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The Polish National Minority in Germany in the Light of International Law

Abstract: The paper is an English translation of the article “Polska mniejszość narodowa w Niemczech w świetle prawa międzynarodowego” published originally in *Ruch Prawniczy, Ekonomiczny i Socjologiczny* no. 2 from 2010. The text is published as a part of a section of the Adam Mickiewicz University devoted to the achievements of the Professors of the Faculty of Law and Administration of the Adam Mickiewicz University, Poznań.

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Introduction

The migratory movement of Poles on German territory can be traced back to the eighteenth century. To a large extent, it resulted from the partition of Poland and numerous national uprisings, whose participants were forced to leave their homeland. Large-scale economic emigration did not begin until the latter half of the nineteenth century, but on the eve of the First World War there were over 4 million Poles on the Reich's territory. They would establish numerous educational, women's, youth, church, sports and singing organizations. The Union of Poles in Germany—which represented the Polish national minority before the German authorities—was founded in 1922, in the early days of the Weimar Republic. The association was dissolved on 27 February 1940 under the Nazi ordinance that abolished all Polish community structures in the Third Reich.

This study seeks to demonstrate that the suppression of all manifestations of Polish activity in Germany in 1940 contravened applicable international law, and that its legal grounds should therefore be considered invalid *ab initio*.

The Polish organizations which operate currently in the Federal Republic of Germany are demanding compensation for the losses incurred following the implementation of the 1940 ordinance. Their claims should be regarded as legitimate and deserving of satisfaction in those respects which have so far been overlooked or ignored. In addition to their financial claims, the organizations demand that the German authorities pronounce the 1940 ordinance invalid and acknowledge that the current Union of Poles in Germany is the continuator of the Union dissolved in 1940, being therefore entitled to the status of the representative of the Polish national minority in Germany. This position is informed by the postulation that Poles in Germany should be considered a national minority on the same principles according to which minority status is granted to the Polish citizens of German origin residing in Poland. Satisfying that demand would be eliminate the asymmetry between the legal position of Germans in Poland and Poles in Germany resulting from the Treaty of Good Neighbourship and Friendly Cooperation concluded between Poland and Germany on 17 June 1991. These particular issues are explored in the following study.

Significance of the Upper Silesian Convention of 1922 for the Polish National Minority in Germany

The Versailles Peace Treaty with Germany of 28 June 1919 and the Polish and German National Minorities after the First World War

The history of international relations has seen numerous treaties whose provisions obliged the signatory states to protect individuals or groups that were distinct from the majority by virtue of their religion or nationality. The Final Act of the Congress of Vienna, signed on 9 June 1815, had already stipulated in Article I that “the Poles, who are respective subjects of Russia, Austria,

and Prussia, shall obtain a representation, and national institutions, regulated according to the degree of political consideration, that each of the governments to which they belong shall judge expedient and proper to grant them.”¹ The First World War brought about extensive changes to European borders, which compelled states to impose treaty obligations on the new members of the international community that granted national, religious and linguistic rights to minorities, so that their legal position would be on a par with the status of the majority of citizens. The Peace Treaty with Germany, concluded at Versailles on 28 June 1919 by the major allied and associated powers as well as other allied and associated powers (including Poland), also featured provisions for the protection of national minorities.

From the standpoint of the foreign policy towards Germany adopted by the reborn Polish State, Article 91 of the Treaty of Versailles particularly relevant. It asserted that that “German nationals habitually resident in territories recognized as forming part of Poland will acquire Polish nationality ipso facto and will lose their German nationality.”² This article further provided that the German citizens residing on Polish territory would be entitled to choose in favour of German citizenship. The same right was granted to the Poles with German citizenship who resided permanently in Germany, enabling them to opt for Polish citizenship. The Treaty of Versailles stipulated that the provisions of Article 91 would only take effect for parts of Upper Silesia after the territory had been conclusively attributed following a plebiscite held there.

The Little Treaty of Versailles of 28 June 1919 and the German national minority in Poland

In the course of the conferences that regulated the aftermath of the First World War, the allied and associated states concluded treaties on the protection of

1 Karol Lutostański, *Les partages de la Pologne et la lutte pour l'indépendance* (Payot, 1918), 384.

2 Bohdan Winiarski, *Wybór źródeł do nauki prawa międzynarodowego* (Komitet Wydawniczy Podręczników Akademickich, 1938), 171.

national minorities. The victorious states which made such commitments included Poland, Yugoslavia, Czechoslovakia, Romania, Greece and Armenia. Analogous obligations were also assumed by the vanquished, such as Austria, Hungary, Bulgaria and Turkey.

As regards Polish-German relations with respect to national minorities, particular importance should be attached to the treaty between the major allied and associated powers and Poland, referred to in the literature as the Little Treaty of Versailles.³ In the latter, the United States of America, the British Empire, France, Italy and Japan affirmed their recognition of the Polish State and, at the same time, obliged Poland to align its laws with the principles of freedom and justice as well as guarantee fair and equal treatment to all inhabitants of the territory over which Poland had assumed sovereignty. The Treaty imposed unilateral obligations on Poland, some of which were in the nature of fundamental rights. First and foremost, those included Article 1 of the Treaty, which set out as follows: “Poland shall deem the provisions contained in Articles 2 to 8 [...] as fundamental rights, whereby no law, ordinance any or official action shall be in conflict with or contrary to those provisions; no law, ordinance or official action shall be of any force or effect against them.”⁴

It follows from Article 1 of the Treaty that the parties found the rights enshrined in Articles 2 to 8 to be fundamental. Thus, the Treaty construes as such the right “of all inhabitants without distinction as to birth, nationality, language, race or religion to comprehensive and total protection of life and liberty” (Article 2). By right alone and without any formal procedure involved, Poland was to recognize German, Austrian, Hungarian or Russian nationals who—at the time when the Treaty came into force—were permanently resident on the territory already or prospectively determined as part of Poland (Article 3) as Polish citizens. Such persons could also choose any other nationality available to them (Article 5). Persons born on Polish territory to parents per-

3 Otherwise known as the Polish Minority Treaty (translator’s note).

4 Winiarski, *Wybór źródeł do nauki prawa międzynarodowego*, 212.

manently residing there were also to be recognized as Polish citizens, although they themselves did not have a permanent residence there (Article 4).

Article 7 provided that “all Polish citizens, without distinction as to race, language or religion, shall be equal before the law and shall enjoy the same civil and political rights.”

The fundamental right formulated in Article 8 of the Treaty is highly relevant for further deliberations. It stipulated that Polish citizens belonging to ethnic, religious or linguistic minorities shall be treated on a par with other Polish citizens. In addition, “they shall have equal rights to establish, run and control at their own expense charity, religious or social institutions, schools and other educational establishments, and the right to freely use their own language and practice their religion therein.”

