Loss of the Right to Invoke Responsibility: Is Latvia Losing its Right to Claim Compensation from Russia?

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This article reviews the effect that the passage of time has on the right to invoke international responsibility of states. Specifically, the article considers whether passage of a prolonged period of time results in a loss of that right. Customary international law as it is reflected in the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts sets out two circumstances when an injured state loses its right to invoke responsibility. The first, if the injured state validly waives the claim. The second, if the injured state validly acquiesces in the lapse of the claim. This Article reviews both of these grounds and enquires whether any one of them is applicable to Latvia's compensation claim against Russia for Soviet occupation and damages suffered during the years of Soviet rule. It is suggested that Latvia has not waived its claim nor acquiesced in the lapse of the claim.

Keywords: international responsibility of states, invocation of responsibility, waiver of claim, acquiescence in the lapse of the claim.

Content

Introduction

On 14 December 2015 Russia's President signed a federal law that allows Russia's Constitutional Court to preclude implementation of judgments passed

by international human rights bodies.[1] The move follows an earlier decision of the Constitutional Court, which in no uncertain terms proclaimed supremacy of Russia's Constitution over international treaties concluded by Russia.[2] Against the backdrop to these developments, there are Russia's threats to withdraw entirely from the Council of Europe, sanctions over Ukraine and demonstrations of Russia's military muscle in Syria and along Russia's vast borders. It seems that these developments are only signs of a much wider trend in the turbulent relationship between Russia and the West. As stated elsewhere: "[f]or Russia, the political dilemma has been enormous: whether to construe itself as part of Europe or as an independent civilization and even hostile to ('Romano-Germanic') Europe."[3] In the sphere of international law, Russia seems to be heading for its own vision of international system. It wants to discard its role of unsuccessful apprentice of the West. It wants to create *Russkiy mir* and to renegotiate its place in the world.

It may seem surprising that it is in such circumstances that Latvia and other Baltic states start to feel more comfortable to address the long standing and unresolved issue of compensation claims against Russia for Soviet occupation. The 25 years of history of Baltic compensation claims came to a certain crescendo on November 5 of 2015. On that date, Ministers of Justice of all three Baltic states adopted a joint declaration, which asserts that Russia as the successor of obligations of the USSR must compensate all losses resulting from Soviet occupation and subsequent Soviet rule. The declaration also maintains that the Baltic states are to "prepare for international actions in accordance with International Law to claim legally and factually justified compensation from the Russian Federation."[4]

The reasons why Latvia has been very cautious (if not to say timid) until now regarding the issue of compensations may be found in the political history of Latvian-Russian relations.[5] Since regaining of independence Latvia continuously had other priorities. First it was to get out the Russian Army from the newly independent state. Then the priority was joining the EU and the NATO. And subsequently, the main concern was to sign a border treaty with Russia. These are all valid reasons – particularly because the chances of actually receiving compensations seem to be rather small. Russia would certainly not agree to pay any compensations (it refuses to acknowledge even the fact of occupation), and there is no international court, which would have jurisdiction, unless both states make an agreement on adjudication.[6] Given these circumstances, Latvia opted for what seemed like a reasonable approach – to voice its compensation claims rather quietly, but more or less persistently.

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[1] Federal'nyj konstitucionnyj zakon ot 14.12.2015 # 7-FKZ "O vnesenii izmenenij v Federal'nyj konstitucionnyj zakon "O Konstitucionnom Sude Rossijskoj Federacii". Available: *http://publication.pravo.gov.ru/* [last viewed 05.02.2016].

[2] Constitutional Court of the Russian Federation, Judgment of 14th July, 2015 No. 21-П/2015. Available: *www.ksrf.ru/en/Decision/Judgments/Pages/2015.aspx* [last viewed 05.02.2016].

[3] *Mälksoo, L.* Russian Approaches to International Law. Oxford: Oxford University Press 2015, p. 71.

[4] See: Joint Declaration of the Ministers of Justice of the Baltic States, signed in Riga, November 5, 2015. Available: *www.tm.gov.lv/lv* [last viewed 05.02.2016].

[5] For an excellent analysis of the political history Latvian-Russian relations on the issue of compensations see: *Ijabs, I.* The Issue of Compensations in Latvian-Russian Relations. In: *Muižnieks, N. (ed.).* The Geopolitics of History in Latvian-Russian Relations. Riga: Academic Press of the University of Latvia, 2011, p. 175.

[6] For an overview of available adjudication forums see: *Ziemele, I.* State Continuity, Succession and Responsibility. Reparations to the Baltic States and their Peoples? *Baltic Yearbook of International Law*, 2003. Vol. 3, p. 187.

However, such an approach has a considerable drawback. As noted elsewhere: "[t]he issue of compensations seems to be one of the bargaining chips in a broader political game between Latvia and Russia, rather than a principled position of the Latvian government."[7] By being diplomatically cautious and not making a robust principled stand, the compensation claim is gradually taken less and less seriously by Russia. To borrow the analogy – the bargaining chip is gradually losing its value.

Considering the ongoing political importance of Latvia's compensation claims against Russia, it seems essential to inquire, what effect does the passage of time have on the right to invoke responsibility. Specifically, whether passage of a prolonged period of time results in a loss of that right. Customary international law, as it is reflected in the International Law Commission's ("ILC's") 2001 Articles on Responsibility of States for Internationally Wrongful Acts ("Articles on State Responsibility")[8] sets out two circumstances, when a state loses its right to invoke responsibility. The first, if the injured state validly waives the claim. The second, if the injured state validly acquiesces in the lapse of the claim. The current article will review both of these grounds and consider whether any one of them is applicable to Latvia's compensation claim against Russia for Soviet occupation.

