

## The Polish-Russian Delimitation in Former East Prussia in the Light of the Potsdam Agreement: Interpretation and Implementation as Against Accomplished Facts

TADEUSZ JASUDOWICZ

### 1. Introductory remarks

The notion *East Prussia* concerns an area of the former Electoral Prussia including Ermland annexed in 1772. After World War the First, according to the peace treaty of Versailles of 28 June, 1919 the area should remain under German sovereignty. However, an attachment of its southern part should be decided by its population in a plebiscite.<sup>1</sup> As the results of the plebiscite were unfavourable to Poland, nearly the whole territory of East Prussia belonged to the Third Reich before World War the Second. It constituted an exclave of the Third Reich, and the treaty of Versailles contained provisions dealing with the freedom of passage between the Reich and East Prussia through Polish territory.<sup>2</sup>

The problem of the so-called *corridor* of Pomerania, causing numerous conflicts, the long boundary between Poland and East Prussia, and an extreme militarization of East Prussia, constituted potentially a great danger for the security and territorial integrity of the Polish State. It should be recalled that a request to establish an extraterritorial railway and highway through Polish territory played an important role in claims of Germany before World War the Second.<sup>3</sup> The experience of the interwar period and of the military campaign of September 1939 proved an enormous danger for Poland connected with the existence of an enemy and militarized area being in the past a *cradle of the Prussian militarism* in its direct neighbourhood.<sup>4</sup>

<sup>1</sup> Cf. Articles 94 – 98 of the peace treaty of Versailles.

<sup>2</sup> Article 89 of the Treaty of Versailles, in connection with a *pactum de contrahendo* of Art. 98.

<sup>3</sup> Cf. the memorandum of the German Government to the Polish Government on the annulment of the Polish-German declaration of 24 January 1934 – cf. L. G e l b e r g (ed.): *Prawo międzynarodowe i historia dyplomatyczna. Wybór dokumentów (International Law and Diplomatic History. Selected Documents)*, vol. II, at 514 – 518 (1958); see also: the speech by A. Hitler at the Reichstag of 28 April, 1939, *ibidem*, at 518 – 521.

<sup>4</sup> Comp. A. K l a f k o w s k i, Ustawa nr 46 o likwidacji Prus z dnia 25 II 1947 (*The Law No. 46 on the Abolition of Prussia of 25 February, 1947*), (1956).

## 2. General principles of interpretation

The future of East Prussia should have been decided during the Potsdam meeting of the Three Powers: United States, United Kingdom and Soviet Union. From the beginning of World War the Second there was a general agreement among the member states of the anti-Nazi coalition that Eastern Prussia should not belong to Germany after the war. The problem shall be dealt with later; we remark here only that the conference of Potsdam was preceded by: Polish claims to the territory of East Prussia as a whole, claims by the Soviet Union presented by Stalin during the meeting in Tehran and consequently upheld in following activities of the Soviet diplomacy, and finally a general regulation of the Declaration of Yalta on Poland.

The problem of East Prussia was dealt with by provisions of two chapters of the Potsdam Agreement: VI *City of Königsberg and the Adjacent Area* and IX.B *Poland*, and also indirectly by chapter XIII *Orderly Transfers of German Populations*.<sup>5</sup>

In Chapter VI the three Powers agreed that „*the section of the Western frontier of the Union of Soviet Socialist Republics which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of the line Braunsberg–Goldap, to the meeting point of the frontiers of Lithuania, Republic of Poland and East Prussia* (underlines T.J.)”.<sup>6</sup> This statement was accompanied by the general agreement on *the ultimate transfer to the Soviet Union of the City of Königsberg and the area adjacent to it*. These provisions were complemented by the provision of the Chapter IX.B, according to which *the former German territories (...) including that portion of East Prussia not placed under the administration of the Union of Soviet Socialist Republics in accordance with the understanding reached at this Conference (...) shall be under the administration of the Polish State and for such purposes should not be considered as part of the Soviet Zone of occupation in Germany*.<sup>7</sup>

### 2.1. The text and context of the Potsdam Agreement

The use of the meaningful terms *frontier of the USSR* and *ultimate transfer* would indicate – even if the notion of *administration* used in the Chapter IX.B of the Agreement is not quite clear – that East Prussia should have been definitely

<sup>5</sup> Cf. *Official Gazette of the Control Council for Germany*, Suppl., at 13 *et seq* (1946).

<sup>6</sup> It is rarely remarked that Lithuania survived the Second World War, at least in the wording of the Potsdam Agreement. Taking into account numerous critical opinions as to the use of the name *East Prussia* in the context of the effects of the Second World War, it is important that this name was used also in the Potsdam Agreement. It is understandable, as the decision on the dissolution of the Prussian State was taken later.

<sup>7</sup> See: comments by K. S k u b i s z e w s k i: *Zachodnia granica Polski (The Western Frontier of Poland)* 497 (1969).

partitioned between Poland and the Soviet Union, according to the legally binding decision of the Powers. It occurs, however, that the wording of Chapter VI is imprecise and it contains an express statement that they do not constitute a final, binding territorial decision.