Article 12 of the Treaty contains an important statement. Poland agreed that the fundamental rights of national, religious or linguistic minorities constituted obligations of international significance and were guaranteed by the League of Nations. Any member of the League had the right to draw the Council’s attention to any breach of or threat to the obligations in question. In the event of a dispute arising on those grounds, the Polish Government agreed that it would be referred for resolution to the Permanent Court of International Justice attached to the League of Nations.

The recognition of the fundamental rights of national minorities by Poland and other states bound by minority treaties, underpinned the international system for the protection of minority rights established under the auspices of the League of Nations.

Polish-German Mutual Obligations in the Light of the Upper Silesian Convention of 1922

On 15 May 1922 in Geneva, Poland and Germany entered into the Upper Silesia Convention. Unlike the previous minority treaties or articles, which set out unilateral obligations of states towards the allied and associated powers, the

Upper Silesian Convention contained mutual commitments of the two states. First, one should outline the historical background of the Convention.

Under the terms of the Versailles Peace Treaty, the national affiliation of Silesia was to be decided by a plebiscite. Following the example of the Greater Poland Uprising and inspired by its victory, the Poles living in Upper Silesia staged the first Silesian uprising as early as 1919. Its unsatisfactory outcomes brought about the second uprising in August 1920, and another one in May 1921. On 11 June 1921, the insurgents signed an armistice agreement with the Inter-Allied Governing and Plebiscite Commission, which established the demarcation line. It should be noted that in the plebiscite held in late March 1921, 707,605 votes were cast in favour of incorporation of the plebiscite area into Germany, while 479,359 voters supported affiliation with Poland.⁵ The Council of Ambassadors approved the division of the plebiscite area on 20 October 1921. Poland received 29% of the area, which included 76% of the Silesian coal mines. A considerable number of Poles inhabiting Opole Silesia found themselves on the German side. As a result of repression and terror, they would subsequently emigrate to Poland, Czechoslovakia, Hungary, and Austria. Approximately 60,000–70,000 Poles left the Opole region. Still, half a million people who identified as Poles remained living in the Opole district (*Regierungsbezirk*).⁶ Early 1922 saw an organizational revival due to the intense activities of the Polish Socialist Party, as well as the establishment of the Union of Polish Sports Associations in the German part of Silesia.⁷

The division of Upper Silesia provoked serious contention between the diplomacy of France, which sided Poland, and the British diplomacy, which

5 Report of the Committee of Experts appointed to study the frontier to be laid down between Germany and Poland in Upper Silesia as the result of the Plebiscite, August 6, 1921, Appendix I, in Georges Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the working of the Upper Silesian Settlement, 1922–1937* (Oxford University Press, 1942), 557.

6 The German population remaining in the Polish part amounted to 250,000 people; see Jerzy Topolski, *Polska XX wieku. 1914–2000* (Wydawnictwo Poznańskie, 2001), 60.

7 Marian Dyba, *Śląskie drogi od X w. do 1939 r.* (Kuratorium Oświaty, Sejmik Samorządowy Województwa Katowickiego, 1992), 154.

took a pro-German stance. The matter was to be resolved at an extraordinary meeting of the Council of the League of Nations in August 1921. The Council decided that the forces of the allied powers would remain stationed in Upper Silesia until Poland and German sign a convention governing relations in the region. The resolution of the Council of the League of Nations of 20 October 1921 specified that Polish-German negotiations would be presided over by Felix Calonder, former president of the Swiss Federation. Polish-German negotiations focused on the liquidation of German property in Polish Upper Silesia. It was opposed by the German representative, Eugene Schiffer, who maintained that depriving German citizens of their chattels and immovables—even if subject to the principle of compensation—would constitute flagrant injustice. The Polish representative, Kazimierz Olszowski, highlighted nationality issues and argued that Upper Silesia had been subject to a process of Germanization for many years. Since 1872, there had not been a single Polish school in Upper Silesia, even though according to official German statistics 1,250,000 Poles and 700,000 Germans inhabited the region in 1919.

As of 1886, Poles were forbidden to hold any office in East Germany. Children speaking Polish were expelled from secondary schools. Poles were prohibited from serving as administrative and judicial officials, civil servants, prosecutors or healthcare officers.⁸

Given the anti-Polish actions of the German authorities, the Polish side placed particular emphasis on mutual protection of the national minorities as opposed to the previous unilateral approach. As a result of Polish efforts, the entire Part III of the treaty was devoted to minority protection.

Article 65, Part III, stated the obligations of both parties to the Convention regarding fundamental rights. Both states declared that “the provisions contained in Articles 66–68 shall be deemed fundamental rights (*fundamentales*), whereby no law, ordinance any or official action shall be in conflict with or contrary to those provisions; no law, ordinance or official action shall be of any force or effect

⁸ Kaeckenbeeck, *The International Experiment of Upper Silesia*, 17.

against them.” As may be seen, the authors of the Convention followed the example of the Little Treaty of Versailles, with the exception that in the latter the above obligation rested solely with Poland.

Article 66 of the Convention is a faithful copy of Article 2 of the Little Treaty of Versailles. Article 67 iterates the content of Article 7, while Article 68 duplicates Article 8 without any change to the wording.

Article 12 of the Little Treaty of Versailles also found its way into the Upper Silesian Convention in the form of Article 72. Both states declared yet again that the fundamental rights were obligations of international significance and were guaranteed by the League of Nations. Both Germany and Poland agreed that in the event of a difference of opinion between their respective governments and any member of the League of Nations concerning the rights or acts stipulated in the articles on the protection of national minorities, it would be regarded as a dispute of an international character, in accordance with the tenor of Article 14 of the Covenant of the League of Nations. Both governments agreed that any dispute of that nature would be referred to the Permanent Court of International Justice at the request of the other party. Decisions of the Court would be considered unappealable and of the same weight as the decisions rendered under Article 13 of the Covenant, according to which the members of the League of Nations undertook to comply with the rulings in good faith (Section 4).

Title III, Part III, of the Upper Silesian Convention contained provisions (Articles 147–158) on petition procedures, according to which the Council of the League of Nations would resolve in the matter of individual or collective petitions concerning the Convention’s articles for the protection of national minority submitted to the Council directly by persons belonging to such a minority. The Council was entitled to send the petition to the government concerned, which then had to send it back to the Council with its comments (Article 147). To examine such petitions, each government was to create an Office for Minority Affairs in its part of the plebiscite area (Article 148). The office was tasked with handling petitions from members of the minorities regarding

the interpretation and application of the minority protection provisions of the Convention by administrative authorities. The Office was obliged to convey petitions to the President of the German-Polish Mixed Commission to obtain their opinion. The Commission was based in Katowice and consisted of two Polish and two German members and the President, a third-country national. If dissatisfied with how a case was handled by the administrative authorities, the authors of complaints were entitled to appeal to the Council of the League of Nations. Seeking to file an appeal with the Council of the League of Nations, as provided for in Article 149, the petition had to be submitted to the Office for Minority Affairs, which referred it to the Council through its government (Article 157).

