

Krzysztof Masło¹

Prohibition of the acquisition of a state territory through deballatio – a historical perspective

DOI: 10.5604/01.3001.0014.1591

Introduction

A war is inevitably linked to changes in state borders, and the fighting armies were often occupying a territory of a hostile state by extending their power onto them. In the past, the areas occupied by a hostile state were often integrated to the victorious state (by the so-called deballatio) or subjected to various forms of dependence (e.g. a fief). Starting from the 19th century, a concept has been developed, according to which territorial changes between two belligerent countries are impermissible until the termination of military activities and the conclusion of a peace treaty². As a result of the Hague Conference of 1899 and 1907, an institution of an occupied territory was introduced into the language of international law, i.e. a state territory occupied by an enemy.

An annexation, being the result of war, has a different character from the institution of an occupied territory, and a military occupation has not replaced a deballatio. They both coexisted, although they stem from a similar factual situation – a state of war and a consequent intrusion of an enemy on another state's territory. They also bring a similar effect, which is to establish the political system of the occupying state in this territory. As long as war was a legal mean of settling international disputes, the resulting transfer of a territory could not be illegal. During the '20s and '30s of the 20th century, the states were applying the practice of integrating the conquered territories rather than establishing a military occupation regime, and this met with the appreciation of the then countries. However, the author of this article puts forth a thesis that at the turn of the '30s and '40s of the 20th century, there was a prohibition of deballatio effected in violation of the then international law, and therefore with the Kellogg – Briand Pact. Territorial annexations, carried out by the Third Reich and the USSR against the territory of the Republic of Poland and other European countries after 1939, were therefore illegal.

The purpose of this article is neither to comprehensively discuss the institution of military occupation, nor the prohibition of acquisition of a state territory through the use or a threat to use armed forces, or in particular – to discuss the current nature of the prohibition of deballatio. The intention of the author is to show how the prohibition of deballatio has finally emerged in the international law. When addressing this issue, it is impossible not to discuss the institution of deballatio and the international practice of the turn of the 19th and 20th centuries and the institution of military occupation, whose introduction to the international law related to the analysed issue. Only when the military occupation is presented, we will discuss the attempts aiming at prohibiting deballatio which have been made since the 19th century.

¹Doctor of juridical science, assistant at the Department of International Law and the European Institute of Legal Sciences UKSW in Warsaw, director of the International Cooperation and Human Rights Department of the Ministry of Justice, public prosecutor, author of publications in the field of armed conflicts law, international criminal law and the European Union law. ORCID: 0000-0003-3997-143X

²Shaw, M. N. *International Law*. Cambridge University Press, 2017, p. 371.

I Deballatio in international practice at the turn of the 19th and 20th centuries

Until the beginning of the 20th century, a legal way of acquisition of a state territory was a deballatio³ or a conquest⁴. In the years preceding the First World War, this way of acquiring a territory was quite common.

For example, Austro-Hungary occupied the territory of today's Bosnia and Herzegovina since the Berlin Congress in 1878. In view of a complex geopolitical situation in the Balkans and the Moldovan revolution in the Ottoman Empire, in 1908 they performed an annexation of that territory. The annexation of Bosnia and Herzegovina was recognised, inter alia, by Turkey and Serbia. A similar act was made by the United Kingdom, when in 1900 it annexed the territories of the Boers. It is worth noting that the Boer Wars ended only in 1902 with the capitulation of Boers. In 1911, Italy carried out an annexation of Tripoli and Cyrenaica, presenting an ultimatum to the Ottoman Empire concerning these territories. Italy invoked the alleged state of disorder and neglect and included this area with its sovereignty in November 1911, one year before signing a peace treaty.

In November 1918, Romania, obtaining the prior consent of Germany and Austro-Hungary, annexed Bessarabia which had previously belonged to the Russian Empire. Previously this territory had been occupied by Romanian forces. However, the annexation of Bessarabia was not recognised by the government of the Soviet Union. After the outbreak of the Second World War, the Soviet forces seized in 1940 Bessarabia and Northern Bukovina.

Deballatio means a primary means of acquiring a state territory through its complete and final acquisition and making a statement by the conquering state of its intention to annexation⁵. Therefore, a deballatio of a territory consists of two acts: 1. the actual possession of that territory (*corpus*), 2. a unilateral declaration by the state expressing an intention to acquire the conquered territory (*animus*)⁶.

The possibility of acquiring a legal title to another state's territory by way of military conquering was due to the fact that levying and waging war

³ This term is used by e.g. Berezowski, C. *Terytorium, instytucje wyspecjalizowane, współpraca międzynarodowa, obszary kolonialne i zależne, wojna powietrzna*. Warsaw: 1957.

⁴ This term is used by e.g. Klafkows i, A. *Prawo międzynarodowe publiczne*. Warsaw: 1979, p. 249 and Białocerkiewicz, J. *Prawo międzynarodowe publiczne. Zarys wykładu*. Toruń: 2007, p. 189.

⁵ Bishop, W. W. *General Course of Public Law, Recueil des Cours*. 1965, p. 280.

