whose concepts were put into practice by Prince Klemens Lothar Wenzel von Metternich. Genz wrote that the principle of equilibrium was comparable with a federative system, where one needs to balance the power of individual members and subordinate their interests to those of the whole[10].

The States of that period defined the principle of political equilibrium using three points:[11]

- firstly, single interests had to be subordinated to the prosperity of the community of the States of Europe, as any excessive claims made by powers could violate that;
- secondly, for the sake of equilibrium, it might be demanded from a State to disregard its own interests;
- thirdly, in exceptional situations, in order to enforce demands put forward by the whole, military intervention was possible[12].

While the first two issues were related to politics, the third one constituted a legal construct.

In this way, the construct of intervention in the seventeenth and eighteenth centuries was one of the kinds of wars, formally justified and legitimised by the alleged interest of the community, though in practice, it was almost completely particularised and abused. It, therefore, constituted an act of the State's action, allowed by law, directed at another State, aiming at the

8 Johann Caspar Bluntschli, *Das moderne Völkerrecht der Zivilisierten Staaten als Rechtsbuch dargestellt*, (Noordlingen: Beck, 1878), 102.

9 Lassa Oppenheim, *International Law*, ed. H. Lauterpacht (London-New York-Toronto: Longsman-Green, 1948), 278. Erich Rebstein, „Das 'Europäische Öffentliche Recht' 1648-1815". Ein institutionengeschichtlicher Überblick. *Archiv des Völkerrechts*, Vol. VIII (1960): 401.

10 Wilhelm Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden Nomos Verlagsgesellschaft 1984), 395.

11 Grewe, *Epochen der Völkerrechtsgeschichte*, 394.

12 Emer Vattel, *Prawo narodów*, transl. Bohdan Winiarski, Vol. I (Warszawa: Państwowe Wydawnictwo Naukowe, 1958), 90.

execution of certain behaviour about the specific matter[13]. One may say that it was a distorted understanding of international solidarity. In the practice of that period, the majority of wars over territory were officially recognised as interventions[14]. Even President Jefferson used intervention aimed at protecting equilibrium as an excuse for the occupation of New Orleans by the USA.[15]

Intervention, and essentially even the principle of equilibrium, *reductio ad absurdum,* also served as one of the elements legitimising actions taken by Russia, Prussia, and Austria in relation to Poland and was to justify the cause for her partition.

Thus, we did not deal with the violation of international law, but at most with the abuse or instrumentalization thereof.

Hence, after the First World War, the Polish State re-emerged. The said re-emergence was a process, that is to say, a series of factual and political events, the result of which achieved a legal level – the international personality of the Polish statehood. Thanks to them, what took place was the shaping of territory, the emerging of the highest authority, and nationality of the State.

The act of 5 November 1916 is considered the moment initiating Poland's emergence – appeals to residents issued on behalf of the German emperor and the Austrian emperor by governors-general (of Warsaw and Lublin)[16]. Their content announced an agreement reached by both emperors regarding the establishment of an autonomous Polish State in the form of a constitutional monarchy. Such Polish Kingdom was to remain allied with both empires, and its organisation and exercise of authority were to be regulated by a treaty. Precise boundaries were to be determined in the future[17].

From the perspective of international law, the said appeal was merely an expression of the will of the monarchs, a declaration without any legal consequences[18]. It however triggered a political and legal process. That

13 Percy Winfield, „The History of Intervention in International Law" British Yearbook of International Law, Vol. III (1922-1923): 130.

14 For the content of the treaty, see: Wilhelm Grewe, *Fontes Historiae Iuris Gentium*. Vol. II (Berlin-New York: Walter de Gruyter, 1995), 406-410.

15 Erich Reibstein, „Das »Europäische Öffentliche Recht« 1648-1815" *Archiv des Völkerrechts*, Vol. VIII (1960): 401.

16 Komarnicki, *Polskie prawo polityczne (Geneza i system)*, 26-27. Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego*, 188.

17 For a catalogue and an analysis of the legal acts of the partitioning powers related to Poland, see also: Komarnicki, *Polskie prawo polityczne (Geneza i system)*, 12 et seq.

18 Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 37.

process embraced both external activity of international subjects and activities on the part of the Polish nation called emancipatory activity.

By the way, a more significant role is attributed at this point to emancipatory activities. They aim at the political and legal effectiveness of the existence and the functioning of a nation as a State. From the perspective of international law, this is a rejection of Kelsen's concepts in favour of the views represented by A. Verdross and J. L. Kunz.

All three scholars representing the German school agreed as to one aspect – it does not suffice to merely formally announce the existence of new statehood in the form of a political declaration or even in the form of a legal act. A State must become a real fact; that is to say, it must be a subject capable of real, effective authoritative (legal) action within a specified territory. The difference between their stances was, in turn related to the direction of this principle. Verdross and Kunz indicate the internal arena of the State. This is where effective highest authority is to function. According to them, this follows from the fact that the introduction into international law of norms defining standards of statehood reduced the significance of 'recognition' by other States as a factor creating statehood. If a socio-political organisation satisfies the requirements of international law, it automatically becomes a State.[19] Even if it is not recognised and does not maintain legal dialogue with other States, it does not lose its statehood, as the exercise of a State's rights refers solely to legal relations and not to its essence[20].

In turn, Kelsen emphasises that it is not possible to consider statehood from the point of view of the legal order of a given State. Solely an order of a higher rank, that of international law may indicate the criteria for the emergence of a State. And only in the light of international legal order should statehood be examined. A State is for him the ought-order (*Sollenordnung*), and it is only international law that creates legal order (*Rechtsordnung*) out of that order. Hence, it is not a State that is sovereign – it is the international order, which should establish its own rule for shaping a lower order – that of

19 Those requirements are as follows: the existence of a legal order (reality); the said order may only be subordinated to the international order; the manner of the establishment of that order and its content are determined independently by that legal order, as this area is submitted to that order by international law (sovereignty). Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 65.

