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LEGAL OBLIGATIONS OF POLAND REGARDING THE RESTITUTION OF PRIVATE PROPERTY TAKEN DURING WORLD WAR II AND BY THE COMMUNIST REGIME IN LIGHT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *The Polish Government's proposal, submitted in autumn 2017, for a comprehensive reprivatisation bill revived the international discussion on the scope of Polish authorities' obligations to return property taken during World War II and subsequently by the communist regime. However, many inaccurate and incorrect statements are cited in the discussions, e.g. the argument that the duty of the Polish authorities to carry out restitution is embedded in the European Convention on Human Rights and its Protocol No. 1. This article challenges that claim and analyses the jurisprudence of the Convention's judicial oversight bodies in cases raising issues of restitution of property taken over in Poland before the accession to both of the above-mentioned international agreements. In the article I argue that there is no legal basis for claiming that there exists a legal obligation upon the Polish State stemming directly from international law – in particular human rights law – to return the property and that the only possibly successful legal claims in this regard are those that can already be derived from the provisions of the Polish law applicable to these kinds of cases. In its latest rulings, issued in 2017–2019, the European Court of Human Rights determined the scope of responsibility incumbent on Polish authorities in this respect.*

Keywords: communism, European Court of Human Rights, European Convention on Human Rights, nationalization, restitution of private property

INTRODUCTION

The Polish Government's proposal, submitted in autumn 2017, for a comprehensive reprivatisation bill has revived the ongoing international discussions on the ques-

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tion of whether the current Polish authorities are obliged, and if so to what extent, to remedy damage caused to the property of individuals during World War II and by the subsequent communist regime.[1] However, many incorrect and inaccurate claims and arguments are used in the debates. Firstly, the arguments simultaneously raise issues of a varied nature: political, moral, and legal. The least attention has been paid to the analysis of possible legal obligations existing on the part of the Polish State. Secondly, the discussions generally do not distinguish between the historical and legal circumstances that led to the loss of property. This distinction is of key importance in order to establish the existence, *vel non*, of any obligations. In the discussion, at least two legal situations must be distinguished: an alleged obligation to return property seized or destroyed by the German Third Reich and the USSR in the occupied Polish territories during World War II; and an obligation to return the property taken over after the war by the communist authorities as a result of nationalisations and mass expropriations. Of course, in many cases the property seizure was first executed by the German authorities, and then the property was taken over by the communist authorities. However, this "legal succession" does not change the fact that the circumstances and the legal bases (or lack thereof) for taking over the property determine the scope of possible liability of the current authorities. Thirdly, the discussions wrongly assume that under the provisions of current Polish law there are no possibilities to recover former property. Fourthly, in the discussions surrounding the reprivatisation processes the argument was raised that the duty of the Polish authorities to carry out these processes is embedded in the field of human rights law, which guarantees property rights, including the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR) and its Protocol No. 1.[2]

In this article I challenge the latter claim and analyse the jurisprudence of the Convention's judicial bodies with regard to cases raising issues of restitution of property taken before Poland became bound by the provisions of the Convention and Protocol No. 1. Having in mind the weaknesses of the current public discussions on reprivatisation indicated above, the focus of the article is only on legal arguments and is based on the jurisprudence of the European Commission on Human Rights (Commission

[1] The draft of the Act on the compensation for certain harm caused to natural persons as a result of the takeover of real estate or movable monuments by the communist authorities after 1944 was prepared by the Ministry of Justice and presented for inter-ministerial consultations in October 2017, available at: https://bip.kprm.gov.pl/kpr/form/r29335531,Projekt-ustawy-o-zrekompensowaniu-niektorych-krzywd-wyrzadzonych-osobom-fizyczny.html (accessed 30 June 2020). The draft provided for *ex lege* discontinuation of all pending reprivatization proceedings. At the same time, the draft introduced the right to compensation in the amount of 20% of lost property, indicating that the individuals entitled to receive it would include children, spouses and parents of the former owners. Due to the introduction of the abovementioned discontinuation of pending proceedings and due to the very narrow circle of potential beneficiaries marked out, the project met with very wide criticism both in Poland and abroad.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1993, No. 61, item 284, as amended; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1995, No. 36, item 175.

or EComHR) and subsequently the European Court of Human Rights (Court or ECtHR). Additionally, I briefly present the legal possibilities available in Polish law to claim restitution or damages for the property taken during the years 1939-1989. In the article I argue that there is no legal basis for claiming that there exists a legal obligation upon the Polish State stemming directly from international law – and in particular from human rights law – to return the property, and that the only possibly successful legal claims in this regard are those that can already be derived from the provisions of Polish law applicable to these kinds of cases. In its most recent judgments and decisions, issued in 2017–2019, the ECtHR finally determined the scope of responsibility incumbent on Polish authorities in this respect.

1. GENERAL PRINCIPLES CONCERNING THE RESTITUTION OF PROPERTY DERIVING FROM THE ECTHR CASE LAW

The principles on which the rulings have been based in cases against Poland regarding the return of or compensation for property looted or destroyed in Polish territories by Nazi and Soviet authorities during World War II and property taken over by the communist authorities after the war were essentially worked out in the previous jurisprudence of the Commission, and subsequently the Court. Therefore, before conclusions with respect to Poland are drawn, it is necessary to briefly present the basic principles of protection of property rights developed in the case law involving other states.

The first complaints concerning property transformations during and after World War II were directed, starting from the 1950s, against Germany,[3] and then from the beginning of the 1990s against other Central and Eastern Europe states which acceded to the Convention system.[4]

[3] EComHR, *A. and Others v. Germany* (App. No. 899/60), 9 March 1962; *A.,B.,C.,D.,E.,F.,G and I. v. Germany* (App. No. 5573/72 and 5670/72), 16 July 1976; *X. v. Germany* (App. No. 6742/74), 10 July 1975; *X., Y., Z v. Germany* (App. Nos. 7655/76, 7656/76, 7657/76), 4 October 1977.

[4] For discussions concerning the ECtHR case law *see generally*, S. Djajic, *The Right to Property and the Vasilescu v. Romania Case*, 27 Syracuse Journal of International Law and Commerce 363 (2000); E. Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5(2) International Journal of Transitional Justice 282 (2001); M. Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, 29(3) Review of Central and East European Law 325 (2004); M. Krzyżanowska-Mierzewska, *Problem wywłaszczonej własności w orzecznictwie Europejskiego Trybunału Praw Człowieka i jego odniesienie do niemieckich roszczeń majątkowych wobec Polski* [The problem of expropriated property in the jurisprudence of the European Court of Human Rights and its reference to German property claims against Poland], in: W.M. Góralski (ed.), *Transfer - obywatelstwo - majątek. Trudne problemy stosunków polsko-niemieckich. Studia i dokumenty*, PISM, Warszawa: 2005; P. Macklem, *Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 European Journal of International Law 1 (2005); C. Lebeck, *Rights in Transitions: The European Court of Human Rights' Judgment in Jahn and Others v. Germany*, 17(2) King's Law Journal 359 (2006); L. Garlicki, *L'application de l'article 1er du Protocol No. 1 de la Convention Européene des Droits de l'Homme dans l'Europe Central et Oriental. Problems de transition*, in: H. Vandenberghe et al. (eds.), *Propriété et droits de l'homme. Property and Human Rights*, Die Keure, Brugge:

Firstly, according to the general principles of international law regarding the non-retroactivity of treaties,[5] the jurisprudence has formulated the rule that states are not responsible – at least under the Convention – for actions they committed before the Convention and Protocol No. 1 entered into force in the respondent state. While there are exceptions concerning "continuing violations" in some areas of human rights law, this principle is rather strictly applied in cases concerning property rights. In the case of Poland, the relevant date from which the judicial authorities of the ECHR have temporal jurisdiction to assess the actions of the Polish authorities on the basis of Protocol No. 1 is 10 October 1994, the date of the entry into force of the Protocol in Poland.