⁶ Łaski, P. *Zawojowanie w świetle prawa międzynarodowego*. Zeszyty Naukowe Akademii Techniczno-Rolniczej im. Jana i Jędrzeja Śniadeckich, No. 220 (1999), p. 25.

was until '20s of the 20th century considered to be the right of each ruler and a way to settle international disputes in accordance with international law, including in particular territorial disputes. The unilateral annexation being the result of a conquest constituted a legal title to a territory. However, it was not clear whether a valid title to the occupied area could only be provided by an annexation made after the termination of acts of war or in their course. The predominant view was of a final character of acquisition of a state territory, namely, of its acquisition as a result of which the conquered state ceased to exist as an international entity. The control over this area should be effective and there should be no reasonable opportunities to recover this area by the former sovereign⁷.

As long as the conquered state had a government (regardless of whether it exercised power from the conquered territory or from its ally state, where it sheltered) and a supporting population, the annexation of the territory could not be considered legal⁸. Therefore, *debellatio* was not considered as its acquisition by means of a treaty terminating the war and granting certain territorial acquisitions to the victorious state. In such a case, there was no termination of legal international personality of the conquered state and, moreover, the acquisition of territories did not take place by way of a unilateral declaration, but by means of an assignment between the two belligerent countries, although often forced by the lost war and the conditions of peace imposed by the victorious state. In practice, this type of assignment only confirmed the previous conquest⁹.

2. Military occupation

A military occupation is a response to the need for a clear determination of a border between the conquered territory occupied by the armed forces and obtaining a legal title to it by way of unilateral annexation¹⁰. International regulations concerning military occupation of a state territory were developed at the turn of the 19th and 20th centuries.

A military occupation has entered the language of international law quite quickly and, *inter alia*, the Hague Conferences of 1899 and 1907 were devoted

⁷ Shaw, M.N. *International Law*. Cambridge University Press, 2017, p. 371.

⁸ Łaski, P. *Zawojowanie* ..., p. 27.

⁹ Bishop, W. W. *General* ..., p. 280.

¹⁰ Schwarzenberger, G. *The law of belligerent occupation: Basic Issues*. Nordisk Tidsskrift for International Ret, vol. 30 (1960), p. 10.

to it. The results of the First Hague Conference of 1899 include, inter alia, a convention on the law and customs of war on land, to which the Regulations concerning the law and customs of war on land have been attached¹¹. This convention entered into force on 4 September 1900 and was ratified by 51 states (joined by Montenegro in 2007 and Ukraine in 2015). Articles 42-56 of the Convention were devoted to theme of military occupation. The Convention was reviewed during the subsequent international peace conference convened in Hague in 1907. One of the 14 conventions adopted at that time was the Fourth Hague Convention on Law and Customs of War on Land. It was a short treaty consisting of only 9 articles. The convention was accompanied by the Regulations concerning the law and customs of war on land, in which relevant standards governing the law of war have been concluded. The Hague Convention IV entered into force on 26 January 1910 and was joined by 38 countries, including Poland¹². The provisions governing the military occupation are contained in chapter III (Articles 42-56) and have the same wording as the provisions of the Hague Convention of 1899.

During the '20s of the 20th century, the nature of the provisions of the Hague Regulations governing the legal status of the occupied territory was considered in the arbitration law. In the case concerning navigation on the Danube, Austria and Hungary have expressed the view that these provisions constitute confirmation of customary international law¹³. As the other parties to the arbitration proceedings did not respond to this claim, it was accepted by arbitrator. However, this claim has a limited value since it referred only to the parties to the dispute. The nature of the provisions of the Fourth Hague Convention of 1907 was also the subject of the deliberations of the International Military Tribunal in Nuremberg. The Court concluded that the rules of war on land contained therein represent progress in relation to the existing international law at the time of their adoption and in 1939 these rules were recognised by all civilised nations as a reflection of the law and customs of war¹⁴.

¹¹ Convention (II) with Respect to the Law and Customs of War on Land and its annex: Regulations concerning the Law and Customs of War on Land. The Hague, 29 July 1899; text for: Schindler, D., Tomana, J. *The Laws of Armed Conflicts*. Martinus Nijhoff Publisher, 1988, p. 69-93.

¹² See: Government's declaration of 20.1.1927 on the accession of the Republic of Poland to the International Convention on the law and customs of war on land, signed in accordance with the relevant regulations in the Hague on 18 October 1907, Journal of Laws 1927 No. 21, item 160; the convention applies to Poland since 9 July 1925.

¹³ Navigation on the Danube (Allied Powers: Czechoslovakia, Greece, Romania, Serb-Croat-Slovene Kingdom); Germany, Austria, Hungary and Bulgaria; Reports of International Arbitral Awards (Recueil Des Sentences Arbitrales), 2.8.1921, vol. I, p. 104.

¹⁴ International Military Tribunal (Nuremberg), Judgement and Sentence, 1.10.1946, text in: American Journal of International Law, vol. 1, p. 248-249.

At a later date, the provisions of the two Hague Conventions concerning the status of an occupied territory were supplemented by the provisions of the Fourth Geneva Convention of 12 August 1949 on the protection of civilians during war¹⁵ and the First Additional Protocol of 8 June 1977 to the Geneva Convention concerning the protection of victims of international armed conflicts¹⁶.