20 For their concepts, see: Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna-Berlin: Julius Sprigner, 1926). Josef Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (Stuttgart: W. Kohlhammer, 1928).

a State. Therefore, the emergence of a State is a legal fact, to which international law attaches legal consequences[21].

Berezowski emphasises that international practice defied Kelsen's concept. International law had not created any norm pertaining to the fact of the emergence of a State. According to him, Kelsen rather described a further stage – the constitutionalisation of a State and not its emergence. It is a reality that is the decisive attribute, and the reality is the permanence of a State's legal order[22]. We may call it today effectiveness in the internal dimension. It is, namely a manifestation of its sovereignty. Therefore, we may recognise the first manifestation of this kind as the moment of the emergence of a State.

A logical consequence of such perception is the confirming, but not the constitutive role of later boundary agreements. They do not affect the very fact of the emergence of a State but merely indicate its frontier line.[23] Hence, States function so often without a formal delimitation of territory, and no one questions their statehood.

Often the date of the emergence of a State is easy to establish, as it is indicated by an act of internal law directly stating the establishment of statehood. After the First World War, this was done so e.g., by Finland (a resolution of the Parliament of 6 December 1917), Estonia (the constitution enacted by the National Council on 20 November 1918), or Latvia (the declaration of independence of the Parliamentary Assembly of 27 May 1918).

However, it is sometimes complicated. Such an unambiguous date is missing in the concept of the emergence of the Polish State. Poland did not authoritatively define the said date[24].

Why is that date so important? It indicates the moment of taking over responsibility for international obligations of the territory, that is to say, the moment of the so-called succession. In this case, the moment of universal succession. But that is a different issue.

Returning to the main topic of our considerations, that is, to the process of the emergence of the Polish State, one thing comes to mind – it was easy to indicate the moment initiating the said process, but it is difficult to indicate further stages, as well as the finale. It is noteworthy that in this

21 See: Hans Kelsen, *Allgemeine Staatslehre*, 2nd ed. (Berlin: Springer, 1925).

22 Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 66-67.

23 Ibidem, 67.

24 The date of the emergence of the Polish State was considered at an international level on the forum of the Permanent Court of International Justice in the case concerning certain German interests in Upper Silesia. See the ruling: http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_06/16_Interets_allemands_en_Haute_Silesie_polonaise_Competence_Arret.pdf. [accessed: 19.07.2018].

package only actions taken by foreign States may have factual and legal character. Emancipatory activities of a nation are a real activity falling outside the legal framework. They enter into the sphere of international law only after the emergence of a State.

Those activities, constituting an element of the process of the emergence of the Polish statehood, embrace, according to Professor Berezowski and the proponents of that concept, the following:

- the Russian declaration of 30 March 1917;
- the appointment of the Regency Council on 12 September 1917 or the actual establishment thereof on 27 October 1917;
- the appeal of the Regency Council of 7 October 1918;
- the removal of occupying powers on 10 November 1918;
- granting support to the coalition of the Allied States by the Polish armed forces on 4 November 1917;
- the recognition of the Polish armed forces on 28 September 1918;
- the actual assumption of authority by ending occupation on 11 November 1918;
- recognising sovereignty by allowing the Polish party to participate in the peace conference of 15 January 1919;
- the Treaty of Brest, in which Russia relinquished her rights to the Kingdom of Poland, by which her sovereignty to those territories *de iure* disappeared;
- the appointment of the Polish government by the Chief-of-State[25].

One needs to remember that this is not a complete catalogue.

4. The concept of the continuity of statehood from before the partitions (the end of occupation)

The said concept derives from adopting the concept of *ius postliminii,* coined in Ancient Rome, in reference to the functioning of a State in international law[26]. In Rome, its essence was re-emergence as a subject of rights and obligations in specific legal situations related most often to war and captivity by fulfilling necessary formal requirements.

The institution of the so-called *postliminium* appeared in international law, just as many other institutions of Roman law, as early as the seventeenth century. Emer de Vattel analysed it one hundred years later in his work entitled *The Law of Nations*[27]. In the subsequent years, it was called the

25 Berezowski, *Powstanie Państwa Polskiego w świetle prawa narodów*, 50-51.

26 Stanisław Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego* (Lviv: Piller-Neumann, 1937), 3.

27 Vattel, *Prawo narodów*, p. 217 (Book III *Of War,* Chapter XIV *Of the Right of Postliminium*).

institution of the restitution of statehood, and its legal requirements were established. Those are[28]:

- a nation (State) must be occupied by way of conquest (military force) to have the right to return to the primary legal situation;
- the authority of the conquering State must be all the time based on force;
- the rebuilding of a State must be founded on the same legal bases on which it had been founded before.

The first requirement means that such a nation could not express legal consent to end its statehood. There may not exist treaties related to that, e.g., referring to the unification, incorporation, or any other form of the loss of sovereignty. In the case of the second requirement, the existence of the expressions of a permanent objection is concerned. A nation concerned must express the said objection unambiguously and permanently to manifest the existence of national (State) awareness. The third requirement means recognizing a State as a rebuilt construction, not as a new one. Such will must be expressed in both the international and internal dimensions[29].

In other words, one distinguishes at this point between two constructs of international law: occupation and conquest. Occupation is a temporary deprivation of the sovereign of the exercise of sovereign rights in his territory. But the sovereign himself does exist. Until he gives consent to the cessation of sovereignty, we merely deal with occupation and not with an effective conquest of territory. Consent to transfer sovereignty may only be granted in a form envisaged by law, i.e., under a treaty of peace concluded in accordance with the rules of international law (in good faith, without constraint)[30].

Thus, the term „annexation" is inherent to conquest. The mere fact of conquest is sole of a *de facto* character. Only a treaty of peace concluded after ending a war, and as of the nineteenth century, even a peace conference could transfer a legal title to the territory (territorial sovereignty). The said process was called annexation. Often not only interested States expressed their opinion in that regard, but also neighbouring countries having important

28 Quoted in: Stanisław Hubert, *Odbudowa Państwa Polskiego jako problem prawa narodów*, odbitka z „Drogi", Warszawa 1934, 6. Cf. Vattel, *Prawo narodów*, 218. Hubert, *Rozbiory i odrodzenie Rzeczypospolitej*, 17 et seq.