Secondly, Protocol No. 1 to the Convention protects only existing possessions and does not guarantee the right to acquire property. Therefore, it does not impose on States an obligation to return property which was taken away by them before ratification of the Convention and Protocol No. 1.[6]

Thirdly, the jurisprudential bodies of the Convention apply an autonomous concept of ownership, independent of a formal assessment in national law. "Property" may be either "existing property" or assets, including claims in which the claimant may assert at least a "legitimate expectation" of obtaining the effective use of property rights.[7] However, the hope of recognizing a right of ownership that could not be effectively exercised, or a conditional claim that fails to be recognised because of non-fulfilment of the conditions stipulated in domestic law, cannot be regarded as "property" within the meaning of Art. 1 of Protocol No. 1.[8]

2006; L. Garlicki, *Transformacja ustrojowa a ochrona prawa własności (Aktualne tendencje w orzecznictwie ETPCz)* [Political transformation and protection of property rights (Current tendencies in the jurisprudence of the ECtHR)], in: J. Góral (ed.) *Ratio est anima legis. Księga jubileuszowa ku czci Profesora Janusza Trzcińskiego*, NSA, Warszawa: 2007; L. Damsa, *The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe. In Search of a Theory*, Springer, Heidelberg: 2016; U. Deutsch, *Expropriation without Compensation: The European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of "New Farmers"*, 6(10) German Law Journal 1367 (2005); A. Mężykowska, *Procesy reprywatyzacyjne w państwach Europy Środkowo-Wschodniej a ochrona prawa własności w systemie Europejskiej Konwencji Praw Człowieka* [Reprivatisation procedures in the countries of Central and Eastern Europe and protection of property in the system of the European Convention for Human Rights], Wydawnictwo UG, Gdańsk: 2019.

[5] Art. 28 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[6] ECtHR, *Ballerstedt and Others v. Germany* (App. No. 54998/00), 17 November 2005; *Beshiri and Others v. Albania* (App. No. 7352/03), 22 August 2006; *Bergauer and 89 Others v. Czech Republik* (App. No. 17120/04), 13 December 2005. *See also* S. Sołtysiński, A. Nowicka, *Skutki nacjonalizacji może zrekompensować tylko polski parlament* [The effects of nationalization can only be compensated by the Polish parliament], Rzeczpospolita 22.2.2007.

[7] ECtHR, *Pine Valley Developments and Others v. Ireland* (App. No.12742/87), 29 November 1991, para. 51; *Pressos Compania Naviera S.A. and Others v. Belgium* (App. No. 17849/91), 20 November 1995, para. 31; *Beshiri and Others v. Albania,* para. 78; *Gratzinger and Gratzingerova v. Czech Republic* (App. No. 39794/98), 10 July 2002, para. 69.

[8] *Gratzinger and Gratzingerova v. Czech Republic,* para. 69; ECtHR, *Von Maltzan and Others v. Germany* (App. Nos. 71916/01, 71917/01 and 10260/02), 2 March 2005, para. 74; *Beshiri and Others v. Albania*, para. 78.

Although the assessment of the nature of the interest is independent of national law, a property claim that is not based on national law will not be protected under Protocol, as the Court is not entitled to create property rights. At the same time, the applicants cannot derive any legitimate expectation of property restitution from the fact that after 1989 there were parliamentary debates on the enactment of a reprivatisation law.[9] A hope that the applicable law would be changed in favour of the applicants cannot be treated as a form of legitimate expectation under Art. 1 of Protocol No. 1.[10] The Court considers that the act of nationalisation/expropriation or other action resulting in the deprivation of property is, in principle, of an instantaneous nature and does not give rise to a situation of continuing infringement of the right.[11]

Fourthly, when introducing restitution solutions, states have a wide margin of appreciation.[12] This margin allows them to take into account the state's financial capabilities as well as allows for the implementation of specific political objectives, also by excluding restitution in relation to certain categories of former owners.[13] States are not limited in determining the extent of any return of property and the choice of conditions that must be met in order for property to be returned to former owners.[14] Moreover, states are not obliged to establish any legal procedures to demand restitution of property.[15]

However, states' margin of appreciation is not unlimited, and it is subject to control by the Convention bodies, which must also take into account the principle of non-discrimination.[16] As soon as a State party to the Convention ratifies Protocol No. 1 and enacts provisions providing for total or partial restitution of property confiscated under previous regimes, such provisions may be assessed as creating new, hitherto previously non-existent, property rights protected by Art. 1 of Protocol No. 1.[17] The same principle applies to legislation providing for restitution or compensation adopted prior to the ratification of Protocol No. 1, provided that the legislation remains in force after the date of the ratification,[18] and in addition the possibility of obtaining compensation is confirmed by subsequent authorities.[19]

Fifthly, the Court's jurisprudence establishes the principle that one cannot claim recognition of a legitimate expectation of a property right in cases where there is a dis-

[9] *Von Maltzan and Others v. Germany,* para. 67.

[10] *Ibidem*, para. 112; *Gratzinger and Gratzingerova v. Czech Republic,* para. 73.

[11] EComHR *Weidlich, Fullbrecht, Hasenkamp, Golf, Klausser and Mayer v. Germany* (App. Nos. 19048/91, 19049/91, 19342/92, 19549/92 and 18890/91), 4 March 1996; ECtHR *Blečić v. Croatia* [GC] (App. No. 59532/00), 8 March 2006, para. 86.

[12] ECtHR, *Jahn and Others v. Germany* (App. No. 46720/99, 72203/01 and 72552/01), 30 June 2005, para. 91; *von Maltzan and Others v. Germany,* para. 74(d), *Beshiri and Others v. Albania,* para. 81.

[13] ECtHR, *Weber v. Germany* (App. No. 55878/00), 23 October 2006.

[14] ECtHR, *Jantner v. Slovakia* (App. No. 39050/97), 4 March 2003, para. 34.

[15] ECtHR, *Beshiri and Others v. Albania,* para. 61.

[16] ECtHR, *Vajagić v. Croatia* (App. No. 30431/03), 20 July 2006.

[17] ECtHR, *Slavov and Others v. Bułgaria* (App. No. 20612/02, 42563/02, 42596/02, 16059/03, 32427/03), 2 December 2008, para. 78.

[18] *von Maltzan and Others v. Germany*, para. 74.

[19] ECtHR, *Bata v. Czech Republic* (App. No. 43775/05), 24 June 2008, para. 77.

pute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts.[20] A general issue that is revealed on the basis of cases in which the applicants challenge the domestic courts' decisions is whether the Court has the right to control the content of the decision of the national authorities, in particular whether it has the right to challenge the interpretation of national law applied by the national authority.

In addition, it should be noted that the Court sees its role as limited to ensuring that the decisions of the national authorities are not arbitrary, and leaves the assessment of the factual and legal circumstances primarily to the national authorities. Due to the fact that the jurisdiction of the ECtHR is subsidiary to the national one and its role is not to replace the views formulated by national courts with its own, when deciding whether there has been an interference with the applicants' rights the Court essentially bases its understanding on the applicable national law and the way in which it is interpreted and applied by national authorities.[21]

2. APPLICATION OF GENERAL PRINCIPLES REGARDING RESTITUTION OF PROPERTY IN CASES AGAINST POLAND

1.1. General rules for restitution of property in Poland after 1989

At the outset, a short introduction is required to explain the existing legal possibilities to recover property that was taken over in the period from WWII to 1989. Above all, it is a misunderstanding to say that in Poland there have been no possibilities to regain property taken under previous regimes. While the issue of the application of national measures is not the subject of this article, nevertheless a brief explanation of the existing legal venues is of key importance for the correct presentation of the EComHR and ECtHR case law.

One important issue that casts a shadow over the effectiveness of the legal regulations applied in the context of assessing the possibilities of recovering properties, including movable objects such as works of art, is the fact that ownership changes made by the communist authorities were often preceded by the German authorities, who looted the property. Although during and after World War II the Polish authorities adopted a whole range of regulations aimed at invalidating the acts of confiscation of property carried out by the occupation authorities, the legal situation concerning properties that met this fate was extremely complicated.[22] It should be noted that situations of this

[20] ECtHR, *Kopecký v. Słowacja* (App. No. 44912/98), Grand Chamber, 28 September 2004, para. 50.

[21] *Bata v. Czech Republic*, para. 80, *Jantner v. Slovakia*, paras. 29-33.