With regard to the Upper Silesian issue, if a judgment or decision was contingent on the interpretation of the Convention, any party to the dispute could request the interpretation to be made by the Arbitration Tribunal. The Tribunal had its seat in Bytom and consisted of a Polish and a German arbitration judge and the president, who was a third-country national (Article 563 § 1(1)). The ruling of the Arbitration Tribunal had to take into account the decisions of the Council of the League of Nations concerning analogous incidents in Upper Silesia (Article 158(2)). In this manner, the general principles of international law formulated by the Council of the League of Nations with a view to protecting national minorities would be manifested in the case law of the Arbitration Tribunal.

An increasingly predominant view within the League of Nations was that there exist certain norms which remain generally binding on the international community, while the provisions contained in minority treaties constituted instances of their special application. Ever more frequently, one would call for the minority obligations to be extended to all states in that community. These obligations limited the exercise of state sovereignty, but they did not elevate minorities or their members to subjects of international law. The prevalent notion in the League of Nations was that individuals or groups of citizens could

not exploit minority provisions to the detriment of the states of which they were part. The loyalty of a national minority towards its own state was associated with the English principle of “clean hands,” according to which petitioners had to demonstrate their loyal conduct with respect to the state concerned and allegiance to the government under whose authority they came.

The atmosphere engendered by the provisions of the Upper Silesian Convention had a positive impact on the social activation of Poles in Germany.

On 27 August 1922, i.e. shortly after the Convention was signed, the Union of Poles in Germany was founded with headquarters in Berlin. Representatives of the Polish population of the Opole region actively contributed to its establishment. The first general meeting was held in December 1922. By drawing lots, the Opole region was designated as “District I” of the Union of Poles in Germany. The Union’s activists sought to expand membership with a view to launching successful election campaign and introduce Polish representation into the German parliament. The Union of Poles in Germany regularly participated in the meetings of the Polish-German Mixed Commission, which examined disputes and complaints from the population. Despite obstruction from the German authorities, the Union organized protest actions and initiated submission of complaints to the administrative bodies, the Mixed Commission and the League of Nations. The tasks of providing legal defence and enforcing the rights enshrined in the Upper Silesian Convention were delegated to the legal and educational department of the Union, as well as its charity and economic commission.⁹ The authorities of the Weimar Republic attempted to counteract the increasingly energetic and effective activities of the Union, but they did not question its mandate to represent the Polish national minority in Upper Silesia.

⁹ Dyba, *Śląskie drogi od X w. do 1939 r.*, 155.

The Position of the German Constitutional and International Law Doctrine after the First World War with Regard to National Minorities

The international law doctrine of the Weimar Republic placed considerable emphasis on the significance of the Upper Silesian Convention of 15 May 1922. According to German authors, the Convention offered important guidelines for the doctrinal clarification of the concept of “national minority” (*nationale Minderheit*).¹⁰ In 1927, Hermann Plettner deplored the fact that the Weimar Constitution of 11 August 1919 did not contain specific provisions for the protection of national minorities.¹¹ Only Article 113 of the Constitution referred to the minority issue, setting out that “the foreign language-speaking communities of the Reich (*die fremdsprachlichen Volksteile des Reiches*) shall not be restricted by the legislation or administration (*Gesetzgebung und Verwaltung*) in free and national development, particularly in the use of their mother tongue at school or before the internal administration and the judiciary.”¹² Godehard Joseph Ebers noted that the draft Constitution of the Reich had originally included Article 40 which, compared to Article 113, circumscribed the scope of the rights of the foreign language-speaking part of the nation, invoking only free and national development as well as use of the mother tongue, but without specifying pertinent circumstances.¹³

When Article 40 of the draft Constitution was being debated, certain members of Parliament requested that the term “*die fremdsprachlichen Volksteile des Reiches*” be changed to “*nationale Minderheiten*.” Mr Cohn cited the experience of the French legislation and the German draft of the Covenant of the

10 See Martin Dachselt, “Die Rechtsverhältnisse der fremden Minderheiten in Deutschland,” *Archiv für Politik und Geschichte – Sonderdruck* 1926, 317; Leo Epstein, *Der nationale Minderheitenschutz als internationales Rechtsproblem*, vol. 7, *Das Selbstbestimmungsrecht der Deutschen* (Hans Robert Engelmann, 1922).

11 Herman Plettner, *Das Problem des Schutzes nationaler Minderheiten: eine Studie seiner allgemeinen ideengeschichtlichen, politischen und formaljuristischen Grundlagen nebst einer ausgewählten Darstellung der Stellungnahme des geltenden rechts* (Sack, 1927), 93.

12 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 88–89.

13 *Die Verfassung des Reiches vom 11. August 1919*, zusammengestellt und eingeleitet von Godehard J. Ebers (Ferd. Dümmlers Verlagsbuchhandlung, 1919), 68–69.

League of Nations, in which it was not foreign language but subjective will that was to determine whether citizens belonged to a national minority. Cohn argued that the Jews could not be regarded as a foreign language-speaking community in the Reich, since a large proportion of that population spoke German exclusively.¹⁴

The position which prevailed in the debate was articulated by the rapporteur for the draft Constitution, Dringer, who was of the opinion that the term “national minority” should not feature in the Constitution.

Hermann Plettner criticized the solution adopted in the constitution and drew attention to the fact that the German side did not hesitate to sign the Upper Silesian Convention, even though many of its articles (Articles 76, 78, 79, 80, 81) referred to members of minorities (*die Angehörigen der Minderheiten*).¹⁵ The author also questioned the wording of Article 113 and pointed out that whenever subjective public rights were formulated in the Constitution, the expression “every German has a right” (*jeder Deutsche hat das Recht*) or “every German is entitled” (*jeder Deutsche ist berechtigt*) was used.¹⁶ This would imply that Article 113 of the Constitution did not establish a law that could be applied directly and required a more precise, statutory determination of what phrases such as “foreign language-speaking community” or “national development” meant. Thus, Article 113 contained a legal principle, which nevertheless required to be rendered in specific terms through pertinent legislation.

In his critique of the wording of Article 113 of the Constitution, Plettner invoked Article 91 of the Treaty of Versailles of 28 June 1919, in which Poles (*Pole*) were referred to as a national minority. They were defined as German citizens permanently residing in Germany, who were entitled to opt for Polish citizenship. There is no mention of Polish as a mother tongue in Article 91. Thus, according to Plettner, the authors of the Treaty of Versailles adopted an objective ethnic criterion rather than a linguistic criterion. A similar solution may be

14 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 89.

15 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 94.

16 Plettner, *Das Problem des Schutzes nationaler Minderheiten*, 91.

found in Article 27 of the Upper Silesian Convention of 15 May 1922, as well as in its Article 74, which expressly stated that “(...) the authorities shall not inquire whether anyone belongs or does not belong to a national, linguistic or religious minority, nor shall they deny such affiliation to anyone.”