In the first alinea of Chapter VI the general description of the boundary line is preceded by an express reservation *pending the final determination of territorial questions at the peace settlement*.<sup>8</sup> The acceptance by the Powers of the ultimate transfer of the Königsberg area is weakened by the expression *in principle* used in alinea 2. Finally, in the following alinea the acceptance is called *the proposal of the Conference*, to be supported by the government of the United States and United Kingdom *at the forthcoming peace settlement*.

It can be concluded that the Potsdam Agreement did not settle in a legally binding way the problem of the territorial sovereignty in East Prussia. The use of the notions *frontier* or *ultimate transfer* do not justify contrary opinions as to the final character of the regulation. Similarly, an argument referring to *derelictio* based upon a mass evacuation of German population from the territory of East Prussia escaping approaching Soviet troops does not solve the problem of conflicting territorial titles of Poland and the USSR with respect to sovereignty in East Prussia.<sup>9</sup>

Other notions like *north-eastern part of east Prussia with Königsberg as an open port*<sup>10</sup> or *incorporation of East Prussia west and south of the line from Königsberg eastwards to the Curzon line into Poland*<sup>11</sup> can be found in a later correspondence between the heads of the Great Powers. More precise provisions can be found in the agreement of 27 July, 1944 between the Polish Committee of National Liberation (the provisional government established in the Polish territory occupied by the Soviet Army) and the government of the USSR on the delimitation of frontier. The parties agreed that *the northern part of the territory of East Prussia passes to the Soviet Union, and the remaining part of East Prussia and the area of Gdańsk including the city and port of Gdańsk passes to Poland* (Art. 2).<sup>12</sup> The frontier was traced (a) *From a village Myczkowce along the rivers Solokiya and Western Bug to Lithuania* (underlined by T.J.) and (b) *west of the coast of the Bay of Gdańsk* (Art. 3). It can be concluded that Soviet claims formulated before the conference of Potsdam cannot

<sup>8</sup> This formula was agreed during the Crimea Conference – see: the last alinea of Declaration VI Poland.

<sup>9</sup> See: K. Skubiszewski, *op. cit.*, at 372, 264, 430 and 429, respectively.

<sup>10</sup> *Sprawa polska podczas drugiej wojny światowej na arenie międzynarodowej. Zbiór dokumentów* (The Polish Question during the Second World War. Selected Documents) 471 (1965); oraz *Dokumenty i materiały do historii stosunków polsko-radzieckich* (Documents and Materials on the History of Polish-Soviet Relations) vol. VIII, 35 (1974).

<sup>11</sup> *Sprawa polska*, 569; *Dokumenty i materiały*, vol. VIII, 42.

<sup>12</sup> The agreement has been published in Polish in *Polska Ludowa – Związek Radziecki. 1944 – 1974. Zbiór dokumentów i materiałów* (People's Poland – the Soviet Union. 1944 – 1974. Collection of Documents and Materials) 12 *et seq.* (1974). Cf. also a German translation by A. Uschakov in *Internationales Recht und Diplomatie* vol. II, 71 ff (1970).

serve as a basis for precise delimitation of a postulated boundary line between Poland and the Soviet Union in East Prussia.

As to the description of the frontier in the Chapter VI of the Potsdam Agreement, the delimitation is certainly land-oriented which can be deduced from the formulas used *the section ... adjacent to the Baltic Sea* and *a point on the eastern shore of the Bay of Danzig*, in connection with the direction of delimitation. The delimitation of the Polish-German frontier in the west (*a line running from the Baltic Sea immediately west of Swinemunde*) confirms the opinion that the Parties to the Potsdam Agreement did not intend to delimit maritime areas including the Bay of Vistula. The delimitation of land areas (*north of Braunsberg-Goldap*) is not precise and could not constitute a basis for a demarcation of territorial sovereignty of the two directly concerned states. The parties were fully conscious of insufficiency of the delimitation, as they subjected *expressis verbis* their acceptance of the *ultimate transfer* of the area of Königsberg to the USSR to a very precise condition: *expert examination of the actual frontier*. Such a provision testifies that the parties did not treat these accomplished facts as settling the problem of delimitation in a definite manner. It is to remark that the acceptance by the Great Powers was conditioned not only by the decision taken by Soviet experts but also by the common expert verification of the demarcation of the frontier.