The vast majority of situations in which military occupation is taking place is preceded by military invasion. It is impossible to determine the precise moment of the termination of a military invasion and the introduction of a regime of the occupied territory¹⁷. A territory shall be deemed to be occupied if it is in fact under the authority of the enemy's army (Article 42 of the Regulations concerning the Law and Customs of War on Land). Occupation is therefore extended to these territories where the wartime power of the occupier is established and exercised. This means that, in the occupied territory there cannot be any other authority than the one imposed or permitted by the occupying power, and this power exercises a governmental authority, effectively maintains the law and order based on its squads of soldiers¹⁸.

Therefore, a military occupation is a real situation taking place on the territory of the belligerent party connected with the seizure of this territory by the enemy's forces¹⁹. This means the actual transfer of power from the legal government to the hands of the occupier, not the transfer of a legal title to the territory, which is confirmed by Article 43 of the Hague Regulations. Therefore, a military occupation of the entire state territory does not mean the collapse of the occupied state and the expiry of the state authority. Such a view has been represented in the international case law since the '20s of the 20th century. In the arbitration proceedings concerning the debt of the Ottoman Empire (*Ottoman Debts*, 1925), the arbiter E. Borrel pointed out that the military occupation of the part of the territories of Bulgaria did not imply a transfer of sovereignty to the occupying powers²⁰. The practice of the Second World War has showed that the European countries, conquered by the Third Reich, including Poland, did not collapse, but the legal government has left the occupied

¹⁵ Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12.8.1949, UNTS vol. 75, p. 287.

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8.6.1977, UNTS vol. 1125, p. 3.

¹⁷ Roberts, A. *Transformative military occupation: applying the laws of war and human rights*. American Journal of International Law, vol. 100, p. 256.

¹⁸ Green, L. C. *The Contemporary Law of Armed Conflict*, 3rd edition. Manchester University Press, 2008, p. 258.

¹⁹ Kwiecień, R. *Okupacja wojenna w świetle prawa międzynarodowego: natura, skutki, nowe tendencje*. Annales Universitatis Mariae Curie-Skłodowska, vol. LX (2013), p. 67.

²⁰ Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie), Reports of International Arbitral Awards (Recueil des Sentences Arbitrales), volume I, 18.4.1925, p. 555.

territory and functioned in exile, establishing underground structures on the occupied territory.

In this context, it is worth noting the Polish diplomatic practice, in which at the turn of the '30s and '40s of the 20th century, it was assumed that “the sovereignty of a state exists as long as the soldiers of the regular army continue to fight. During the time [of the Second World War] the territories of Serbia and Belgium were occupied, but none considered the commitments towards them to be invalid. Napoleon entered Moscow, but until the Kutuzov army existed, Russia was thought to exist too.”²¹ In a letter of 24 December 1940 of the Polish Member in Budapest to the head of the Hungarian government it was indicated that “the state participating in the coalition war, and occupied even entirely by the enemy’s army, does not consequently cease to exist, especially if its armed forces continue to fight. In the case of Poland: defeated by the prevailing forces of its neighbours, it has never capitulated, has never recognised foreign rule, and its land, air and sea armed forces fight next to the allies.”²² This position was shared by the entire international community, with the exception of Germany and their closest allies.

The legal status of the occupied territory was to be settled after the termination of acts of war, most often in the form of a peace treaty. The status of that territory is therefore characterized by its temporariness and the accompanying uncertainty as to its final fate. After the end of the war, on the basis of the arrangements between the belligerents, the occupied territory could be assigned to the victorious state which occupied it until that time. However, until the termination of occupation, the occupying power has obligations related to ensuring public order and safety in the occupied territory, including the obligation to respect the laws in force in that state (Article 43 of the Regulations). The Fourth Hague Convention of 1907 clearly contradicted the view that the occupied territory of the enemy, and the population living therein, is becoming a spoils of war left on the mercy of the enemy’s army. For this purpose, the Hague Regulations of 1907 established a number of obligations and prohibitions applicable on the occupied territory:

- prohibition of confiscation of private property (Article 46 of the Regulations) and pillage on the occupied territory (Article 47 of the Regulations);

²¹ A reply from the ambassador of the Republic of Poland in Moscow, W. Grzybowski, for a note of the Minister of Foreign Affairs of the USSR of 17 September 1939, which contains a false thesis about the collapse of Poland through its deballatio. The Polish position was divided by the International Military Tribunal in Nuremberg, which indicated that the armed conflict in Poland was not completed at the turn of September and October 1939, due to the continuation of the armed combat by the Polish army (see below, footnote 37).

²² Red. Kowalski, W. T. *Polska w polityce międzynarodowej (1939-1945). Zbiór dokumentów*. Warsaw, 1989, p. 422.

- right of the occupant to collect taxes in the occupied territory in accordance with the tax regulations in force in that territory (Article 48 of the Regulations);
- obligation to respect civilians, their honour, family, beliefs and religious convictions and practice; obligation to treat civilian persons in a humanitarian manner (Article 46 of the Regulations);

The military occupation has to be distinguished from the original occupation being the necessary condition for the acquisition of an unowned territory (*occupatio terra nullius*) from peaceful occupation and from occupation being the result of an unconditional capitulation²³. For the purposes of this article, a particular importance is attached to clear separation of military occupation and *occupatio terra nullius*. In the ancient doctrine of international law there were voices justifying the acquisition of sovereignty over the occupied territory through the effective holding of that territory by the occupying power²⁴. However, such a view should be rejected. The original occupation concerns only an unowned territory or a territory which has become unowned for some period of time. An occupied territory shall not be considered as *terra nullius*. It is difficult to recognise that it was abandoned by the current government, since it has lost control over this territory as a result of the use of armed forces, but it still exists in exile and there is population that supports this government (as well as armed forces of this government operating in the occupied territory from hiding). Another feature of *occupatio terra nullius* is its peaceful nature²⁵, which in the case of military occupation does not exist for obvious reasons. If we accept the view on the acquisition of an occupied territory by the hostile army through *occupatio terra nullius* as a legal title to that territory, it would be a primary occupation, not a *deballatio*.