All the German authors quoted above advocated the adoption of a subjective criterion, depending on the will of the individual who declares his or her national affiliation. It follows that the state cannot create objective criteria which preclude one from becoming a member of a national minority. Thus, the dominant view in the legal doctrine of the Weimar Republic was that belonging to a national minority was determined by the will of the individual and that the individual had fundamental rights to free national development.

From the moment Adolf Hitler came to power in 1933, those rights would be successively curtailed under the influence of fascist ideology, affecting the Jewish minority first and other national minorities later on. Robert O. Paxton observed that “enemies were central to the anxieties that helped inflame the fascist imagination.” The number of internal enemies was rapidly increasing in their minds. In fascist Germany, “the unclean, the contagious, and the subversive often mingled in a single diabolized image of the Jew, Gypsies and Slavs were also targeted.”¹⁷ Among the Slavs, the first to become such a target were the Lusatians. Between 1935 and 1938, all Lusatian organizations and associations were dissolved, all Sorbian-language periodicals were shut down, the use of the language in schools was prohibited, while most Lusatian activists were arrested and deported or imprisoned in concentration camps. Such an approach from the Nazi leadership inevitably undermined the position of national minorities—contrary to international law—culminating in their liquidation.

17 Robert O. Paxton, *Anatomia faszyzmu*, trans. Przemysław Bandel (Dom Wydawniczy Rebis, 2005), 46.

Liquidation of the Polish National Minority in Germany in 1940: Ordinance of 27 February 1940

On 2 March 1940, the Reich Law Gazette (*Reichsgesetzblatt*) No. 39 published the ordinance of the Council of Ministers for the Defence of the Reich of 27 February 1940 concerning the organizations of the Polish ethnic group (*Volksgruppe*) in the German Reich.¹⁸

Due to the fact that the text of the ordinance is unknown in Poland and its content is somewhat bizarre, it is worth being quoted in full.

Ordinance on the organizations of the Polish ethnic group in the German Reich of 27 February 1940.

The Council of Ministers for the Defence of the Reich decrees with the force of law (*Gesetzeskraft*):

§ 1

- (1) The activities of organizations of the Polish ethnic group in the German Reich (associations, foundations, societies, cooperatives and other enterprises) are prohibited. New organizations of the Polish ethnic group may not be established.
- (2) The previous executive bodies of the organizations of the Polish national minority shall step down. They may not manage the enterprises of the organizations and those assets which have a legal or economic connection with the enterprises.
- (3) In case of doubt, the Reich Minister of the Interior shall decide whether an organization is to be regarded as an organization of the Polish ethnic group.

¹⁸ *Reichsgesetzblatt*, Teil I, no. 39, 2 March 1940, 444.

§ 2

- (1) The Reich Minister of the Interior is authorized to appoint the Commissioner for the organizations of the Polish ethnic group.
- (2) The Commissioner shall carry out his activities in accordance with the instructions of the Reich Minister of the Interior and shall be subject to his official supervision. He may delegate his powers in individual cases.

§ 3

- (1) The Commissioner shall administer the organizations of the Polish ethnic group with the aim of liquidating them and shall be authorized to act for or against such organisations.
- (2) The Commissioner shall be authorized to dissolve the organizations of the Polish ethnic group.
- (3) Dissolved organizations of the Polish ethnic group shall be wound up by the Commissioner. The Reich Minister of the Interior may, in agreement with the Reich Minister of Justice, issue guidelines for the liquidation. These guidelines may deviate from the general regulations on liquidation.
- (4) Where organizations that are entered in public registers are concerned, the Commissioner may, at his own request, enter changes into the register.

§ 4

The Commissioner shall not be bound by the articles of association or resolutions of the general meeting of members (general meeting of the board) of an organization which regulate management by the executive bodies or the realization of assets.

§ 5

No claims for damages may be brought in connection with the measures taken on the grounds of this ordinance.

§ 6

Anyone who, contrary to § 1, participates in the continuation or establishment of an organization of the Polish ethnic group shall be punished with imprisonment and a fine or one of these penalties.

§ 7

The Reich Minister of the Interior shall issue the legal and administrative regulations necessary to implement and supplement this ordinance.

§ 8

This ordinance shall not apply to the incorporated eastern territories, including the territory of the former Free City of Danzig, as well as the Protectorate of Bohemia and Moravia.¹⁹

The above regulation was signed by the Chairman of the Council of Ministers for the Defence of the Reich, Field Marshal Hermann Göring, the Plenipotentiary General for the Reich Administration Frick, and Minister of the Reich and Head of the Reich Chancellery, Dr. Hans Lammers.

The function of the Reich Commissioner, an extraordinary plenipotentiary for the liquidation of the assets of the Polish ethnic group in Germany was entrusted to privy councillor A. Schmid. At first, he set about liquidating the property of the Union of Poles in Germany, which owned a number of tenements, mainly in Bochum. He placed four of them under administration exercised by a trustee, namely the stock company Treuhandstelle der ländlichen Genossenschaften Westfalens GmbH, based in Münster.

19 Polish translation from the German by J. Sandorski, J. Sandorski, jr.

The company sold the houses to the Germans. Three of them had previously been owned by the Bank Robotników [Workers' Bank] GmbH, a financial institution of the Polish diaspora. The Dom Polski [Polish House], where the Union was headquartered, was acquired by the Bremen-based company Scipio und Co.

Under the 1940 Ordinance, a number of Polish institutions were liquidated, including the Workers' Bank GmbH in Bochum. Commissioner A. Schmid seized all property belonging to the bank and the contributions of its shareholders. At the Commissioner's request, the Bank was removed from the court register. The property of the Union of Poles in Germany located in Mannheim-Santhofen was also appropriated. Subsequently, the property belonging to Towarzystwo Szkolne [School Society], Towarzystwo Młodzieżowe [Youth Society] and Towarzystwo "Zgoda" ["Concord" Society] was confiscated.

In Berlin, the Commissioner seized the assets of the Union of Poles in Germany and the banks of the Polish community: Bank Słowiański [Slavic Bank], Unia i Bank Ludowy "Pomoc" [People's Union and Bank "Succour"]. The capital acquired by Commissioner Schmid was deposited in an account at the Prussian State Bank (*Preussische Staatsbank*). The seized securities were also placed in liquidation accounts at the Dresdener Bank, Commerz und Privatbank and the Deutsche Bank.

The aftermath of the 1940 Ordinance was not confined to grave material damage suffered by the Polish national minority. Polish activists who were considered enemies of National Socialism were subjected to persecution and sent en masse to concentration camps; the number of such persons is estimated to have been at least 2,000. In May 1946 in Westphalia, the survivors formed the Association of the Former Political Prisoners of the Polish Minority in Germany. On behalf of those prisoners, the Bochum-based Union of Poles in Germany took steps to seek material compensation for the moral and physical harm as early as 1949.