29 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 202. Komarnicki, *Polskie prawo polityczne (Geneza i system)*, 36 et seq.

30 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 43 et seq.

interests in the region[31]. Hence, one may find in English literature the term *voluntary annexation* as opposed to *forceful annexation* or *annexation imposed by force*[32].

In the light of such rules, with the lack of annexation, *postliminium* should function automatically, immediately after the removal of the occupying powers[33]. The interwar doctrine of international law is familiar with and recalls examples of the institution's contemporary (the nineteenth century) application[34].

While applying those principles to the Polish case, the proponents of the concept of restitution[35] indicate several issues.

The first issue embraces constraints related to the conclusion of partition treaties and the fact that the said treaties were in breach of the previous agreements guaranteeing territorial inviolability of the Polish State[36]. The said constraint was manifested by real pressure exerted on State organs and Polish citizens. One indicates here pressure exerted by a Russian envoy on the Polish king, who under his influence summoned the Council of the Senate, and it summoned 31 members instead of 132. In the same way, under threat of confiscation of the property of persons dissolving regional legislative assemblies (*sejmiki)*, and despite the noblemen boycotting those assemblies, a session of the Sejm was convened by force. The negotiating delegation was forced to accept the conditions presented by the other party, and the rebelling ones were threatened with exile to Siberia. In the case of the Second Partition, Grodno – the seat of the king and the place where sessions of the Sejm were held – was surrounded by the army, and cannons were directed at the debating members of the Sejm. They were held captive in this way until a delegation of negotiators had been sent. The last partition was even regulated in treaties concluded directly between the partitioning powers, constituting *res inter alios acta*.

31 Friedrich von der Heydte, *Die Geburtsstunde des souveränen Staates* (Regensburg: Josef Habbel, 1952), 427, 428; John Bassett Moore, *Digest of International Law*, Vol. I (Washington: Government Printing Office, 1906), 290.

32 Stephan Verosta, „Gebietshoheit und Gebietserwerb im Völkerrecht" *Österreichische Juristen-Zeitung*, (1954): 242.

33 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 9.

34 Ibidem, 20 et seq.

35 Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego*, 187.

36 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 60 et seq.

Secondly, the fulfilment of the following requirement is emphasised. The Polish society never made peace with the conquest of the State. Despite a lapse of 123 years, that is to say, during the period of five generations, there was no acceptance of the collapse of the State. One cherished the language, memory, culture, and history. The Polish nation never ceased to form a unity[37].

Thirdly, the authority of the partitioning powers had to be founded on force, which eliminated the legality of such authority. It suffices to mention the key dates of rebellions and uprisings, beginning with the battles led by Dąbrowski's legions and ending with those led by Piłsudski's legions in 1830, 1846, 1848, 1863, 1905[38]. And also the substitute and provisional forms of the Polish statehood in the nineteenth century[39].

At those moments, aside from battles, also political will to retain statehood was visible. The outbreaks of uprisings instantly provoked the appointment of State institutions and the execution of the law.

Also, the rebuilding of statehood after the First World War was based on the assessment that it took place independently and in accordance with the nation's will. The constructive elements described above, which had an external political element, were rejected. The starting point for that concept is the assumption of power by Józef Piłsudski[40]. This took place on 11-14 November 1918. Authority was complete – civil and military. It was also self-born[41]. That element of the national will is legally founded by virtue of decrees issued by the Chief-of-State[42]. This was expressed in the resolution of the Sejm of 20 February 1919, in which the Sejm noted the transfer of power to it from the Chief-of-State and entrusted him with the continued exercise of power until the establishment of constitutional organs[43].

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37 Komarnicki, *Polskie prawo polityczne (Geneza i system),* 10.

38 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej, Zagadnienia prawa międzynarodowego*, 153 et seq.

39 Hubert, *Odbudowa Państwa Polskiego jako problem prawa narodów,* 9. Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 97 et seq.

40 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 204-205.

41 Hubert, *Odbudowa Państwa Polskiego jako problem prawa narodów*, 10.

42 What is particularly concerned here is the decree concerning the elections to the Sejm, which as a representative organ continued the building of statehood together with Piłsudski.

43 Journal of Laws, Dz. P.P.P. 1919, no. 19, item 226. Cf. Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*,

In this way, in accordance with that concept, the Polish State had established itself before the conclusion of the Treaty of Versailles, to which it was a party[44]. Thus, the said treaty could not constitute the foundation of its existence. Poland had already been functioning as a State, satisfying the standards of internal and external sovereignty: it had territory, population aware of its political dimension, the highest authority, and it protected its property by participating in international dialogue. The Treaty of Versailles could merely confirm this fact, as in 1919, Poland could only be deprived by force of her regained sovereignty.

What reflects this concept in international law is the note issued by Józef Piłsudski directed at the President of the USA and the governments of England, France, Italy, Japan, Germany, and other battling and neutral States, in which he notified of the existence of the Polish State reborn out of the will of the nation in the territories of united Poland[45]. From that perspective, an invitation to participate in a peace conference seems like implicit recognition.

In this way, the Polish State was the continuation of the statehood from before the year 1794. This was expressed in legal acts, which involved the first decree issued on 14 November 1918, in which the Chief-of-State announced the establishment of provisional authority representing the Republic of Poland until the constitution of the legislative Sejm embracing three partitions[46]*. In turn, the decree on electoral law announced elections in districts indicated therein, which covered all partitions*[47]*. Thus, those lands were recognised as Polish. Finally, also the Preamble to the March Constitution emphasised that: „*We, the Polish

224. Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego*, 205.

44 Cf.: Stanisław Bukowiecki, „Rola czynników wewnętrznych w utworzeniu nowej państwowości polskiej", *Niepodległość* t. I (1930): 4.