III Shaping the prohibition of *deballatio* in the international practice at the turn of the 19th and 20th centuries.

It is generally acknowledged that the prohibition of the acquisition of a state territory through *deballatio* has derived from the Anti-War Treaty of 27 August 1928²⁶ (hereinafter referred to as the Kellogg-Briand Pact)

²³ Kwiecień, R. *Okupacja wojenna...*, p. 65.

²⁴ Nys, L. *Le droit international*. Brussels, 1912, vol. 1, p. 52.

²⁵ Gilas, J. *Prawo ...*, p. 187.

²⁶ Traktat Przeciwojenny, 27.8.1928 r., *Journal of Laws* 1929 No. 63 item 489.

and the Henry Stimson's doctrine, the US Secretary of State, formulated on 7 January 1932.²⁷ The issue of legality of *deballatio*, being a title to a territory, has already been mentioned in judicial decisions, in particular by arbitration courts appointed *ad hoc* on the basis of peace treaties giving an end to the First World War. The practice of the interwar period shows countries which used to condemn territorial acquisitions obtained by use of armed forces, taking the form of diplomatic notes and international agreements.

3.1. Prohibition of *deballatio* in judicial decisions of international courts

After the Second World War, on the basis of the peace treaties concluded between the European countries, *ad hoc* arbitration tribunals were appointed to settle inter-state disputes. In certain cases, these tribunals were faced with the need to assess the effectiveness of territorial changes caused by the military activities of the First World War.

Regarding the dispute between Bulgaria, Iraq, Palestine, Emirate of Transjordan, Greece, Italy and Turkey (*Ottoman Debts*)²⁸, the question of the assignment of a part of the national territory of Bulgaria, based on the Neuilly-Sur-Seine peace treaty²⁹, was considered. It was assumed that Bulgaria should not be responsible for these territories, which have been occupied by the Entente states and their allies from the moment of occupation. In the arbitration award, the arbitrator E. Borel expressed the view that a military occupation on another state's territory does not transfer sovereignty over that territory to the occupying power. The title to these territories was only transferred by the peace treaty and from the date of its entry into force.

Similar conclusions were reached by the arbitration court in the dispute between the USA and the United Kingdom (*Iloilo claims*). It concerned sovereignty over the Philippine islands³⁰. The dispute was connected with the American-Spanish war, during which the American troops took over the Philippines. The arbitration court stressed that the ceasefire agreement does not mean a transfer of sovereignty over the territory. Its transfer may *de iure* take place upon ratification by the parties concerned of the treaty terminating the war.

²⁷ Bronwlie, I. *International Law and the Use of Force by States*, Oxford University Press 1963, p. 410.

²⁸ *Affaire de la Dette publique ottomane (Bulgarie, Irak, Palestine, Transjordanie, Grèce, Italie et Turquie)*, Reports of International Arbitral Awards (Recueil des Sentences Arbitrales), Volume I, 18.4.1925, p. 555.

²⁹ Treaty between the Principal Allied and Associated Powers and Bulgaria and Protocol, signed at Neuilly-sur-Seine, 27.11.1919.

³⁰ *Sever Dal British Subjects (Great Britain) V. United States (Iloilo Claims)*, Reports of International Arbitral Awards (Recueil des Sentences Arbitrales), Volume VI, 19.11.1925, p. 160.

The British-American peace treaty was concluded on 10 December 1898 and entered into force on 11 April 1899 and the title to the territory of the disputed islands was transferred only on this date.

A similar decision was issued by the the Hungaro-Yugoslav Mixed Arbitral Tribunal in the case of *Kemeny v. Yugoslavia*³¹. The Tribunal noted that the conclusion of the ceasefire agreement between Hungary and the Government of Serbs, Croats and Slovenes on 3 November 1918 did not affect the exercise by the Hungarian government of territorial jurisdiction over the territory occupied by the Yugoslavian forces. The jurisdiction over these areas was only transferred to Yugoslavia together with the entry into force of the Treaty of Trianon³².

The Bulgarian and Greek dispute (*Forest of Central Rhodope*) clearly stated that Bulgaria acquired sovereignty over certain territories of the Ottoman Empire only upon the entry into force of the Treaty of Constantinople of 29 September 1913³³.

To sum up the above awards, the arbitrators did not clearly identify the legality (or illegality) of an acquisition of a territory through *debellatio*. It was clearly pointed out that the sole fact of a seizure of a territory by a hostile state does not transfer the legal title to the territory. In all the above rulings, the legal title was only an international agreement terminating the war between the parties to these agreements. In this context, it is impossible to omit the arbitration award rendered in 1928 in the dispute between the USA and the Netherlands on the island of Palmas³⁴. In that award it was pointed out that one of the titles of the acquisition of territorial sovereignty in the then international law was a conquest. However, the arbitration court did not formulate any further guidance as to how *debellatio* should be understood. This award confirms that during the '20s of the 20th century, *debellatio*, under certain conditions, was considered to be a legal way of acquiring a state territory.

