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RESPONSIBILITY OF RUSSIA AND POLAND FOR THE SMOLENSK CATASTROPHE FROM THE PERSPECTIVE OF EUROPEAN CONVENTION ON HUMAN RIGHTS

Key words: Smolensk Catastrophe, human rights, right to life, State-Parties, responsibility

Abstract

Smolensk Catastrophe is not only about the question of clarifying facts, but also the one of responsibility stemming from them on the grounds of European Convention on Human Rights, and being more precise from its art. 2: The right to life. The article includes both negative obligations, such as the prohibition of depriving an individual of life, as well as positive ones regarding the establishing of effective regulations in criminal law, providing legal and administrative procedures aiming at e.g. preventing the acts of life deprivation, including the ones referring to procedural obligations concerning the conduct of a proper and effective investigation. Responsibility is shared by both parties of the Convention: Russia and Poland. The first of them ought to be responsible for depriving the Catastrophe casualties of their lives, not only in the event of an attack and explosion, but also in the context of TU 154 renovation, the manner of organizing the visit, dividing it between 7th and 10th April 2010, the level of securing the quality of service at the North Smolensk airport, conducting the investigation and keeping the evidence (the wreck, black box, etc.), which made it impossible for Poland to conduct the effective investigation. Poland, on the other hand, is responsible for the lack of applying appropriate legal and administrative procedures, as well as preventive and controlling measures, inappropriate conduct of aviation investigation by Military Prosecutor Office, as well as the lack of an effective investigation indicated in art. 2 of the Convention. Poland ought to be held responsible also for the manner of organizing the visit. The responsibility of a state on the basis of the Convention includes detecting, pursuing and punishing individuals responsible for actions and cessations determined as a punishable offence of negligence and not fulfilling ones duties. Therefore there certainly was the situation of breaching the material and procedural obligations stemming from art. 2 of the Convention.

Introduction

It is eight years since Smolensk Catastrophe. Just before the Report of Smolensk Subcommittee is published¹, immediately after listening to its Head, Antoni Macierewicz at our Conference, facing the already fore-judged rejection of both MAK (Interstate Aviation Committee) Report, as well as Miller's Commission Report mainly based on it², one ought to consider, amongst the others, the issue of responsibility for the Smolensk crash. The issue may be examined in a variety of dimensions, since there is a difference between the responsibility of natural persons in Russia and Poland, guilty of action or abandonment which might be the rightful basis to charge them, and international responsibility of the states themselves for breaching their international obligations.

Although one may agree with K. Skubiszewski that, "The issue of international responsibility is as old as international law itself"³, at the same time it must be stated that it is a highly up-to-day issue, as only recently it became an object of codification works of UN International Law Commission, which resulted in accepting the Articles on the States' Responsibility for Internationally Wrongful Acts by United Nations General Assembly on 12th December 2001⁴. We may also take into account the effects of UN International Law Commission works on the protection of individuals in case of accidents as complementary⁵. In the first place,

however, accordingly to the title, the issue of responsibility will be examined in the system of European Convention on Human Rights (ECHR), particularly in the light of case law of European Court of Human Rights (ECtHR).

The above mentioned monograph of M. Balcerzak focuses on this issue. One may agree with His fundamental assumption, that the obligation of responsibility of a state-party in the ECHR system, even though it is not a regional representation of the obligation of responsibility as expressed in the Articles of UN International Law Commission and possesses its characteristic features, is not at the same time closed, isolated from the universal obligation, therefore the essential elements of the universal obligation are significant for the European one and may be taken advantage of to study the system of ECHR⁶.

Thus, systematics of his monograph "feeds on" the structure of the system of responsibility stemming from the Articles of UN International Law Commission, taking into account in the following order: 1) "Breach of international obligation as the element of an internationally wrongful act"⁷, 2) "Attribution of the breach as the element of an internationally wrongful act"⁸, 3) "Circumstances precluding wrongfulness"⁹, 4) "Pursuing responsibility of a state"¹⁰, 5) "Consequences of determining responsibility from the legal-international perspective"¹¹. For the sake of this study two first out of the above mentioned elements will be of significance.

I would like to add a prior element here, the preliminary condition of a state's responsibility, i.e. the presence of an international obligation that according

¹ The text of the Report was published in „Gazeta Polska” on 25th April 2018, no 17/1289, p. 37–87: *The Technical Report of Subcommittee for the Re-examination of the Aviation Accident*, which in its Introduction par. 4 „invalidates the classification of the causes of TU 154M crash in Smolensk on 10th April 2010 as the controlled flight towards the ground caused by the pilot's error (CFIT)”.

² Surprisingly, Miller's Report does not refer to a number of critical remarks expressed by Poland towards the Report of MAK at all, which MAK did not respond to nor took into account in its final report.

