Occupation or Seizure: A Dispute Between Polish Lawyers as to the Legal Status of the German Conquest of Polish Territory

Joanna Lubecka

ORCID ID: 0000-0002-2965-7925
Jesuit University Ignatianum in Kraków, Institute of National Remembrance

Abstract

The eminent Polish lawyers, Profs. Ludwik Ehrlich and Antoni Peretiatkowicz, who were called upon as experts in international law in trials before the Supreme National Tribunal, concluded that the attack on Poland did not bear the hallmarks of war in a legal sense; the rule of the Reich in the Polish lands was not so much an occupation, but more an "unlawful seizure of land through violence and coercion." This legal qualification of German aggression against Poland fundamentally changes the rights and obligations of the invader (not occupier) and the rights of "the population of a seized area." The aim of the paper will be to present the arguments of lawyers in the discussion on the legal status of Germans as invaders and, on the other hand, citizens of the Polish state during the Second World War. Why did experts refuse to recognize the "state of occupation," and what implications could such a legal qualification have? What arguments were used by opponents of such a construction?

Totalitarian and 20th Century Studies, vol. 5
ISSN 2545-241X, pp. 412–427

In as early as September 1945, the eminent Polish lawyer Alfons Klafkowski warned that "the very phrase 'the German occupation of Poland through the lens of international law' is fraught with pitfalls" (Klafkowski, 1946, p. 47). The aim of this article is to present a very interesting postwar dispute between Polish lawyers as to the legal status of Polish territory invaded by the Germans in 1939, and thus as to the spatial and temporal scope of possible application of the 1907 Hague Regulations respecting the laws and customs of war on land, which set forth the rights and duties of both the occupier and the population of the occupied lands (Convention respecting the Laws and Customs of War on Land, 1907, Section III "Military Authority over the Territory of the Hostile State"). The parties to the dispute were the most distinguished representatives of the legal sciences who specialized in international criminal law (then known as the law of nations) with a particular emphasis on the law of armed conflict. These included Alfons Klafkowski, Stanisław Piotrowski, Leszek Kubicki and Józef Giebułtowicz, as well as Ludwik Ehrlich and Antoni Peretiatkowicz, who also served as experts in trials before the Supreme National Tribunal.

Before proceeding to discuss the lawyers' positions on the status of Polish lands, I would like to make a few legal comments. Firstly, the state of occupation is not only a legal, but primarily a factual situation, hence the opinion of lawyers – especially *post factum* – was not that crucial for its evaluation. Secondly, the differentiation made by the Germans between "annexed Eastern lands" (*eingegliederte Ostgebiete*) and "occupied Polish lands" (*Generalgouvernement für die besetzten polnischen Gebiete*) did not constitute a legal framework for the factual situation. Its assessment is based on international law, not the terminology of German decrees. Thirdly, it should be borne in mind that although neither wartime opinions (of German lawyers) nor postwar sentiments could alter the facts on the ground, the German qualification of the time of the legal status of Polish territory (hence the dispute whether it was an occupation or a seizure) had a tangible influence on the behavior of German officials and administrators. What mattered was their belief that they were acting on an occupied or seized territory, and consequently whether they were bound by the Hague Regulations or not.

Since, as I have emphasized above, the legal status of an invaded territory depends on the factual situation, not the legal one – though the latter determines the behavior of the invaders, it does not affect the assessment of their actions – why should we consider the opinions of Polish lawyers, especially those who were called upon as experts in trials before the Supreme National Tribunal, if they had little bearing on the sentence?

It seems that the lawyers' arguments are worth presenting for at least two reasons. Antoni Peretiatkowicz and Ludwik Ehrlich had a different opinion on the legal status of Polish lands invaded by the Germans than most of their contemporaries in the profession. These experts

concluded that the attack on Poland did not bear the hallmarks of war in a legal sense; the rule of the Reich in the Polish lands was not so much an occupation, but more an "unlawful seizure of land through violence and coercion" (Ehrlich, 1946, p. 81). This legal qualification of German aggression against Poland fundamentally changes the rights and obligations of the invader (not occupier) and the rights of "the population of a seized area." It is worth considering why the aforementioned experts refused to recognize "the state of occupation" and instead propounded the thesis of *debellatio*, that is complete subjugation.