[22] Dekret o mocy obowiązującej orzeczeń sądowych wydanych w okresie okupacji niemieckiej na terytorium Rzeczypospolitej Polskiej [Decree on the validity of judicial decisions made during the German occupation in the territory of the Republic of Poland], Journal of Laws of 1945, No. 25, item 151; Dekret o majątkach opuszczonych i porzuconych [Decree on derelict and abandoned property], Journal of Laws of 1945, No. 9, item 45; Ustawa o majątkach opuszczonych i porzuconych [Law on derelict and abandoned

type occurred in all the countries of occupied Central and Eastern Europe[23] and are not specific only to Poland.

Despite the fact that the Polish authorities did not enact a comprehensive restitution act, the legal system that was created enables, in certain cases, restitution or compensation through the so-called "judicial reprivatisation" proceedings.[24] If in an individual case the nationalisation had been carried out by the communist authorities in breach of the then-applicable law, it is legally permissible to initiate legal action before the administrative and civil courts (depending on the legal circumstances) in order to obtain a ruling declaring that the nationalisation in a concrete individual case was illegal. To understand the legal situation in Poland, it is crucial to take into account that the general concept of reprivatisation laws which was applied in different CEE countries was based on an assumption that nationalisation without compensation was illegal *per se*. Unlike some others, the discussed Polish regulations does not contest the legality of the laws of communist State aimed at taking over property, but allows for the possibility to reverse individual acts on nationalisation that were carried out in violation of the nationalisation provisions. Following the systemic transformation which took place in 1989, the possibility to challenge the legality of administrative decisions, which had been introduced into the legal system in 1980, has been more and more frequently used by persons affected by nationalisation and expropriations.

Allegations made by international public opinion regarding the ineffectiveness of the restitution provisions available in Poland refer precisely to the above-mentioned legal possibility of challenging legality of individual nationalisation decisions.[25] No doubt part of the criticism is justified, particularly bearing in mind the protracted length of many proceedings. On the other hand, however, the critics do not take note of the fact that for years the jurisprudence of administrative bodies and courts (both civil and administrative) was very favourable to claimants, causing a great burden on the state budget.[26]

Secondly, it should not be forgotten, that in the years 1948–1971 Poland concluded with some West European countries, the United States and Canada a series of so-called

property], Journal of Laws of 1945, No. 17, item 97; Dekret o majątkach opuszczonych i poniemieckich [Decree on derelict and former German properties], Journal of Laws of 1946, No. 13, item 87.

[23] R. Crowder, *Restitution in the Czech Republic: Problems and Prague-nosis*, 5(1) Indiana International and Comparative Law Review 237 (1994), pp. 237 et seq.

[24] *See* L. Bosek, K. Krolikowska, *Constitutional Dimensions of the Judicial Restitution of Wrongfully Expropriated Property in Poland*, 41(3) Loyola of Los Angeles. International and Comparative Law Review 369 (2018), p. 371.

[25] *See* US Department of State, Country Reports on Human Rights Practices for 2011 and 2012 (Poland), available at: https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (accessed 30 June 2020).

[26] B. Zdziennicki, *Reprywatyzacja w świetle zasad prawa* [Reprivatization in the light of the principles of law], 3 Studia Prawnicze 5 (2015), pp. 21-28; E. Łętowska, *Orzecznictwo sądowe jako instrument reprywatyzacji zdekoncentrowanej* [Jurisprudence as an instrument of fragmented reprivatization], in: M. Pilich (ed.), *Studia i Analizy Sądu Najwyższego. Materiały Naukowe. Reprywatyzacja w orzecznictwie sądów*, vol. 3, Sąd Najwyższy, Warszawa: 2016, p. 97.

"lump sum agreements", aimed at satisfying the claims of foreigners and foreign legal persons deprived of property as a result of nationalisations in Poland. In the implementation of these agreements the countries with which they were concluded had the responsibility for distributing the compensation.[27] According to the prevailing view presented in the literature, the conclusion of the lump sum agreements cannot be assessed as an acknowledgment on the part of the Polish State of any legal international obligation toward foreign citizens to pay compensation for nationalised property.[28] This assessment reflects the idea, widely accepted in the socialist doctrine, according to which nationalisation was regarded as the right of a sovereign state and did not entail any compulsory compensation.[29] Regardless of the motivation that prompted the conclusion of the agreements, the Polish state had to allocate significant resources in their implementation.

Thirdly, the Polish authorities enabled restitution of immovable property to churches and other religious associations, a process which was carried out through the work of property restitution commissions, i.e. the so-called regulatory commissions.[30] A total of five such commissions were established (some of which are still functioning) to deal with the restitution of the property of 13 churches and religious denominations.[31] The restitution of church property in Poland took place according to the principle of a

[27] *See generally* M. Pilich, *Międzynarodowe umowy indemnizacyjne w praktyce sądów* [Lump-sum agreements in judicial practice], in: M. Pilich (ed.), *Studia i analizy Sądu Najwyższego. Materiały naukowe. Reprywatyzacja w orzecznictwie sądów*, vol. 3, Sąd Najwyższy, Warszawa: 2016; J. Barcz, *Opinia prawna w sprawie relacji między układami indemnizacyjnymi zawartymi przez Polskę z dwunastoma państwami zachodnimi a dekretem z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m.st. Warszawy, ze szczególnym uwzględnieniem aspektów międzynarodowoprawnych* [Legal opinion on the relationship between the lump-sum agreements concluded by Poland with twelve western states and the Decree of 26 October 1945 on the Ownership and Use of Land within the Capital of City Warsaw, with particular emphasis on international law aspects], available at: https://bit.ly/3iAERd7 (accessed 30 June 2020).

[28] *See* W. Dudek, *Regulowanie odszkodowań wynikających z roszczeń na tle ustawodawstwa nacjonalizacyjnego (zagadnienia prawno-międzynarodowe*) [Regulation of damages arising from claims based on nationalization legislation (international legal issues)], 6 Państwo i Prawo 971 (1968), pp. 972-973.

[29] *See* M. Lachs, *Nacjonalizacja i rozwój międzynarodowych stosunków gospodarczych* [Nationalization and development of international economic relations], 10 Państwo i Prawo 513 (1958), p. 521.

[30] *See generally* P. Borecki, *Reprywatyzacja nieruchomości na rzecz gmin wyznaniowych żydowskich* [Reprivatisation of real estate for the benefit of Jewish religious communities], 9 Państwo i Prawo (2011).

[31] Ustawa o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej [Act on the Relations between the State and the Catholic Church in the Republic of Poland], Journal of Laws of 2018, item 380 and 1169 (consolidated text); Ustawa o stosunku Państwa do Polskiego Autokefalicznego Kościoła Prawosławnego [Act on the Relations Between the State and the Polish Autocephalous Orthodox Church], Journal of Laws of 2014, item 1726 (consolidated text); Ustawa o stosunku Państwa do Kościoła Ewangelicko-Augsburskiego w Rzeczypospolitej Polskiej [Act on the Relations Between the State and the Evangelical-Augsburg Church in the Republic of Poland], Journal of Laws of 2015, item 43 (consolidated text); Ustawa o stosunku Państwa do gmin wyznaniowych żydowskich w Rzeczpospolitej Polskiej [Act on the Relations Between the State and the Jewish Religious Communities in the Republic of Poland], Journal of Laws of 2014, item 1798 (consolidated text); Ustawa o gwarancjach wolności sumienia i wyznania [Act on the Guarantees of the Freedom of Conscience and Creed], Journal of Laws of 2017, item 1153 (consolidated text).

full return, and the laws regulating the functioning of the commissions provides for a return in nature as a basic solution, followed by the granting of a substitute property or payment of compensation.

Fourthly, for people who as a result of the frontier changes in the aftermath of World War II had to leave their properties which remained outside the new Polish borders, there existed a possibility to claim compensation under the Law of 8 July 2005 on Exercising the Right to Compensation for Immovable Property Left outside the Borders of the Republic of Poland.[32]

Each of above-mentioned legal procedures was aimed at granting satisfaction for material losses, and require the interested party to take appropriate legal actions. However, it should be borne in mind that over the passage of time – and in particular the changes in ownership, changes of law, and changes of the economic and political system that took place during the systemic transformation at the turn of 1989 and 1990 – it was often difficult to determine the current legal status of the properties in question in order to regain property or receive compensation. In many cases, it has turned out that despite the theoretical possibility of regaining old property, practical implementations have encountered considerable difficulties for a variety of reasons.