It can be concluded that the decision of Potsdam does not meet the requirements of finality and precision of the postulated territorial settlement. If interpreted in good faith, according to an ordinary meaning of expressions used, in the given context, in the light of its purpose and object, the Potsdam Agreement, and in particular its Chapter VI in connection with Chapter IX.B, is not a definitive, precise, conventional settlement of the territorial sovereignty over East Prussia and of an eventual delimitation of the frontier between Poland and the USSR in this area. The Polish-Soviet agreement of 27 July 1944 mentioned above does not constitute an instrument relating to the Potsdam Agreement which could be treated as the context for interpretation.<sup>13</sup>

## 2.2. Later agreements and practice connected with the implementation of the Potsdam Agreement

The problem of the delimitation between Poland and the Soviet Union in East Prussia after the Potsdam conference should be considered in order to verify its effects from the point of view of general law of treaties. Two weeks after the conclusion of the Potsdam Agreement, on 16 August 1945 an agreement on the delimitation of the Polish-Soviet frontier was concluded. Its Article 3 provides that *the section of the Polish-Soviet frontier adjacent to the Baltic Sea ... will*

<sup>13</sup> The parties to the agreement were not competent to dispose neither of East Prussia nor of Danzig; the Polish Committee of National Liberation was not legitimate (did not possess *ius representationis*) with respect of the Nation and Polish State, and could not conclude international obligations binding for Poland.

*pass from the point on the eastern shore of the Bay of Danzig ... to the east, north of Braunsberg-Goldap, to the meeting point of this line with the line provided in Article 2 of the present agreement.*<sup>14</sup>

This provision repeated<sup>15</sup> the regulation of Chapter VI of the Potsdam Agreement with all its features: land-oriented delimitation with the vector of delimitation directed up-land, and a general character of the description. However, the politics of *faits accompli* by the USSR dominates this solution and has changed the concept of the delimitation.

If one evaluates this agreement in its relation to the Potsdam Agreement from the point of view of general law of treaties, one must state that it is not a *subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*. Only one of the parties to the Potsdam Agreement was a signatory to the agreement of 16 August 1945, without any consultation or acceptance of the remaining parties. The other signatory, Poland, was a third state from the point of view of the Potsdam Agreement.

Formally, taking into account the letter of the agreement, the signatories followed the provisions of the earlier agreement. The delimitation was accompanied by the clause *in accordance with the decision of the conference of Berlin* (i.e. with the Potsdam Agreement – T.J.) and was drafted *pending the final determination of territorial questions by the peace settlement*. Therefore, the parties accepted a bilateral *modus vivendi*, on a temporary basis, not infringing formally the Potsdam Agreement.

One can consider whether the conclusion to the contrary is not correct, taking into account the fact that a substantive delimitation took place, i.a. the Bay of Vistula was divided. Subsequently, the USSR made impossible the implementation of the annex to the agreement of 16 August 1945 by establishing the military harbour Baltijsk in the Strait of Pilau connecting the Bay of Vistula with the high sea and proclaiming a prohibited military zone in the northern part of the Bay. Poland did not protest against these acts what made impression of the acquiescence on its part. Did these facts constitute the practice generating legal effects from the perspective of the Potsdam Agreement?

It is unquestionable that these facts cannot be treated as a *subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*.<sup>16</sup> They cannot even be considered as a practice dealing with the interpretation and application of the Potsdam Agreement, as being in fact *contra legem*, and based upon a clear abuse of rights stemming from this agreement by the USSR. The Soviet Union did not fulfil conditions provided by it. The practice was held without any acceptance by the other parties to the agreement and cannot prove any understanding among them

<sup>14</sup> 10 UNTS 193.

<sup>15</sup> It should be emphasized that this provision omits the expressions *Lithuania and East Prussia*, and it refers more to the *Ribbentrop-Molotov Pact* rather than to the *Curzon line*.

<sup>16</sup> Art. 31 al. 3 (b) of the 1969 Vienna Convention on the Law of Treaties, codifying customary law.

as to the interpretation of the agreement. It does not even demonstrate the existence of an agreement between the two states directly concerned, as it violates Article 3 of the Agreement of 16 August 1945 and the annex thereto. The argument on acquiescence cannot be accepted because of the total dependence of the People's Republic of Poland on the USSR.

On 5 March, 1957 Poland and the USSR concluded in Moscow an agreement on the delimitation and demarcation of the Polish-Soviet frontier in the area adjacent to the Baltic Sea. It could be expected that after events of 1956 and a common Polish-Soviet declaration of 18 November 1956<sup>17</sup> Poland should have claimed its rights connected with the problem of East Prussia and the Bay of Vistula. In fact, the agreement neither referred to the Potsdam Agreement, nor emphasized a condition of a future peace settlement.

The agreement reversed an earlier philosophy of delimitation. The description of the boundary line begins with the point situated at the farthest east up-land and adopts the sea-oriented vector, tracing the frontier westwards to the precisely defined point on the eastern shore of the Bay of Vistula, expressly dividing a maritime area of the Bay of Vistula and the Spit of Vistula. The parties to the agreement behaved as, if they had full competence to establish and delimitate the territorial sovereignty in former East Prussia.

The agreement did not contain any provision concerning navigation rights of Poland in the area of the Bay of Vistula and Strait of Pilau, referring with this respect to the earlier regulation of 1945.<sup>18</sup> In practice nothing changed: the USSR still kept its huge military harbour of Baltijsk, and the seat of the command of the Baltic Fleet; the Soviet part of the Bay of Vistula was still transformed into the prohibited military zone, and Poland could not enjoy its navigation rights.