The second reason for presenting the titular dispute is postulative in nature: when describing the history of the Second World War, and particularly German crimes committed in the Polish lands, it would be advisable to pay attention to the meaning of legal terms and the proper classification of war crimes, as well as to make every effort to use precise language. As a historian myself, I fully agree that researchers of the past have a right to apply some terms in a broader sense than that contained in their legal definition (e.g. "genocide"), but I would like to note that imprecise and too broad application of the term "occupation" overly simplifies the description of the policies of the German invader towards the Polish lands and blurs the difference between the legal orders in the annexed territories and the General Government, and consequently makes it impossible to specify in sufficient detail to what extent the occupier/invader violated international law. The inclusion of legal categories can also prevent the generalization and mythologization of the history of the war.[1]

Occupatio bellica and *debellatio*

The term "occupation" as widely used by historians rarely corresponds to the narrow legal definition, and it is the latter that concerns the case in question, that is the legal qualification of the status of Polish lands (let us add that this does not refer to the annexed territories – *eingegliederte Ostgebiete*). Belligerent occupation (*occupatio bellica*) of a given territory

1 Many historians, especially regionalists, conduct very exhaustive and extremely valuable research on the occupant's policies in a limited area. Their findings are indispensable for the writing of historical monographs and syntheses. In many cases, however, the policies of the occupier/invader (especially as regards administrative management) were subject to the Hague Convention (IV). Lack of reference to the broader aspects or the legal framework of the occupation often leads to repeating generalities about unlawful requisitions/contributions of food in the countryside and the illegal collection of taxes (in reality, both are the rights of the occupant, though the proportionality principle must be taken into account). Fully conscious that the Germans violated the Hague Law, the authors should nevertheless present the scale of these crimes basing themselves on the provisions of the Hague Convention.

is understood to be a temporary situation following the armed seizure of said territory and the imposition of authority of the invading power. Pursuant to Art. 42 of the Hague Regulations, a territory is considered occupied "when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised" (Convention respecting the Laws and Customs of War on Land, 1907, Section III "Military Authority over the Territory of the Hostile State"). Occupation, then, is only temporary, and the occupying power solely administers the occupied territory. It has clearly defined obligations and rights with regard to the native population and has to observe them. Art. 43 of the 1907 Hague Convention states unequivocally:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country (Convention respecting the Laws and Customs of War on Land, 1907, Section III "Military Authority over the Territory of the Hostile State").

The occupying authorities have to ensure among others that the lives and honor of persons, family rights and private property, as well as religious freedoms are respected. Pillage is formally forbidden, while all works of art (including public ones) are protected. All taxes, contributions and requisitions are formally regulated and have to stay in keeping with the proportionality principle: the occupant has to balance the necessity to meet his military needs with the demands of humanitarianism (Kwiecień, 2013, p. 67; Marcinko, 2014b, p. 59). Provisions concerning occupation are applicable regardless of whether it resulted from legitimate use of force (e.g. in self-defense) or a violation of international law – an armed aggression (Marcinko, 2014a, p. 37). In conclusion, *jus ad bellum* (right to go to war) is not correlated with *jus in bello* (proper conduct in war). A violation of the right to go to war does not absolve from the obligation to observe the norms of proper conduct in war.

Debellatio, i.e. complete subjugation, is final in character – there are no grounds at the time for expecting that the situation of the vanquished state would change. In order for *debellatio* to occur, not only must a given territory be seized and garrisoned, but also the enemy forces must be destroyed and the government of the conquered state deprived of real power. The defeated enemy ceases to exist as an entity recognized by international law and, as the vanquished party, has no ability to take any legal action (von Treskow, 1965, pp. 112–114). Through a change of sovereign in the seized territory the aggressor acquires full power over the conquered

lands and population, but he has no right to annex the territory before the end of the war, that is before specific conditions for termination of the conflict are settled (Peretiatkowicz, 1946, p. 675). The relations between the conqueror (the new sovereign) and the conquered population are no longer governed by international law, but by the national law of the new sovereign. The Hague Convention no longer applies, but the population in the subjugated lands is still protected by other rules of war (*jus in bello*) resulting from customary law and the law of nations (Kilian, 1977, pp. 130–131). It has to be emphasized, however, that since the signing of the Kellogg–Briand Pact of 1928, in which signatory states renounced war as an instrument of national policy, any aggression constitutes a violation of international law. A war of aggression, then, gave no legal entitlement to the acquisition of territory.

Legal concepts of the Germans as to the status of Polish lands

German analyses and opinions concerning the status of Polish lands invaded by Germany in 1939 are important for several reasons. Firstly, Polish lawyers often referenced them; secondly, they perfectly show the equivocal position taken by German experts on international law; finally, they prove that – irrespective of the opinions of jurists (and sometimes in stark contrast to them) – the German authorities adopted a pragmatic approach to this issue, which was dictated by their contemporary policies.

Considering the legal status of the lands invaded in September 1939, German lawyers differentiated between two time periods: from 1 September 1939 to 8 July 1940, when the situation bore all the hallmarks of *occupatio bellica*, and from 8 July 1940 to the end of the war, when *debellatio* occurred.[2] On 8 July 1940, on orders from his Führer, Governor Hans Frank issued an ordinance removing the phrase *für die besetzten polnischen Gebiete* ("for occupied Polish territories") from the name of the General Government (Datner, 1967, p. 63).