1. Waiver

Circumstances, in which a state (either the injured state or a state that is concerned by a breach of an *erga omnes* obligation) loses its entitlement to invoke responsibility, are set out in Article 45 of the ILC's Articles on State Responsibility:

> "*Article 45. Loss of the right to invoke responsibility*
> *The responsibility of a State may not be invoked if:*
> *(a) the injured State has validly waived the claim;*
> *(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim*."[9]

Thus, the Article sets out two instances, when a state, which otherwise would be entitled to invoke responsibility, loses that right. The first instance deals with a waiver of the injured state. Waiver is a "voluntary renunciation of the right to claim"[10]; or, in other words, – the injured state gives up its right to claim. Waiver may be expressed in a variety of forms. It may be included as a specific clause in a treaty – such as the condition presented by Russia in 1992 (but rejected by Latvia) to the Latvian–Russian Treaty on Full Withdrawal of Russia's Armed Forces[11] – on waiving of all future compensation claims resulting from the period of Soviet rule.[12]

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[7] *Ijabs, I.* The Issue of Compensations ..., p. 175.

[8] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (A/56/10) ("Articles on State Responsibility"). *Yearbook of the International Law Commission*, 2001. Vol. II, Part Two, p. 26.

[9] Ibid.

[10] *Tams, C.* Waiver, Acquiescence, and Extinctive Prescription. In: *Crawford, J., Pellet, A., Olleson, S. (eds.).* The Law of International Responsibility. Oxford: Oxford University Press, 2010, p. 1036.

[11] See: Latvijas Republikas un Krievijas Federācijas līgums par Krievijas Federācijas Bruņoto spēku pilnīgas izvešanas no Latvijas Republikas teritorijas nosacījumiem, termiņiem un kārtību un to tiesisko stāvokli izvešanas laikā [Treaty on Full Withdrawal of Armed Forces of the Russian federation from the Territory of the Republic of Latvia], adopted 30.04.1994, in force from 27.02.1995. *Latvijas Vēstnesis*, 10 December 1994. No. 144(275).

[12] *Upmalis, I. (et al.)*. Latvija – PSRS karabāze [Latvia – a Military Base of the USSR]. Rīga: Zelta Grauds, 2006, p. 329.

Waiver also may be a unilateral statement of the injured state or be expressed in a negotiation process between states. A waiver may be expressed or it may be inferred from conduct.[13]

Furthermore, a waiver must be "clear and unequivocal",[14] leaving no doubt that the injured state unmistakably intends to renounce its right to claim. In *Certain Phosphate Lands in Nauru (Nauru v. Australia)* Australia argued that Nauru had waived its right to claim responsibility with regard to damage suffered by Nauru as a result of devastating exploitation of phosphate quarries during the period, when Nauru was jointly administered by Australia, United Kingdom and New Zealand.[15] In particular, Australia argued that Nauruan authorities had waived their claim by an agreement on future phosphate mining concluded before independence, as well as by pronouncements during independence negotiations. However, the agreement in question contained no provisions on waiver. Similarly, the evidence in the case demonstrated that during independence negotiations Nauruan authorities had not waived possible future claims. Consequently, the International Court of Justice ("ICJ") found that Nauruan authorities had not waived their right to claim rehabilitation of the phosphate lands, since their conduct "did not at any time effect a clear and unequivocal waiver of their claims".[16]

The Court also noted that the statements, on which Australia relied as constituting a waiver "[n]otwithstanding some ambiguity in the wording, [..] did not imply any departure from the point of view expressed clearly and repeatedly by the representatives of the Nauruan people before various organs of the United Nations".[17] Thus, the *Certain Phosphate Lands in Nauru* case indicates that the waiver may not be assumed – it has to be unequivocal. Similarly, in the *Certain Norwegian Loans* case, the ICJ concluded that abandonment of claim can not be presumed.[18] Therefore, it seems that the correct view is the one suggested by Crawford that "the threshold for inferring waiver is high".[19]

Another important condition, which the waiver must satisfy is that it must be given validly. The doctrinal undercurrent of waiver is the principle of consent. Thus, the conditions for valid waiver are the same as those of valid consent under the Vienna Convention on the Law of Treaties.[20] For example, waiver will not be valid, if given in circumstances of coercion of the representative of the state, or coercion of the state itself by threat or use of force. However, if a valid waiver is given, the state disposes of its right to invoke responsibility. It may do so, as demonstrated in the *Russian Indemnity case,* with regard to the entire claim or to a specific part of the claim, such as interest.[21]

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13 *Tams, C.* Waiver, Acquiescence, and Extinctive Prescription ..., p. 1038, *supra* 10.

14 International Court of Justice. *Certain Phosphate Lands in Nauru, Preliminary Objections,* ICJ Reports 1992, p. 247.

15 Ibid., p. 240.

16 Ibid., p. 247, para. 13.

17 Ibid., p. 250, para. 20.

18 International Court of Justice. *Certain Norwegian Loans (France v. Norway)*, ICJ Reports 1957, p. 26.

19 *Crawford, J.* State Responsibility, The General Part. Cambridge: Cambridge University Press, 2013, p. 559.

20 Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331.