³ Compare K. Skubiszewski, *Cz. X: International Responsibility*, [in:] *The Outline of Public International Law*, ed. by M. Muszkat, vol. II, Warsaw 1956, p. 230–258, on p. 243.

⁴ Annexe: *The Articles of International Law Commission on the Responsibility of States for internationally wrongful acts* [in:] M. Balcerzak, *Responsibility of the State-party of European Convention on Human Rights and fundamental Freedoms. International Low Study*, Toruń 2013, p. 289 and the following.

⁵ Compare *The Project of "Articles on the Protection of Persons in Case of Catastrophes"*, [in:] M. Balcerzak, *The Protection of Persons in the Event of Catastrophes. Remarks on the project of Articles of International Law Commission of the United Nations*,

[in:] *The Directions in the Development of Contemporary International Law*, ed. K. Karski, Warszawa 2015, p. 90–108, annexe p. 102 and the following.

⁶ M. Balcerzak, *The Responsibility...*, chapter II. 5 *"The Responsibility of the State on the Basis of ECHR – „closed regimen”?*, p. 55–60. In his opinion the Strasbourg case law "<intuitively> refers to general rules", and "the system of state responsibility on the basis of the Convention does not make closed regimen, but stays open for the rules of common regimen of responsibility" – *ibidem*, p. 59 and 60, respectively.

⁷ *Ibidem*, Chapter III, p. 61–138. Comp. art. 1–3 and chapter III: *The Breach of International Obligation* (art. 12–15) of UN International Law Commission Articles – *ibidem*, p. 289–290 and 293–294.

⁸ *Ibidem*, Chapter IV, p. 139–186. Comp. art. 2.a. and Chapter II: *Attributing Behaviour to a State* (art. 4–11) of UN International Law Commission Articles – *ibidem*, p. 290–293.

⁹ *Ibidem*, Chapter V, p. 187–207.

¹⁰ *Ibidem*, Chapter VI, p. 208–222.

¹¹ *Ibidem*, p. 223–284.

the dynamic aspect of *pacta sunt servanda* rule, must be performed *bona fide*. It is not an arbitrary idea. According to Articles of UN International Law Commission, "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character"¹² Therefore, an international obligation sets with its character and scope the positive area of responsibility of a certain state-party, determines what its duties are.

Theoretically, in case of negative obligations it indicates what a state must not do, whereas in case of positive ones, what a state is obliged to do to fulfil a certain obligation¹³. In my view, simple traditional division into negative and positive obligations, especially associating the first ones with human rights of I generation, including the ones protected on the grounds of ECHR, and the latter ones with human rights of II generation, is no longer justified.

It appears, that the demand of effective international protection of human rights of I generation, reflected in Strasbourg case law with the concept of "not illusory or theoretical rights, but practical and effective ones", implies, even in the context of the prohibition to take sb's life intentionally on the grounds of art. 2 of ECHR, far-fetched positive obligations, including the ones regarding legal and administrative regulation, obeying it in practice, and additionally establishing institutional and procedural guarantees necessary for investigating and exerting responsibility.

The responsibility of states-parties of ECHR in connection with the Smolensk Catastrophe

I have decided to examine the issue of Russian and Polish responsibility for the Smolensk on the basis of the ECHR, since both states are the parties of the Convention¹⁴, and thus bear obligations resulting from it,

particularly on the grounds of art. 2: the right to life¹⁵, which as a result of opulent Strasbourg case law (ECtHR and by 1998 ECHR) are explained and precised to a great extent, and state-parties respect it highly.

Two first provisions of the Convention are of significance for the sake of the issue examined here: art. 1 regarding the obligation of obeying human rights¹⁶, as well as art. 2 regarding the right to life. The hard core of the obligations, which are *prima facie* negative, can be summarised in the formula, "no one will be deprived of life intentionally". However, its realisation, also in the context of limitations accompanying it presented in art. 2, is associated with multiple positive obligations, regarding e.g. the precise legal regulation and actualization¹⁷. From the perspective of positive obligation sentence I in paragraph 1 is of particular significance, according to which, "Everyone's right to life shall be protected by the law"¹⁸.

Let us look closely at the subsequent specifying of content of the positive obligation resulting from it. The ECtHR emphasises that, "Article 2 of the Convention does not solely concern deaths resulting from the use of force by agents of State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction"¹⁹. In a Greek case con-

¹⁵ More broadly on the issue: T. Jasudowicz, *The Obligations of Poland and Russia in the System of European Convention on Human Rights in the Context of Smolensk Catastrophe and its consequences*, [in:] T. Jasudowicz, G. Górski, *The Legal Issues of Smolensk Tragedy. Texts and Materials*, Toruń 2018 Monographs Jagiellonian College, p. 62–81

¹⁶ On its basis states-parties are to "provide each individual under their jurisdiction with rights and freedoms", determined in the Convention and its Protocols. More broadly on the issue: L. Garlicki, *Art. 1: the obligation of obeying human rights*, [in:] *Convention on Human Rights and Fundamental Freedoms, vol. I. The Comments to articles 1–18*, ed. L. Garlicki, Warsaw 2010, p. 21–56.