2.2. Claims concerning the confiscation of property during World War II

One of the claims raised in the complaints brought in the initial period of Poland's participation in the Convention system concerned lack of compensation from the German or Polish authorities for material damage caused by the confiscation of property during World War II.

In the circumstances of the case *I.G. v. Germany and Poland*, movable property belonging to the applicant's legal predecessors was confiscated in 1942 by Nazis during the war.[33] In the 1990s, the complainant turned to German authorities to obtain compensation, but received a reply stating that the German authorities had no obligation to pay compensation to Polish citizens as Polish authorities renounced any reparations against Germany in 1953, a fact which was further confirmed by them in the Agreement between Poland and Germany concluded in 1970. According to German authorities there was no legal basis for the applicants' claims.

When adjudicating the complaint, the EComHR determined that the confiscation of the applicant's parents' movable property was carried out by Germans in occupied Poland in 1942. These were, therefore, actions taken before the entry into force of the

[32] Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej [Law on Exercising the Right to Compensation for Immovable Property Left outside the Borders of the Republic of Poland], Journal of Laws of 2005, No. 169, item 1418, as amended. Current information about the progress in the implementation of the said provisions are provided on monthly basis at the Government's website: https://www.gov.pl/web/mswia/rekompensata-2020 (accessed 30 June 2020). According to information presented therein, until the end of May 2020, the State Treasury paid under this title compensation in amount of PLN 4.673 billion (USD 1.06 billion).

[33] EComHR, *I.G. v. Germany and Poland* (App. No. 31440/96), 7 January 1997.

Convention towards Germany, which took place on 13 February 1957. At the same time, the Commission emphasized that it was not possible to derive from Art. 1 of Protocol No. 1 the right to compensation in cases concerning facts which took place before the entry into force of the Convention. The Commission assessed the complaint in that regard as inadmissible *ratione temporis*. Thus in its decision the Commission explicitly stated that the Convention and the Protocol could not constitute a basis for compensation claims for damage caused by Germany during World War II.

In turn, in the application *Sokołowski v. Poland*,[34] the Court had to consider whether the applicant could derive from Polish law an expectation of obtaining compensation for the destruction of property of his legal predecessors during World War II effectuated by Germany. The applicant unsuccessfully sought compensation for this property, indicating two grounds for the existence of a compensation obligation on the part of the Polish State. First of all, he derived such an obligation from the fact that Poland obtained reparations from Germany, which in his opinion should also have been passed on to individuals who lost their property; secondly he claimed that such an obligation stemmed directly from Polish law, namely from the Act of 2 July 1947 on the Economic Reconstruction Plan,[35] which in his opinion required the state to pay compensation to individuals who lost property as a result of the World War II, and which obligation had not been implemented. The Court declared the complaint inconsistent *ratione materiae* with the provisions of the Convention and the Protocol No. 1. It shared the view of the domestic courts that the applicant's claim for damages was not based on any statutory provision or court ruling, because the purpose of the Act of 1947 was to repair the damage caused to the national economy as a result of the war, and its legal force expired with the implementation of the objective. Therefore, the Act of 1947 could not be interpreted as creating a claim or an entitlement belonging to an individual. Moreover, the interpretation made by the domestic courts dealing with the applicant's case was neither arbitrary nor manifestly unjustified as those terms were understood in the case law of the ECtHR.

The Court additionally referred to one more argument which seems to be valid also for other matters. In assessing the applicant's allegation that his right to compensation was based on international law, the Court emphasized that the applicant had not indicated any specific grounds in public international law for his claims, and moreover the Court, in light of Art. 1 of the Convention, has no jurisdiction to adjudicate on claims based solely on international law.

Thus, in the above-discussed rulings the Strasburg judicial review bodies definitively excluded the possibility to assess the responsibility of Germany and Poland for any acts of deprivation of individual property that were effectuated in relation to inhabitants of Polish territories occupied during the war by Germany.

[34] EComHR, *Sokołowski v. Poland* (App. No. 39590/04), 7 July 2009.

[35] Ustawa o Planie Odbudowy Gospodarczej [Act on the Economic Reconstruction Plan], Journal of Laws of 1947, No. 53, item 285.

2.3. Claims concerning the state's non-fulfilment of compensation commitments made before the fall of communist regime

Another legal issue requiring examination concerns the situation of deprivation of property effectuated long before Poland became bound by Protocol No. 1, but for which the authorities assumed at the relevant time an obligation to make compensation and even began to implement it. The problems raised in the cases directed to the Court concerned the issue whether the state was obliged to continue to fulfil this obligation.

The case *Broniowski v. Poland*, extensively discussed in the literature,[36] concerned the practical ineffectiveness of legal mechanisms offered by the national system to enforce compensation for property left behind the Bug River during and after World War II. In September 1944, Poland concluded agreements with three Soviet republics – Ukraine, Belarus and Lithuania – which sanctioned the new territorial shape of Poland. These "republican" agreements constituted the legal basis for the displacement of people and the kind of compensation for lost property which could be made available. Detailed rules for the implementation of the compensatory rights were accordingly specified in the laws adopted by the Polish authorities immediately after war, during the communist rule, and after the ratification by Poland of Protocol No. 1. The basic problems that had to be considered by the Court concerned a two-pronged question: (a) whether the compensatory right called "right to credit" could be treated as a property right within the meaning of Art. 1 of Protocol No. 1; and (b) whether the state could be held liable before the ECtHR for the promises of compensation it made before ratification of the said Protocol. While defining the legal basis of the underlying right, the Court emphasized that while the sources of entitlement were republican agreements, they were confirmed in the subsequent legislation and in the case law of domestic courts, including the Supreme Court. Further, it assumed that the exact content and scope of this right was clarified in the case law of the national authorities, and therefore it considered "the right to credit" as a property interest protected by Protocol No. 1.[37] The problem revealed in the applicant's complaint was that both before 1994 and after that date, the State adopted a number of provisions introducing restrictions on the exercise of this right, in consequence of which the entitled persons encountered a number of obstacles preventing them from benefiting from such rights.[38] Considering the above-mentioned elements, the Court stated that it

[36] *See generally* G. Bieniek, *Mienie zabużańskie* [Property beyond the Bug River], in: G. Bieniek, S. Rudnicki (eds.), *Nieruchomości. Problematyka prawna*, Wolters Kluwer, Warszawa: 2006, P. Filipek, *Sprawa mienia zabużańskiego przed Europejskim Trybunałem Praw Człowieka. Raport* [The case of property beyond the Bug River before the European Court of Human Rights. Report], 1 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 162 (2003); L. Garlicki, *Broniowski and after: On the Dual Nature of the "Pilot Judgments",* in: S. Breitenmoser, M. Sassoli, B.W. Pfeifer (eds.), *Human Rights, Democratie and the Rule of Law. Liber amicorum Luzius Wildhaber*, Nomos, Kehl: 2007, A. Młynarska-Sobaczewska, *Odpowiedzialność państwa polskiego za mienie zabużańskie* [The responsibility of the Polish State for the property beyond the Bug River], 2 Państwo i Prawo 57 (2010).

[37] ECtHR, *Broniowski v. Poland* (App. No. 31443/96), 19 December 2002, paras. 98-102, ECtHR, *Broniowski v. Poland* (App. No. 31443/96), 22 June 2004, paras. 129-133.

[38] *Broniowski v. Poland* (2004), paras. 136-154.

had temporal jurisdiction (*ratione temporis*) to deal with complaints, since some of the actions of the State interfering with the applicant's rights were taken after Poland's accession to Protocol No. 1, and that it had material jurisdiction (*ratione materiae*) because the applicant was able to prove the existence of a property right covered by the protection of Art. 1 of Protocol No. 1. The restrictions which affected the applicant in the exercise of his rights were then assessed by the Court as violations of Art. 1 of Protocol 1.