21 *Russian Indemnity case (Russia v. Turkey),* UNRIAA, Vol. XI (1912) pp. 421, 443. Russia had repeatedly demanded from Turkey that it pays back the loan, which it owed to Russia without mentioning interest or damages for delay. Once the Turkey had paid the sum demanded by Russia, the arbitration tribunal held that Russia's conduct amounted to the waiver of other claims arising from the loan.

1.1. Has Latvia waived its right to claim responsibility from Russia?

From the restoration of Latvia's independence until today, there have been several instances, when Russia insisted on Latvia waiving any possible claims against Russia for damages resulting from the Soviet occupation.[22] In 1992, during negotiations on withdrawal of Russian forces from Latvia, Russia's foreign minister Andrei Koziryev presented several conditions on which Russian forces would be withdrawn.[23] One of those conditions was that Latvia had to waive any possible compensation claims against Russia. Latvia rejected this condition[24] and the treaty that was eventually concluded in 1994 contains no provisions on Latvia waiving any future compensation claims.[25]

In 1996, when Russia joined the Council of Europe, it agreed to commitments enumerated in the Opinion 193 (1996) of the Parliamentary Assembly of the Council. Article 7.12 of that document provides:

> "*the Russian Federation will assist persons formerly deported from the occupied Baltic states or the descendants of deportees to return home according to special repatriation and compensation programmes which must be worked out.*"[26]

The document is remarkable in several respects. Firstly, the wording clearly recognized the fact of the occupation of the Baltic states. Secondly, by becoming a member of the Council of Europe, Russia agreed to the commitment to provide compensations to deportees or their descendants. Although Article 7.12 does not impose a binding legal obligation, the political commitment that Russia made is nevertheless of marked importance for the present analysis. This makes it very difficult to argue that Latvia or other Baltic states have made something akin to implicit waivers of their compensation claims, when Russia itself has made a clear commitment before a major international organization to provide compensations to victims of Soviet deportations.

In subsequent years, there were other important developments in relations between Latvia and Russia, such as conclusion of the Border Treaty in 2007.[27] However, the review of Latvia-Russia relations up till 2016 also provides no evidence of Latvia's conduct that would even remotely resemble explicit or implicit waiver of its right to claim compensation from Russia for occupation and damages suffered during the years of Soviet rule.[28]

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[22] A question related to any possible waiver by Latvia brings up a related issue – a question, whether Latvia can waive claims of its nationals. Under the customary law on diplomatic protection, a state that exercises diplomatic protection is protecting its own subjective rights (see PCIJ: *Mavrommatis Palestine Concessions*, 1924, PCIJ Reports, A, No. 2, p. 4; ICJ: *Barcelona Traction, Light and Power Company*, *(Belgium v. Spain)* Judgment, ICJ Reports 1970, p. 3, para. 44.). Therefore, clams on the basis of diplomatic protection are between the respective states and thus, the entitlement to waive the claim in principle is with the state.

[23] For actual text of the conditions, see: *Upmalis, I. (et al.).* Latvija – PSRS karabāze ..., p. 326.

[24] Ibid., p. 329.

[25] See: Latvijas Republikas un Krievijas Federācijas līgums par Krievijas Federācijas Bruņoto spēku ..., *supra* 11.

[26] Council of Europe, Opinion 193 adopted on 25 January 1996. Available: *assembly.coe.int* [last viewed 05.02.2016].

[27] Latvijas Republikas un Krievijas Federācijas līgums par Latvijas un Krievijas valsts robežu [Treaty of the Republic of Latvia and the Russian Federation on the State Border of Latvia and Russia], 27.03.2007. *Latvijas Vēstnesis*, 29 May 2007. No. 85(3661).

[28] For a detailed analysis of Latvia-Russia interstate relations with regard to compensation claims see: *Ijabs, I.* The Issue of Compensations ..., p. 175.

1.2. Is waiver applicable to breaches of peremptory norms?

A further and rather theoretical issue that may be raised with regard to Latvia's claim is whether in principle waiver is also applicable to breaches of peremptory norms. Peremptory norms by their definition concern interests of the whole international community.[29] Therefore, the question arises, whether the injured state is entitled to waive a claim, which is in the interests of the international community as a whole. The ILC in its Commentary to the Articles on State Responsibility notes that:

> "*Of particular significance in this respect is the question of consent given by an injured State following a breach of an obligation arising from a peremptory norm of general international law, especially one to which article 40 applies. Since such a breach engages the interest of the international community as a whole, even the consent or acquiescence of the injured State does not preclude that interest from being expressed in order to ensure a settlement in conformity with international law.*"[30]

Thus, the ILC suggests that a waiver of the injured state does not prevent responsibility claims that other states may bring with regard to breaches of peremptory norms. Such reasoning is also confirmed by Article 26 of the Articles on State Responsibility, which stipulates that the circumstances precluding wrongfulness do not excuse breaches of peremptory norms. On the other hand, Article 48 suggests that concerned states, which are not directly injured by the breach, may claim reparation only in the interest of the injured state or beneficiaries of the breached obligation. It may be problematic to apply this rule to a situation where a concerned member of the international community claims reparation for the benefit of the injured state and that injured state itself has renounced the claim. Also, such preclusion of waivers by injured states with regard to peremptory norms may be at odds with state practice of mutually waiving claims at the conclusion of peace treaties. The ILC, however, clearly supports a position that the claims by third states for breaches of peremptory norms, and, in particular, serious breaches, may not be waived. In line with that position, the members of the international community are entitled to invoke responsibility, even if the injured state itself has waived the claim.