It can be stated that neither the Agreement of 1957 nor the practice of its implementation, do not constitute an agreement of the parties concerning the interpretation and application of the Potsdam Agreement. The legal basis established by this Agreement was fully disregarded by both respect of its general considerations, and the detailed delimitation of sovereignty in the territory of former East Prussia.

Four years later, an agreement on the legal relations on the Polish-Soviet frontier, and cooperation, and mutual assistance in the matters connected with the boundary was concluded on 15 February 1961.<sup>19</sup> This agreement contained provisions confirming navigation rights in the Bay of Vistula in favour of Poland, as well as certain other rights (e.g. fishing rights); it treated the Bay of Vistula

<sup>17</sup> In fact, the declaration did not provide for the regulation of this question. In its basis, a status of Soviet forces temporarily residing in Poland was regulated in 1956, and an agreement on the repatriation of the population of Polish origin from the USSR to Poland was concluded in 1957.

<sup>18</sup> The object of these rights cannot be defined simply as a right of innocent passage, as the rights were established exclusively in favour of Poland.

<sup>19</sup> Cf. *Dziennik Ustaw (Official Journal)* 1961, No. 47, Item 253.



and other boundary water areas as *shared national resources*, provided a common exploitation of these resources and created certain bases of international responsibility for damages caused to the other party. The agreement, however, did not introduce any new elements concerning the sovereignty and delimitation in the territory of former East Prussia, and it did not concern directly fundamental problems regulated in the Potsdam Agreement.

From the perspective of the implementation of the rights granted to Poland in the Bay of Vistula, the agreement of 1961 remained a dead letter. The USSR did not change its policy of militarization of its part of East Prussia, and in particular did not resign to treat the Bay of Vistula and the Strait of Pilau as a military zone what fully excluded a practical implementation of Poland's navigation rights.

The USSR and other socialist states used to consider the provisions of the Final Act of the CSCE of 1 August 1975 as a final petrification and legitimation of the existing frontiers. In this sense the principles of the CSCE Decalogue: III – inviolability of boundaries and IV – territorial integrity of states, were interpreted. Perhaps such an attitude was politically justified; however, from the legal point of view such a conclusion could not be drawn from the Final Act, in particular as this instrument is not a treaty and does not bind the parties. It could not replace the peace settlement provided by the Potsdam Agreement. Such an interpretation of the principles III and IV, beyond the context of other principles, is contrary to express provisions of the Declaration of Principles of the Final Act, according to which all principles have a basic and fundamental position, and none of them should be considered separately.

In my opinion, the conference *Two plus Four* could be considered either as a *final settlement* or as a subsequent agreement of the parties regarding the interpretation or application of the Potsdam Agreement. The dissolution of the Soviet Union and establishing of the Russian Federation, separated from the Kaliningrad Area by independent Lithuania and Belarus, could not petrify the Soviet sovereignty over the part of former East Prussia, established in the way of the accomplished facts by the Soviets. On the contrary, it seems that these issues made the problem of the northern part of East Prussia actual again as an object of discussions and international projects.<sup>20</sup>

### 2.3. Relevant rules of international law

In any case, certain doubts as to the context of the Potsdam Agreement remain actual. Let us add that according to the law of treaties in order to establish a correct interpretation of the agreement one should take into account *relevant rules of international law applicable in the relations between the parties*.<sup>21</sup>

<sup>20</sup> See: a report from the international conference *Kaliningrad – the centre of the Baltic Cooperation*, Svetlogorsk, 27 – 30 May 1992.

<sup>21</sup> Art. 31 al. 3 (c) of the Vienna Convention on the Law of Treaties of 1969.

The object of the present study could and should be considered from the perspective of fundamental, preemptory, and universally binding principles of international law.<sup>22</sup> It is not a place for a detailed analysis. In any case one can state that these principles cannot legalize illegal accomplished facts and do not nullify effects of a general principle *ex iniuria non oritur jus*. The principle of performance of international obligations in good faith guarantees fundamental rights granted to Poland by the Potsdam agreement and by the bilateral agreements with the USSR. The principle of non-interference in domestic affairs of states excludes any acts of coercion by foreign states (including the USSR) which could affect Poland's vital interests. The principle of sovereign integrity and observance of sovereign rights does not exclude a possibility of a peaceful modification of frontiers.

The Polish-Soviet delimitation can be evaluated also from the point of view of the general law of the sea, what is of great importance in the context of the division of the Bay of Vistula and the Spit of Vistula. Analysing the decisions of the Powers and *travaux préparatoires* to the Potsdam Agreement one can conclude that they aimed at the restitution of Poland as the powerful and democratic state, disposing of a large access to the sea being a source of her economic development and growing welfare of her inhabitants. This aim should be realized i.a. thanks to advantages from navigation and trade on the Oder via the port Szczecin-Świnoujście (Stettin-Swinemunde) on the one hand, and by the Vistula and Nogat connected with the Bay of Vistula, and Strait of Pilau on the other hand. In fact, because of the unilateral dictate of the USSR, and because of certain unilateral practices by the GDR in the west restricting the access to the port of Stettin in the 1980-s violating international law, Poland has been deprived of these advantages.