¹⁷ Comp. L. Garlicki, *Art. 2: The Right to Life*, [in:] *ibidem*, p. 63–96, esp. p. 70–80; T. Jasudowicz, *The Right to Life*, [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski, *Human Rights and Their Protection*, ed. II, Toruń 2007, p. 260–292, esp. p. 271–279.

¹⁸ See: L. Garlicki, *Art. 2(...): The Obligation to Protect Life*, p. 89–96; T. Jasudowicz, *The Right to Life (...): Positive Obligations of States in the Sphere of the Right to Life*, p. 279–281.

¹⁹ And so in: *Case of Kolyadenko and Others v. Russia*, judgment of 28 February 2012, point 151. Text [in:] *The Smolensk Assistant. The set of Strasbourg case law for the sake of investigating legal issues of Smolensk Catastrophe and its consequences, along with the subject index*, [in:] T. Jasudowicz, G. Górski, *op.cit.*, p. 105 and the following. Comp. *Affaire Pereira Hen-*

¹² All the more so, since the following art. 14 of the Articles explains that there is no breach, „if this state is not bound with the obligation while performing the act”.

¹³ More broadly on positive obligations: E.H. Morawska, *Positive Obligations of the States-Parties of the Convention on Human Rights and Fundamental Freedoms*, Warsaw 2016, *passim*.

¹⁴ Poland has been bound with ECHR since 10th January 1993 r. (it recognized the competence of Strasbourg organs on 1st May 1993 r.). Whereas Russia on 5th May 1998 r.

cerning the responsibility associated with the helicopter accident the Court specified that within this obligation, “art. 1 par. 1 imposes on them (i.e. the states – T.J.) the obligation to guarantee the right to life by introducing specific criminal legislation, discouraging from committing a crime against life, basing on the mechanism of its application, able to prevent, eradicate and punish the violations”²⁰.

The state’s obligations exceeds the narrow frame of criminal legislation. In a famous case *Oneryildiz v. Turkey*, regarding the responsibility for tragic consequences of gas explosion at the city landfill, the Tribunal emphasised that the positive obligations resulting from art. 2 which aim at securing the right to life, “entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life”²¹.

In the context of dangerous activities, and it considered the functioning of the landfill as such, the Tribunal added that, “in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives”. The above mentioned regulations, “must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks”²².

It is not only about establishing such a wide range of legal and administrative regulation, but also for its effective functioning. As the Court specifies, “Where

lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – juridical or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished”²³. To meet such requirements, “the relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels”²⁴.

It is clear then, that the implied obligations are to a great extent of preventive character. It is strengthened in cases of life threat regardless of its causes. And so in the case of a landslide from the Caucasian mountain Elbrus, the Tribunal decided, “(...) special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks”²⁵.

Further on it stated strongly, that, “where the authorities in question, fully realising the likely consequences and disregarding the powers vested in them, failed to take measures that were necessary and sufficient to avert the risks inherent in a dangerous activity, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative”²⁶.

In *Kaya* judgement the Court emphasised that such primary positive obligations of a state, “It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose life is at

riques c. Luxembourg, arret 9 mai 2006, point 56, [in:] *ibidem*, p. 95 and the following. Also compare: T. Jasudowicz, *Obligations...*, p. 68–69.

²⁰ *Affaire Papapetrou et autres c. Grece*, arret 12 juillet 2011, point 50. Text [in:] *Smolensk Assistant...*, p. 89 and the following. Comp. *Case of Mahmut Kaya v. Turkey*, judgment of 28 march 2000, point 85. Also compare: T. Jasudowicz, *Obligation...*, p. 69.

²¹ *Case of Oneryildiz v. Turkey*, judgment of 30 November 2004, point 89. Text [in:] *Smolensk Assistant...*, p. 92 and the following. Comp. *Case of Budayeva and Others v. Russia*, judgment of 20 march 2008, point 129; *Kolyadenko*, point 157. Texts [in:] *ibidem*, p. 97 and the following; 105 and the following, respectively.

²² *Oneryildiz*, pkt 90. Por. *Budayeva and Others*, point 132; *Kolyadenko and Others*, point 158; *Case of Byrzykowski v. Poland*, judgment of 27 june 2006, point 103, text [in:] *Smolensk Assistant ...* p. 168 and the following.

²³ *Oneryildiz*, point 91.

²⁴ *Ibidem*, point 90. Comp.: *Papapetrou*, point 54; *Budayeva and Others*, point 131; *Kolyadenko and Others*, point 181–182. Also compare: *Case of McKerr v. the United Kingdom*, judgment of 4 may 2001, point 160; text [in:] *Smolensk Assistant...*, p. 116 and the following.