In the case of the Baltic states and particularly Latvia, invocation of Russia's responsibility by some third state in order to protect community interests seems like a rather remote possibility. Of all states, it is probably only Ukraine and Georgia that would at present be even distantly interested in further upsetting relations with their uncomfortable neighbour. However, these states already have their own, much more recent, compelling and more straightforward claims against Russia.[31] And anyhow, they would face the same problem as Latvia, i.e., absence of a court that would have binding jurisdiction over the interstate dispute.

However, if one does consider such a possibility, one would have to prove that by occupying the Baltic states in 1940 the USSR breached obligations that it owed to the

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[29] See: Art. 53 and Art. 64 of the Vienna Convention on the Law of treaties, May 23, 1969, 1155 UNTS 331; *Orakhelashvili, A.* Peremptory Norms in International Law. Oxford: Oxford University Press, 2006.

[30] *Crawford, J.* The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries. Cambridge: Cambridge University Press, 2002, pp. 266–267.

[31] For an overview of Ukraine's claims against Russia in the ECHR, see the Court's press release. Available: *hudoc.echr.coe.int/eng-press?i=003-5187816-6420666* [last viewed 05.02.2016].

international community as a whole.[32] To say that use of force and other beaches of the USSR violated peremptory norms creating obligations towards the international community already in 1940 is a very doubtful proposition. Another way for a concerned member of the international community to invoke Russia's responsibility would be to argue that occupation of the Baltic states was a continuous breach. If the breach was continuous until the moment of Baltic independence in 1990, then USSR was in beach of obligations owed to international community as a whole from the moment when international law came to recognize existence of peremptory norms that create *erga omnes* obligations, i.e., somewhere in the second half of the 20th century.

2. Acquiescence in the lapse of the claim

The second instance, when a state loses its right to invoke responsibility, is the so called acquiescence in the lapse of the claim. Acquiescence refers to a situation, where a state does not assert its claim for a prolonged period of time, although circumstances are such that some form of action would have been expected.[33] In other words, by being passive, the injured state implicitly accepts extinction of its claim. The concept of acquiescence is closely related and in practical terms often overlapping with other notions, such as implied waiver, estoppel, and extinctive prescription. Due to difficulties in maintaining distinction between these concepts, the ILC opted to present them all under the notion of acquiescence.[34]

The difficult question is how long must the period of time be before a claim may no longer be perused.[35] International courts have been reluctant to give a specific number. For instance, the ICJ in the *Certain Phosphate Lands in Nauru* stated that:

> "*international law does not lay down any specific time limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible.*"[36]

Many other international decisions follow a similar approach. The general agreement seems to be that there is no specific time limit within which the claim must be invoked. The emphasis is rather placed on considering the specific circumstances of each case. Thus, in *Tagliaferro*[37] and *Giacopini*[38] cases Italy-Venezuela Claims Commission held that even delays of more that 30 years did not preclude presenting of a claim. Therefore, it seems that the passage of time, even if several decades long, in itself is not an obstacle to instituting a claim.[39] The practice of arbitration tribunals indicates that the key factor for extinction of claims due to passage of a long period of time is whether the delay in presenting the claim

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[32] See: *Ziemele, I.* State Continuity, Succession and Responsibility ..., p. 180, *supra* 6.

[33] *Tams, C.* Waiver, Acquiescence, and Extinctive Prescription ..., p. 1042, *supra* 10.

[34] For discussion on distinction between acquiescence, implied waiver, estoppel, and extinctive prescription see: *Sinclair, I.* Estoppel and Acquiescence. In: *Lowe, V., Fitzmaurice, M. (eds.).* Fifty Years of the International Court of Justice. Cambridge: Cambridge University Press, 1996, p. 104; *Tams, C.* Waiver, Acquiescence, and Extinctive Prescription ..., pp. 1042–1049.

[35] Some treaties provide for a specific time limit within which a claim must be brought, e.g., Article 10 of the 1971 Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187.

[36] International Court of Justice. *Certain Phosphate Lands in Nauru, Preliminary Objections,* ICJ Reports 1992, p. 253.

[37] *Tagliaferro (Italy v. Venezuela),* (1903) 10 RIAA 593.

[38] *Giacopini (Italy v. Venezuela)* (1903) 10 RIAA 594.

[39] *Stevenson*, (1903) 9 RIAA 385.

places respondent in a disadvantaged position.[40] The disadvantage could be various conditions of prejudice, such as inability to gather evidence or other circumstances resulting in procedural unfairness. The ILC in its Commentary concisely summarises the practice of international tribunals in the following terms:

> "*a claim will not be inadmissible on grounds of delay unless the circumstances are such that the injured State should be considered as having acquiesced in the lapse of the claim or the respondent State has been seriously disadvantaged. [..] The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued.*"[41]

In order to avoid any prejudice to the respondent, it is important that the injured state has duly notified the claim to the potential respondent. Once the respondent has become aware of the claim and the injured state maintains its legal position, even though it does not institute proceedings, the delay is unlikely to cause a prejudice to the respondent. Thus, a concept that plays an important role in the loss of the right to invoke responsibility is notice of claim.

Notice of claim is a technical prerequisite for invocation of responsibility. The ILC has reflected this rule of customary law in Article 43 of the Articles on State Responsibility, where it states that "[a]n injured State which invokes the responsibility of another State shall give notice of its claim to that State". The ILC's Commentary makes it clear that although state responsibility arises from the commission of the wrongful act itself (i.e., responsibility is 'objective' in a sense that obligation to provide reparation exists regardless of the notice by the injured state), there is, nevertheless, a requirement that the injured state must first respond to the breach by notifying the responsible state. This requirement in practical terms ensures that the responsible state is made aware of the breach and of the form of reparation that the injured state seeks. As a result of the notice of claim, the responsible state is not placed in a disadvantaged position with regard to gathering of evidence or other issues of procedural fairness.