The multiplicity of applications lodged with the Court by the Bug river claimants, the number of potential applicants (estimated at 80,000), and the fact that the State's interference resulted from the systemic inefficiency of the compensatory mechanism, prompted the Court to issue, in this case, its first ever pilot judgment. The actions taken by the Polish authorities in the implementation of the judgment and the closure of the pilot procedure initiated by it are considered to be the most representative example of a government's proper cooperation with the Court and the Committee of Ministers of the Council of Europe in the implementation of the ECtHR's judgments.[39]

The *Czajkowska and Others v. Poland* case constitutes another example of the Court's recognition of a violation of property rights through the failure to perform compensation obligations that started under the communist rule.[40] The property, which belonged to the legal predecessors of the applicants, was taken over by the State Treasury in 1950. The former owner of the property asked for compensation and in subsequent years, including also after 10 October 1994, decisions were issued granting her, and later her legal successors, partial compensation. These decisions included promises of granting further sums of money in later periods. Until 2010, i.e. until the Court's judgment was issued, the applicants had not obtained all their damages. When assessing whether the applicants possessed property rights protected by Protocol No. 1, the Court found that the regulations in force both before and after the date of ratification provided for the payment of appropriate compensation to the owners of the nationalized property. These provisions were applied in practice, including in the applicants' individual situations. In addition, the authorities, when issuing decisions and determining the amount of compensation for each part of the property, confirmed the applicants' right to subsequent payments of compensation, informing them that all claims would be satisfied at a later stage.[41] The Court took the view that the combination of the indicated legislative acts and the administrative decisions issued in the case of the applicants pointed to the existence of a legal interest protected by Protocol No. 1, thus constituting a situation of a continuous nature, which took place both before and after 10 October 1994. Failure to implement the claim during the period covered by the Court's jurisdiction, i.e. over 15 years, constituted a violation of the applicants' property rights.

In the light of the judgments in *Broniowski v. Poland* and *Czajkowska and Others v. Poland*, it can be concluded that in cases where a deprivation of property occurred

[39] Final Resolution CM/ResDH(2009)89, Execution of the judgments of the European Court of Human Rights Broniowski against Poland, adopted on 30 September 2009.

[40] ECtHR, *Czajkowska and Others v. Poland* (App. No. 16651/05), 13 July 2010.

[41] *Ibidem*, para. 51.

before Poland acceded to Protocol No. 1, and in which the domestic law provided for damages or other property rights and this right was confirmed in judicial rulings and other actions of public authorities, the Polish State bears responsibility for the effective enjoyment of property rights. However, it should be clearly stressed that in cases where both the deprivation of property and the total payment of compensation took place before the entry into force of Protocol No. 1, the ECtHR has no temporal jurisdiction to assess the amount of compensation.[42]

2.4. Claims concerning nationalisation carried out after World War II in contravention of the law

Another group of the Court's verdicts consists of complaints concerning the course and results of domestic proceedings initiated after the fall of communist rule in which the applicants questioned the very legality of the communist nationalisation decisions in light of the domestic provisions biding at the time of their issuance. In these complaints, the Commission and the Court have resolved a whole range of legal issues raising doubts under Protocol No. 1.

The first general issue that needed consideration was whether, in the event of the property taken by the communist authorities, the Polish applicants had an unconditional right to restitution and whether there existed national remedies necessary which needed to be exhausted before turning to Strasbourg justice.

In the aforementioned case of *I.G. v. Germany and Poland*, the Commission adjudicated an applicant's complaint in which he demanded compensation from the Polish authorities for immovable property taken over from his predecessors on the basis of the so-called "Bierut decree" issued in 1945.[43] An essential aspect of the case was that the applicant did not initiate appropriate domestic legal proceedings aimed at recovery of the possessions. In its decision, the Commission settled two issues. Firstly, it rejected the claim directed against Poland concerning deprivation of property, arguing that it took place before Poland became bound by Protocol No. 1 and therefore the act of deprivation occurred outside its temporal jurisdiction. Secondly, it noted that the applicant did not make use of available legal means in order to recover the property. In consequence he was not in possession of a domestic decision recognising his claims, and the property rights extinguished with the moment of nationalisation. In this respect, the Commission recalled, in line with its previous case law, that deprivation of property is an instantaneous act that does not produce continuous effects which would allow it to assume that an applicant's proprietary interest still exists. Consequently, the Commission considered that the applicant had no grounds to claim compensation under Protocol No. 1 for the seized property, since this legal act does not guarantee a right to acquire new property, i.e. to restitution.

[42] EComHR, *Solidarność Trade Union at Fresco Plant and at Zgoda Co-operative v. Poland* (App. No. 25481/94), 6 April 1995.

[43] Dekret o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree on the Ownership and Use of Land within the Capital of City Warsaw], Journal of Laws of 1945, No. 50, item 279, as amended.

Having confirmed that the institution of domestic proceedings aimed at challenging the nationalisation decision is necessary for the exhaustion of domestic remedies, the Strasbourg judicial review organs had to consider the legal situation of those applicants who initiated the said proceedings, but at the time of lodging the application the proceedings were still pending. The legal question that arose was whether the mere institution of such proceedings could be regarded as exhaustion of domestic remedies and as conferring on the applicant a proprietary interest protected by Protocol No. 1.

This legal issue was the background of the case *Pełka and Others v. Poland*, in which the applicants lodged their application with the Commission while the case was still pending before domestic organs and argued that the failure of the administrative authorities to declare the nationalisation decision of 1950 null and void violated their rights guaranteed in Art. 1 of Protocol No. 1.[44] The Commission observed that in the light of the Polish law, the applicants did not have at their disposition "existing possessions" at the moment of lodging the application, since the property was formally and with immediate effect taken from their predecessors in 1949 and nationalised in 1950, and the effects of those acts were not reversed in administrative proceedings. The Commission concluded that the mere fact of instituting proceedings was not enough to state that they possessed legally recognisable claims which could be regarded as "legitimate expectations" of the enjoyment of property rights protected by Protocol No. 1. Simultaneously, the Commission reiterated that the said agreement did not guarantee a right to acquire new property, including the restitution of property.[45]

This decision contained a clear conclusion: that applications lodged with the Strasbourg authorities while domestic proceedings are still in progress will be considered *ratione materiae* incompatible with the provisions of the Convention. A person alleging interference with their property rights must be able to demonstrate the existence of a confirmed proprietary interest at the time of submitting the application. The existence of a mere hope that the appropriate organs will decide in their favour and reverse the effects of a nationalisation decision does not constitute such an interest.

Thus only a final domestic ruling declaring that given properties were not subject to the nationalisation rules and in consequence that the nationalisation was carried out contrary to the law should be regarded as giving the complainant a legal interest falling within the notion of "property" within the meaning of Art. 1 of Protocol No. 1. It is worth noting that later on the Court expressly found that a supervisory decision declaring the invalidity of the previous administrative decision "confers" on the applicant a proprietary interest protected by the Convention system.[46]

As a result of obtaining a decision declaring that the assets in question were not subject to the nationalisation regulations, the owner obtains under Polish law a whole range of procedural entitlements enabling the effective enjoyment of the newly confirmed

[44] EComHR, *Pełka and Others v. Poland* (App. No. 33230/96), 17 January 1997.

[45] For similar conclusions, *see* EComHR, *Kitel v. Poland* (App. No. 28561/95), 17 January 1997, *Szyszkiewicz v. Poland* (App. No. 33576/96), 9 December 1999.

[46] ECtHR, *Bennich-Zalewski v. Poland* (App. No. 59857/00), 22 April 2008, para. 90.

rights (e.g. the right to institute compensation proceedings or proceedings to hand over the property[47]). The Court clearly indicated that in such a situation it is the State's duty pursuant to Art. 1 of the Convention to ensure the effective exercise of all rights pertaining to the applicant. The commitments upon the State consist not only of not arbitrarily interfering with the applicant's rights, but also often include the obligation to take positive action. In the last two decades, the case law of the ECtHR has seen a significant development of the concept of positive obligations.[48] The Court assessed the degree of fulfilment by Poland of its positive obligations under Art. 1 of the Protocol No. 1 in the context of the implementation of the decisions confirming the invalidity of nationalisation decisions while examining the case of *Tarnowski and Others v. Poland*.[49] In the proceedings before the Court, the applicants alleged that despite obtaining a final ruling annulling the nationalisation decision, they had to pursue further proceedings aimed at obtaining effective use of the rights arising from that decision. The Court found, however, that the Polish legal system ensures effective enforcement of rulings declaring the nationalisation invalid by creating a legal framework enabling applicants to recover their property and resolve all legal disputes between them and other private entities remaining in the possession of the disputed properties.[50] Consequently, the Court found that Polish law provided a legal framework under which the applicants could demand the recognition in practice of the economic value of their rights arising from the domestic decisions. Therefore, it did not find a violation of Art. 1 of Protocol No. 1 in the case at issue.