The Permanent Court of International Justice (PCIJ) has never explicitly stated its admissibility of *debellatio* as the acquisition of a legal title to a state territory, nor has it considered the admissibility of recognition by other countries of such territorial acquisitions. On the other hand, in the case of East Greenland,

³¹ Alexandre Kemeny v. Serbo-Croate-Slovenia, 13.9.1928, (1929) 8 RDTAM 588, p. 593.

³² Treaty of Peace Between the Allied and Associated Powers and Hungary And Protocol and Declaration, Signed at Trianon, 4.6.1920, text in: *The American Journal of International Law*, vol. 15, No. 1, Supplement: Official Documents (Jan., 1921), p. 1-4.

³³ *Affaire des forets du Rhodope central (question préalable)* (Grèce contre Bulgarie), Reports of International Arbitral Awards (Recueil des Sentences Arbitrales), Volume III, 4.11.1931, p. 1428.

³⁴ Island of Palmas case (Netherlands, USA), Reports of International Arbitral Awards (Recueil des Sentences Arbitrales), vol. II, p. 839.

PCIJ – on the margins of considerations concerning the legal status of Eastern Greenland and the waiver of claims in this territory by Norway – described the notion of a conquest³⁵. The Court referred this term to the loss of sovereignty in the context of war between states where, as a result of defeating one of the states, sovereignty over the territory is transferred from the defeated to the victorious state. The Permanent Court of International Justice has also failed to negate the legality of a conquest as a title to a territory. It is worth noting, however, that the PCIJ leads its deliberations concerning conquest in the context of the loss of control over two – established back in times of the King of Norway Erik the Red in 10th century – settlements, Eystribygd and Vestribygd, which ceased to exist in the 14th century and Norway has lost its sovereignty over these settlements. In the proceedings before the Court it was claimed that this happened as a result of a conquest or a voluntary abandonment. However, the Court rejected this view by recognising that the concept of a conquest does not apply when the settlements were established in a distant state, and their inhabitants are massacred by the indigenous peoples³⁶. The Court concluded that the use of the institution of conquest in the context of a collapse of both settlements in the 14th century, is incorrect. It is also worth noting that the Court examined the concept of a conquest in the context of events in the 14th century and did not refer it to events from the early '30s of the 20th century when Norway announced the occupation of the territory of Eastern Greenland. Therefore, the award of the PCIJ does not express an unambiguous opinion as to whether the position of the Hague judges in the '30s of the 20th century was a legal way of transferring sovereignty over the territory.

The International Military Tribunal in Nuremberg³⁷, in its judgement on *Major German war criminals*³⁸ in the context of territorial annexations committed by the Third Reich in 1939-1940, dealt with the acceptability of deballatio as a legal way of primary acquisition of a state territory. In the proceedings before the Tribunal, it was argued that in connection with the conquest of the European countries by the Third Reich and the integration of the territory of, among others, Poland to the Third Reich, the Fourth Hague Convention of 18 October 1907

³⁵ Legal status of Eastern Greenland, 5.4.1933, Permanent Court of International Justice, Series A./B., Judgments, Orders And Advisory Opinions, p. 47.

³⁶ Ibid.

³⁷ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal, 8.8.1945, UNTS vol. 82, p. 279.

³⁸ The Trial of German Major War Criminals, judgement of 1.10.1946, text in: American Journal of International Law, vol. 1, p. 248-249.

on the law and customs of war on land, together with the annexed Hague Regulations, does not apply for crimes committed in the territory of the Republic of Poland. However, the International Military Tribunal rejected this argument by stating that there was an army operating in these territories which attempted, by means of an armed combat, to restore the occupied territories to the legitimate power.

When analysing this fragment of the award of the International Military Tribunal, it should be noted that the Tribunal did not explicitly state the illegality of *debellatio*. However, the Nuremberg Tribunal took the view that the armed conflict, *inter alia* in Poland, was not terminated at the turn of September and October 1939 due to the continuation of an armed combat by the Polish army.

Thus, the annexation of the Polish territory made by the Third Reich had taken place before the end of the war and as such was ineffective and invalid in international law.³⁹

At this point, attention should also be paid to the practice of the Polish Supreme Court which, in the interwar period, had to face the issues arising from the First World War and the German occupation of territories, which were granted to Poland. In one of the cases, the Supreme Court pointed out that “undoubtedly [...] the basis of the occupant’s power is force, not law; it is therefore an actual, but temporary owner of the occupied areas, and even though it governs in its own name until the final result of the war, and by actually exercising its rights and waging war not only armed, but also economically, it has the right to take the movable property of the hostile state as spoils of war, then this refers only to things which can be actually liquidated, not to entering into agreements and obligations that go beyond the actual seizure, to which the law in Article 2045 of the Civil Code requires the capacity of regulation and to which no provisions of the occupant grant the right; [...]”⁴⁰. The Supreme Court also emphasised the falseness of the thesis according to which during the war, the occupying authorities of a hostile state in occupied locations exercise power equal to the power of the legal government. Therefore, the Supreme Court has implicitly accepted the view that a seizure of a state territory by hostile forces does not lead to a transfer of a legal title to the territory on the occupying power, and this power may only exercise the rights resulting from the Forth Hague Convention of 1907.