45 For the content of the note, see: Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 233-234.

46 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 210.

47 In practice, elections were held in the Russian Partition and in a part of the Austrian one. As for the remaining part of the Austrian Partition, which was at war, the former members of the former House of Deputies of the Imperial Council of the Austrian Empire were delegated to the Sejm. A similar situation took place in the territories of the Prussian Partition. Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 215. Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego*, 207.

Nation, grateful to Providence for setting us free from a servitude of a century and a half; remembering gratefully the courage and perseverance of the self-sacrificing struggle of generations which have unceasingly devoted their best efforts to the cause of independence (…) do enact and establish in the Legislative Seym of the Republic of Poland this constitutional law"[48].

What is also exposed in this concept are elements indicating the will to continue the Polish statehood from before the partitions as expressed in international relations of that period. One indicates here both the area of dialogue related to the building of the post-war international reality as well as Poland's bilateral relations.

The first sphere concerns historical and legal arguments used in negotiations. On that basis, Poland's boundaries embraced the district of Piła, although the majority of its residents were German. It was namely recognised that this was a result of the colonising policy. One also referred to the political will of the Polish nation to 'restore independence', and not to gain it, as expressed during the conference of Versailles. Finally, one of the significant examples was the proposal by President Wilson, constituting a compromise in the issue of Poland's boundaries. Wilson proposed to establish them at the Prussian-Polish frontier of 1772.

The historical factor was also decisive in the process of conferring the status to the Free City of Danzig or in constructing the enclave of East Prussia.

The context of continuity is also visible in bilateral agreements. The Polish-Turkish treaty of 1923 mentions the „restoration" of diplomatic relations. In turn, the Treaty of Riga of 1921 refers to the relinquishment of mutual claims to territories situated outside the indicated boundary. This means indirect recognition of the previously existing rights of Poland to the territories situated to the east of the new frontier[49].

What poses problems in this concept is the determination of a specific moment of the rebirth of statehood. Some representatives of the doctrine incline towards the date of 11 November 1918, which was the first day after partitioning powers were driven out of Warsaw, and it symbolised the recreation of the Polish authority. There are proponents of the day of 14 November 1918 as the final process of taking over authority by Józef Piłsudski from the Regency Council and the day of the issuance of the decree on the provisional government and the future Legislative Sejm, or finally, of the decree of 22 November 1918 on the assumption of authority by the Intermediary

48 Journal of Laws, Dz. U. RP 1921 no. 44, item 267.

49 Hubert, *Odbudowa Państwa Polskiego jako problem prawa narodów*, 15.

Chief-of-State, constituting the first Polish constitution of the period following the partitions, though personally connected with the person of Piłsudski[50].

5. The approach of the national judiciary to the issue of Polish statehood

The Polish judiciary advocated the concept of the continuity of the Polish State, though not unequivocally.

In the ruling of the Second (Criminal) Chamber of the Supreme Court of 17 October 1919 concerning the activity of an agent of the German secret police in 1915, the court considered whether the Polish State existed in that period. It then concluded that the State separateness of the Kingdom of Poland had never died out in the perception of the nation, nor under international law. The Supreme Court emphasised that since 1815 the Polish State had also existed – the Kingdom of Poland – though in a union with Russia but possessing its own statehood in the light of international law[51].

In turn, in the ruling of 29/30 September 1922, the Second (Criminal) Chamber of the Supreme Court held that the recognition of the collapse of the Polish statehood after the Third Partition and the treatment of Poland as a new State as of 1918 had been a legal error. The collapse of the highest authority or the conquest of territory does not yet determine the collapse of the State. States collapse when the population loses the sense of identity – the sense of separateness in the face of a foreign invasion, when it gives consent to the new order, tradition, and the permanent will to pursue desires, beliefs, forms of life, language, etc. disappears[52].

In turn, the First (Civil) Chamber of the Supreme Court in the ruling of 11 May 1928 concerning the confiscation of the property of insurgents assessed that the actions of the Russian authorities had been based on violence (force) on the part of victorious Russia in the battle against the Polish party. Hence, upon the regaining of independence, relations of private law created illegally had collapsed, and the rights and titles of the legal owners had been

50 Hubert, *Rozbiory i odrodzenie Rzeczypospolitej. Zagadnienia prawa międzynarodowego*, 213. Cybichowski, *Polskie prawo państwowe na tle uwag z dziedziny nauki o państwie i porównawczego prawa państwowego*, 206.

51 See: the ruling of the Second Chamber of the Supreme Court of 17 October 1919, [in:] *Collection of the Rulings of the Supreme Court, the rulings of the Second (Criminal) Chamber the year 1919*, (Warszawa) 132-143.

52 See: the ruling of the Second Chamber of the Supreme Court of 29 and 30 September 1922, [in:] *Collection of the Rulings of the Supreme Court, the rulings of the Second (Criminal) Chamber the year 1922* (Warszawa), 628-634.

revived, provided that they had not lost them as a result of the newly enacted law in the free Polish State[53].

The Supreme Court ruled similarly way on 14 February 1930, emphasising that the limitations period of claims could not run over the whole period of partitions[54].

In the ruling of 9 January 1931, the First (Civil) Chamber of the Supreme Court confirmed the previous rulings, thus explaining that this did not apply to situations when the current owner might refer to the title acquired in good faith (the property had not come directly from Russian confiscation)[55].

A certain discrepancy is visible in those rulings. While the Second (Criminal) Chamber of the Supreme Court argues for the continuity of Polish statehood, the First (Civil) Chamber softens that stance. It namely allows for the possibility of the loss of property under the new legal order.

However, the role of civil jurisprudence decreased upon the entry into force of the Act of 18 March 1932 on a confiscated property by the former governments of the partitioning States from the participants in battles for independence (Journal of Laws – Dz. U. RP no. 24, item 189), which set out the requirements for and the scope of restitution.