Bearing in mind that the Court's role in assessing the application by national authorities of domestic legal provisions is rather limited due to its subsidiary character, interesting questions have been raised in cases in which the Court was requested to overrule the results of domestic proceedings by ruling in favour of the applicants. For example, in the case *Romer and Dmowska-Baculewska v. Poland*, the applicants questioned the

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[47] R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych* [Compensating the effects of infringements of property rights resulting from nationalization acts], Wolters Kluwer, Warszawa: 2003, p. 124.

[48] *See generally* A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Portland: 2004; D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, New York: 2012; J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka* [Positive obligations of the state in the sphere of first-generation human rights against the background of the European Convention on Human Rights], Wydawnictwo UWM, Olsztyn: 2014. With regard to the rights guaranteed under Art. 1 of Protocol No. 1, the performance of positive duties entails the necessity to organize the legal system in such a way so that individuals can effectively claim realisation of their property rights. In some cases, it may entail the need to take steps to protect property rights, even in matters that take place between private parties. *Cf.* ECtHR, *Anheuser-Busch Inc. v. Portugal* (App. No. 73049/01), 11 January 2007, para. 83; *Sovtransavto Holding v. Ukraine* (App. No. 48553/99), 2 October 2003, para. 96; *Bennich-Zalewski v. Poland*, para. 92.

[49] ECtHR, *Tarnowski and Others v. Poland* (no. 1) (App. No. 33915/03), 29 September 2009; *Tarnowski and Others v. Poland* (no. 2) (App. No. 43934/07), 29 September 2009.

[50] *Tarnowski and Others v. Poland* (no. 2), para. 86.

decision of the national authorities as to whether the conditions of the nationalisation laws were met, thus disputing the correctness of the interpretation made by the domestic court.[51]

In the case at issue the administrative organs consistently refused to issue a decision annulling the former expropriation decision, despite the fact that, as claimed by the applicants, the plots taken over by the State were not subject to the Decree of 6 September 1944 of the Polish Committee of National Liberation on the Introduction of the Agrarian Reform (the Decree on the agrarian reform).[52] In the applicants' opinion, in doing so the authorities acted in contravention to the jurisprudence of the Constitutional Court. The ECtHR communicated the case to the Government and decided to consider whether, despite the lack of a domestic ruling confirming their entitlement, the applicants could be treated as having a "legitimate expectation" to restore their property rights. Eventually, the adjudication of the case was closed, because in the course of the proceedings before the ECtHR the applicants obtained a satisfactory ruling at the domestic level and withdrew their application.

The above rulings demonstrate that in the Court's opinion the acts of nationalisation or expropriation or other actions of the Polish authorities resulting in the deprivation of property were of an instantaneous nature and did not give rise to situations of a continuous violation of property rights. The ECtHR clearly confirmed that the deprivation of property occurred at the moment of issuance of a nationalisation decision or the *ex lege* acquisition of property, thus long before Poland became bound by Protocol No.1. Until a competent national authority rules that the deprivation of property occurred contrary to the then applicable law, the applicant does not have property rights that would be protected under Protocol No. 1.[53] Additionally, the Court assessed that the law in force in Poland provides for an appropriate legal framework for the effective enforcement of domestic rulings reversing the effects of unlawful nationalisation or expropriation.

2.5. Claims concerning deprivation of property after World War II carried out in accordance with nationalisation laws: old promises of damages

In cases of nationalisation or expropriation carried out in accordance with the law then in force, there are no possibilities under the current Polish law to regain property or receive compensation. Nevertheless, many of the injured parties unsuccessfully undertook different legal steps in order to challenge the effects of the authorities' actions. As their efforts ended in failure, they turned to the ECtHR, hoping to have the domestic decisions reversed because, as they argued, of their incompatibility with fundamental rules of the principle of protection of property. The key decisions that put an end to the hopes of obtaining compensation at the European level were issued in the

[51] ECtHR, *Romer and Dmowska-Baculewska v. Poland* (App. No. 72166/01), 8 November 2011.

[52] Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej [Decree of 6 September 1944 of the Polish Committee of National Liberation on the Introduction of the Agrarian Reform], Journal of Laws of 1944, No. 4, item 17.

[53] Garlicki (*Transformacja ustrojowa*), *supra* note 4, p. 395.

cases *Marie Izabella Zamoyski-Brisson v. Poland* and *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland*.

The application in the case *Marie Izabella Zamoyski-Brisson v. Poland*[54] was made by successors of individuals deprived of property under the provisions of the Decree on agrarian reform (the act already discussed in the case *Romer and Dmowska-Baculewska v. Poland*). The applicants unsuccessfully demanded compensation from the domestic courts for the forests that were taken over in accordance with the provisions of the decree. The applicants based their claim primarily on the provisions of the Act of 6 July 2001 on Preserving the National Character of the Country's Strategic Natural Resources (Act of 2001),[55] which contains a general provision providing for compensation in a case of expropriation. The courts assessed that the purpose of the adoption of the Act of 2001 was quite different from the way the applicants perceived it. The purpose of the act was not to establish a legal basis for compensation claims for property lost in the past, but to safeguard for the future the country's strategic resources against privatization. The provisions of the act did not specify either the objective or subjective scope of the right to compensation, did not specify the compensation mechanism and the conditions for compensation, and therefore could not be regarded as imposing on the State Treasury an obligation to provide payments of individual monetary amounts to individual entities.

In turn, the complaint *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland*[56] concerned a situation of taking over the assets of the applicant company in accordance with a nationalisation decision issued on the basis of the Act of 3 January 1946 on Taking Over the State's Basic Branches of National Economy (Act of 1946).[57] The legislator provided that pursuant to Arts. 5 and 7 of the Act of 1946 implementing regulations would be issued, which would regulate the question of the procedure for granting and estimating the compensation for companies that were nationalised. As the government never intended to keep their promises, the indicated executive acts were never issued. The legal successors of the applicant company's shareholders unsuccessfully demanded damages for the property taken over, claiming that they had not received compensation because the national authorities had committed a legislative omission by not issuing executive acts pursuant to the Act of 1946. Their claims were

[54] ECtHR, *Marie Izabella Zamoyski-Brisson and 3 cases v. Poland* (App. No. 19875/13, 19906/13, 19921/13 and 19935/13), 3 October 2017. The same legal issues were resolved in the following cases: ECtHR, *Adam Stefan Zamoyski v. Poland and 23 others* (App. No. 19912/13), 16 January 2018; *Stanisław Jan Piotrowski v. Poland* (App. No. 56553/15), 12 December 2019; *Izabela Julia Emilia Chłapowska-Trzeciak v. Poland* (App. No. 20177/13), 26 June 2018.

[55] Ustawa o zachowaniu narodowego charakteru strategicznych zasobów naturalnych kraju [Act on Preserving the National Character of the Country's Strategic Natural Resources], Journal of Laws of 2001, No. 97, item 1051.

[56] ECtHR, *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland and 2 other applications* (App. Nos. 1680/08, 3117/08 and 46309/13), 3 October 2017.

[57] Ustawa o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Act 1946 on Taking Over the State's Basic Branches of National Economy], Journal of Laws of 1946, No. 3, item 17.

dismissed by the courts because even if it was assumed that the omission to issue such acts actually took place (which can also be called into question considering the fact that the authorities never intended to compensate for damages), the omission still occurred in the 1940s, when the authorities issued other executive regulations to this act. On the other hand, the Polish courts emphasized that the provisions introducing into the Polish legal system the institution of legislative omission clearly stated that the concept cannot be applied to situations that took place before 1 September 2004, i.e. before the institution entered into force.

In both of the above-discussed cases, the conclusion of the domestic courts was that the applicants' claims for damages based on the allegation of an unlawful seizure of property under the legislation on agrarian reform and on the nationalisation of industry did not have any basis in Polish law and consequently had to be dismissed.