The Articles on State Responsibility do not specify what form the notice must take. The ILC's Commentary explains that there is no requirement that the notice be given in writing.[42] In the *Certain Phosphate Lands in Nauru* case, the ICJ was satisfied that Australia knew about Nauru's claim, even though no notice of claim by formal diplomatic channels was made for fourteen years. The Court took note of the fact that the President of Nauru spoke of the claim in his Independence Day speech, and that the claim was subsequently discussed in communications between Nauruan and Australian officials. Thus, on the basis of the *Nauru* case, it seems that requirements as to the form of notice are rather flexible. The ICJ's reasoning indicates that the key prerequisite for a notice of claim to be considered validly made is that the claimant has made the respondent clearly aware of the claim by any means of communication, so that the respondent state knows the allegations against it and is not placed at a disadvantaged position by passage of a prolonged period of time.

Viewing Article 43 and Article 45 jointly, we can see that failing to give notice of the claim to the responsible state and then being passive for a long period

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[40] *Gentini*, (1903) 10 RIAA 552; *Lighthouses Concession (France v. Greece),* (1956) 12 RIAA 155.
[41] *Crawford, J.* The International Law Commission's Articles ..., p. 269.
[42] Ibid., p. 261.

of time may be regarded as acquiescence and thus lead to the loss of the right to invoke responsibility. However, a distinction must be emphasized between a notice of claim and institution of proceedings in an international court or tribunal.[43] Article 43 requires the injured state to notify the responsible state of its legal position. It does not require bringing a formal claim to an international court. Once the potential respondent is made aware of the claim, passage of time without instituting proceedings in a court or tribunal will not result in a loss of the right to invoke responsibility. The ILC in its Commentary specifically notes that a "[m]ere lapse of time without a claim being resolved is not, as such, enough to amount to acquiescence, in particular where the injured State does everything it can reasonably do to maintain its claim."[44]

Thus, the above analysis shows that a prolonged inactivity of the injured state in presenting its claim may lead to the loss of the right to invoke responsibility, but only if the passage of time places the respondent state at a disadvantage. However, the right to invoke responsibility is very unlikely to be lost, if the injured state has made the respondent aware of its claim. Once the notice of claim has been given and the injured state maintains its legal position, even passage of several decades without formally instituted proceedings is unlikely to result in a loss of the right to invoke responsibility.

2.1. Has Latvia validly acquiesced in the lapse of the claim?

If the issue of compensations for Soviet violations of international law is ever to move from political rhetoric to legal arguments, the question of acquiescence due to lapse of time is likely to play an important role. It is now nearly 25 years, since Latvia has restored its independence and has been recognized by the international community as the continuator of the state unlawfully occupied in 1940. During this time, Latvia has not formally invoked Russia's responsibility before any international court or tribunal. Moreover, Latvia's conduct with regard to the compensation claims has at times been somewhat uncertain. Therefore, it seems pertinent to briefly review Latvia's conduct in these 25 years in the light of the above analysis of acquiescence in the lapse of the claim.

Already before the final collapse of the USSR in 1990 independently minded government of the Latvian Soviet Socialist Republic requested its Economic Reform Commission to calculate balance of mutual accounts between Latvia and the USSR with an implicit aim to ascertain the sum of damages caused by Soviet occupation and subsequent Soviet rule to Latvia and to its nations.[45] The result was the so called Šmulders' Report, which calculated that damages amounted to 39.5 billion rubbles.[46] The results were not presented to Moscow in any formal manner. However, the

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[43] For discussion on distinction between notice of claim and institution of proceedings see: *Jennings, R., Watts, A. (eds.).* Oppenheim's International Law, 9th ed. Harlow: Longman, Vol. I, Peace, 1992, p. 527.

[44] *Crawford, J.* The International Law Commission's Articles ..., p. 267, *supra* 42.

[45] See: LPSR Ministru padomes rīkojums Nr. 90 par Latvijas un PSRS savstarpējo tautsaimniecisko attiecību (ekonomisko norēķinu bilances) grāmatu [Executive Order of the Council of Ministers of the Latvian Soviet Socialist Republic No. 90 On mutual economic accounts balance between Latvia and the USSR]. In: *Upmalis, I. (et al.).* Latvija – PSRS karabāze ..., p. 315.

[46] *Šmulders, M.* Who Owes Whom? Mutual Economic Accounts Between Latvia and the USSR, 1940–1990. Riga: The Economic Reform Commission of the Council of Ministers of the Republic of Latvia, 1990, p. 34. Ijabs notes with regard to this report that "Šmulders' work is not fully comprehensive. There is no list of sources and not much attention is devoted to methodology. The author admits this himself in the preface, stating that "a more extensive overview of Latvian and Soviet economic relations will be published at the end of 1990."" *Ijabs, I.* The Issue of Compensations ..., p. 179, *supra* 7.

report itself was subsequently employed by Latvia in negotiations with Russia throughout the 1990s.