It should be emphasized that the law of the sea does not allow any state to cut off a neighbouring coastal state from its sovereign right to access to the high sea. The general law of the sea has established the rules of delimitation of maritime zones in the areas adjacent to its coast.<sup>23</sup> The dividing of the Bay of Vistula by the USSR is a unique event on a world scale. The proclamation of the military zone in the northern part of the Bay of Vistula which restricts the traffic of Polish ships constitutes a flagrant violation of the law of the sea, or even a crime against the law of the sea, as well as against the interests of coastal population of the Bay of Vistula.<sup>24</sup>

<sup>22</sup> I mean the principles codified in Chapter I *Aims and Principles* of the UN Charter, as formulated in the Resolution 2625 (XXV) of 1970 mentioned above and accepted on a regional level by the CSCE Final Act of 1975.

<sup>23</sup> Cf. Art. 15 of the UN Convention on the Law of the Sea of 10 December, 1982, UN Doc. A/Conf. 62/122 (1982), in connection with art. 12 of the Geneva Convention on the Territorial Sea and Contiguous Zone of 29 April, 1958, 516 UNTS 205.

<sup>24</sup> Cf. Art. 7 al. 5 of the 1982 Law of the Sea Convention, in connection with Articles 1 al. 2 of the 1966 Human Rights Covenants, respectively. The Convention on the Law of the Sea attempts to recognize and safeguard special interests of the coastal population.



The reference to the *relevant rules of international law* in order to interpret the Potsdam Agreement emphasizes the illegality of the Soviet actions and the negative effects of the non-implementation by the USSR of an important provision of the Potsdam Agreement: an expert examination of the delimitation by competent and impartial experts. Taking into account the general rules of interpretation, one cannot state that the activities of the USSR (and actually of Russia) in former East Prussia are consistent with the Potsdam Agreement.

### 3. Supplementary means of interpretation

In order to confirm the above interpretation, one should refer to supplementary means of interpretation, i.e. to the circumstances of its conclusion and to the preparatory work. These methods have just been used in the former part of this study. I have adopted a certain discretion in regrouping them, taking into account historical circumstances of the conclusion of the Potsdam Agreement, as well as connecting the preparatory works with the evaluation of arguments and/or titles supporting these claims. Competing claims of Poland and the USSR have been considered.

#### 3.1. Circumstances of conclusion

Almost immediately after the establishment of the Polish government-in-exile in Paris in September 1939 the idea was expressed that *Future Poland should control East Prussia*, and a representative of the British government agreed that *the security of Poland will require it in the future*.<sup>25</sup> Subsequently, in the note prepared by Ambassador Raczyński after the visit of Prime Minister Sikorski in London one reads: *The French pronounce for the incorporation of East Prussia to Poland. The British express serious doubt in this respect, fearing their own public opinion*.<sup>26</sup> On 24 February 1940 Ambassador Raczyński after he had investigated the activities of different British official and semi-official circles, reported that from the part of the United Kingdom one presupposes *an incorporation of East Prussia into Poland in one form or another in order to give us a better access to the sea*.<sup>27</sup> Polish claims have been accepted by the Americans,<sup>28</sup> and even the USSR did not oppose them. Stalin declared during the meeting with Polish Prime Minister Sikorski in early December of 1941 that *East Prussia should belong to Poland and the western boundary should be*

<sup>25</sup> See: *Sprawa polska...*, op. cit., 132; K. Skubiszewski, op. cit., 23.

<sup>26</sup> *Sprawa polska*, 119.

<sup>27</sup> Quoted by W.T. Kowalski: *ZSRR a granica na Odrze i Nysie Łużyckiej 1941 - 1945 (The USSR and the Oder-Neiße Frontier 1941 - 1945)* 25 (1965). See also: K. Skubiszewski, 23.

<sup>28</sup> Cf. a telegram of the American Ambassador Biddle to the Secretary of State of 12 October, 1941, quoted in *Foreign Relations* vol. I, 373 (1941).

based on the Oder.<sup>29</sup> The British readiness to recognize Polish claims to East Prussia as a whole was confirmed by the statements by Minister Eden during his meeting with General Sikorski on 9 September 1943, and the letter from Prime Minister Churchill to Minister Eden of 6 October 1943.<sup>30</sup> Finally, the Polish territorial program formulated by the resolution of the Council of Ministers of 7 October 1942 read as follows: *Our aim is to incorporate Danzig, East Prussia and Silesia of Oppeln, as well as generally to shift a frontier with Germany, and to vindicate the freedom of the Baltic Sea.*<sup>31</sup>