²⁵ *Budayeva and others...*, pkt 132.

²⁶ *Ibidem*, point 140. Comp. *Oneryildiz*, points 89–90.

risk from the criminal acts of another individual”²⁷. Not only does the above concern criminal activities of third parties but also catastrophes and natural disasters, and in general all the situations endangering the lives of an individual or individuals. Henceforth, in the Budayeva case judgement the Court pointed out that, “the authorities at various levels were aware that any mudslide, regardless of its scale, was capable of causing devastating consequences in Tyrnauz because of the state of disrepair in which the defence infrastructure had been left after the previous mudslide”, and additionally that, “the Court sees no justification for the authorities’ failure to prepare the defence infrastructure for the forthcoming hazardous season of 2000”²⁸.

Informing the society about potential, and particularly already existing, dangers for human life is an essential element of the preventive positive obligations of a state. Therefore, the Court emphasises that “Among these preventive measures, particular emphasis should be placed on the public’s right to information(...)”²⁹.

Hence, the duty of states-parties to protect life comprises the entire network of mutually complementary obligations consisting of: effective regulations of criminal law realised in practice and general comprehensive frames of legal and administrative regulations embracing the preventive measures concerning life threats, including undertaking effective preventive operational measures, informing the society on such dangers, as well as establishing the efficient judiciary system, the adequate system of supervision and controlling, i.e. creating the network of institutional and procedural guarantees providing the appropriate functioning of the system in practice.

What is important, the Tribunal decided that procedural obligations resulting from art. 2 ECHR, in the

context of depriving of life in consequence of using absolutely necessary force as expressed in its par. 2, are likewise applicable in the sphere of other doubtful cases of losing life due to catastrophes, disasters, medical error, etc. The obligation of conducting official effective investigation, “is justified not only because any allegations of such an offence normally give rise to criminal liability, but also because often, in practice, the true circumstances of the death are, or may be, largely confined within the knowledge of State officials or authorities”³⁰.

In Budayeva case judgement the Court added that, “Where lives are lost as a result of events engaging the State’s responsibility for positive preventive action, the judicial system required by Article 2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied to the extent that this is justified by the findings of the investigation”³¹. Furthermore, “In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, firstly, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the State officials or authorities involved in whatever capacity in the chain of events in issue”³².

The obligation of conducting by a state *ex officio* effective investigation, derived from the positive aspect of art. 2 of the Convention and its general obligation expressed in art. 1, is entirely doubtless in the latest Strasbourg case law. It is not about some “minimal standards of effectiveness”, since the Court emphasises the requirements of effectiveness explicitly and strongly, at the same time pointing at the demands regarding the independence and impartiality of investigation, its versatility, completeness, and of course, immediacy and reasonable promptness³³.

²⁷ *Mahmut Kaya*, point 85 *in fine*. Compare the judgements: *Osman*, point 115; *Al-Adsani*, point 44 and *Van Colle*, point 50 and the following versus the United Kingdom. Also compare: E.H. Morawska, *Positive Obligations...*, p. 237

²⁸ *Budayeva and Others*, point 149–151. Comp. *Kolyadenko and Others*, point 158–180; *Finogenov and Others*, point 209.

²⁹ *Oneryildiz*, point 90 par. 2. Comp. *Kolyadenko and Others*, point 159 and point 181–182; *Budayeva and Others*, point 152, where ECtHR remarked that, “In such circumstances it would be reasonable to expect the authorities’ awareness of higher risk of accidents in case of a landslide that year as well as performing all due diligence in informing civilians as well as preparing measures in case of extraordinary evacuation. Anyway, informing the society on possible risks was one of significant practical measures indispensable to provide effective protection of local citizens”.

³⁰ *Oneryildiz*, point 93 par. 2. Comp. *Budayeva*, point 131.

³¹ *Budayeva and Others*, point 142.

³² *Ibidem*, *in fine*. Comp. *Affaire Demiray c. Turquie*, arret 21 novembre 2000, point 48; text [in:] *Smolensk Assistant...*, p. 115 and the following; *Case of Hugh Jordan v the United Kingdom*, judgment of 4 may 2001, point 105; text [in:] *ibidem*, p. 120 and the following *McKerr*, point 111.

³³ More broadly on the issue: T. Jasudowicz, *Smolensk Investigation from the Perspective of Right to Life in European Convention on Human Rights*, [in:] G. Górski, T. Jasudowicz, *op.cit.*, p. 196 and the following. Also compare: T. Jasudowicz, *Obligations...*, p. 72 and the following. Id., *The Legal Position*

An extremely significant question of collecting, securing and conducting evidence is associated with effective investigation conducted *ex officio*. In the Luxembourg case of a fatal accident at the renovation of a building the Court emphasised that, “The effectiveness of investigation requires from the authorities to undertake reasonable measures they have at their disposal in order to guarantee obtaining evidence concerning the respective facts, including e.g. testimony of eyewitnesses, expertise or post mortem if necessary, which provides complete and precise image of damage, as well as objective analysis of clinical examination, especially the cause of death”³⁴.