The legal status of Polish lands invaded by the German troops was a frequent subject of debate for the German International Law Committee (Ausschuss für Völkerrecht), whose members ultimately failed to present a unified stance.[3] Some were of opinion that *debellatio* should be applied to the General Government, while others doubted whether – should such

2 The differentiation was made by Alfons Klafkowski on the basis of German legal acts (Klafkowski, 1946, pp. 47–49).

3 Members or collaborators of the International Law Committee included esteemed professors, such as Gustav Adolf Walz, Viktor Bruns, Friedrich Giese, Carl Heyland, Helmut James Graf von Moltke, Ernst von Weizsäcker, Axel von Freytagh-Loringhoven, Walter Schätzel; for more cf. Madajczyk, 1984, p. 18.

legal status be accepted – the "exclusion" of applicability of international law before *debellatio* had occurred could be considered legal (Migdał, 2017, pp. 130–132; Toppe, 2008, pp. 409–410). Among the opponents of the *debellatio* thesis was Prof. Ernst Schmitz, who argued that it would be a violation of the Hague Convention because Poland's allies were still fighting. Helmut James Graf von Moltke also voiced objections:

> I have to confess that I do not understand how we could renounce the Hague Convention in the occupied lands. As long as the war continues and as long as Poland's allies are fighting we are bound to adhere to the principles included in the Convention, and Poland is no exception (Toppe, 2008, pp. 409–410).

He also raised the issue of the Polish government-in-exile, which was recognized not only by the Allies, but also by neutral states (p. 20). In his seminal work *Bau und Gefüge des Reiches*, Prof. Ernst Rudolf Huber, one of the most eminent experts on German law and a leading lawyer of the German Reich, thus commented on the removal of the phrase *für die besetzten polnischen Gebiete* from the name of the General Government:

> In this way, the last mention was erased of the fact that this territory could still be the territory of the Polish state under German wartime administration in accordance with the concept of *occupatio bellica* known from international law (Huber, 1941, p. 45).

Some German lawyers were undoubtedly aware of the brutality of the German occupation of the Polish lands, and thus of the violation of the rights of the occupied population and the failure to comply with the obligations of the occupant set forth in the Hague Convention. At the same time, however, they must have known that provisions of international law are not rendered null and void by the mere fact of their violation.

The opinion of German lawyers was thus summarized by Alfons Klafkowski: "even the National-Socialist interpretation of international law did not lend its support to the Weh–Klein thesis" by recognizing the validity of arguments against *debellatio* (Klafkowski, 1946, p. 103).

The Weh–Klein thesis mentioned by Klafkowski was propounded by two German lawyers and put into practice in the General Government despite doubts voiced by numerous experts. The first of its authors was Dr. Albert Weh, Head of the Legislation Office of the General Government (Leiter des Amtes für Gesetzgebung in der Regierung des Generalgouvernements), while the other was Dr. Friedrich Klein, Assistant Professor at the University in Frankfurt am Main. It seems that the high position in the administration of the General Government occupied by Albert Weh

since the end of September 1939 was not without its significance. Probably his *debellatio* thesis was adopted precisely because of its practicality, i.e. the compatibility of the legal concept and the challenges faced by the occupation authorities. On the basis of international law (citing particularly Alfred Verdross[4]), Weh argued that Poland was "completely subjugated" (*debelliert ist*), as "the existing order lost its effectiveness, and the state authority is challenged by the occupation authority" (Weh, 1943, p. 61).

In his considerations, Weh dismissed the problem of *besetzte polnische Gebiete*, arguing that it had no legal significance, and thus was not related in any way to *occupatio bellica* (p. 64). As a matter of fact, both authors passed over the removal of the aforementioned phrase; they considered it to be a nonbinding change of name, as *debellatio* had already taken effect in September with the cessation of hostilities (Klafkowski, 1946, p. 83). Their reasoning was as follows: Poland had ceased to exist, hence sovereignty over the seized territory was transferred to the Reich. From that moment onwards, the relation of the German Reich to the thus-far occupied Polish territory was governed by German national law, not international law, which automatically precluded the applicability of the Hague Convention (IV) (Weh, 1943, pp. 64–65). It is worth emphasizing that both legal constructions were formulated *ex post facto*, about a year after the German aggression against Poland.

As it has already been stressed in the introduction, while the concepts propounded by German lawyers could not alter the facts on the ground, during the war they nevertheless served as a foundation for guidelines prepared for officials of the General Government on the treatment of the Polish populace and its national assets.[5] Testifying during his Kraków trial in 1948, State Secretary of the General Government Josef Bühler made it plain that such was the interpretation passed on to the officials:

> Following *debellatio* in September 1939, the Polish state ceased to exist. Since the German administration of these lands was no longer that of an occupant – as I was informed – it was no longer necessary to observe the rules contained in the Hague Convention (Gumkowski & Kułakowski, 1967, p. 186).