6. The stance of the Allied Powers: recognition and treaty solutions

Also, international recognition is important for the process of the constitution of a State. This is an institution of international law, which was indeed known in the international reality, though in the history of States it was not widely applied[56]. This followed from their monarchical essence. Hereditary succession to the throne did not require recognition. The ruler namely had divine legitimisation. In States with elective rulers, the issue of exercising authority was an internal matter. The need for recognition appeared in the area of authority only along with the change of the form of authority or

53 See: the ruling of the First Chamber of the Supreme Court of 11 and 12 May 1928, [in:] *Collection of the Rulings of the Supreme Court, the Rulings of the First (Civil) Chamber the year 1928 (the first term)* (Warszawa), 153-158.

54 See: the ruling of 14 February-4 March 1930, [in:] *Collection of the Rulings of the Supreme Court, the Rulings of the First (Civil) Chamber, the year 1930* (Warszawa), 81-83.

55 See: the ruling of 9-20 January 1931 r., [in:] *Collection of the Rulings of the Supreme Court, the Rulings of the First (Civil) Chamber, the year 1931* (Warszawa), 18-19.

56 The period of the 15th-17th centuries was familiar with three precedent cases. Those were: gaining independence by the Netherlands (1648), Portugal becoming independent from Spain (1658), separating of the Swiss Confederation from the German Empire (1648).

of the ruler's title, which could not be inferred from the essence of that State's sovereignty[57]. A different case was the change of the form of statehood from a kingdom into a republic. Recognition was then required for the new State formula rather than for the acceptance of authority[58].

Recognition became rooted in international law as a result of France's foreign policy, which was first to recognise the declaration of independence of thirteen English colonies in North America and supported them in their fight for independence. It took place in an unambiguous way. And it was reciprocated. When the US ambassador to Paris, who asked for instructions when the revolution was spreading and taking over power in the capital and in provinces, he received a letter from Jefferson, the then Secretary of State, in which the latter wrote: „It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared"[59]. Consequently, when on 17 February 1793 the French minister plenipotentiary in Philadelphia notified Jefferson that the French nation established a republic, the note was accepted[60].

In the nineteenth century, the process of the strengthening of the institution of the recognition of States began. This was since the process of establishing States ceased to be an incidental event, though the said events took place in colonies. Europe functioning to the rhythm of the so-called „concert of the superpowers" wanted to be in control of those processes; hence, recognition received a constitutive meaning. A State did not exist without the recognition of other States.

Such a solution did not stand the test of time. And at the beginning of the twentieth century, it became a declarative formula. It was ambivalent for the establishment of a State. It merely indicated the attitude of external subjects, including their obligation to apply international law concerning the new State.

In this light, from the perspective of the institution of recognition, the attitude of the Allied Powers towards Poland needs to be recognised as ambiguous, or maybe even contradictory. Initially, the very act of 5 November 1916 led to actions unfavourable to Poland. In Poland's perception, the Allies acted rather in the interest of their ally – Russia. A certain turn was

57 Johen Abraham Frowein, „Die Entwicklung der Anerkennung von Staaten und Regierungen im Völkerrecht" *Der Staat*, No. 11 (1972), 156.

58 Frowein, *Die Entwicklung der Anerkennung von Staaten und Regierungen im Völkerrecht*, 157. See also: Moore, *Digest of International Law*, Vol. I, 41-45. Moore describes it however as a *de facto* recognition of the government.

59 Moore, *Digest of International Law*, 120.

60 Ibidem, 121.

brought about by President Wilson's peace note of 18 December 1916, in response to which the Allied Powers indicated as the requirement for the future peace also the reorganisation of Europe based on a system respecting the rights of all nations and on the fundamental right of free economic development of all peoples. They also noted the necessity to liberate Slavs from foreign rule.

Such enigmatic nature of treatment prevailed practically until the Russian March Revolution. Only London accepted the statehood of future Poland (with Polish territory having access to the sea), whereas France gave Russia a free hand, concluding with her the treaty of 11 March 1917, where she received for that concession Russian support for the acquisition of Lorraine and Alsace.

In turn, the United States of America recognised the right of the Polish nation to self-determination. The representatives of the doctrine assess that stage as indirect recognition. Only after joining the war did the United States take a clear stance in the Polish cause. The USA confirmed the necessity of establishing an independent Polish State, the guarantees of territorial inviolability, and access to the sea. This was formally expressed in the famous point 13 of President Wilson's address to Congress. This was of great significance for the genesis of the State, as making peace by America depended on that.

The new reality, including the adoption of a treaty of peace of 3 March 1918 concluded between Germany, Austria-Hungary, and their allies and Soviet Russia (the so-called Treaty of Brest), prompted a change of the policy pursued by London and Paris[61]. At the conference in Versailles on 3 June 1918 the Prime Ministers of France, England, and Italy advocated the establishment of an independent Polish State with access to the sea as one of the requirements for just peace in Europe. By the way, the Polish State had already existed at that time, at least *de facto.*

Recognition in international law has two formulas: explicit and implicit. In a manner envisaged by international law, the former consists of submitting a declaration on recognition (e.g., a public declaration of a State representative, a diplomatic note, a provision in a treaty). The latter consists in entering into collaboration with such a State in a manner envisaged for the collaboration of States (the exchange of ambassadors, the conclusion of a treaty). From this perspective, one sees the contradictions mentioned above.

Firstly, during the preparations of the activities of the peace conference, there existed three groups of States: allied States, enemy States, and newly established States (at different stages of establishment). Out of the different ideas concerning the shape of the conference, the concept proposed by France won (considering the American memorandum), assuming that, aside from

61 Cf. Komarnicki, *Polskie prawo polityczne (Geneza i system)*, 16 et seq.

allied and enemy States, also neutral, newly established, and nascent States should be allowed to participate in sessions. Allowing Poland to participate in sessions, which constituted implicit recognition, took place on 23 January 1919. Therefore, the concept is right that at the peace conference, Poland was represented by two delegates: Paderewski and Dmowski. Their activity focused on the territorial shaping of the State, and not on the formal constitution thereof.