In its estimation of evidence the Court usually applied the standard of “proof beyond reasonable doubt” drawing attention to the fact that “such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact”³⁵.

In connection with the unfortunate practice of the Polish Public Prosecutor’s Office to keep secret all information on the Smolensk investigation, it ought to be reminded that according to Strasbourg standards necessary level of public control over the investigation, and particularly letting relatives of casualties participate in investigation to the extent necessary to secure their rights and interests, are the necessary elements of this *ex officio* investigation. As the Court stated in *Mc Kerr* case judgement, “The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the

procedure to the extent necessary to safeguard his or her legitimate interests”³⁶.

As concluded from the above, the scale and scope of international obligation of a state-side resulting from art. 2: The Right to Life of the European Convention of Human Rights, are vast and capacious. It regards the entire group of obligations: negative and positive ones³⁷, material and procedural, whose violation is, “internationally wrongful act of a state” and update the issue of its liability, and which comprise numerous preventive obligations associated with securing the lives of individuals under its jurisdiction, such as regulation, monitoring, supervision and control, remedial measures, including the ones connected with rescue services and potential evacuation, and finally the means directly associated with the realisation of liability, like the ones regarding the securing of the site, evidence and in general, effective investigation.

The violation of material obligation of States-Parties of the European Convention of Human Rights in connection with Smolensk Catastrophe

For the sake of particular responsibility of the States-Parties of ECHR, namely Russian and Poland, I will not refer to the “findings” of either MAK or Miller’s Report, since I do agree with the opinion included in the Technical Report of Smolensk Subcommittee that, “findings” of Miller’s Commission appeared to be untrue in the light of conducted examination, wrongly indicating the causes of the crash and repeating the untrue findings of MAK commission”³⁸. What is more, from the perspective of international law in general, and particularly the international law of human rights, both

of Smolensk Families in the Context of Investigating Smolensk Catastrophe and the Pursuit of Claims Resulting from it, [in:] *ibidem*, p. 178 and the following, esp., p. 180–185; Id., *The Final Synthesis Regarding the Work of Legal Subcommittee of the Smolensk Conference*, [in:] *ibidem*, p. 218 and the following esp. p. 223–226. Compare also with the speeches of M. Szonert-Binienda, Ph.D. and J. Czepek, Ph.D. at our Conference.

³⁴ *Affaire Pereira Henriques c. Luxembourg*, arrêt 9 mai 2006, point 57. Text [in:] *Smolensk Assistant...*, p. 95 and the following.

³⁵ Comp. *Demiray*, point 43; *Finogenov and Others v. Russia*, judgment of 20 December 2011, point 199. More broadly on the issue: M. Balcerzak, *Evidence Standards in Proceedings at the European Court of Human Rights*, [in:] *International Responsibility in Cases of Violating Human Rights and International Humanitarian Law*, ed. M. Balcerzak and J. Kapelańska-Pręgowska, Toruń 2016, p. 13–30; J. Skrzydło, *Responsibility of Poland for CIA prisons in Poland in the Light of International Law*, [in:] *ibidem*, p. 99; T. Jasudowicz, *Obligations...*, p. 75–76.

³⁶ *McKerr*, point 115. Comp. T. Jasudowicz, *Legal Situation of...*, p. 184–185.

³⁷ Comp. more broadly: E.H. Morawska, *Positive Obligation of State-Parties of the Convention on Human Rights and Fundamental Freedoms*, Warsaw 2016, p. 87 and the following; M. Balcerzak, *Responsibility of a State-Party ...*, p. 92 and the following.

³⁸ It is highly surprising that Miller’s Commission, which had previously forwarded numerous remarks and amendments to the project of MAK Report, illegally neglected by MAK, in its final report did not include these remarks and actually repeats the findings of MAK. More broadly on Miller’s Report: T. Jasudowicz, *The Opinion Regarding “The Letter to Lawyers” to invalidate so called Miller’s Report*, [in:] T. Jasudowicz, G. Górski, *op.cit.*, p. 82–88.

documents could and ought to be perceived as acts internationally wrongful for which responsibility can be ascribed to Russia and Poland respectively. Neither of them was the document of investigation as expressed in art. 2 ECHR, since both of them were associated with the aviation investigation, which does not regard the issue of a state or states responsibility; at the same time, each of them is of significance from the perspective of investigation as expressed of art. 2 of the Convention, hence it could and ought to provide vital evidence for its sake.

All the facts and acts preceding the Smolensk Tragedy, which may have influenced its coming into existence, character and course, within the scope of positive responsibility of suitable organs or officials, raising doubts in the context of catastrophe, should be clarified entirely. When it comes to the range and degree in which they imply the violation or negligence regarding duties associated with securing the right to life, they should update the responsibility of a state, not only because they came to life but also individuals whose actions or abandonment contributed to them have not been held liable.