In summary, the German legal construction concerning the change of status of the Polish territory from that of an occupied state to that of a completely subjugated state was politically motivated, and not based on

4 Prof. Alfred Verdross (1890–1980) was the most eminent Austrian expert on the law of nations.

5 The Hague Convention forbids confiscation of private property (Art. 46) and pillage (Art. 47), as well as seizure or destruction of works of art and science (Art. 56).

law, as admitted also by numerous German lawyers (e.g. Ernst Schmitz, Helmut James Graf von Moltke), though many of these opinions were not publicly disclosed (*nur für den Dienstgebrauch* – "for official use only") (Klafkowski, 1946, pp. 142–413).

An analysis of German documentation produced in the General Government, conducted during and immediately after the war by Prof. Klafkowski, allowed him to conclude that despite protest from some German lawyers who denied Poland the status of an occupied territory (the Weh–Klein thesis), the occurrence of *occupatio bellica* could actually be proved (p. 53). German lawyers and politicians did not cite the Hague Convention directly, but – as Klafkowski writes – an examination of legal acts issued by the German authorities allows us to "discern manifestations of the formal applicability of the Hague Convention" (p. 57). In May 1941, at a meeting of the aforementioned International Law Committee, Prof. Walter Schätzel – who was well acquainted with the realities of occupation in the Polish lands – unequivocally stated that "the Hague Convention is applied there" (Migdał, 2017, p. 131).

Arguments against the *debellatio* thesis were also supplied by the International Military Tribunal (IMT) in Nuremberg, which completely dismissed any consideration of the *debellatio* doctrine, as "it was never deemed applicable as long as any army continued fighting with the aim of returning the occupied lands to their rightful owners" (Arai-Takahashi, 2009, p. 37). What is more, the IMT ruled that in the case in question, the *debellatio* doctrine could not be applied to any territories occupied after 1 September 1939.

The position of Polish lawyers

The majority of Polish lawyers, and especially experts on the law of armed conflict, agreed as to the division of the years 1939–1945 into two periods and had no doubts that the period from September 1939 to 8 July 1940 should be described as the state of occupation during which the Hague Convention (IV) automatically applied (Klafkowski, 1946, pp. 71–74). Immediately after the war, many of these lawyers published works in which they unequivocally defined the legal situation in the General Government during the first phase of the war as *occupatio bellica*. Let us cite a few passages: Prof. Alfons Klafkowski: "*occupatio bellica* as based on the Hague Convention (IV) has substantial grounds for application in the case of Poland" (p. 52); Prof. Zygmunt Cybichowski: "Germany is responsible under both the Hague Convention and international law in general" (Cybichowski, 1945); and Prof. Henryk Dembiński:

> The purportedly final change of the legal system introduced by the Germans in the Polish lands under the pretense that

> this was the case of conquest, and not of an occupation, was a blatant lawlessness and only proved conclusively that all gains are elusive and uncertain as long as the war continues (Dembiński, 1945, p. 2).

It seemed, then, that occupation of the Polish lands was recognized as a factual situation (particularly in the first year of the war) by all lawyers specializing in the international law of armed conflict. Meanwhile, two lawyers who served as experts on international law in trials before the Supreme National Tribunal, Prof. Ludwik Ehrlich (1979b) and Prof. Antoni Peretiatkowicz (1979), rejected the occupation thesis. Already in the trial of Arthur Greiser (the first trial to be held before the Supreme National Tribunal), the court ruled that the German Reich's aggression against Poland on 1 September 1939 was "an unlawful invasion of the neighboring state and a breach of the non-aggression pact between the two countries" (Ehrlich 1979a, p. 97).[6] Prof. Ehrlich wrote in his expert report:

> According to the law of nations, the war was inadmissible; in commencing hostilities against the other country, neither of them [Germany and Poland – J. L.] could consider it a war (Ehrlich, 1979b, p. 49).

The experts concluded that since the war was illegal, there was no question of occupation of the Polish territory, because the Germans had not acquired the right "to be the occupant." In keeping with this line of reasoning, Greiser was not accused of violating the Hague Convention, but – pursuant to Arts. 93, 97 and 99 of the Polish Penal Code of 1932 – of:

> participation in an organization under the name of NSDAP, which – by way of waging wars of aggression – sought to bring Europe under the National-Socialist rule and to incorporate foreign territories into Germany, this including Polish lands, as well as of working in collusion with the main governing bodies of the German Reich to incite hostilities with the aim of seizing a part of the Polish state (Gumkowski & Kułakowski, 1967, pp. 66–69).