Secondly, the war with Germany was ended with the Peace Treaty of Versailles. It is noteworthy that Poland is a party to that treaty as one of the Allied States. This means implicit recognition by all parties to the treaty. The very formula of the treaty suggests even the previous existence of the State because as a State-signatory of peace, it had to be in a state of war with Germany.

Thirdly, in Article 87 of the Treaty of Peace, Germany fully recognised the independence of Poland[62]. The literature on the subject perceives it as formal, explicit recognition of the State[63]. This is confirmed by jurisprudence[64].

We will not come across such recognition in other treaties. We rather deal with silent recognition. In the case of Russia – the exchange of diplomatic representatives.

The above overlaps with quite a peculiar further practice. Namely, notes on recognition appeared. Accordingly, France recognised Poland in the note of the French Minister of Foreign Affairs of 23 February 1919. In turn, the note of the British Mission in Warsaw of 25 February 1919 concerns the recognition by the HRH government of the Polish government and expresses content with Poland joining the circle of the nations of the world. Likewise, the Italian note of 27 February 1919. In turn, Japan, by the note of 22 March 1919, notified the recognition by the imperial government of Poland as an independent State.

The said practice is perfectly summarised by the provision of the introduction to the so-called Little Treaty of Versailles, concluded for the

62 „Germany, in conformity with the action already taken by the Allied and Associated Powers, recognises the complete independence of Poland (…)". For the content, see: Journal of Laws – Dz. U. 1920 no. 35 item 200. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19200350200/O/D19200200_PL.pdf. [accessed: 19.07.2018].

63 Stanisław Kutrzeba, *Polskie prawo polityczne według traktatów*, Vol. I, *Traktaty – Suwerenność – Terytorjum – Ludność – Ograniczenia (Mniejszości – Wolności handlowe)* (Kraków: Gebethner i Wolff, 1923), 32.

64 The judgment of the Prussian Tribunal for Disputes over Powers of 10 March 1928.

implementation of the provisions of Article 93 of the Peace Treaty of Versailles, in which we read that the Allied Powers restore to the Polish nation independence of which it had been unjustly deprived[65]. This is related to the content of a letter to Paderewski, in which Poland is asked to sign the treaty at issue *on the occasion of the confirmation of her recognition as an independent State*[66].

7. The issue of State boundaries

The issue of Polish boundaries was a subject of the Versailles Conference[67]. Stances taken by the Principal Powers were different, in particular as regards Danzig, the land of Teschen, and the extent of the west boundary. Article 87 of the Treaty of Versailles sorted out the said matters. It defined only a certain part of the boundary by indicating respective territories. Subparagraph 3 provided, however that „the boundaries of Poland not laid down in the present Treaty will be subsequently determined by the Principal Allied and Associated Powers"[68]. For that purpose, the subsequent subparagraph announced the constitution of a commission composed of seven members (the Council of Ambassadors). The said provision is criticised because boundaries should be indicated by the State concerned. The other States may only recognise them.

In the East, the territory of Poland was at first formally recognised to the West from the Curzon line.[69] On the remaining territory, feuds and fights

65 Treaty of Peace between the United States of America, the British Empire, France, Italy and Japan and Poland. We read there: „(…) Allied Powers have by the success of their arms restored to the Polish nation independence of which it had been unjustly deprived". http://treaties.fco.gov.uk/docs/pdf/1919/TS0008.pdf. [accessed: 19.07.2018] See also: Zygmunt Cybichowski, *Encyklopedja prawa publicznego (konstytucyjnego, administracyjnego i międzynarodowego*, Vol. II (Warszawa: Instytut Wydawniczy „Biblioteka Polska", 1926), 626, (entry Poland).

66 http://treaties.fco.gov.uk/docs/pdf/1919/TS0008.pdf. [accessed: 19.07.2018].

67 Cf. Wacław Komarnicki, „Geneza terytorium państwowego Polski ze stanowiska prawa narodów" *Rocznik Prawniczy Wileński*, Vol. I (1925), 255.

68 See also: Journal of Laws, Dz. U. 1920 no. 35 item 200. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19200350200/O/D19200200_PL.pdf. [accessed: 19.07.2018].

69 The line determined by the Council of Ambassadors embraced the eastern boundary of the Kingdom of Poland with Białystok, excluding the Suwałki Governorate. It was not accepted by Poland. See also: Cf.

with Ukrainians and Russians went on. The commission of powers also interfered with those matters.

In turn, the aforementioned Treaty of Brest concluded between the Central States and Russia contained in its Article III the provision that the territories to the west of the line determined in it would not be subject to Russian authority. In turn, the central powers made a proviso that they would decide on the status of those lands after consultations with the people residing in those territories. The treaty at issue was ratified on 16 March and entered into force on 29 March 1918. However, in the Treaty of Versailles, the Treaty of Trianon, and the Treaty of St. Germain, Austria, Germany, and Hungary relinquished their rights arising from the Treaty of Brest[70].

In the end, the said territory was subject to Polish debellation. The following treaties legally indicated boundaries: (1) the Preliminary Peace Treaty between Poland and Russia and the Ukrainian Socialist Republic of 12 October 1920, which entered into force on 2 November 1920; (2) an armistice agreement signed at the same time. The former indicated in Article I State boundaries, and the latter announced the retreat of armed forces in accordance with those boundaries. Only on 18 March 1921 was a proper peace treaty concluded in Riga, and in Article 2 thereof the boundary was indicated, and subsequently through the protocol of 31 July 1924, its final indication took place. It is noteworthy that, on that basis, the boundaries of Poland also embraced Central Lithuania, which the Republic of Lithuania did not recognise[71].

As regards the south-eastern boundaries of Poland, the treaty concluded with Austria in Saint Germain was important. It envisaged in Article 91 that Austria renounced territories in favour of the Principal Allied and Associated Powers situated outside the new frontier of Austria so far as they had not been assigned to any State[72]. Although this did not conform to the Treaty of Riga but the latter, because it had been concluded sooner, excluded the effectiveness of those last provisions concerning the territory of Poland. Anyway, Poland ratified the Treaty of Saint Germain as late as 5 November 1924.