After 1956, related claims would rely on the Federal Restitution Law (*Bundesentschädigungsgesetz*), enacted on 29 June 1956. One would particularly invoke § 1 of the law, which stated that compensation may only be paid to those who, being citizens of Germany, were able to prove that they had been subjected to discrimination on political, racial or religious grounds during the Nazi rule. The law was accompanied by a commentary, which stated that “Poles in Germany were persecuted not as a result of negative attitudes towards National Socialism, but due to their particularly radically represented and manifested nationalist aims.”²⁰ That commentary was evidently discriminatory, as it only mentioned the Polish national minority. Such a position of the German lawmaker tallied with the occasionally expressed opinion that the “old Polish diaspora,” who had migrated from the former Prussian partition mainly to Westphalia and the Rhineland, was not a national minority, because the reason for migration was the desire to improve their standard of living.

The Union of Poles in Germany fiercely objected to the anti-Polish notions and emphasized in its memoranda that it had been opposed to National Socialism, which is why it had been dissolved by the Nazi authorities, had its property confiscated and its members persecuted, despite the fact that they fulfilled their civic duties.

The disadvantageous situation faced by the Polish national minority was not changed by the Final Law of the Federal Restitution Law, adopted on 14 September 1965.²¹ German courts repeatedly rejected compensation claims filed by members of the Polish national minority who had been persecuted by the Nazi authorities. Appeals to higher courts proved unsuccessful as well.

²⁰ *Bundesgesetzblatt*, July 1956, 121.

²¹ *Bundesentschädigungsgesetz – Schlussgesetz vom 14 September 1965*, *Bundesgesetzblatt*, September 1965.

Estimation of the Losses Suffered by the Polish National Minority After 1940

A global estimate of the losses suffered by the Polish national minority after 1940 is by no means an easy task. Particular difficulties can be encountered when formulating claims relating to loss of health or life as a result of the brutal Nazi persecution. However, such efforts should not be discontinued even though the German authorities chronically ignore the matter of compensation payments to the German citizens belonging to the Polish national minority who had been persecuted in the Third Reich. It is also quite difficult to estimate the material losses incurred by the Polish diaspora associations, banks and other enterprises. The mere inventory of their property is extremely problematic due to missing records.

In 1945–1948, one considered the possibility of having Poles who lived in Westphalia and the Rhineland re-emigrate. Therefore, the Provisional Government of National Unity, acting on behalf of the Polish associations, attempted to recover the community property confiscated under the Ordinance of 1940. Those efforts were cut short in 1949 following the founding of the Federal Republic of Germany, which the Polish government did not recognize. In consequence, all contacts that had been established as part of the recovery process were severed.

Albeit incomplete, the documents and records salvaged and collected after the war make it possible to state that the value of the Polish property sequestered in the area of North Rhineland and Westphalia was as follows:

- 1) the confiscated capital of the Union of Poles in Germany and other union organizations, in cash and bank deposits: RM (Reich Mark) 247,665
- 2) confiscated movables of Polish associations, societies, organizations and institutions: RM 255,000.

The total amount of RM 502,665,²² cannot be considered final as it is only an estimate. Assessment of the losses of the Polish diaspora banks proves

²² Data after Anna Poniatowska et al., *Związek Polaków w Niemczech w latach 1922–1982*, ed. Jerzy Marczewski (Wydawnictwo Polonia, 1984), 213.

particularly problematic. It is to be presumed that the RM 3,000,000 which Commissioner A. Schmid deposited on an identified account (no. 141068) with the Prussian State Bank came from the assets which, may have belonged to the Slavic Bank, the People's Bank "Succour" as well as the Workers' Bank. As early as 1951, the Union of Poles in Germany applied for the removal of unlawful entries from the court register pertaining to the Workers' Bank and for a refund of the bank's capital. An Extraordinary General Meeting of the Shareholders of the Bank was instituted, and the Bank's Management Board and Supervisory Board were elected. However, reactivation the Bank was impossible because the DM 200,000 required as seed capital were lacking. For this reason, none of the pre-war Polish banks reopened.

It should be emphatically stressed at this point that the damages for the liquidated banks of the Polish community should not only include the compensation for the assets such banks had held but also the equivalent for the lost profits (*lucrum cessans*).

In Berlin alone, the documented amounts from the confiscated assets of the Union of Poles in Germany and other Polish diaspora organizations are as follows:

- 1) bank deposits: RM 1,413,534,
- 2) lump-sum interest of 25%: RM 353 383.50,
- 3) receivables for movable assets: RM 3,186,785.

With the aforementioned estimates in mind, it may be concluded that the losses incurred by the Polish national minority in Germany in the wake of the Ordinance of 1940 amount to RM 8,456,367.

If one adopts the revaluation coefficient of 1:5, which applied after the war to determine the RM to DM ratio, one obtains the amount of DM 1,691,273.50. As already noted, this amount does not include claims in respect of *lucrum cessans*.

The Issue of National Minorities in the Treaty of Good Neighbourship of 17 June 1991

The Polish-German Treaty of Good Neighbourship and Friendly Cooperation, signed on 17 June 1991, contains three articles (Articles 20–22) concerned with minority issues. Article 20(1) states that “members of the German minority in the Republic of Poland, i.e. persons with Polish citizenship who are of German origin or who acknowledge themselves to be of German language, culture or tradition, as well as persons in the Federal Republic of Germany, who hold German citizenship and who are of Polish origin or who acknowledge themselves to be of Polish language, culture or tradition have the right, individually or together with other members of their group, to freely express, preserve and nurture their ethnic, cultural, linguistic and religious identity without any attempt at assimilation against their will.”

In Section 2 of the same article, both parties to the Treaty declared that they “exercise rights and discharge obligations in accordance with international standards on minorities [...]” That section lists international documents which set the standards in question, such as the 1948 Universal Declaration of Human Rights, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 International Covenant on Civil and Political Rights, and the 1975 Helsinki Final Act.

The scope of protection is defined in Article 20(3), while its authors modelled it on the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.

In the provisions of Article 20 of the Treaty, protected persons in Poland were referred to as “German minority in the Republic of Poland,” but no analogous qualification was applied to German citizens of Polish origin in Germany. This discrepancy requires a commentary, given that international law offers no definition of a national minority that would be accompanied by a catalogue of instruments for the protection of such a minority. Therefore, the distinction made in Article 20 should not entail adverse legal consequences.