What is more, Ehrlich and Peretiatkowicz concluded that the attack on Poland did not bear the hallmarks of war in a legal sense; because the Reich had earlier renounced war, it "could not claim that it had actually

6 The latter refers to the German–Polish declaration of non-aggression signed in Berlin on 26 January 1934, and also to the Kellogg–Briand Pact.

waged a war despite its prior pledge" (Kubicki, 1963, pp. 79–80). Basing themselves on those by all means legitimate opinions (on the unlawful waging of war), the experts penned a surprising report, arguing that since the war was illegal, the German Reich could not exercise rights granted to the belligerent parties in the Hague conventions. Ehrlich further claimed that the rule of the Reich in the Polish lands was not an occupation (as defined in the Convention) but "an unlawful seizure of land through violence and coercion" (Ehrlich, 1946, p. 81; cf. also: Ehrlich, 1979b, pp. 43–68). This interpretation was repeated in the judgments of the Supreme National Tribunal in the cases against Forster and Bühler. It was also endorsed by several other lawyers, including Władysław Wolter, who concluded that "an invader who is an illegal occupant does not and cannot have any right to protect his interests, similarly to a burglar breaking into another man's house" (Wolter, 1947, pp. 202–203; cf. also: Wyrok w procesie Bühlera, 1948, k. 60).

Leszek Kubicki, who *post factum* criticized the reasoning behind the legal arguments made by the experts, and thus the relevant judgments of the Supreme National Tribunal, points out that it could lead to a conclusion that since the Polish lands were not occupied, the Hague Convention was not applicable. He also highlighted the inconsistencies in the judgments of the Supreme National Tribunal: by rejecting the status of occupation, the judges ruled that the situation in the Polish lands was not regulated by any laws. At the same time, however, the German defendants were tried for violating the rules of occupation set forth in the Hague conventions (Kubicki, 1963, p. 84). In word, the Hague Convention was deemed binding as to the obligations of the occupant, but not as to his rights.

The opinion stated by the Polish experts could also prove problematic with regard to the rights and obligations of the population in the seized territory. In Bühler's bill of indictment it was emphasized that due to the lawlessness of the German attack on Poland and the German occupation,

> the Polish population had a right of collective self-defense. This self-defense did not necessarily have to take the forms prescribed in the aforementioned regulations [the Hague Convention] because of the lawlessness of the war and the occupation that ensued. The attacked can avail themselves of all means that are necessary to counter the unlawful invasion. The prosecution of civil resistance – an act of self-defense – through repressive punishment is therefore unlawful (Wyrok w procesie Bühlera, 1948, f. 60).

For Ehrlich and Peretiatkowicz, then, the population's right of self-defense had other sources than the Hague Convention, but this was

precarious reasoning. This legal qualification of German aggression against Poland fundamentally changes the rights and obligations of the invader (not occupier, since *occupatio bellica* was dismissed) and the rights of "the population of a seized area." What followed was that all irredentist activities – those carried out not only by organized military or paramilitary units, but also by civilians, who under the formal laws of occupation are generally not entitled to conduct them[7] – could be judged differently. In the customary law of armed conflict there was a rule that civilians are persons who are not members of the armed forces. They are protected as long as they do not take a direct part in fighting (Górzyńska, 2007, p. 178; Grzebyk, 2014, p. 615).

In the last trial held before the Supreme National Tribunal (that of Josef Bühler), the "unlawful invasion" concept proposed by the experts was replaced with the term "aggressive war," which – clearly under the influence of the Nuremberg rules – was also called "a crime against peace," so the Polish penal code was no longer the sole source of reference (Wyrok w procesie Bühlera, 1948, f. 58).

Not all Polish lawyers endorsed the legal construction outlined above and adopted by the Supreme National Tribunal along the following lines: the invasion of Poland did not bear the hallmarks of waging a war, *ergo* the Germans were not the occupant, *ergo* the aggressor did not have the same rights as an occupant, *ergo* the population in the occupied territory was not bound by the rights and obligations of the occupied population. Profs. Józef Giebułtowicz and Leszek Kubicki feared that the above reasoning could lead to a conclusion that international law of armed conflict is applicable only if the war is lawful (Kubicki, 1963, pp. 84–89; Giebułtowicz, 1945, pp. 29–30). Such an interpretation would be very dangerous, and – as Kubicki writes – "could have absurd consequences in various areas" (Kubicki, 1963, p. 84). First of all, it would allow for concluding not only that the population has no obligations towards the occupant, but primarily that the occupant has no obligations towards the population in the conquered lands. At the same time, Kubicki criticizes the lawyers (and experts) of the Supreme National Tribunal for inconsistencies in their thinking, emphasizing that the judgments were based precisely on the fact that the occupant violated the international law of armed conflict: "the convention was thus deemed applicable as to the obligations of the occupant, but not as to his rights" (p. 85).