It can be concluded that the government of Poland clearly formulated its claims to East Prussia as a whole as soon as 1939 – 1943, and the four Great Powers recognized and supported these claims. It was summarized by a common statement of the three Powers during the conference of Moscow on 19 – 31 October 1943, and followed by the proposal of W. Churchill, made during the conference in Teheran: *Poland should receive an equal compensation in the west including East Prussia*, and then repeated that it meant i.a. *the incorporation of East Prussia into Poland.*<sup>32</sup> The positive attitude of the Great Powers towards the recognition and support of the Polish claims with respect of East Prussia as a whole was therefore elaborated before the conference of Teheran. The Great Powers were bound by these proposals according to the estoppel rule. The stance of Stalin in Teheran was therefore fully surprising. In reaction to the speech by Churchill, Stalin declared that *Russia would need open ports of Königsberg and Memel, as well as respective part of East Prussia*. He lied that the Russians did not possess any open port in the Baltic Sea and that the territories in question were Slavonic from time immemorial.<sup>33</sup> Stalin treated his new claim as a condition *sine qua non* of the Soviet acceptance of the *formula proposed by Churchill*. Eventually, Stalin convinced Churchill and Roosevelt to recognize temporarily the Soviet claims, though no provision was introduced into official recordings of the conference. From the legal point of view, the decision was not consulted (to say nothing of the acceptance) with Poland as the directly interested state. In fact, the proposed settlement was never announced to the Polish government-in-exile which was not aware of the situation and repeated its claims concerning the incorporation of East Prussia into Poland in 1944.

On the other hand, Stalin constantly presented his territorial claims. His effectiveness in forcing the Western Powers to accept Soviet claims was confirmed during the conference of Quebec on 11 – 15 September 1944, the British–

<sup>29</sup> See: *Documents on Polish–Soviet Relations 1939 – 1945*, vol. 1, 274, 365 (1961); W.T. Kowalski, op. cit., 34.

<sup>30</sup> *Sprawa polska*, 407; K. Skubiszewski, 31.

<sup>31</sup> Quoted by W.T. Kowalski, 26 – 27.

<sup>32</sup> Cf. *The Conferences at Cairo and Teheran 1943* 603 (1961).

<sup>33</sup> *Sprawa polska*, 429. See: also T. Jasudowicz: *Prusy Wschodnie w kontekście II wojny światowej i likwidacji jej skutków (East Prussia in the Context of the Second World War and of the Elimination of its Consequences)* 10 (1991).

American meeting at Malta on 30 January – 2 February 1945, and the Crimean conference on 4–11 February 1945. However, even the documentation of the latter does not lead to equivocal conclusions, as Churchill stated that *the territory of Poland should comprise (...) the territory of East Prussia west and south of Königsberg*, according to the position of the US *Poland should receive compensation in the form of German territories including a part of East Prussia with Königsberg*, and even Molotov after he had agreed the text of an agreement proposed to add a remark on *the restoring of the Poland's old frontiers in East Prussia and along the Oder*.<sup>34</sup>

According to the Yalta Agreement, Poland should *receive substantial accession of territory in the North and West*, but an American suggestion was accepted that *the final delimitation of the Western frontier of Poland should thereafter await the Peace Conference*.<sup>35</sup> The opinion expressed by Eden on 20 February 1945 that the British government in principle did not reject a possibility of the final settlement of this problem during the Crimean conference, without awaiting the future peace conference,<sup>36</sup> was therefore not decisive, neither was the Soviet decision accepting the establishment of the Polish administration in the part of East Prussia delimited unilaterally by the USSR.<sup>37</sup>

Diplomatic documents presented above, evidence that the Great Powers recognized the danger connected with the existence of the East Prussian enclave for Poland, as well as the existence of the *incontinuum* between the Polish territorial accession in East Prussia and wide, free and economically important access to the sea. Each of the three powers separately, as well as together recognized the Polish claims to East Prussia as a whole, and so did France. Nothing justified the change of the stance of the powers which should be bound by their decision according to the principle of estoppel. The claim presented by Stalin in Teheran was accompanied by the lie, and the claim itself was neither precise, nor explicitly recognized. The historical circumstances of the conclusion of the Potsdam Agreement do not oppose to the conclusion drawn from the text of the agreement that the regulation was provisional and imprecise, and the final settlement of the problem was deliberately left to the future peace conference.

### 3.2. Travaux préparatoires

I consider under this term not only the documentation of the Potsdam conference, but also earlier meetings of representatives of the Great Powers, and a diplomatic correspondence. Let us be reminded that during the conference of Teheran Stalin presented arguments concerning open ports, security of the USSR, and finally he joined an idea of historic title advanced by Churchill. I compare the arguments of the both claimants.

<sup>34</sup> Quoted by W. T. Kowalski, 240.

<sup>35</sup> *Foreign Relations of the United States*, vol. VII, 974 (1947).

<sup>36</sup> W. T. Kowalski, op. cit., 208–209.

<sup>37</sup> K. Skubiszewski, op. cit., 47.

### 3.2.1. Geographical and economic title

The argument concerning open ports was presented by Stalin earlier during the negotiations on 23 August 1939, when he forced Ribbentrop to contact Hitler and to agree for the shifting of planned demarcation between the *zones of interest* to the northern frontier of Lithuania in order to incorporate open ports of Lipau and Vindau (both in Latvia) into the USSR.