Before the ECtHR, the complainants claimed that in light of the national law and contrary to the domestic courts' conclusions, they had "legitimate expectations" of being granted compensation. In the context of the *Lubelska Fabryka* case an important question that arose was whether the non-fulfilment of an old promise of compensation could constitute a basis for asserting that there has been an interference with the property rights of the applicants which could be assessed by the Court.[58]

In settling both of the above-mentioned complaints, the Court held that the allegations concerned mainly the issue of interpretation and application of national law. In this regard the Court has clearly indicated that it has limited possibilities to verify whether national law has been properly implemented, because this is primarily the role of national courts. The Court's competences are limited to ensuring that the decisions of national courts are not arbitrary and manifestly unjustified. In the Court's view, the circumstances of both cases examined did not reach such a level. On the contrary, the decisions of the national courts consistently concluded that the compensatory actions brought by the applicants did not have grounds under national law. Referring to the hope of the applicants derived from the political promises to introduce a general restitution act, the ECtHR pointed out that the Polish legislature has so far not realised its intentions. The Court emphasized that the national legislator was free to adopt solutions in response to changes in the political and economic system and it was entirely within its discretion whether it intended to introduce the socially-expected restitution provisions.[59]

The Court noted that the issue of receiving compensation based on the provisions indicated by the applicants was widely discussed and led to some discrepancies in the case law, but the arguments of the applicants and other persons in the same situation were rejected by the domestic courts. Therefore, the Court could not treat the applicants as having legitimate expectations to be granted compensation under domestic law. In

[58] The legal question of validity of "old" compensation promises was raised firstly in the case *Pikielny and Others v. Poland* (App. No. 3524/05), 18 September 2012. The case was found inadmissible for non-exhaustion of domestic remedies.

[59] *Mutatis mutandis*, *Kopecký v. Slovakia,* para. 35 and *von Maltzan and Others v. Germany,* para. 77.

consequence, they could not claim to have "ownership of property" within the meaning of Protocol No. 1, and thus the complaints were rejected as being inadmissible *ratione materiae*.

The Court clearly distinguished the legal situation of the applicants from that of the Bug River claimants, settled in the aforementioned *Broniowski v. Poland* judgment. In that case the right to compensation in the form of the "right to credit" was anchored in both the pre-ratification and post-ratification legislation and recognized in the jurisprudence of national courts.[60]

The dismissal of the above-discussed applications based on the lack of a domestic basis for compensation for properties nationalised in accordance with relevant legal acts has multiple and significant consequences. First of all, the Court expressly confirmed, both in relation to Poland and also in relation to other countries,[61] that old nationalisation acts containing compensation provisions that were not put into practice did not create financial obligations unless these obligations were confirmed or legally recognised after the states' accession to Protocol No. 1. The lack of a national legal basis for compensation and restitution claims in connection with the expropriations and nationalisations carried out after World War II thus precludes the possibility of pursuing them in proceedings before the ECtHR. Further, the Court expressed its acceptance of the ultimately established case law of Polish courts with respect to this matter. The Strasbourg rulings emphasized that the divergences in the jurisprudence pointed out by the applicants are, under certain conditions, immanent features of a constantly developing and evolving legal system.

2.6. Claims concerning loss of ownership through acquisitive prescription

Another group of complaints consists of applications concerning the definitive loss of property as a result of the State acquiring possession by acquisitive prescription of property left behind by people who fled Poland after war, and whose real estate were covered by municipal management.[62] In the cases *Borenstein v. Poland* and *Weitz and Others v. Poland* the original court's decisions – declaring the acquisitions of the real estate in question by acquisitive prescription by the State Treasury – were issued in 1962 and 1978 respectively. But in the 1990s the applicants, who decided to initiate legal steps in order to regain the property of their predecessors, managed to achieve annulment of these prescription decisions. However, in 2002 and 2004 respectively, the Polish courts issued final decisions stating that the State acquired the real property in question, but only in 1988 and 1985. They treated as the starting date of the period

[60] *Broniowski v. Poland* (2004), para. 100.

[61] *Bata v. Czech Republic*.

[62] *See* A. Mężykowska, *Problematyka jurysdykcji czasowej i przedmiotowej ETPCz – glosa do decyzji z 24.06.2008 r. w sprawie Borenstein i inni v. Polska oraz decyzji z 23.06.2009 r. w sprawie Weitz v. Polska* [Issues related to the temporal and subject jurisdiction of the ECtHR – a commentary to the decision of 24.06.2008 in the case of Borenstein and Others v. Poland and the decision of 23.06.2009 in the case of Weitz v. Poland], 11 Europejski Przegląd Sądowy 45 (2010).

of acquisitive prescription the dates on which the original decisions on acquisitive prescription became final. The position taken by the domestic courts was based on settled case law of the Polish Supreme Court. The question raised by the applicants before the ECtHR was whether the decisions of the national authorities – which were "unfavourable" for the applicants' claims but consistent with the established case law in such cases – were not characterized by arbitrariness and lack of reliability. The ECtHR assessed both complaints as manifestly ill-founded. It stressed that in the circumstances of the cases the applicants were not formally deprived of their property (neither under the communist rule nor later), but rather that the decisions of the public authorities (including courts) were of a regulatory nature and amounted to a "control of use" of property within the meaning of the second paragraph of Art. 1 of Protocol No. 1. This conclusion allowed the Court to confirm its temporal jurisdiction over the cases. It then further decided that a violation of Protocol No. 1 did not take place due to the fact that the national authorities, when issuing the decisions on acquisitive prescription, relied on established case law, especially that of the Polish Supreme Court. Therefore the ECtHR did not decide to challenge the domestic decisions, but treated them as an acceptable way to regulate the legal status of real estate properties. However, it is worth pointing out that, contrary to the prevailing practice, the Court's decisions on inadmissibility in both cases were not adopted unanimously.

In rejecting the applicants' arguments based on the alleged arbitrariness of the decisions, the Court again underlined the paramount importance of positive obligations incumbent on states under Art. 1 of Protocol No. 1. In the cases at hand the obligation consisted of the creation of a system in which all disputes concerning property issues, including situations in which the former owner has not been exercising its ownership for a long period of time, could be considered and resolved.

2.7. Claims concerning the State's failure to redeem national bonds issued before 1939

Another group of applications decided by the Court were those of holders of pre-war bonds, which were decided in the cases *Mach v. Poland* and *Woźny v. Poland*.[63]

In the first complaint, the bonds were to have been redeemed in 1995. As a result of a lawsuit against State Treasury for non-redeemed pre-war bonds, the applicant received compensation in an amount constituting 0.1% of the requested sum. The domestic court assessed that the applicant's claims were not time-barred, but the value

[63] ECtHR, *Jolanta and Bogusław Mach v. Poland* (App. No. 68750/11), 15 December 2015; *Zdzisław Woźny v. Poland* (App. No. 70720/11), 15 December 2015. *See also* A. Mężykowska, *Prawo międzynarodowe nie może stanowić wyłącznej podstawy do wywodzenia roszczeń restytucyjnych w braku właściwych przepisów krajowych – postanowienia Europejskiego Trybunału Praw Człowieka w sprawach Jolanta i Bogusław Mach przeciwko Polsce (skarga nr 68750/11) oraz Zdzisław Woźny przeciwko Polsce (skarga nr 70720/11)* [International law cannot constitute the sole basis for restitution claims in the absence of relevant national provisions – decisions of the European Court of Human Rights in cases Jolanta and Bogusław Mach v. Poland (no. 68750/11) and Zdzisław Woźny v. Poland (no. 70720/11)], 6 Europejski Przegląd Sądowy 44 (2016).

of outstanding bonds should be calculated taking into account regulations issued in the 1940s and 1950s concerning, e.g., changes in the value of money. The court stated that due to the legislative and economic changes in Poland that had taken place over the ensuing decades, the value of the bonds was already symbolic only, for which the current State could not bear financial responsibility.

On the other hand, in the case of *Woźny v. Poland*, the applicant's lawsuit for non-redeemed bonds was dismissed as the domestic court assessed that the state bonds in the possession of the plaintiff entirely lost their economic value as a result of the statutory changes introduced in 1949 and 1950.