7 As a matter of fact, the exclusion of civilians from taking direct part in hostilities under pain of losing protection granted to the civilian populace was first included in the so-called Additional Protocol I (of 8 June 1977) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, but before it had been part of customary international law.

A question should be asked what were the motivations of the experts Peretiatkowicz and Ehrlich? In their reports submitted to the Supreme National Tribunal these are not clearly stated. It can only be surmised that they sought to formally recognize the legality of the Polish resistance, especially since it was largely civilian in character. As Kubicki emphasizes, however, under international law a population has the right to collective self-defense, as well as to the protection granted under international law of armed conflict (which is often customary), also in the case of unlawful war. Adoption of the thesis that the law of occupation is not applicable to unlawful occupation would render the law of armed conflict utterly pointless (Haberland, 2017, p. 364).

Stanisław Piotrowski[8] was also critical of Ehrlich; he stated plainly:

> Ehrlich is wrong in his opinion that the attack of the Nazi Reich on Poland in 1939 did not result in a war, but in "a series of unlawful acts," only because the Reich renounced war in the Kellogg Pact and, in the 1934 agreement with Poland, pledged not to resort to violence in settling disputes (Piotrowski, 1956, p. 175).

Piotrowski criticized Ehrlich for a wrong interpretation of international law according to which a war of aggression precluded the applicability of the Hague Convention (p. 175).

The erroneousness of the position adopted by the Supreme National Tribunal on the basis of expert reports penned by Peretiatkowicz and Ehrlich was eventually confirmed by the judgment of the Supreme Court of 11 October 1949:

> The Hague Regulations are applicable to each and every occupation, including even an unlawful occupation, an example of which is the German occupation of Poland [...]. Considering that the Hague Convention is aimed primarily at protecting the populations and governments of occupied states, it must be concluded that the *quod ab initio vitiosum* doctrine[9] – cited by the Tribunal as the basis for criminal liability of the

8 Stanisław Piotrowski (1901–1972) – an eminent Polish lawyer, expert on international law, prosecutor, and member of the Polish delegation at Nuremberg. He edited *Hans Frank's Diary* and on its basis provided the Allies with evidence of crimes committed in Poland. Since 1946, he was engaged in the activities of the Main Commission for the Investigation of German Crimes in Poland (later renamed to the Main Commission for the Investigation of Hitlerite Crimes in Poland).

9 *Quod ab initio vitiosum est, non potest tractu temporis convalescere* – "that which is void in the beginning *cannot* gain strength by lapse of time"; in this context: since the war was unlawful from the beginning, the Germans could not exercise rights granted by the Hague Conventions to a belligerent and occupant state.

> defendants, this due to an erroneous interpretation of the judgment of the Nuremberg Tribunal – cannot be accepted as the basis for their liability, and that the occupant who *de facto* administered the occupied Polish territory was in a position to issue orders compatible with the Hague Convention but had no power to violate its provisions (Gąska & Ciupiński, 2001, p. 44).

As Kubicki noted, following this judgment of the Supreme Tribunal,

> after initial hesitation the judicature concluded that the Nazi occupant was bound by the provisions of the Hague Convention (IV) throughout the war and that no circumstances occurred that would exempt him from compliance with the prohibitions, restrictions and duties laid down therein (Kubicki, 1963, p. 87).

Despite the general consensus among the lawyers as to the applicability of the Hague Convention regardless of whether the war was lawful or not, Prof. Ehrlich insisted on his earlier opinion as expressed during the Greiser trial. In a *Prawo międzynarodowe* textbook on international law, which was published in 1958, he unequivocally stated:

> if *occupatio bellica* results from a war waged in violation of the Kellogg Pact and the aggressor becomes the occupant, then compliance with the Hague Regulations on his part is only an attempt to evade greater responsibility, as the occupation itself constitutes an act of aggression in violation of international law (Ehrlich, 1958, p. 490).

Concluding remarks

The dispute among Polish lawyers as to the legal status of the General Government was eventually settled with an unequivocal conclusion: the very fact that a war is unlawful does not preclude the recognition of a state of occupation and does not exempt from compliance with the Hague Convention (IV). At the same time, referencing the German legal thought from the period of the Second World War – which also seems particularly valuable – the Polish lawyers refuted the *debellatio* thesis with several arguments based on the law of armed conflict. Three preconditions were not met: firstly, the occupation was neither "permanent" nor irreversible; secondly, the Polish armed forces were not utterly defeated; thirdly, if the war is fought by groups of states (allies), the seizure of one cannot serve as grounds for declaring *debellatio*, as the conquered state can resume

fighting with the help of its allies. What is more, an émigré government with its seat in an allied country can still exert effective control over the population, and thus ensure the continuous functioning of the state. The Polish government in France and later in England was recognized by all the Allies (and also neutral states) as an independent body still engaged in the war, to which the German lawyers also acquiesced.[10]