This argument cannot be taken seriously as the USSR has got numerous open ports along her coasts, and at that time the Soviets possessed a powerful fleet of ice-breakers. On the other hand, there is no title to open ports recognized under international law. In fact, no geographic title in favour of the Soviet claim should be considered in the context of the incorporation of East Prussia into the far-removed Russian Federative Soviet Republic. It could only be taken into account in connection with the sovereignty of the USSR over Lithuania integrated with the Soviet Empire<sup>38</sup> but cannot be referred to after the dissolution of the USSR when the region of Kaliningrad is separated from Russia by the territories of independent state Lithuania and Belarus.

On the contrary, Polish statesman R. Dmowski emphasized after the end of the First World War that, if the Baltic coast between the estuaries of the rivers Vistula and Nemen (between Danzig and Königsberg) had been left to Germany, it would have isolated it from its Polish hinterland. Consequently, it would remain economically dead and the way to progress would be closed for it. Dmowski suggested that the section of the Baltic coast with the estuaries of the Vistula and Nemen should be incorporated into Poland.<sup>39</sup>

One must pay attention to the hydrography of East Prussia. Its main navigable waterway is Pregola collecting water from the north and south. Existing artificial connections including the Channel of Elbing and Mazurian Channel link Pregola with the complex of Mazurian lakes and with the system of the Nemen. The existing system could play an important role in the development of the territory. Moreover, East Prussia is connected through the Nogat river with the system of the Vistula and further with the European water network. Taking into account the access to the Baltic Sea through the Bay of Vistula and Strait of Pilau, port tradition of Elbląg (Elbing) and the possible access of big ships to the port of Kaliningrad (Königsberg) through the adapted navigable channel of the Bay of Vistula, we obtain an optimistic image of the potential trade and economic advantages of the water system.

The territory of Poland is the important hinterland for East Prussia than the USSR/Russian Federation, and East Prussia constitutes an economically indispensable bridge from a part of Poland to the Baltic Sea.<sup>40</sup>

<sup>38</sup> These territorial rights were based upon the aggression of 15 June 1940, and constituted in fact an illegal occupation.

<sup>39</sup> R. D m o w s k i: *Polityka polska i odbudowanie Państwa. Pisma (Polish Policy and the Reconstruction of the State. Writings)*, vol. VI, 357 *et seq.* (1937).

<sup>40</sup> It is characteristic that the ideological declaration of the communist-oriented Union of

### 3.2.2. Military and security reasons

According to the Soviet Union, the incorporation of East Prussia was absolutely necessary from the point of view of the security of the Soviet Empire. Was it really necessary as a measure of precaution against the feared German policy of aggression provided in Article 53.1 of the UN Charter, if the USSR disposed of the occupation zone in Germany transformed later in the GDR, and stationed powerful units of the Northern Group of the Soviet Army in the whole territory of Poland?

It was clear that the main object of the action undertaken by Stalin was not the security of the USSR but rather outflanking Poland (despite the establishment of the communist government and the imposing of the Soviet regime) and Lithuania (the resistance against its *liberation* by the Soviets and rein-corporation into the Soviet Empire persisted till 1952). The Soviet sovereignty in East Prussia served the subjugation of Central and Eastern Europe rather than the suppression of the German *Drang nach Osten*.

The dissolution of the USSR, the restoration of independent Lithuania and Belarus, finally shook the Soviet arguments. No one can say in good faith that Russian sovereignty over the Kaliningrad area is indispensable from the point of view of strategic and security needs of the Russian Federation. Moreover, no one can declare that any form of the Russian presence (including a military one) in this area serves well to the needs of security in the Baltic area, and in Europe in general.

On the contrary, the arguments of security support clearly the Polish claims to East Prussia as a whole. Even before the creation of Poland after the First World War, politicians emphasized the risk of being surrounded by German territory from the north and the west. The militarization of East Prussia in the interwar period and the aggression against Poland realized this danger. So the security arguments accompanied the economic arguments presented by Poland with the claims to East Prussia during the Second World War.

Polish experience after the Second World War including the events of 1956 and 1980 – 1981 confirmed these arguments. At present, the potential danger resulting from the existence of the Russian exclave in East Prussia increases as the sense of security after the abolishing of the *iron curtain* grows. It is connected with the stationing of numerous troops and the storage of enormous quantities of arms including nuclear weapons withdrawn from Poland and the former GDR. The area of Kaliningrad has been turned into a huge barrel of pulver, the existence of which constitutes the direct danger for the vital interest of Poland and other states.

It can be concluded that from the point of view of the security and strategic interests the Soviet/Russian title cannot compete with the clear and generally comprehensible interests of Poland.

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Polish Patriots in the USSR of 10 June 1943 stated that *East Prussia should become a bridge between Poland and the Baltic Sea*. Cf. *Polska Ludowa*, op. cit., 615.