In practice, a certain asymmetry may be observed between the position of persons of German origin in Poland and persons of Polish origin in Germany. Although no such international legal obligations exist, the Polish electoral law exempts the German national minority from the so-called “five percent clause”. There is no equivalent provision in German legislation pertaining to German citizens of Polish origin. The wording used in Article 20(1) of the Treaty of Good Neighbourship suggests that there is no Polish national minority in Germany, which does not correspond to the actual state of affairs. J. Kranz aptly observes: “[...] although the Treaty and the law of the Federal Republic of Germany do not know the legal term of ‘Polish minority in Germany’, its existence is corroborated by the fact that the Treaty grants the same rights—described as minority rights and borrowed almost verbatim from the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE of 29 June 1990—to the German minority in Poland and the Polish group in Germany.”²³ The author concludes that, “if there were no Polish group in Germany, the Treaty would be exclusively concerned with the German group in Poland.”

In the Federal Republic of Germany, there is a noticeable tendency not to recognize certain national minorities in legal terms. Underlying that is a reluctance to bear the legal and financial consequences of minority recognition. Undoubtedly, German policies in this regard is influenced by the presence of a substantial Turkish population who reside permanently in Germany. The failure to include the Polish national minority in the 1991 Treaty does not mean that there are no minority protections for persons of Polish origin. It does, however, lead to certain organizational problems and makes it easier for the administrative authorities to adopt a negative attitude towards requests for financial assistance from the Polish diaspora in Germany.

²³ Jerzy Kranz, “Problematyka mniejszościowa w świetle Traktatu polsko-niemieckiego z 17 czerwca 1991 r. (wybrane zagadnienia),” in *Problematyka mniejszościowa w świetle Traktatu polsko-niemieckiego o dobrym sąsiedztwie i przyjaznej współpracy z dnia 17 czerwca 1991 r.* (Biuro Studiów i Analiz Kancelarii Senatu, 1996), OT-159, 4.

The provisions of the 1991 Treaty contain obligations binding on both federal and local authorities. Polish diaspora organizations establish contacts with both federal and lower-tier authorities, but their interactions often generate tensions and controversies resulting from a misunderstanding of the legal solutions provided for in the Treaty. In turn, this provokes dissatisfaction among certain Polish community groups in Germany. The asymmetry between the position of the German minority in Poland and the Polish community in Germany is largely due to the differences in their financial standing. The German minority in Poland takes advantage of the support from the Polish state as well as from the German government. The financial status of the Polish diaspora is much worse, as it does not benefit from funds provided by either government.

As regards the Polish community in Germany, one should strive for a much more effective realization of the rights which arise from the safeguards set out in Article 20(3) of the 1991 Treaty. Indisputably, due to the federal structure of the German state, it is much more difficult for Poles in Germany to exercise the rights enshrined in the Treaty than it is for Germans in Poland. For this reason, Polish diaspora organizations should demand—on the grounds of the 1991 Treaty—both legal and financial assistance to facilitate their organizational activities. In contrast to the Germans living in Poland, it is all too often the case that Poles in Germany do not know what subsidies they may obtain and on whose will they depend. This is compounded by the fact that they are dispersed across Germany and have to negotiate with representatives of 16 states (*Länder*).

**Claims of the Polish National Minority Defined as
“German Citizens of Polish Origin of Polish Origin”
Against the Federal Republic of Germany**

As early as 1945, The Polish Committee for Westphalia and Rhineland petitioned the occupation authorities requesting the restitution of the Polish property confiscated by the Nazi authorities. At the same time, the pre-war Board of

the Workers' Bank GmbH in Bochum demanded permission from the British occupation authorities to resume the operation of the Bank. To that end, Polish organizations were requested to demonstrate that they were formally and legally the same entities that had existed between 1922 and 1949. This requirement was only met in 1950, when the relevant decision was obtained at the Registration Court in Berlin-Charlottenburg.

In 1956, the Union of Poles in Germany recovered the Polish House in Bochum. The Union's authorities continued their efforts to reopen the Workers' Bank in Bochum. Already in 1951, an extraordinary General Meeting of the shareholders elected a new management and supervisory board, with the goal of taking formal steps to have the bank's assets restituted. The claims brought by the newly elected official bodies of the Bank were rejected in January 1954 by the West Berlin Senator for Treasury Affairs. The rationale behind his decision was astonishing in that it asserted—among other things—that the property in question used to belong to an enemy and that its subsequent fate should be decided by the states during peace treaty negotiations. In December 1955, the Regional Court (*Landgericht*) of Berlin did not—admittedly—share the senator's position, but it dismissed the compensation claim, stating that it was not possible to determine the value of the property as at 27 February 1940 and, consequently, the extent of the losses. An appeal to the Supreme Court in Berlin was unsuccessful, as the Court ordered material evidence to be provided documenting the history of the property, a demand that the Union of Poles in Germany was unable to meet.

Revindication attempts were resumed in 1963. The Supreme Restitution Court of Berlin (Das Oberste Rückerstattungsgericht für Berlin) ruled in March 1963 that the confiscation of the Polish diaspora property by the authorities of the Reich was unjustified. On those grounds, in June 1963, the Regional Court of Berlin awarded the Union of Poles in Germany symbolic compensation for the movable property once found at the Berlin headquarters of the Union of Poles in Germany. Also, one succeeded in obtaining compensation for the confiscation of the People's Bank "Succour."

With regard to the remaining Polish diaspora property, the requirement to supply evidence of the material losses resulting from Nazi confiscations remained in force, despite the intervention of the Federal Union of European Nationalities (Föderalistische Union Europäischer Volksgruppen), of which the Union of Poles in Germany had been a member since 1956. It was impossible to collect the relevant documents, because records of the kind had been partly destroyed during the war. By way of amicable procedure, the Polish side managed merely to obtain a refund of DM 500,000 in March 1967, though the amount constituted only partial compensation for the Union of Poles in Germany, without the property of other Polish organizations taken into account.

Furthermore, no indemnification has been awarded to date to the victims of Nazi terror among the Polish diaspora. Even the intervention of the German Human Rights League (Deutsche Liga für Menschenrechte e.V.) failed to change the German government's position on the issue. As the provisions of the 1956 Federal Restitution Law (*Bundesentschädigungsgesetz*) of 1956 were clearly in conflict with both the Federal Constitution of 1949, which guarantees equal treatment for all citizens, and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, to which Germany is a party, attempts were made to amend them, but they proved unsuccessful as well.

Recent Activities of the Polish Diaspora Organisations Aimed At Normalization of Their Legal Position and Recognition of Their Property Claims

Following the founding of the Convention of Polish Organizations in Germany in 1998, which united the previously conflicted Polish diaspora associations (Congress of the Polish Diaspora in Germany, the Union of Poles in Germany, the Union of Poles "Concord," the Polish Council in Germany, and the Catholic Centre for Promoting Polish Culture, Tradition and Language), efforts to

strengthen the position of persons of Polish origin in Germany intensified. The government of the Federal Republic of Germany has not yet decided to acknowledge the Convention as the representative of the entire Polish community. However, the community is slowly beginning to speak with one voice, even though the Union of Poles in Germany still retains a clearly distinct status in view of its historical role.