Thus, when it comes to the renovation of TU154 in Russia, Poland may and should be held accountable for the conditions and the character of renovation tender as well as the choice of a tenderer, and additionally the lack of suitable supervision and control over the renovation itself. On the other hand, Russia can be held responsible for the outcome of the renovation, regardless the fact that the renovation was done by a private company³⁹.

Before the flight of TU-154 there had been a rebuilt within the plane, as well as the placement of so called technical first aid kit on the night of 9th to 10th April, without BOR (Government Protection Bureau) and SKW (Military Counterintelligence Service) being informed, or pyrotechnics control of the plane, or non-functioning of the electronic system of controlling the access of the personnel entering the restricted area nearby the aircraft⁴⁰. There had been an inexplicable, yet extremely significant in the context of the catastrophe, split of the visit: primarily meant for 10th April

2010 visit of both Polish President and Prime Minister along with the delegation, had somehow strangely been cancelled. The visit of PM Tusk, planned for 7th April, had place in the conditions of functionality and efficiency of North Smolensk airport.

After their fruits ye shall know-the split brought about tragic consequences of President's Lech Kaczyński visit, when the same airport appeared to be unfit to be used, and the services responsible for its functioning had not secured the conditions of landing approach, landing or go-around of TU-154. Therefore, there is a responsibility on the side of Poland and its obligation was and still is to account for the deeds of e.g. Donald Tusk, the head of his office Tomasz Arabski, the ambassador and some of the employees of the Polish embassy in Moscow, especially Tomasz Turowski.

The experience of the Smolensk Tragedy has proved that there was no adequate regulations of VIP flights in Poland, including material regulations, procedures and appropriate control, especially the particular attention of special services in the event of such visits. There was the absence of efficient Polish services, especially consular and special ones, at the site of the catastrophe at the Northern Smolensk airport. All of the above place the blame on the Polish state.

On the side of Russia, the inadequate state of airport preparations, including the lighting ought to be noted. However, what the Report of Subcommittee draws attention to in particular, are inappropriate activities of Russian air traffic services including "systematic misleading of Polish pilot by Russian controllers", the lack of information on changing weather conditions and the way of glide path to landing, granting the agreement on attempting landing approach by unauthorised individual, etc., etc.⁴¹

All of these indicate that there was: the explosion in detachable part of the left wing⁴², further catastrophic events before TAWS38 point⁴³, the disintegration of the plane from TAWS38 point to Kutuzow motorway⁴⁴, the blow up in the centre section of the wing and dispersion of its parts⁴⁵. As presented in the Report of Subcom-

⁴¹ *Ibidem. The activities of Russian air traffic services*, p. 45–46.

⁴² *Ibidem. The explosion in the detachable part of the left wing*, p. 47–59 (with opulent photo documentation).

⁴³ *Ibidem. The events between the explosion of the wing and TAWS 38 point*, p. 60–61.

⁴⁴ *Ibidem. Disintegration of airplane from TAWS38 to Kutuzow motorway*, p. 61.

⁴⁵ *Ibidem. The course of events from Kutuzow motorway to*

³⁹ More broadly [in:] *The Technical Report, The Renovation of TU-154M*, PLF101, p. 43. In the Report it is emphasised that, „Miller's Commission does not take into account the fact regarding the renovation of TU-154(...)” – *ibidem, The Previous Examination*, p. 42.

⁴⁰ *Ibidem, Preparations for the Flight*, p. 45.

mittee, the plane disintegrated into over 60 000 parts, most of which got stuck into the ground and have never been excavated⁴⁶. Numerous reservations might also be expressed towards the presence and preparations of fire, medical, rescue and security services necessary during the arrival of a plane⁴⁷.

Hence, Poland might be held responsible for violating/not fulfilling positive obligations stemming from art. 2 ECHR, due to the lack of appropriate and properly functioning legal and administrative frames securing the right to life of passengers and crew of TU-154 on 10th April 2010, as well as the lack of proper supervision and control in the context of renovating and preparing the plane for the flight. In association with these deficiencies and the split of Katyn visit, as well as doubtful Polish–Russian negotiations regarding this issue one might not exclude the charge of accessory or accomplice in criminal deprivation of life of all 96 casualties of the Smolensk Catastrophe.

Taking into consideration Russian initiatives and participation in the above mentioned negotiations regarding the split visit and the conditions of its conduct, as well as the conditions and manners in which Russian services function, especially the ones dealing with air traffic in their communication and contacts with pilots, Russia might and ought to be held responsible for not fulfilling positive obligations concerning the securing of passengers and crew right to life, besides and regardless of the possible perpetration in depriving of life in illegal and arbitral manner.