From 1991 to 1994 the issue of compensations was raised repeatedly in bilateral negotiations on withdrawal of Russia's Armed Forces.[47] Not only Latvia insisted on compensations (governmental commission asserted that Soviet Army had caused environmental damage amounting to 13.5 billion roubles), but Russia also demanded compensations from Latvia for buildings and infrastructure left behind by the Soviet Army. Eventually, the Treaty on Full Withdrawal of Russia's Armed Forces[48] was concluded in 1994. The treaty did not contain any provisions on Russia's obligation to pay compensation. However, it did mention that Russia was entitled to a just compensation for the real estate built or acquired by Russian Army (i.e., only during the period after the collapse of the USSR). Subsequently, Latvia and Russia agreed to form an intergovernmental commission for further discussion of their unresolved claims. Latvian Ministry of Foreign Affairs specifically placed the issue of compensations on the agenda of the meeting between Deputy Prime Ministers of both countries. However, the commission never started its work and the envisaged meeting of Deputy Prime Ministers never took place.[49]

In 1996, when becoming a member of the Council of Europe, Russia agreed to commitments of the Opinion 193 (1996) of the Parliamentary Assembly of the Council. As mentioned previously, by this document the Council of Europe and, most importantly, Russia itself acknowledged the fact of the occupation of the Baltic states and made a non-binding commitment to work out special repatriation and compensation programmes to persons deported from the occupied Baltic states.[50] This commitment, however, was not honoured by Russia and there was no follow-up. However, in the same year 1996 Latvian Parliament adopted the Declaration on Occupation of Latvia, calling on all states and organizations to recognize Latvia's occupation and to assist Latvia in dealing with the consequences of the occupation.[51]

The issue of compensations was raised repeatedly also by other Baltic states, individually as well as jointly. In 2000, Lithuania adopted a Law on Compensation of Damages Resulting from the Occupation by the USSR.[52] The law specifically provided that Lithuanian government must calculate damages and present them to Russia. In the same year, within the Baltic Council of Ministers, the heads of governments of all three Baltic states stated that the Baltic claims against Russia are well-justified.[53] Similarly, on 19 December 2004 the Baltic Assembly, which unites parliamentarians of the three Baltic states, adopted a resolution calling for

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[47] See the statement of the Minster of the Foreign Affairs of Latvia Valdis Birkavs in the Latvian Parliament on September 12, 1996. Available: *www.saeima.lv/steno/st_96/sa1209.html* [last viewed 05.02.2016]; also *Ijabs, I.* The Issue of Compensations ..., pp. 180–183, *supra* 7.

[48] *Ijabs, I.* The Issue of Compensations ..., pp. 180–183, *supra* 11.

[49] See the statement of the Minster of Foreign Affairs of Latvia Valdis Birkavs in the Latvian Parliament on September 12, 1996. Available: *www.saeima.lv/steno/st_96/sa1209.html* [last viewed 05.02.2016].

[50] Council of Europe, Opinion 193 adopted on 25 January 1996. Available: *assembly.coe.int.* [last viewed 05.02.2016].

[51] Parliament of the Republic of Latvia, Deklarācija par Latvijas okupāciju [Declaration on the Occupation of Latvia], 22.08.1996. *Latvijas Vēstnesis*, 27 August 1996. No. 143.

[52] Parliament of the Republic of Lithuania, Law on Compensation of Damages Resulting from the Occupation by the USSR, 13 June 2000, No. VIII – 1727. English translation reprinted in the *Baltic Yearbook of International Law*, 2003. Vol. 3, p. 98.

[53] *Ijabs, I.* The Issue of Compensations ..., p. 184, *supra* 7.

"negotiations with Russia and Germany on compensating damage caused by the occupations."[54]

On 26 April 2005 Latvia attached a unilateral declaration to the Border Treaty between Latvia and Russia, which had remained unsigned since 1997. The declaration stated that Latvia "does not link the signing of the agreement with the much broader question of eliminating the consequences brought about by the illegal occupation",[55] thus implicitly referring to its right to claim compensation. Needless to say, Russia declined to sign the document. Then, just two weeks later, on 12 May Latvian Parliament adopted the Declaration on Condemnation of the Totalitarian Communist Occupation Regime,[56] which in clear terms obliged Latvian Government "to continue maintaining claims against the Russian Federation on compensation of damages to Latvia and its population resulting from the occupation".[57] Even more importantly, the Declaration of 12 May called on Russia:

> "*to recognize that the Russian Federation as the legal and political heir of the USSR is morally, legally and financially responsible for crimes against humanity committed in Latvia and for damages caused to Latvia and its population during the time of the occupation, and in accordance with fundamental principles of international law – to fulfil its obligation to compensate Latvia and its population the damages resulting from the unlawful conduct*".[58]

More recently, in a similarly unequivocal language the Ministers of Justice of all three Baltic states adopted a joint declaration on 5 November 2015, which asserts the need to

> "*highlight the fact of occupation in relations with the Russian Federation and to ensure that the Russian Federation as the successor of rights and obligations of the USSR acknowledges this occupation, takes full responsibility and compensates all related losses. [..] To enable the three Baltic states to prepare for international actions in accordance with International Law to claim legally and factually justified compensation from the Russian Federation*."[59]

The above overview indicates several important points. Firstly, it is difficult to see how on the basis of the above facts one could argue that Latvia has acquiesced in the lapse of the claim. Acquiescence, as discussed earlier, requires passivity of the injured state in asserting its claim. It is certainly true that Latvian Minister of Foreign Affairs, President or Prime Minister have not instituted international legal proceedings or sent a formal written statement of claim to their Russian

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54 Available: *www.baltasam.org/images/pdf_2012/23_resolution3.pdf* [last viewed 05.02.2016].