The debate on the status of Polish lands during the war sheds light on just a few of the challenges and difficulties faced by the Polish lawyers in trying the new type of crimes. In many aspects, the adopted solutions were by no means obvious or predetermined. The discussions and disputes among the jurists were undoubtedly aimed at working out the appropriate body of rulings of the Supreme National Tribunal, and although they did not resonate globally, they followed in the tradition of the Polish lawyers' involvement in the codification and unification of international criminal law.[11]

The awareness of the legal complications and dilemmas or even disputes as to the legal qualification of the new type of crimes following the end of the Second World War can undoubtedly prove useful also in historical research and description. While historians have a full right to use the terminology of their own profession, the inclusion of legal categories such as occupation or *debellatio* could help in a more accurate recounting of the wartime realities. It could also allow for determining the precise scale of crimes and presenting them in the context of the international law of armed conflict, thus leading to a better understanding of the issue also outside of Poland.

(transl. by Aleksandra Arumińska)

Bibliography

Archival sources:

Archives of the Institute of National Remembrance (Archiwum Instytutu Pamięci Narodowej – AIPN)

Files of the Main Commission for the Investigation of Hitlerite Crimes (Akta Głównej Komisji Badania Zbrodni Hitlerowskich – GK)

— Wyrok w procesie Bühlera [Judgment in the case of Bühler] (1948). AIPN GK, file no. 196/245.

10 Among them were Profs. Freytagh-Loringhoven and Schätzel, as mentioned by Klafkowski (1946, p. 103).

11 For political reasons, the West followed the trials in Poland with considerable distrust. In the interwar period, the Polish lawyers took an active and influential part in the works of the International Bureau for the Unification of Criminal Law, of which Prof. Emil Stanisław Rappaport was the deputy chairman in 1929 and member of its committee in the years 1929–1938. His associates included Wacław Makowski, Rafał Lemkin, Michał Potulicki, Juliusz Makarewicz and others.

Publications:

Arai-Takahashi, Y. (2009). *The Law of Occupation: Continuity and Change of International Humanitarian Law and its Interaction with International Human Rights Law*. Boston: Martinus Nijhoff.

Cybichowski, Z. (1945). Zdobycz wojenna a prawa suwerenne. *Głos Wielkopolski, nr. 91, 30 May*, p. 5.

Datner, S. (1967). *55 dni Wehrmachtu w Polsce 1 IX–25 X 1939*. Warszawa: Wydawnictwo Ministerstwa Obrony Narodowej.

Dembiński, H. (1945). 1918–1945. *Tygodnik Powszechny, no. 21*, p. 2.

Ehrlich, L. (1946). Opinia biegłego prof. L. Ehrlicha w sprawie Greisera. *Państwo i Prawo, nr. 7*, pp. 80–86.

Ehrlich, L. (1958). *Prawo międzynarodowe*. Warszawa: Wydawnictwo Prawnicze.

Ehrlich, L. (1979a). *Ekspertyza prof. dr. Ludwika Ehrlicha w sprawie Fischera: Zagadnienie prawne procesu Ludwiga Fischera i innych, jako obywateli Rzeszy Niemieckiej z punktu widzenia prawa narodów*. In: C. Pilichowski (ed.), *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym*, part 1: *Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* (pp. 43–68). Warszawa: Ministerstwo Sprawiedliwości, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce.

Ehrlich, L. (1979b). *Ekspertyza prof. dr. Ludwika Ehrlicha w sprawie Greisera: Zagadnienie wojny we współczesnym prawie międzynarodowym*. In: C. Pilichowski (ed.), *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym*, part 1: *Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* (pp. 43–68). Warszawa: Ministerstwo Sprawiedliwości, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce.

Gąska, M., Ciupiński, A. (2001). *Międzynarodowe prawo humanitarne konfliktów zbrojnych. Wybrane problemy*. Warszawa: Akademia Obrony Narodowej.

Giebułtowicz, J. (1945). *Odpowiedzialność przestępców wojennych w świetle prawa narodów*. Lublin: Spółdzielnia Wydawnicza „Czytelnik".

Górzyńska, M. (2007). *Okupacja wojenna w prawie międzynarodowym – wybrane zagadnienia*. In: T. Jasudowicz (ed.), *Międzynarodowe prawo humanitarne we współczesnym świecie. Osiągnięcia i wyzwania* (pp. 169–193). Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora".