Suspicions and doubts were to be clarified by appropriate fulfilment of procedural obligations by Poland and Russia in the context of the protection of right to life on the basis of art. 2 of the Convention.

The breach of procedural obligations of the State-Parties of ECHR in association with the Smolensk Catastrophe

The breach of procedural obligations stemming from art. 2 of ECHR must be examined and stated by referring to the Convention standard of adequate and effective official investigation mentioned above. In the realm of universal international aviation law art. 26 of the Chicago Convention on the International Civil Aviation is to be referred to, in connection with Protocol XIII of the Convention. However, both the Convention and Protocol, adequately to its core art. 3 and its title itself, regard exclusively civil aviation and investigation of civil aircrafts incidents, not military or state ones. On the contrary, the illegally rejected agreement between Poland and Russia from 1993 regarded exclusively military aircrafts and cooperation at investigating their accidents⁴⁸.

There must be a clear distinction between an investigation in the meaning of aviation law and investigation as expressed in art. 2 of ECHR. From the perspective of the Smolensk Catastrophe, the first one had the basis in Polish aviation law, and was to be conducted by The Commission of Investigating the Aviation Accidents of the State Aircrafts led by Jerzy Miller, the Minister of Internal Affairs and Administration. The commission forwarded supposed critical remarks concerning the project of MAK report, which however were neglected and not taken into account. And yet, further on it modelled its “examinations” on the MAK findings and founded its Report on them⁴⁹.

Aviation investigation, expert by definition, does not mean investigation according to art. 2 of ECHR, yet it may and ought to provide the investigation with evidence and materials essential for effective fulfilment of its functions and objectives. By no means has it been done by Miller’s Commission. Its establishment itself,

the explosion in the centre section of the wing, p. 62–64. Comp. *Ibidem. The burnt pieces of the plane in Kutuzow Street; The explosion in the plane’s fuselage TU-154M 101; The epicentre of the centre section of the wing explosion and the dispersion of its parts*, p. 65–66, 67–68, 69–72, respectively.

⁴⁶ *Ibidem. The main field of wreckage*, p. 73–74. Also compare: *Ibidem. The passenger part of the fuselage; Passengers* p. 75, 76–77, respectively.

⁴⁷ *Ibidem. Fire, medical, rescue and securing services*, p. 78.

⁴⁸ More broadly on the issue: P. Daranowski, *The Agreement Determining the Legal Basis and Manner of Investigating Smolensk Catastrophe*, [in:] *II Smolensk Conference 21–22.10.2013. The Conference Materials*, Warsaw 2014, p. 339–350. Comp. T. Jasudowicz, *From Katyn Tragedy to Smolensk Tragedy – from the perspective of international law and the standards of human rights*, [in:] T. Jasudowicz, G. Górski, *op.cit.*, p. 50–52; Id., *The Decalogue of Questions Regarding Smolensk Tragedy and Investigations Associated with it*, [in:] *ibidem*, q. 1, p. 59.; Id. *Obligations...*, p. 77.

⁴⁹ More broadly on the issue: T. Jasudowicz, *The Opinion...*, p. 82 and the following

leadership and supervision over it could in no way be in agreement with constitutional requirements. Therefore, they indirectly violated procedural obligations stemming from art. 2 of the Convention, which makes Poland responsible for it. In consequence, Poland has the obligation to hold individuals responsible accountable, especially Donald Tusk, Jerzy Miller, Edmund Klich and Bogdan Klich.

For many years Smolensk Catastrophe has been dealt with by Chief Military Prosecutor Office. If one takes into consideration its personal decisions, the level of thoroughness at collecting and conducting evidence, and particularly demanding the transfer of evidence by the Russian side, standstills in the process and its extraordinary protraction, the absence of impartiality and independence, flagrant fragmentation of the examination etc, its actions ought be judged as the chain of faults in fulfilling the obligation of adequate and effective investigation, as expressed in art. 2 of the Convention in its procedural dimension.

Also the Polish Republic Prosecutor Office dealt with isolated parts of Smolensk investigation, without the vision of the entire issue or its essence, not at the state level, rather at the local one. It did not contribute significantly to the issue and disrespected the importance and gravity of the case. The "theoretical state" of PO-PSL government neither was able to nor was willing to face the duty of the investigation in the context of Smolensk Tragedy.

The third year of the United Right Wing's good change transformation is just passing. There have been so numerous positive changes! Despite "barking dogs" Poland is being transformed in positive way. So much good is happening. Yet, what about Smolensk Investigation? Well, in spite of multiple obstacles the aviation investigation has been conducted by the subcommittee, which has resulted in concrete outcome, namely the Technical Report I referred to also in my study.