It follows from the judicial decisions of the interwar period that the mere seizure of a state territory by a hostile army was not conferring a legal title to that area. The authority of a power, whose armed forces took over the state

³⁹ Shaw, M. *International ...*, p. 371.

⁴⁰ Judgement of the Supreme Court of 28.4.1923, I C 621/19, OSN(C) 1923/1/53.

territory, was factual and temporary, and its legal status was determined only by the provisions of a peace treaty, resulting in its entry into force.

3.2. Prohibition of *deballatio* in diplomatic and treaty practice in the interwar period

The Covenant of the League of Nations did not prohibit the use of war as a means of settling international disputes, it also did not refer to the acquisition of a territory through *deballatio*. Articles 12 to 15 restrict the right of states to resort to war as a means of settling international disputes. The Covenant also contained a commitment to respect and maintain territorial integrity and political independence of all members of the League against any external attack (Article 10). During the '30s of the 20th century H. Lauterpacht observed that the non-recognition of a conquest in violation of the Covenant of the League of Nations is a minimum of commitment to respect and maintain the territorial integrity of other members of the League of Nations⁴¹.

Some countries have also introduced a prohibition on the acquisition of state territories through war, in violation of the Covenant of the League of Nations and its related prohibition of the recognition by third countries of territorial acquisitions obtained by use of armed forces. In 1922, the Danish government has communicated to the League of Nations that the acquisition of a territory in Europe will not be lawful if it results from a war, a conquest or a peace treaty, and any agreements or regulations that have been made contrary to this rule should not be recognised by the Member States of the League of Nations⁴². Article 10 of the Covenant of the League of Nations was also the subject of a meeting of the League's Assembly. On 11 May 1932, the Assembly adopted a resolution in which it was recognized that Article 10 of the Covenant impose an obligation on the League Member States not to recognise territorial changes through *deballatio*.

A real breakthrough in the approach to *deballatio* was the signing of the Anti-war Treaty (also referred to as the Kellogg-Briand Pact). Initially, the Treaty was to be in force between France and the USA and prohibit waging war between these countries. At the initiative of the USA a multilateral negotiations took place, in which participated as many as 15 countries in the peak moment in 1928, including Poland. The Treaty was signed by 15 countries in Paris on 27 August

⁴¹ Lauterpacht, H. *Règles Générales du Droit de la Paix, Recueil des Cours de l'Académie de Droit International de la Haye*, vol. 62 (1937), p. 336.

⁴² Proposal of the Danish Government communicated to the League of Nations in 1922, text for: American Journal of International Law, vol. 33, supplement, p. 892.

1928 and entered into force on 24 July 1929.⁴³ On the day preceding the war, 63 countries were its members, including Poland, Germany and USSR since 1929. It was therefore a universal treaty.

The Anti-war Treaty is a very short international agreement, consisting of a preamble and three articles. In accordance with Article I, the parties to that Treaty condemned resorting to war as way of dealing with international disputes and renounced it as a tool for national politics in their mutual relations. On the basis of Article II, the parties recognised that handling and settling of all disputes and conflicts, regardless of their nature or origin, should always be achieved by peaceful means. The Anti-war Treaty did not prohibit conducting a defence war, provided that the defensive actions taken are proportionate⁴⁴. Therefore, since the war was outlawed as a means of settling territorial disputes, it was illegal to acquire a state territory through *debellatio*. This is a consequence of *ex iniuria lex non oritur* principle.

In the interwar period, the concepts prohibiting acquisition of a territory through *debellatio* and non-recognition of territorial acquisitions obtained with the use of armed forces, were the most popular on the American continent. They date back to the Hague Peace Conference of 1907, during which Brazil⁴⁵ made a proposal not to grant the right to conquest of a territory. In 1925, the American Institute of International Law prepared a draft declaration on the rights and obligations of states. According to this project, the acquisition of territory obtained through war, under threat of war or in the presence of armed forces, could not be considered as conferring a legal title⁴⁶. The draft declaration was sent to the Pan-American Union. However, until the events in Manchuria in 1931 and 1932, related to the Japanese occupation and the creation of a puppet country of Manchukuo, dependent on Japan, speeded up works on the issue of legality of *debellatio* under the Pan-American Union.

In identical diplomatic notes addressed to the Government of China and Japan on 7 January 1932, the US Secretary of State Henry Stimson stated that "given the current situation and its own rights and obligations in this respect, the US Government considers it necessary to notify both the government of Japan and the government of the Republic of China that it cannot accept the legality of any current situation, nor does it intend to recognise the treaty or the agree-

⁴³ General Treaty for Renunciation of War as an Instrument of National Policy, 27.8.1928, LNTS vol. 94, p. 57.

⁴⁴ Białocerkiewicz, J. *Prawo* ..., p. 416; Gilas, J. *Prawo międzynarodowe*, Toruń 1999, p. 316;

⁴⁵ *Proceedings of the Hague Peace Conferences, Conference of 1907 (1920)*, Vol. I, p. 551.