Grzebyk, P. (2014). *The role of the Polish Supreme National Tribunal in the development of principles of international criminal law*. In: M. Bergsmo, W. L. Cheah, P. Yi (eds.), *Historical Origins of International Criminal Law*, vol. 2 (pp. 603–630). Brussels: Torkel Opsahl Academic ePublisher.

Gumkowski, J., Kułakowski, T. (1967). *Zbrodniarze hitlerowscy przed Najwyższym Trybunałem Narodowym*. Warszawa: Wydawnictwo Prawnicze.

Haberland, M. (2017). *Okupacja wojenna w prawie międzynarodowym*. In: D. Kornobis-Romanowska (ed.), *Aktualne problemy prawa Unii Europejskiej i prawa międzynarodowego – aspekty teoretyczne i praktyczne* (pp. 353–407). Wrocław: E-Wydawnictwo, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego.

Huber, E. R. (1941). *Bau und Gefüge des Reiches*. Hamburg: Hanseatische Verlagsanstalt.

Kilian, A. (1977). Hitlerowskie dążenia do pozbawienia obywatelstwa polskiego ludności Pomorza Gdańskiego jako naruszenie prawa międzynarodowego. *Zeszyty Muzeum Stutthof, nr. 2*, pp. 127–158.

Klafkowski, A. (1946). *Okupacja niemiecka w Polsce w* świetle prawa narodów. Poznań: Instytut Zachodni.

Konwencja dotycząca praw i zwyczajów wojny lądowej (IV konwencja haska) (1907). Dz.U. 1927, nr. 21, poz. 161. Retrieved from: https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19270210161 [accessed: 17.08.2021].

Kubicki, L. (1963). *Zbrodnie wojenne w świetle prawa polskiego*. Warszawa: Państwowe Wydawnictwo Naukowe.

Kwiecień, R. (2013). Okupacja wojenna w świetle prawa międzynarodowego: natura, skutki, nowe tendencje. *Annales Universitatis Mariae Curie-Sklodowska, vol. 60, nr. 1*, pp. 65–80.

Madajczyk, C. (1984). *Faszyzm i okupacje 1938–1945. Wykonywanie okupacji przez państwa Osi w Europie*, vol. 2: *Mechanizmy realizowania okupacji*. Poznań: Wydawnictwo Poznańskie.

Marcinko, M. (2014a). *Główne założenia międzynarodowego prawa humanitarnego konfliktów zbrojnych*. In: M. Marcinko, Z. Falkowski (eds.), *Międzynarodowe prawo humanitarne*

konfliktów zbrojnych (pp. 23–58). Warszawa: Wojskowe Centrum Edukacji Obywatelskiej.

Marcinko, M. (2014b). *Podstawowe zasady międzynarodowego prawa humanitarnego konfliktów zbrojnych*. In: M. Marcinko, Z. Falkowski (eds.), *Międzynarodowe prawo humanitarne konfliktów zbrojnych* (pp. 59–94). Warszawa: Wojskowe Centrum Edukacji Obywatelskiej.

Migdał, P. (2017). Koncepcje prawne w zakresie prawa międzynarodowego wypracowane w III Rzeszy. *Studia Prawnicze KUL, nr. 2 (70)*, pp. 124–165.

Peretiatkowicz, A. (1946). Proces Greisera w świetle prawa międzynarodowego. *Przegląd Zachodni, nr. 7–8*, pp. 673–680.

Peretiatkowicz, A. (1979). *Ekspertyza prof. dr Antoniego Peretiatkowicza: Działalność władz okupacyjnych niemieckich w świetle prawa międzynarodowego*. In: C. Pilichowski (ed.), *Ekspertyzy i orzeczenia przed Najwyższym Trybunałem Narodowym*, part 1: *Agresja III Rzeszy Niemieckiej na Polskę i okupacja hitlerowska w Polsce w świetle prawa międzynarodowego* (pp. 117–124). Warszawa: Ministerstwo Sprawiedliwości, Główna Komisja Badania Zbrodni Hitlerowskich w Polsce.

Piotrowski, S. (1956). *Dziennik Hansa Franka*. Warszawa: Wydawnictwo Prawnicze.

Toppe, A. (2008). *Militär und Kriegsvölkerrecht: Rechtsnorm, Fachdiskurs und Kriegspraxis in Deutschland 1899–1940*. München: De Gruyter Oldenbourg.

Treskow von, W. (1965). *Der Begriff der Debellatio*. Bonn: s.n.

Weh, A. (1943). *Die rechtlichen Grundlagen des Generalgouvernements*. In: J. Bühler (ed.), *Das Generalgouvernement, seine Verwaltung und seine Wirtschaft* (pp. 59–74). Krakau: Burgverlag Krakau.

Wolter, W. (1947). *Prawo karne. Zarys wykładu systematycznego*. Warszawa: Gebethner i Wolff.