55 Cabinet of Ministers of the Republic of Latvia, Order No. 263 "Par Deklarāciju "Par Latvijas Republikas un Krievijas Federācijas līgumu par Latvijas Republikas un Krievijas Federācijas valsts robežu"" ["On Declaration "On the Treaty of the Republic of Latvia and the Russian Federation on the State Border of the Republic of Latvia and the Russian Federation""]. *Latvijas Vēstnesis*, 28 April 2005. No. 67(3225).

56 Parliament of the Republic of Latvia. Deklarācija par Latvijā īstenotā Padomju Sociālistisko Republiku Savienības totalitārā komunistiskā okupācijas režīma nosodījumu [Declaration on the Condemnation of the Totalitarian Communist Occupation Regime Implemented in Latvia by the Union of the Soviet Socialist Republics], 12 May 2005. Available: *www.saeima.lv/arhivs/8_saeima/deklarac_total.htm* [last viewed 05.02.2016].

57 Ibid.

58 Ibid.

59 Available: *https://www.tm.gov.lv/lv/aktualitates/tm-informacija-presei/baltijas-valstu-tieslietu-ministri-parakstijusi-deklaraciju-par-psrs-okupacijas-nodarito-zaudejumu-a* [last viewed 05.02.2016].

counterparts. However, the current analysis shows that international law does not demand such stringent requirements in order to establish the absence of acquiescence in the lapse of the claim. What the customary law requires, as reflected in the Articles on State Responsibility and practice of international courts, is that the respondent must be made clearly aware of the claim by any means of communication. In *Nauru* case, the ICJ was satisfied that the respondent was made aware of the claim through a public speech of the President and low key negotiations between officials. If the same standard is applied to the Latvian compensation claim, it seems beyond doubt that Latvia has made Russia aware of its claim and that this claim has been maintained throughout the 25 years since restoration of Latvia's independence.

Secondly, the possible argument of procedural disadvantage caused to Russia as a result of delay in instituting proceedings (which might be advanced by Russia, if Latvia is ever to institute such proceedings) also does not seem persuasive. International judicial practice indicates that delay in instituting proceedings as a ground for the loss of the right to invoke responsibility is relevant only when passage of time creates a disadvantage for the respondent. However, if the respondent state is made aware of the claim, it is able to gather evidence, assert its rights or take any other action that may be necessary to ensure procedural fairness. Therefore, whenever respondent is made aware of the claim, passage of time in itself without adjudication will not result in the loss of the right to claim. In the case of Latvian compensation claim, Latvia has repeatedly stated in bilateral negotiations and also in unilateral declarations that Russia must compensate damages resulting from Soviet occupation and subsequent Soviet rule. In such circumstances, it is difficult to argue that Russia did not know about the claim and therefore suffers some procedural or other unfair disadvantage in the proceedings. Thus, since Latvian compensation claim is well known to Russia and has been expressed on various occasions during the last 25 years, the argument that Latvia has acquiesced to the lapse of its claim seems rather unpersuasive.

Summary

The above review of customary law as it is reflected in the ILC's Articles on State Responsibility provides that waiver must be validly made, clear and unequivocal. The analysis of relations between Latvia and Russia until 2016 provides no evidence of Latvia's conduct that would amount to explicit or implicit waiver of its right to claim compensation from Russia. With regard to acquiescence, the practice of international courts indicates that there is no specific time limit, within which the claim must be invoked. A prolonged inactivity of the injured state in presenting its claim may lead to the loss of the right to invoke responsibility, but only if the passage of time places the respondent state at a disadvantage. However, the right to invoke responsibility is very unlikely to be lost, if the injured state has made the respondent aware of its claim. Once the notice of claim has been given and the injured state maintains its legal position, even passage of several decades without formally instituted proceedings is unlikely to result in a loss of the right to invoke responsibility. Considering that Latvian compensation claim is well known to Russia and has been expressed on various occasions during the last 25 years, the argument that Latvia has acquiesced to the lapse of its claim seems unconvincing.

Sources

Literature

1. *Crawford, J.* State Responsibility, The General Part. Cambridge: Cambridge University Press, 2013.
2. *Crawford, J.* The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries. Cambridge: Cambridge University Press, 2002.
3. *Ijabs, I.* The Issue of Compensations in Latvian-Russian Relations. In: *Muižnieks, N. (ed.).* The Geopolitics of History in Latvian-Russian Relations. Riga: Academic Press of the University of Latvia, 2011, p. 175.
4. *Jennings, R., Watts, A. (eds.).* Oppenheim's International Law, 9th ed. Harlow: Longman, 1992, Vol. I, Peace.
5. *Mälksoo, L.* Russian Approaches to International Law. Oxford: Oxford University Press, 2015.
6. *Orakhelashvili, A.* Peremptory Norms in International Law. Oxford: Oxford University Press, 2006.
7. *Sinclair, I.* Estoppel and Acquiescence. In: *Lowe, V., Fitzmaurice, M. (eds.).* Fifty Years of the International Court of Justice. Cambridge: Cambridge University Press, 1996.
8. *Šmulders, M.* Who Owes Whom? Mutual Economic Accounts Between Latvia and the USSR, 1940–1990. Riga: The Economic Reform Commission of the Council of Ministers of the Republic of Latvia, 1990.
9. *Tams, C.* Waiver, Acquiescence, and Extinctive Prescription. In: *Crawford, J., Pellet, A., Olleson, S. (eds.).* The Law of International Responsibility. Oxford: Oxford University Press, 2010, p. 1036.
10. *Upmalis, I. (et al.).* Latvija – PSRS karabāze [Latvia – a Military Base of the USSR]. Rīga: Zelta Grauds, 2006.
11. *Ziemele, I.* State Continuity, Succession and Responsibility: Reparations to the Baltic States and their Peoples? *Baltic Yearbook of International Law*, 2003. Vol. 3, p. 187.