The prosecutor's investigation, this time conducted by National Public Prosecutor's Office, is proceeding slowly, or maybe not even so. The opinions of Smolensk Families are divided; some seem to have been eluded with mysterious mist, skilfully dispelled by Prosecutor's Office. I personally am not convinced with this mist or thick fog, as thick as the Smolensk one. Firstly, because I do not see that there is sufficient supervision of public control over the investigation by providing the society with satisfactory information on the investigation. According to Strasbourg standard the secrecy of investiga-

tion by all means can be in accordance with such public control. Secondly, since I cannot see the sufficient participation of Victims' Families in the investigation in the range and degree granting effective protection of their rightful interest. Thirdly, due to the fact that National Public Prosecutor's Office did not respond to the invitation to participate in our Conference; I did not receive even the confirmation of getting our invitation, not to mention the participation of Prosecutor's Office representative in the Conference.

The fundamental, even if its range and character has been decided upon by Prosecutor's Office, information on the investigation would be useful for the effective conduct of our conference, without any breach of "secrecy". This is how it is perceived by the Strasbourg Tribunal, especially due to the fact that numerous facts concerning Smolensk Tragedy have been "public secret" for long time. The post-communist threatening "wind of secrecy" is still blowing over Poland although it ought to have stopped long ago.

In this sense I am entitled to express the statement that the real, adequate and effective, complete and thorough investigation, as required in art. 2, has not been conducted in Poland so far. There are still no principal demands addressed at Russia when it comes to regaining fundamental evidence, including the wreck, which is the property of Poland, flight recorder, etc. There are no appropriate diplomatic notes, nor demands towards Russia regarding Smolensk Catastrophe. Therefore, Poland may be charged with the negligence of procedural obligations stemming from art. 2 of the Convention.

How much more it is justified to charge Russia with this. The statements about appropriate investigation being conducted there are nothing but ironic. The thesis that the wreck may not be returned to Poland due to the investigation in process seems to be black humour. As Putin has stated, it would be conducted *ad calendas graecas*. Hence, the charge concerning the material violation of art. 2 by Russia, is accompanied with the one concerning the violation of its procedural dimension.

Sad conclusions

There is thus the responsibility of Poland for violating the material dimension of art. 2 of ECHR, multiple *ante actum* preventive obligations, as well as obligations connected with the event itself and its consequences by time and place, partially associated with its procedural

dimension and deficiencies in this respect. In the perspective of the state there are already the conditions to charge particular public persons. After fulfilling the investigation requirements as to entire and thorough *post mortem*, the sphere of potential charge will no doubt expand, since it is *post mortem* that provides fundamental evidence as to circumstances of the death, particularly its cause⁵⁰. We are still awaiting the completion of the procedure and announcement of the *post mortem* results.

The Eighth Anniversary of the Smolensk Catastrophe passed. The 96th Month of the Smolensk Tragedy on 10th April 2018 meant the end of beautiful, deep in patriotic and religious sense solemn celebrations of Monthly Smolensk commemoration. The Smolensk Monument has been erected... It's eight years already! The wreck and flight recorder are still in Russian hands. "Moguczaja Rossija" (Mighty Russia) can do that, which proves that Poland still has not become a strong sovereign state, which is able to address its demands at Russia. Until she does, we may not expect its mighty allies to do it for her.

There is no doubt that both Poland and Russia are responsible from the perspective of material and procedural obligations stemming from art. 2 of ECHR. There are already premises (e.g. protraction) to hold both states responsible. The Convention allows also to perceive and qualify the manner of examining the Catastrophe and treating the demands of Victims' Families as the violation of art. 3 of the Convention, due to inhuman and humiliating attitude. The question of Smolensk Families taking advantage of state legal measures ought to be examined to state whether all the available ones have been used in order to be able to use Strasbourg complaint against Poland. As far as I am concerned, we will not find any legal measure in Russia to pursue claims of Smolensk Families. Yet, this issue requires a thorough examination, possible trial and conclusion.

All in all, in my view it is possible for Poland to forward state complaint against Russia according to art. 33 of ECHR, regarding Russia's actions concerning the evidence and more.

When we take into consideration the universal level, I do not share the utopian, in my opinion, dreams of M. Szonert-Binienda, Ph.D., on establishing some special international tribunal for the sake of Poland in the context of Smolensk Catastrophe. I'd rather Poland forwarded summons against Russia to the International Court of Justice, yet it is unlikely, since firstly, Poland has not matured enough to employ a principal standpoint in Smolensk Issue towards Russia; secondly, Russia has always been and still remains the opponent of obligatory jurisdiction of ICJ and would certainly not agree to pass the case to the Court.

Therefore, one may state the responsibility, yet there are no appropriate conditions for the justice to come to life. I am finishing in a pessimistic manner, dreaming quietly on such conditions to appear!

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⁵⁰ More broadly on the issue: T. Jasudowicz, *Criminalistic Aspects of the Right to Life in the Light of the Strasbourg Case Law*, [in:] *Doctrina multiplex, veritas una. The Jubilee Book presented to Professor Mariusz Kulicki*, Toruń 2004 UMK Publishing House.

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