On 24 August 2009, Berlin-based attorney Stefan Hambura, acting on behalf of the Polish diaspora organizations, addressed a letter to the Chancellor Angela Merkel.²⁴ Hambura's letter met with lively response in Polish parliamentary circles—at a meeting of the Sejm Committee for Liaison with Poles Abroad on 24 September 2009—as well as in the statements by the representatives of the Ministry of Foreign Affairs.²⁵

The response of the Federal Ministry of Justice of 13 October 2009 to the letter of attorney Stefan Hambura addressed to Chancellor Angela Merkel is fundamentally important, and it deserves to be discussed in greater depth in view of its import. In the letter, the Ministry stated that the Ordinance of 27 February 1940 could not be repealed, because it “has long become invalid” (“längst ungültig geworden ist”). To justify that viewpoint, it was asserted that “the laws of the Nazi regime automatically became invalid with the enactment of the Basic Law, insofar as their content was contrary to the Basic Law and, in particular, when they were incompatible with the fundamental rights and essential principles of the democratic constitutional order of the Federal Republic of Germany.” The letter from the Federal Ministry of Justice underlined that “Article 123(1) of the Basic Law states that a law enacted prior to the meeting of the German Bundestag on 7 September 1949 remains in effect only if it does not contravene said Basic Law.” “[...] The Ordinance on the organizations of the Polish minority in the German Reich is contrary to the freedom of associa-

24 Full text of the letter in Piotr Cywiński, “Walka o symbole złączyła Polaków w Niemczech,” *Rzeczpospolita*, 25 August 2009.

25 Kancelaria Sejmu, Biuro Komisji Sejmowych, *Biuletyn*, no. 2771/VI kad. (24 September 2009), 4–7, 9.

tion as well as to the general principle of equality guaranteed under Articles 9 and 3 of the Basic Law.” In addition, it is noted in the letter that all provisions from before that date are null and void unless they are expressly listed in the body of federal law contained in Part III of the *Federal Law Gazette*. The Federal Ministry of Justice concludes by stating that the Ordinance referred to in the letter of attorney Stefan Hambura “was not included in the compilation for the reasons mentioned above” and therefore “the repeal or abrogation of the ‘Ordinance on the Organizations of the Polish Ethnic Minority in the German Reich’ is not required” (“Einer Aufhebung oder Außerkraftsetzung der ‘Verordnung über die Organisationen der polnischen Volksgruppe im Deutschen Reich’ bedarf es daher nicht”).²⁶

Prospects for Resolving Legal Issues Relating to Claims of the Polish Diaspora Organizations in the Federal Republic of Germany

When the position of the German government, as expressed in the letter of the Federal Ministry of Justice of 13 October 2009, is examined against the position of the Ministry of Foreign Affairs of the Republic of Poland, one will readily conclude that both sides concur that the 1940 Ordinance is invalid. This raises the question of the consequences of such a mutually recognized legal state of affairs. The invalidity of a legal act, both in domestic and international law, should result in *restitutio in integrum*, i.e. the restoration of the state that had existed before the invalid act was introduced. Adopting the concept presented in the letter of the Federal Ministry of Justice, the 1940 Ordinance may be considered to have been invalid since 7 September 1949 at the earliest. However, even farther-reaching conclusions may be drawn.

²⁶ Letter from the Bundesministerium der Justiz dated 13 October 2009, 1100/311–48–702/2009, 2.

Given the legal state of affairs described above and analyzing the prospects for resolving the problems involved in the claims of the Polish diaspora organizations, the following deductions should be made.

- 1) One should abandon the argument that the legislation of the Allied Control Council, which exercised governance in Germany after World War II, rendered the Ordinance of 27 February 1940 inapplicable. During the 32 months of its existence, the Allied Control Council was unable to resolve any major legal issue.²⁷ Its proclamations and laws give the impression of stating the obvious. On 10 October 1945, the Allied Control Council issued a law on the liquidation of all Nazi organizations, enumerating the latter in detail. At the same time, the Council indicated a number of enactments of the Third Reich that ceased to apply. The Ordinance of 27 February 1940 was not included in that list. It would follow that, in line with the wording of Article II of Law No. 1, the Council did not find it to cause “injustice or inequality [...] by discriminating against any person by reason of his race, nationality [...].”
- 2) The fact that the Federal Ministry of Justice unequivocally recognizes the Ordinance to be invalid under Article 123 of the Basic Law, warrants abandoning the arguments relying on the actions of the Allied Control Council. Given the construction of *restitutio in integrum*, one should perhaps recall the legal situation of the Polish minority in Germany and the German minority in Poland before the Second World War. Unlike the minority treaties, which in 1919 and 1920 obliged several states (Poland—the so-called Little Treaty of Versailles of 28 June 1919, Yugoslavia, Czechoslovakia, Romania, Greece and Armenia) to grant certain rights and privileges to racial, religious and linguistic minorities, the Polish-German Convention of 15 May 1922 on Upper Silesia (which expired in 1937) did not contain unilateral but mutual obligations of the two states, while their scope was much

27 See Jerzy Krasuski, *Historia RFN* (Książka i Wiedza, 1981), 31.

broadier than in the minority treaties. Although—admittedly—it concerned the inhabitants of Upper Silesia on either of the border, it had a significant impact on the legal position of the Polish national minority in Germany.

The foreign policy of the Third Reich with respect to national minorities is compellingly reflected in the initiative of the German diplomacy following the expiry of the Upper Silesian Convention of 15 May 1922 on 15 July 1937. The German ambassador to Warsaw, Hans Adolf von Moltke, suggested to the Polish side that both states conclude an agreement on the mutual protection of national minorities. That proposal stemmed from the fact that on 26 January 1934 Poland had signed a declaration of non-aggression with Germany, while the Minister of Foreign Affairs, Józef Beck, had announced that he would not cooperate with the organs of the League of Nations where compliance with minority safeguards in Poland was concerned. Although the idea of a new minority agreement advanced by Germany did not meet with acceptance in Poland, the insistence of Ambassador von Moltke (who invoked the express wish of Adolf Hitler), prompted the Polish Government to endorse—on 5 November 1937—a concordant declaration on the mutual protection of national minorities.²⁸

Considering the vital impact which that declaration had for upholding the fundamental rights of national minorities formulated in the Upper Silesian Convention, it may be worthwhile to examine the provisions of that instrument.

28 Übereinstimmende Erklärung der Deutschen und der Polnischen Regierung über den Schutz der beiderseitigen Minderheiten, veröffentlicht am 5 November 1937, in Dokumente zur Vorgeschichte des Krieges, Erstes Kapitel (Forts.) Entwicklung der Deutsch-Polnischen Beziehungen, B. Deutschlands Bemühen um eine Verständigung mit Polen, 1933 bis 1939, V. Verhandlungen über eine Deutsch-Polnische Minderheitenerklärung (Januar bis November 1937), no. 101.