Komarnicki, *Geneza terytorium państwowego Polski ze stanowiska prawa narodów*, 258 et seq. Wacław Komarnicki, „Odbudowa państwowości polskiej na ziemiach wschodnich" *Rocznik Prawniczy Wileński*, Vol. III (1929): XXIV

70 As a result of the Treaty of Brest, the Council of People's Commissars cancelled 13 agreements concluded by the Russian tsar in relations to the partitions of Poland.

71 On determining the boundary with Lithuania, see: Komarnicki, *Odbudowa państwowości polskiej na ziemiach wschodnich*, XXXVI et seq.

72 For the content see: http://treaties.fco.gov.uk/docs/pdf/1919/TS0011.pdf. [accessed: 19.07.2018].

The question of the boundary with Czechoslovakia in the region of Teschen Silesia, Orawa, and Spisz was to be regulated by way of a plebiscite. It, however did not take place; therefore, following the investigation of the League of Nations into the matter, the said issue was settled by the decision of the Council of Ambassadors. It was legally solved by the bilateral protocol of 6 May 1924[73].

The matter of the boundary in East Prussia and Silesia was based on plebiscites. The legal basis for holding the said plebiscites was provided by Article 88 (Silesia) and Articles 94-97 (East Prussia) of the Treaty of Versailles. Following the plebiscite and Silesian uprisings, the Allied Powers divided Upper Silesia by the decision of the Council of Ambassadors of 20 October 1921. In turn, under the influence of England and the United States, Danzig was excluded from Polish territory, establishing by virtue of Article 102 of the Treaty of Versailles the Free City of Danzig „placed under the protection of the League of Nations"[74].

Eastern territory subject to the authority of the Polish State was formally recognised by virtue of the decision of the Council of Ambassadors of 15 March 1923 as the implementation of the disposition provided by Article 87 of the Treaty of Versailles[75]. In this way, also the provisions of the aforementioned Article 91 of the Peace Treaty of St. Germain were implemented. This was necessary, as the treaty of 10 August 1919 signed at Sevres, indicating the boundaries between Poland, Romania, Czechoslovakia, and the Kingdom of Serbs, Croats, and Slovenes, did not enter into force[76].

It is however noteworthy that for the existence of a State, the issue of a specific indication of boundaries is of no significance[77].

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73 Journal of Laws – Dz. U. 1925 no. 133, items 950, 951, 952. For the content see: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19251330952/O/D19250952.pdf. [accessed: 19.07.2018].

74 For the content see: Journal of Laws - *Dz. U.* 1920 no. 35 item 200. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19200350200/O/D19200200_PL.pdf. [accessed: 19.07.2018].

75 Komarnicki, *Odbudowa państwowości polskiej na ziemiach wschodnich*, XXV.

76 Treaty between the Principal Allied and Associated Powers and Poland, Romania, the Serb-Croat-Slovene State and the Czech-Slovak State related to Certain Frontiers of those States. http://treaties.fco.gov.uk/treaties/treatyrecord.htm?tid=1855. [accessed: 19.07.2018].

77 Cf.: Komarnicki, *Geneza terytorium państwowego Polski ze stanowiska prawa narodów*, 255 et seq.

8. The succession of debts of the partitioning States

It was assumed during peace conferences that the succession of a part of debts of the partitioning States was to be regulated by way of a treaty. But this was not the case. Despite that, Poland finally managed not to assume responsibility for parts of German, Austrian and Russian debts.

Accordingly, the issue of the succession of German debts was regulated by Articles 92 and 254 of the Treaty of Versailles. Since during negotiations, the concept of the so-called odious debts[78] was applied, which by Article 92 embraced the costs of the German colonization, one managed to limit them[79]. The whole issue was resolved in bilateral relations by issuing mutual bills (compensation).

Austrian debts were regulated by Article 203 of the Peace Treaty of Saint Germain concluded with Austria[80]. Based on Article, each State arising from the dismemberment of the Austro-Hungarian Monarchy assumed responsibility for a portion of the debt that was in existence on 28 June 1914. The details of proceedings, including the issue of war debts, were regulated in the subsequent articles. The matter was finally resolved according to the Hague Agreements of 1930.

The issue of Russian debts was resolved by the Treaty of Peace between Poland, Russia, and Ukraine of 18 March 1921 (the Treaty of Riga), in which Article XIX Russia and Ukraine released the Polish party from *debts and all obligations of the former Russian Empire*[81].

9. The succession of nationality

The establishment of a State is also related to the issue of determining the relation between individuals residing in the State territory and between the State organisation. The said relation is called nationality.

78 To put it simply, one may say that the concept of odious debts is related to the rejection of responsibility for debts incurred by the regimes for purposes morally unacceptable. It emerged in the 1920s and survived until now. Such debts embrace *inter alia* debts incurred by the regime to fight insurgents who may refuse to pay them off after they assume power in the State.

79 For the content see: Journal of Laws – Dz. U. 1920 no. 35 item 200: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19200350200/O/D19200200_PL.pdf. [accessed: 19.07.2018].

80 For the content, see: http://treaties.fco.gov.uk/docs/pdf/1919/TS0011.pdf. [accessed: 19.07.2018].

81 For the content see: Journal of Laws – Dz. U. RP 1921, no. 49, item 300. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19210490300/O/D19210300.pdf. [accessed: 19.07.2018].

There exists a principle in international law that issues concerning the acquisition or loss of nationality are determined by the State itself in acts of its internal law. This was confirmed by the Advisory Opinion of the Permanent Court of International Justice of 7 February 1923 concerning nationality decrees issued in Tunis and Morocco. International law merely requires the conformity of such provisions to the objective principles arising from the international order.