⁴⁶ Project No. 30, "Conquest", American Institute of International Law, 25.2.1925, Preparatory Study Concerning a Draft Declaration on the Rights and Duties of State, ILC, 1948, p. 114.

ment between those Governments or their representatives, [...] which concern sovereignty, independence or territorial and administrative integrity of the Republic of China [...] and that it does not intend to recognise any situation, treaty or agreement that could be concluded in a manner contrary to the covenants and obligations of the Pact of Paris of 27 August 1928, of which both China, Japan and the United States are parties."⁴⁷ The above note constituted merely a statement with the intention of non-recognition of certain situations and treaties that infringe previous treaties. It therefore did not impose any obligations either on the USA or other countries⁴⁸. The view expressed by H. Stimson in the above note has come to international law under the name of Stimson's doctrine. The Stimson's doctrine can be considered as a political declaration. It has been replicated by the Assembly of the League of Nations in its resolution of 11 March 1932, which recognised that it is the duty of the League members not to recognise any situation, treaty or agreement that may be caused by measures contrary to the Covenant of the League of Nations or the Anti-War Treaty of 1928.⁴⁹ This resolution was already a much stronger action than the sole political declaration made by the US Secretary of State, as it referred to the Covenant of the League of Nations, including to Article 10. However, it did not refer to the prohibition of *deballatio*, but to the results of the incompatible with the Covenant of the League of Nations acquisition of the territory of Manchuria by Japan. A similar opinion was presented in a report concerning the situation in Manchuria, adopted by the League's Assembly on 24 February 1933. It excluded the possibility to *de facto* and *de iure* recognize the new regime in Manchuria, as incompatible with the fundamental principles of existing international commitments⁵⁰.

A conflict between Bolivia and Paraguay on Chaco's territories is also interesting. On 3 August 1932, a special committee composed of 19 of the then American countries issued a statement to the Government of Bolivia and Paraguay in which it announced a non-recognition of territorial regulations which were not obtained by peaceful means and the validity of the acquisition of a territory, which could be the result of an occupation or a conquest by armed forces⁵¹. The declaration clearly questioned the legality of *deballatio* and the

⁴⁷ Notes from the Government of the United States to the Governments of China and Japan, 7.1.1932, text for: American Journal of International Law, vol. 33, supplement, p. 892/893.

⁴⁸ Briggs, H.W. *Non-Recognition of Title by Conquest and Limitations on the Doctrine*, 34 American Society of International Law Proceedings, vol. 42 (1940), p. 76.

⁴⁹ League of Nations, Official Journal, 1932, Spec. Supp. No. 101, p. 87.

⁵⁰ Assembly Report, 24.2.1933, text for: American Journal of International Law, vol. 33, supplement, p. 893.

⁵¹ text for: American Journal of International Law, vol. 33, supplement, p. 893.

possibility of recognising the legal effects on the disputed territory resulting from the use of armed forces.

The prohibition of the recognition of territorial acquisitions obtained through conquest was finally shaped on the American continent as an international law standard during the Seventh Pan-American Conference in Montevideo. At that time the Convention on the Rights and Obligations of the States was adopted⁵². It entered into force on 26 December 1934 and was ratified by 16 American countries, including the USA (ratification of 13.07.1934). In accordance with Article 11, the countries recognised as a rule in their proceedings that they will not recognise the territorial acquisitions that have been obtained through the use of armed forces, threats to diplomatic representatives or any other means of effective coercion. The Convention on the Rights and Obligations of the countries did not introduce a direct prohibition of *deballatio*, but it has prohibited to recognize the consequences of *deballatio* as legal.

The Anti-war Treaty of Non-aggression and Conciliation signed on 10 October 1933 in Rio de Janeiro, on the initiative of Argentina reached much further⁵³. It condemned aggression in mutual relations between the parties and committed them to resolve disputes and controversies with the use of peaceful means (Article 1). In accordance with Article 2, the member states declared that territorial disputes cannot be resolved by force and the countries will not recognise any territorial regulations that were not obtained by peaceful means or the acquisition of territory which may result from the use of force. The Anti-war Treaty of Non-aggression and Conciliation of 1933 introduced a direct prohibition of *deballatio*. It is worth noting that its parties were Argentina, Brazil, Chile, Mexico, Paraguay and Uruguay, as well as the USA (since 1935). The Treaty was in force until the introduction of the American Treaty on Pacific Settlement of International Disputes of 30 April 1948, hereinafter referred to as the Pact of Bogotá.

The provisions of the Treaty on the rights and obligations of the states from Montevideo and the Pact of Bogotá were taken over by the Charter of the Organization of the American States. Article 21 of the Charter establishes a prohibition of the recognition of territorial acquisitions obtained by force or by means of coercion⁵⁴.

A summary of the interwar efforts aimed at prohibiting the recognition of territorial acquisitions obtained through conquest, was the 26th resolution

⁵² Montevideo Convention on the Rights and Duties of States, 26.12.1933, LNTS vol. 165, p. 19.

⁵³ The Anti-War Treaty of Non-Aggression and Conciliation, 10.10.1933, OAS, Treaty Series, No. 16.

⁵⁴ Charter of The Organization of American States, 30.4.1948, UNTS vol. 449.

adopted on 22 December 1938 during the Eighth Pan-American Conference in Lima⁵⁵. It emphasized that the provisions of the Non-aggression and Conciliation Treaty of 1933 are an expression of a common and united attitude of the American states, and the prohibition of the acquisition of territory by force results from geographical, historical and political circumstances of the peoples of America. The states recognised that occupation or acquisition of a territory or any other territorial or border changes obtained through conquest by force are invalid and do not have any legal effect. It was also stressed that the commitment of a non-recognition of a situation arising from these conditions, cannot be unilaterally or collectively waived.