In the introduction, the Polish and German governments found it advisable to make the position of German minorities in Poland the subject of a friendly discussion.

Both governments were unanimous that the interests of those minorities were crucial for the further development of good-neighbourly relations between Germany and Poland, and that the welfare of the minorities would be ensured in accordance with the same principles in each country. For those reasons, it was with mutual satisfaction that the two governments agreed that within the framework of respective sovereignties and in the interests of said minorities, either state will regard the following principles as binding (*maßgebend*): (1) Reciprocal respect for the German and Polish nationhood (*Volkstum*) precludes attempts to forcibly assimilate minorities, question minority affiliation or hinder the declaration of minority affiliation. In particular, no pressure shall be exerted on the young members of minorities with the aim of alienating them from their minority membership; (2) Members of minorities shall have the right to use their language freely in speech and writing, both in personal and business matters, in periodicals, as well as during public gatherings. Members of a minority shall not suffer any negative consequences when cultivating their mother tongue and the customs of their nation in both public and private life; (3) Members of a minority are guaranteed the right to associate for cultural and economic purposes; (4) A minority may maintain and establish schools where their mother tongue is used. As regards worship, religious practice in the minority mother tongue as well as respective ecclesiastical structures shall be protected as well; (5) Members of a minority may not be persecuted due to their minority affiliation when choosing or engaging in their profession or any economic activity. In economic activities, they are ensured the same rights as mem-

bers of the state nation, in particular with respect to the ownership and acquisition of real estate.

In the conclusion of the declaration, the parties stipulated that the rules formulated therein must not undermine the loyalty of minority members towards the state to which they belong. The parties also underlined that the aim of those principles is to guarantee the minority an equitable existence and promote their harmonious coexistence with the majority nation in the state, which should contribute to the strengthening of good-neighbourly relations between Poland and Germany.²⁹

The concordant declaration by the governments of both countries was accompanied by a statement from the Führer Adolf Hitler conveyed to representatives of the Polish ethnic group on 5 November 1937, in which he stressed that “the Government of the Reich has endeavoured to shape the coexistence of the Polish ethnic group with the German state nation (*Staatsvolke*) in a harmonious and internally peaceful manner.”³⁰

The joint declaration of 5 November 1937 bears all the hallmarks of a binding international agreement and contains the fundamental principles of international law pertaining to the protection of minorities. Compared to the Upper Silesian Convention of 1922, the joint declaration affirmed that those fundamental principles were valid not only for the inhabitants of Upper Silesia, but also with regard to the national minorities living elsewhere in both states. It would follow that the expiry of the Upper Silesian Convention did not worsen the legal position of the national minorities on either side of the border.

29 Übereinstimmende Erklärung der Deutschen und der Polnischen Regierung über den Schutz der beiderseitigen Minderheiten, veröffentlicht am 5 November 1937.

30 Erklärung des Führers, beim Empfang der Polnischen Volksgruppenvertreter, 5 November 1937, in: Dokumente zur Vorgeschichte des Krieges, Erstes Kapitel (Forts.), Entwicklung der Deutsch-Polnischen Beziehungen, B. Deutschlands Bemühen um eine Verständigung mit Polen, 1933 bis 1939, V. Verhandlungen über eine Deutsch-Polnische Minderheitenerklärung (Januar bis November 1937), no. 102.

Prior to further conclusions, it should be asserted that the Ordinance of 27 February 1940 on the Polish ethnic group in the German Reich was not only contrary to the general principles of international law, but also in flagrant breach of the joint declaration of 1937.

In keeping with the Convention of 15 May 1922, the Union of Poles in Germany was registered in the same year and subsequently recognized as the representative of the Polish national minority. During the Weimar Republic, the Union would be referred to using the term “*nationale Minderheit*” (national minority). It was only in the Fascist propaganda that the appellation “*polnische Volksgruppe*” (Polish ethnic group) would be propagated, manifesting in the title of the Ordinance of 27 February 1940.

- 3) From the standpoint of international law, the fascist Ordinance of 27 February 1940 was at variance with the applicable international standards at the time. After the First World War, the international community realized that ethnic tensions invariably entailed a threat to international security and potential escalation into armed conflict. Therefore, efforts to safeguard the rights of national minorities were seen as tantamount to striving for social and political stability. One was aware that protecting those rights was one of the foremost international issues, whose regulation in international and domestic law was anything but easy. Nonetheless, there was a widespread view that the core obligations contained in the minority treaties concluded after the First World War represented a special application of the norms generally binding on the so-called Western culture states. Such a notion is best illustrated by the position expressed in 1922 by the Assembly of the League of Nations, according to which “States not under treaty obligation with regards to minorities shall observe, in respect of their racial, religious and linguistic minorities, at least as lofty standards of justice and tolerance as those required of others by treaties and by the proper action of

the Council.”³¹ By virtue of being international standards, the generally applicable norms bound the “Western culture states” such as Germany, even if it was no longer a party to the minority provisions. The Ordinance of 27 February 1940 clearly violated the norms of widely applicable international law and, as such, must be deemed invalid *ab initio*. Therefore, it should be concluded that the Polish minority in Germany has existed uninterruptedly since 1922 to the present day.

- 4) With the 1940 Ordinance being invalid *ab initio*, adoption of the construction of *restitutio in integrum* warrants abandoning euphemisms such as “Polish ethnic group” or “persons in the Federal Republic of Germany who hold German citizenship and are of Polish origin,” used so maladroitly in Article 20(1) of the Treaty of Good Neighbourship and Friendly Cooperation concluded on 17 June 1991 between the Republic of Poland and the Federal Republic of Germany. One should consistently employ the term “Polish national minority in the Federal Republic of Germany,” whilst avoiding any other wording. Also, efforts should be made to revise Article 20 of the Treaty by negotiating an appropriate annex in which “the Polish national minority in Germany” would replace the awkward “persons in the Federal Republic of Germany who hold German citizenship and are of Polish origin.”
- 5) It should also be emphasized that the Union of Poles in Germany which currently functions in the Federal Republic of Germany is, beyond any doubt, the same organization as the Union of Poles in Germany founded in 1922. According to the proposition advanced in (3) above, the Union of Poles in Germany has never ceased to exist, which makes it a continuator rather than a successor of the pre-war Union. In addition, a substantial proportion of the members of the Union meet the condition of having lived for generations in the areas of traditional

31 *Société des Nations. Actes de la Troisième Assemblée. Séances Plénières*, Genève 1922, 186.

settlement of the ethnic group in Germany. Therefore, there are no grounds to question whether it is representative of the Polish national minority in Germany.

- 6) The Polish authorities should make every endeavour to fully document the property claims of the Polish organizations in Germany. For this purpose, one should conduct research in the archives of the Provisional Government of National Unity, which made attempts to inventory the property of the Polish diaspora already in the late 1940s.

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