### 3.3.3. Historic title

The argument on historic title of the USSR was in fact presented by Churchill, who wrote in a letter to Stalin of 20 February 1944 that he treated the Second World War as the *thirty-year war begun in 1914* and emphasized that East Prussia is a *soil stained with Russian blood*, so that Russians have a *historical and well-founded claim to this German territory*.<sup>41</sup>

The reference by Churchill to the boundaries of Russia of 1914 and the notion of the *thirty-year war* recall the *exposé* by Molotov during the 5<sup>th</sup> Extraordinary Session of the Supreme Soviet of the USSR on 31 October 1939 in which the speaker justified the aggression against Poland.<sup>42</sup> International law does not recognize any title based upon the stain of blood of any national, and the idea of such a title is inhuman and extremely dangerous.

There was no opportunity to establish any historic title of Russia with respect to East Prussia. In 1758 Russia invaded this territory and subsequently offered it to Poland in exchange of the part of Inflant area.<sup>43</sup> In the mid-18<sup>th</sup> century Russia was therefore not interested in the area of Prussia; probably being fully aware of ties binding Electoral Prussia with Poland. Neither Russia nor the USSR claimed the territory of East Prussia before the conference of Teheran. The historic title of Russia cannot be seriously considered under these circumstances.

Polish ties with the territory of Prussia reach back to the beginnings of the stathood. One can refer to the mission of St. Adalbert in Prussia, to the acceptance by the Pope of the bishopric in Włocławek with the task *to organize missions in Prussia*. Prince Konrad of Mazovia invited the Teutonic Order to Poland in connection with the proclaiming by the Pope of the mission and crusade in Prussia, in order to conquest Prussia for the christianity.

In the 15<sup>th</sup> century, an important movement in favour of connections with Poland were present in Prussia and the Prussian Orders forced the Teutonic Knights to conclude a treaty in 1435. The Treaty limited the autonomy of the Teutonic Order and assured *the freedom of social and economic contacts between Poland and Prussia, and in particular the freedom of trade*.

This trend was continued by the creation of the Union of Prussian Towns in 1440. The Union renounced the sovereignty of the Teutonic Order, started an uprising and proposed the Polish King to establish his sovereignty over whole Prussia. The Act of Incorporation of Prussia to the Polish Crown was edited on 6 March, 1454 and referred to the old titles of Polish monarchs to the territories in question. After the thirteen year war, according to the peace treaty of Toruń (Thorn) of 19 October 1466 all Prussian territories – including the part of Prussia

<sup>41</sup> *Sprawa polska*, 476 ff.

<sup>42</sup> Text published i.a. in L. S z c z e ś n i a k (ed.): *Zmowa. IV rozbiór Polski (The Plot. 4<sup>th</sup> Partition of Poland)* 181 ff (1991).

<sup>43</sup> All historical issues quoted according to *Historia Dyplomacji Polskiej (The History of the Polish Diplomacy)*, vol. I – II, *passim* (1982).



remaining under the administration of the Teutonic Order – were subjected to the sovereignty of the Polish Kingdom.

Subsequently the treaty of 1525 between the Polish king Zygmunt Stary and the Great Master Albrecht Hohenzollern sanctioned the dissolution of the Teutonic Order (the secularization of Prussia). Hohenzollern as the secular prince remained a vassal of the king of Poland *with the title of the prince in Prussia, not of Prussia, as the Polish king was the sovereign of Prussia.*

If these conditions had been kept, the Principality of Prussia should have been incorporated into Poland in 1618. However, because of the support of the Polish claims in Inflant area in 1562 – 1563 Poland accepted the succession of the house of Brandenburg in Prussia. The elector of Brandenburg succeeded in obtaining the Polish acceptance for the investiture of his son Friedrich Wilhelm in Prussia. After his father's death, the latter rallied the power both in Brandenburg and Prussia.

The new prince used an opportunity created by the Swedish aggression against Poland and concluded in a treaty with Moscow in 1656 and two treaties with Poland in 1657. According to the latter, Poland resigned of the Prussian vassalage. Although the treaties of 19 September and 6 November 1657 granted full sovereign rights (*jus supremi domini*) in Prussia to Friedrich Wilhelm and his male descendants, they preserved certain ties between Prussia and Poland. In particular they contained a condition that after the extinction of the male line of the Hohenzollerns Prussia would have returned to Poland.

It is a paradox of the history that this condition was realized after the Second World War through the extinction of the Hohenzollerns, and through the dissolution of the Prussian State by the Law No. 46 of the Control Council for Germany. These events were preceded by precise Polish claims to the territory of East Prussia as a whole. The historic title supported by the Polish claims, and the realization of the condition formulated in the treaties of 1657 could, and should have found support in the loss of a part of territory of the aggressor state (in this case: Germany) as one of the forms of international responsibility for aggression.<sup>44</sup>

Summing up, also from the point of view of the historic title (and in particular from this point of view) the Soviet/Russian claim to East Prussia cannot compete with the Polish title. The Soviet claim was contrary to the estoppel rule and the satisfying of these claim constituted in fact inadmissible gratification of the co-aggressor against Poland of 1939 and therefore violated the principle *ex iniuria non oritur jus*.

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<sup>44</sup> In fact the co-aggressor was not only granted with the title to the territories incorporated illegally in 1939 but received also the northern part of East Prussia with Königsberg.