Regulatory enactments

International treaties

1. Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187.
2. Vienna Convention on the Law of Treaties, May 23, 1969, UN Doc. A/Conf.39/27; 1155 UNTS 331.
3. Latvijas Republikas un Krievijas Federācijas līgums par Krievijas Federācijas Bruņoto spēku pilnīgas izvešanas no Latvijas Republikas teritorijas nosacījumiem, termiņiem un kārtību un to tiesisko stāvokli izvešanas laikā [Treaty on Full Withdrawal of Armed Forces of the Russian Federation from the Territory of the Republic of Latvia], adopted 30.04.1994, in force from 27.02.1995. *Latvijas Vēstnesis*, 10 December 1994. No. 144(275).
4. Latvijas Republikas un Krievijas Federācijas līgums par Latvijas un Krievijas valsts robežu [The Treaty of the Republic of Latvia and the Russian Federation on the State Border of Latvia and Russia], 27.03.2007. *Latvijas Vēstnesis*, 29 May 2007. No. 85(3661).

National legal acts

1. Parliament of the Republic of Lithuania, Law on Compensation of Damages Resulting from the Occupation by the USSR, 13 June 2000, No. VIII – 1727. English translation reprinted in the *Baltic Yearbook of International Law*, 2003. Vol. 3, p. 98.
2. Federal'nyj konstitucionnyj zakon ot 14.12.2015 # 7-FKZ "O vnesenii izmenenij v Federal'nyj konstitucionnyj zakon "O Konstitucionnom Sude Rossijskoj Federacii". Available: *http://publication.pravo.gov.ru/* [last viewed 05.02.2016].

Case law

International Court of Justice

1. *Certain Phosphate Lands in Nauru, Preliminary Objections,* ICJ Reports 1992, p. 247.
2. *Certain Norwegian Loans (France v. Norway),* ICJ Reports 1957, p. 26.
3. *Barcelona Traction, Light and Power Company*, *(Belgium v. Spain)*, Judgment, ICJ Reports 1970, p. 3.

Permanent Court of International Justice

1. *Mavrommatis Palestine Concessions*, 1924, PCIJ Reports, A, No. 2, p. 4.

Arbitration tribunals and claims commissions

1. *Lighthouses Concession (France v. Greece)*, (1956) 12 RIAA 155.
2. *Tagliaferro (Italy v. Venezuela)*, (1903) 10 RIAA 593.
3. *Russian Indemnity case (Russia v. Turkey)*, UNRIAA, Vol. XI (1912), p. 421.
4. *Giacopini (Italy v. Venezuela)*, (1903) 10 RIAA 594.
5. *Stevenson*, (1903) 9 RIAA 385.
6. *Gentini*, (1903) 10 RIAA 552.

Decisions of National Courts

1. Constitutional Court of the Russian Federation, Judgment of 14th July, 2015 No. 21-П/2015. Available: *www.ksrf.ru/en/Decision/Judgments/Pages/2015.aspx* [last viewed 05.02.2016].

Other documents

1. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 (A/56/10) ("Articles on State Responsibility"). *Yearbook of the International Law Commission*, 2001. Vol. II, Part Two, p. 26.
2. Council of Europe, Opinion 193 adopted on 25 January 1996. Available: *assembly.coe.int* [last viewed 05.02.2016].
3. Joint Declaration of the Ministers of Justice of the Baltic States, signed in Riga 5 November 2015. Available: *www.tm.gov.lv/lv* [last viewed 05.02.2016].
4. Cabinet of Ministers of the Republic of Latvia, Order No. 263 "Par Deklarāciju "Par Latvijas Republikas un Krievijas Federācijas līgumu par Latvijas Republikas un Krievijas Federācijas valsts robežu"" ["On Declaration "On the Treaty of the Republic of Latvia and the Russian Federation on the State Border of the Republic of Latvia and the Russian Federation""]. *Latvijas Vēstnesis*, 28 April 2005. No. 67(3225).
5. LPSR Ministru padomes rīkojums Nr. 90 par Latvijas un PSRS savstarpējo tautsaimniecisko attiecību (ekonomisko norēķinu bilances) grāmatu [Executive Order of the Council of Ministers of the Latvian Soviet Socialist Republic No. 90 On mutual economic accounts balance between Latvia and the USSR]. In: *Upmalis, I. (et al.).* Latvija – PSRS karabāze [Latvia – a Military Base of the USSR]. Rīga: Zelta Grauds, 2006, p. 315.
6. Parliament of the Republic of Latvia, Deklarācija par Latvijā īstenotā Padomju Sociālistisko Republiku Savienības totalitārā komunistiskā okupācijas režīma nosodījumu [Declaration on the Condemnation of the Totalitarian Communist Occupation Regime Implemented in Latvia by the Union of the Soviet Socialist Republics], 12 May 2005. Available: *www.saeima.lv/arhivs/8_saeima/deklarac_total.htm* [last viewed 05.02.2016].
7. Parliament of the Republic of Latvia, Deklarācija par Latvijas okupāciju [Declaration on the Occupation of Latvia], 22.08.1996. *Latvijas Vēstnesis*, 27 August 1996. No. 143.