The practice of countries in the interwar period is also important for the prohibition of *deballatio*. In particular, in the '30s of the 20th century in various parts of the world with examples of situations where countries were making claims to territories that they had acquired through the use of armed forces. Thus, the formation of the country of Manchukuo was recognized by the Third Reich, Japan, the USSR and Salvador, but also by Poland in 1938⁵⁶ and Hungary in 1939⁵⁷. Many Member States of the League of Nations (with the exception of the USA and the USSR) recognised the annexation of Abyssinia (today's Ethiopia) by Italy in 1935. Although the League of Nations formally condemned the annexation of Ethiopia, many members of the League's Council highlighted the freedom of states with respect to decision to recognise these Italian territorial acquisitions. Many countries, including the United Kingdom, also recognised the annexation of Austria in 1938.

In 1939, the recognition of territorial acquisitions by the states obtained through *deballatio* changed quite substantially. This was influenced mainly by the events in Europe, where the Third Reich was occupying territories of its neighbouring countries. After the actual seizure of the Czech Republic and Moravia in the spring of 1939 by the army of the Third Reich, the president of Czechoslovakia – E. Benesh – demanded a non-recognition of the annexation by the League of Nations, while in December 1939 he founded the Czechoslovak National Committee, which transformed into a Czechoslovak Interim Government⁵⁸. He obtained recognition of, *inter alia*, the USSR and the USA, while the United Kingdom initially recognised the effective control of Germany

⁵⁵ The 26th Resolution adopted at the Eighth International Conference of American States, Lima, 22.12.1938, text for: *American Journal of International Law*, vol. 33, supplement, p. 894/895.

⁵⁶ *Monitor Polski*, 7.12.1983, No. 280, p. 2-4.

⁵⁷ League of Nations, *Official Journal*, January 1939, p. 23.

⁵⁸ Zareba, S. *Ciągłość państwa polskiego od 1918 r. z punktu widzenia prawa międzynarodowego*. *Sprawy Międzynarodowe*, No. (2018), p. 277.

over the Czech Republic and Moravia and the factual independence of Slovakia. However, Czechoslovakia retained its membership in the League of Nations.

A much stronger and united actions were taken by the international community in relation to the annexation of Albania. In April 1939, Italian troops took over Albania which became a protectorate of Italy. Nevertheless, Albania remained a member of the League of Nations until the dissolution of this organisation and the annexation met with objections of the USA and the United Kingdom.

Following the outbreak of the Second World War in September 1939, a number of countries, including the USA and the United Kingdom, did not recognise the territorial acquisitions of the Third Reich and its allies, including the USSR. An example is Poland, which in October 1939, as a result of the lost war with the Third Reich and the USSR, lost its entire national territory, which was incorporated in the Third Reich and the USSR. The Third Reich and the USSR were promoting a thesis about the fall of the Polish state which appeared, among others, in a bilateral treaty on borders and friendship, in which the course of the common border on the territory of the "former Polish state" was generally defined. Already on 3 October 1939, the German Ministry of Foreign Affairs sent a manual to diplomatic representations, which suggested application of propaganda activities aimed at promoting thesis about the fall of Poland. The annexation of Polish territories was not recognised by the then countries and many governments accepted the Polish government in exile. In 1940, the USSR annexed the territory of Lithuania, Latvia and Estonia. These annexations were not recognised as legal by the governments of the USA, Canada and Sweden.

Conclusion

Although an aggressive war was outlawed and found illegal in 1928, the practice of the countries at the turn of '20s and '30s of the 20th century was not uniform and was rather a reflection of particular interests of governments and forged alliances. However, in the judicial practice of international courts, an argument about the inadmissibility of unilateral territorial regulations resulting only from a military advantage was more and more prominent. This was the general acceptance of the Kellogg-Briand Pact and the reactions of the then international community to the events that took place in the international arena after 1939, which finally during the Second World War shaped a prohibition of *debellatio* in international relations. The international community has adopted a view on the illegality of territorial changes made

unilaterally in a manner incompatible with the then international law, which outlawed war since 1929. Then if it was illegal to resolve territorial disputes by means of war, it is also illegal to unilaterally acquire a territory in this way. Even during the Second World War, the then powers were stressing the need to return to borders from before the German aggression, at the same time recognising the existence of countries that were conquered by the Third Reich and the USSR.

The ultimate prohibition of war and its consequences, and hence the admissibility of *deballatio*, became the result of the United Nations Charter of 26 June 1945 and the Charter of the International Military Tribunal of 8 August 1945. In 1949 the Committee on International Law in the draft declaration on the rights and obligations of the states underlined the territorial integrity of the states and the commitment of each state to refrain from recognising any territorial acquisitions obtained in violation of international law (Article 11).⁵⁹ This would not have been possible without the interwar period *acquis*. Despite the prohibition of use and on threats to use armed forces, the issue of *deballatio* is still up-to-date and attempts have been made in international practice to obtain territorial acquisitions through *deballatio*, as an example of which is an attempt to annex the territory of Kuwait by Iraq.

⁵⁹ Draft Declaration on Rights and Duties of States, Yearbook of the International Law Commission, 1949, Report to the General Assembly, §46-52.