Based on Art. 1 of Protocol No. 1, the applicants raised two allegations. The first related to the bond's loss of economic value, which in their view was tantamount to a deprivation of property; and the second concerned the failure of the State to take action to meet its obligations and to redeem the bonds. Relying on its previous case law, the Court stated that in both cases the applicants had not been deprived of property in the classic sense. The ECtHR perceived that they still had legal title to the bonds, however it shared the domestic courts' conclusions that the bonds were deprived of their economic value following the entry into force of the post-war regulations. Further, the decline in the value was caused by economic changes which took place in Poland starting from the 1950s and continuing until the 1990s. In consequence, the ECtHR found that the decrease in the value of the applicants' bonds should be assessed as tantamount to depriving the applicants of property, which however took place in 1949-1950, i.e. before the entry into force of Protocol No. 1 in Poland.

Referring to the plea that the democratic State failed to redeem the bonds, the Court found that the bonds owned by the applicants were issued before World War II and were deprived of real value long before Poland entered the Convention system. The Polish authorities did not adopt any provisions revealing its will to compensate the unredeemed bonds. In conclusion, the ECtHR found that Poland had no obligation under Art. 1 of Protocol No. 1 to adopt provisions providing for restitution or compensation for lost property, including for the bonds, if an individual was deprived of their property before Poland became bound by Protocol No. 1. In the absence of claims based on domestic law supporting compensation, the ECtHR found that the complaints were *ratione materiae* inadmissible.

CONCLUSIONS

The above presented analysis of case law in cases against Poland makes it possible to indicate in what circumstances persons who have been deprived of ownership during World War II and/or under the communist rule may lodge effective complaints against the Polish authorities concerning the restitution of property. The possibilities are quite limited, and in fact concern only situations when the applicants face difficulties in enjoyment of their property rights relating to old property titles whose existence has

been confirmed by competent national authorities both before and after the date of the ratification by Poland of Protocol No. 1. Thus paradoxically the only violations of property rights were found in cases in which compensation obligations were guaranteed and at least partially implemented by the communist authorities.

It must be clearly stressed that in the light of the case law of the Court it is not possible to assess, from the point of view of the Convention and Protocol No. 1, the legality of acts of deprivation of property if they occurred prior to Poland's accession to these treaties. The Court treated situations leading to the deprivation of property as instantaneous situations, which did not lead to a continuing infringement of property rights. The very fact of the continuous formal application in the Polish legal system of nationalisation laws issued in the 1940s and 1950s, many of them containing vague promises of damages, cannot in itself constitute the basis for a claim before the ECtHR if the existence of claims was not confirmed by the national authorities. The Court expressly stated that under international law, including the European Convention on Human Rights, it is not possible to derive an obligation on the part of Poland to enforce restitution and compensation claims if such claims do not have a clear basis in national law.

Against the background of the Court's rulings regarding the right to respect for property, the question arises whether the Court's jurisdiction in this regard proves the statement, rightly expressed in the literature, that the Convention cannot be used as an instrument for settling accounts with the past.[64]

The position that the Convention has been developed and adopted to establish guarantees that the tragic events of World War II will not be repeated is unquestioned. It is also largely undisputed that its role was not to correct historical injustices. However, legal contexts have occurred which enabled the ECtHR to establish its jurisdiction over disputes concerning certain "historical situations" preceding the enactment of the Convention and the accession of particular states to its system.

The Convention has been in force for 70 years, and it has been a period of intensive development of the scope of human rights guarantees at the European level. The Commission and the Court, similarly to other human rights protection bodies, has considered, with the passage of time, in great depth the temporal factor[65] that prompted the implementation of certain legal institutions developed in international law, such as the concept of continuous violations. In addition, the CEE countries began to accede to the Convention in the 1990s together with their baggage of complicated experiences and problems arising from the communist times. Many legal and factual situations that subsequently have constituted the subject of complaints to the ECtHR have been difficult to enclose within clearly defined time frames. Some of them began during the communist regime, but continued despite the change of systems. These circumstances could not remain without influence on the Court's approach to past injustices. Hence, the temporal jurisdiction of the Court finally covered allegations concerning lack of

[64] Garlicki (*Transformacja ustrojowa*), *supra* note 4, p. 388.

[65] A.A.C. Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Brill, Leiden-Boston: 2010, p. 34.

efficient investigation submitted under Arts. 2 and 3 in situations that occurred before the date of ratification, cases that involved a continuing situation constituting a violation of a right that commenced before the critical date of ratification and cases concerning historical events linked with the problem of the limits of freedom of speech.[66]

However, it seems that while in cases concerning violations of Arts. 2, 3, 8 or 10, the ECtHR has been inclined to re-consider the limits of its jurisdiction, cases regarding violations of property rights have not prompted the Court to extend the scope of state responsibility. This approach can be justified in several ways. First of all, it should be noted that the Court, operating in specific political and legal contexts, cannot completely isolate itself from the financial arguments that clearly appeared in the discussions in Poland and other CEE countries about the potential scope of reprivatisation and its costs. Secondly, the Court's restrained approach has undoubtedly been the result of the narrow scope of the property rights guaranteed under Protocol No. 1 and, in general, the lack of specific regulations on the protection of the property rights of individuals at the international level. At this point it is worth recalling that Art. 1 of Protocol No. 1 protects only *existing* property and does not provide for a right to *acquire* property. Considering the fact that both in Poland and in other CEE countries private property was transferred under communist rule to the state administration, it would be impossible to maintain the position (regardless of all the nuances of domestic solutions) that such property still belonged to the former owners. Hence, it cannot be excluded that the actual real estate situation prompted the Court to draw the conclusion about the instantaneous nature of nationalisations or expropriations, which in turn significantly limited the application by the Court of the concept of continuous violations with respect to property. Bearing in mind the scale of communist nationalisations and expropriations, the Court has been reluctant to reverse their results. Consequently, the Court's case law deserves full support in this regard.

It is worth mentioning that cases against Poland in which the arguments concerning old compensation promises were raised remained pending before the Court for a relatively long period. Ultimately the Court did not succumb to the temptation to replace the gaps in national legislation with its case law and thereby improve the undoubtedly disadvantageous position of people affected by ownership changes carried out in the distant past and who are not entitled under current Polish law to any kind of compensation. Since the national legislator has not implemented and most likely will not fulfil the political promises of reprivatisation made so far, the Court rightly decided not to cut corners and create, through its case law, proprietary interests that do not exist in Polish law. It must be borne in mind that although the Court's interpretation of the concept of "property" leads to an extension of the scope of rights guaranteed under Protocol No. 1,[67] it cannot lead to the creation of rights that are not rooted in national

[66] I.C. Kamiński, *"Historical Situations" in the Jurisprudence of the European Court of Human Rights in Strasbourg*, 30 Polish Yearbook of International Law 9 (2010), p. 60.

[67] M.A. Nowicki, *Wprowadzenie do interpretacji EKPCz* [Introduction to the interpretation of the ECHR], 1 Europejski Przegląd Sądowy 4 (2010), p. 11.

law. The source of the subjective rights protected by Protocol No. 1 may only be the law of the State Party to the Convention.

Unlike the jurisprudence of the ECtHR in relation to cases raising reprivatisation issues against other countries of Central and Eastern Europe, the key complaints against Poland were mainly resolved by the Court by stating its lack of material competence. Undoubtedly, such a result was a consequence of the fact that no general reprivatisation provisions were introduced in Poland, the shape and implementation of which could be subject to evaluation by the ECtHR.

For years the Polish authorities have operated under pressure, mainly created by very active legal representatives, of an upcoming ECtHR ruling that would "change" the course of history and oblige the State to adopt a comprehensive reprivatisation bill. On one hand, these fears were justified by the instability of the national case law and the existence of situations of a pathological or even criminal character surrounding reprivatisation, as well as by the continuous lack of decision-making by the ruling parties as to the need for a comprehensive regulation of the problem. But on the other hand, the fears of the authorities were alleviated by the discernible discouragement on the part of the ECtHR to consider ever new complaints regarding unresolved property issues. However, it seems that with the delivery of the above-discussed rulings, which in a comprehensive manner resolve numerous doubts as to the scope of the obligations incumbent on the authorities in the field of protection of property rights, this period of uncertainty should be considered extinguished. At the same time, the introduction of potential new and sweeping changes to the already applicable provisions, e.g. delineating the circle of beneficiaries or introducing new comprehensive legislation, may be the source of new and finally effective applications.