However, this kind of solution is not satisfactory for the process of the establishment of a State on a part of territories of other States, as was the case with Poland. This would lead to a situation where between the establishment of a State and the issuance of a proper legal act, persons residing in the territory of that State would be either foreigners or even stateless persons. Hence, international law introduces two constructs, which are to solve real problems of this kind. Those are the principle of automatism and option.

The principle of automatism consists in granting the nationality of a nascent State to every person residing in its territory. Potential collisions of the new nationality with the previous one are solved in international agreements.

The option, in turn consists in making a choice. It has a future effect. It means that the person interested may withdraw the effect of the acquisition of the nationality of the new State by a declaration filed in accordance with the procedure and deadline specified by law.

As for international legal solutions, the issue of Polish nationality is regulated at a level of an agreement by the treaty of 28 June 1919 concluded between the Principal Allied Powers and Poland (the so-called Little Treaty of Versailles). Persons of German, Austrian, Hungarian, or Russian nationality, residing in the Polish territory on 10 January 1920, were recognised as Polish nationals. Also, their children, even those who were not residents in Polish territory, were recognised as Polish nationals. Finally, persons who were not nationals of any State, resident in Polish territory, were recognised as Polish nationals.

The solution, however contained provisos related to the Treaty of Peace with Germany (Article 91) or Austria (Article 70), where not only was the principle of the acquisition of nationality *ipso facto* based on residing in the territory granted to nascent Poland was adopted, but also the possibility of option was envisaged for persons over eighteen years of age within two years after the coming into force of the Treaty [Article 91(3)][82].

The option was also made possible by Article 3 of the Little Treaty of Versailles. It also granted Polish nationality to German, Austrian, Hungarian,

82 For the content see: Journal of Laws – *Dz. U.* 1920 no. 35 item 200. http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19200350200/O/D19200200_PL.pdf. [accessed: 19.07.2018].

and Russian nationals resident in Polish territory on the day of its entry into force. It, however allowed persons who were over eighteen years of age to opt for any other nationality which might be open to them. In turn, it placed an obligation on the persons who have exercised the right to opt to transfer their place of residence to the State for which they have opted[83].

In turn, the issues of nationality in territories acquired as a result of plebiscites or debellation were regulated by separate peaceful solutions. Accordingly, regulations concerning the nationality of the residents of Teschen, Spisz, and Orawa were contained in the decision of 28 July 1920 adopted by the Conference of Ambassadors regarding the status of those territories. It was related to possessing domicile or indigenisation at the critical date (1 January 1914 and 1 January 1908). Interested parties also concluded proper agreements. In turn, in eastern territories, adequate international norms were contained in the Preliminary Peace Agreement signed at Riga on 12 October 1920[84] and in the Treaty of Peace of 18 March 1921[85].

And accordingly, the Preliminary Treaty placed an obligation on the parties to provide in the treaty of peace for provisions concerning option (Article III). In turn, the treaty of peace determined a specific scope of that option (Article VI). It distinguished between persons entitled to the right of option as regards Russian or Ukrainian nationality and persons who were not entitled to option. Moreover, it assigned some other nationality to those who did not exercise the right of option. This complicated construct allowed to adjudicate solely by means of interpretation who possessed Polish nationality in the light thereof. Those were persons who had not exercised the right of option and fulfilled the treaty criteria: were over eighteen years of age, resided in Polish territory at the critical date (the day of ratification – 30 April 1921), were Russian nationals on 1 August 1914, were registered in the census of the former Kingdom of Poland or were entitled be registered in that way, or were registered in town or rural communes[86].

International solutions were complemented by the Polish Citizenship Act of 31 January 1920.

10. Summary

As is usually the case with international law, it is difficult to unequivocally assess the legal and structural issues concerning factual events after such a long time. Also, international practice proves that despite the existence

83 For the content see: http://treaties.fco.gov.uk/docs/pdf/1919/TS0008.pdf. [accessed: 19.07.2018].

84 For the content see: Journal of Laws – Dz. U. RP 1921 no. 28 item 161.

85 For the content see: Journal of Laws – Dz. U. RP 1921, no. 49, item 300.

86 For the content see: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19210490300/O/D19210300.pdf. [accessed: 19.07.2018].

of diverse patterns and standards of conduct, political reality mixes them, and the conduct of States is based on choosing solutions and pursuing their interests.

Also, the evolution of international law, including the introduction of several legal standards of a peremptory character, that is to say, in this case, strengthening the existing statehood, including a prohibition on annexation, is not conducive to an unequivocal settlement of the issue under discussion.

This also overlaps with the specificity of the process of the emergence of a State. At the beginning of the twentieth century, the establishment of statehood was not treated yet as a legal process regulated by international law. It was defined as a historical event in the political life of a nation. It was considered that political forces, freedom, the will and power of peoples, tribes, and nations were more active in the said process. And those are rather intra-state factors[87]. Only after the emergence of a State did the existing rules of order become binding upon it. And it was international law that determined on what conditions and in what shape a State would join the developing international community[88]. The institution of recognition served that purpose, which was defined as a guarantee given to a State that it would be treated as a politically independent organism within the community of nations. Indeed, the rights and attributes of sovereignty belong to a State regardless of recognition, but only through recognition can they be exercised. Regular international relations may only exist if States are mutually recognised[89].

Also, the very practice of political centres, both Polish and foreign ones, is not unequivocal as regards the legal aspects.

This leads to the conclusion that one should describe the said process – which as a historical process deserves to be cherished in the memory of the Polish nation – thus exposing its legal nuances and curiosities, especially in foreign languages and abroad, but at the present stage, one does not need to make unequivocal assessments.

87 Bluntschli, *Das moderne Völkerrecht der Zivilisierten Staaten als Rechtsbuch dargestellt*, p. 72. Likewise, see e.g.: Komarnicki, *Polskie prawo polityczne (Geneza i system)*, p. 8.

88 Bluntschli, *Das moderne Völkerrecht der Zivilisierten Staaten als Rechtsbuch dargestellt*, p.72.

89 Moore, *Digest of International Law*, p. 72. See also diplomatic documents contained therein.

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