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WAR REPARATIONS AND INDIVIDUAL CLAIMS IN THE CONTEXT OF POLISH-GERMAN RELATIONS

Abstract: *The issue of war reparations was a subject of controversy in Polish-German relations for a long time. This was due to the position of the Federal Republic of Germany that this issue had been deferred to the moment of German unification. The German concept of reparations also included the individual claims of Polish victims of National Socialism (Nazism). The case for interstate reparations from Germany to Poland was closed as a result of the Polish waiver of 1953, while the issue of individual compensation for Polish victims was symbolically resolved as a result of agreements between Poland and the Federal Republic of Germany only in 1990 and 2000. The scope and amount of any new payments depends on the agreements of particular countries or organizations with the Federal Republic of Germany. As long as the victims are still alive, new pragmatic solutions should not be ruled out.*

Keywords: war reparations, individual compensation, international responsibility, Potsdam Conference (1945), peace settlement with Germany, 2+4 Treaty, *Wiedergutmachung*, Polish-German relations

INTRODUCTION

The renewed debate in Poland on reparations from Germany is arousing interest due to its legal aspects. This issue already has its place in the scientific literature in

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Poland,[1] along with other contentious legal issues in the post-war Polish-German relations,[2] including those related to forced labour.[3]

1. THE CONCEPT OF REPARATIONS

1.1. The concept of reparations is often used – both in the legal doctrine and in practice – in an inconsistent manner. One may find terms such as reparations, compensation, indemnity, restitution, satisfaction, etc.[4] In this context, it is not easy to establish a uniform and legally binding definition of reparations.

There is an undisputed principle in legal systems that a breach of law should be remedied. It is reflected in many international agreements, documents, and in the judgments of international courts.[5] Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)[6] indicate that a state bears international

[1] J. Barcz, J. Kranz, *Reparacje od Niemiec po drugiej wojnie światowej w świetle prawa międzynarodowego. Aspekty prawa i praktyki* [German reparations after the Second World War in the light of international law. Legal aspects and practice], Elipsa, Warszawa: 2019; W. Czapliński, *Pojęcie reparacji wojennych w prawie międzynarodowym. Reparacje po drugiej wojnie światowej* [The concept of war reparations in international law and reparations after the Second World War], 1 Sprawy Międzynarodowe 66 (2005); W.M. Góralski, S. Dębski (eds.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944-2004* [Problem of reparations, compensation and payments in the Polish-German relations 1944-2004], PISM, Warszawa: 2004 (vol. I: Studia, vol. II: Dokumenty); K. Ruchniewicz, *Polskie zabiegi o odszkodowania niemieckie w latach 1944/45-1977* [Polish actions for compensation from Germany between 1944/45-1977], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 2007; W. Jarząbek, *Władze Polskiej Rzeczypospolitej Ludowej wobec problemu reparacji i odszkodowań od Republiki Federalnej Niemiec 1953-1989* [The authorities of the Polish People's Republic in the face of the problem of reparations and compensations from the Federal Republic of Germany 1953-1989], XXXVII(2) Dzieje Najnowsze 85 (2005).

[2] W.M. Góralski (ed.), *Breakthrough and Challenges, 20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations*, Elipsa, Warszawa: 2011 (and in particular J. Kranz, *Polish-German Legal Controversies – An Attempt at Synthesis*, pp. 419-460); W. Czapliński, B. Łukańko (eds.), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal problems in Polish-German relations at the threshold of the 21st century], Wydawnictwo Scholar, Warszawa: 2009.

[3] H. Kramer, K. Uhl, J.-Ch. Wagner (eds.), *Zwangsarbeit im Nationalsozialismus und die Rolle der Justiz. Täterschaft, Nachkriegsprozesse und die Auseinandersetzung um Entschädigungsleistungen*, Stiftung Gedenkstätten Buchenwald und Mittelbau-Dora, Nordhausen: 2007; J. Barcz, B. Jałowiecki, J. Kranz, *Między pamięcią a odpowiedzialnością. Rokowania w latach 1998-2000 w sprawie świadczeń za pracę przymusową* [Between memory and responsibility. Negotiations in 1998-2000 on benefits for those subjected to forced labor], Prawo i Praktyka Gospodarcza, Warszawa: 2004; J. Kranz, *Zwangsarbeit – 50 Jahre danach: Bemerkungen aus polnischer Sicht*, in: K. Barwig, G. Saathof, N. Weyde (eds.), *Entschädigung für NS-Zwangsarbeit. Rechtliche, historische und politische Aspekte*, Nomos, Baden-Baden: 1998, pp. 111-134.

[4] French: réparation, indemnité, indemnisation; German: Reparation, Schadensersatz, Entschädigung, Wiedergutmachung, Ausgleich.

[5] PCIJ, *Factory At Chorzów (Claim for Indemnity) (The Merits)*, Judgment, 13 September 1928, Recueil, série A, no. 17, p. 29, 47.

[6] International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (ARSIWA), Yearbook of the International Law Commission, 2001, vol. II, Part Two, Arts. 31-39.

responsibility for an act inconsistent with international law that can be attributed to it. It is then obliged to make reparations, i.e., to redress the injury.

In the context of armed conflicts, the term "war reparations" is most often used.[7] This concept has evolved historically, as can be seen from the example of various post-conflict periods, especially the differences in the concept after the First and Second World Wars.

According to Art. 3 of the Hague Convention IV (1907): "A belligerent party which violates the provisions of the said Regulations[8] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This principle was repeated in Additional Protocol I of 1977 (Art. 91) to the Geneva Conventions of 12 August 1949 on the protection of victims of international armed conflicts.

1.2. The obligation to make reparation for injury, as the so-called secondary rule, is not sufficiently operational and requires the specification, in the norms of both international and/or national law, of a concrete legal basis for reparation claims, of their scope and form, as well as the time and procedure of their investigation (primary rules). Losses and damages concern both the state and its subjects (natural and legal persons), with the state acting on its own behalf as well as on behalf of its nationals. After the end of an armed conflict, these matters are usually regulated by a peace treaty or other agreement(s).

Post-war settlements are usually lump-sum and interstate, taking into consideration the political circumstances and economic and financial possibilities of the defeated state. In practice, reparations are never tantamount to the actual injury caused, and in case of total war justice will always be imperfect.

In 1945, after the Great Powers took over the supreme authority in Germany,[9] their Potsdam decisions, including on reparations, were imposed on Germany.[10] They were

[7] P. Sullo, J. Wyatt, *War Reparations*, in: *Max Planck Encyclopedia of Public International Law* (MPEPIL), September 2015, available at: https://bit.ly/3t1Tr4a (accessed 30 June 2022); P. d'Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des Etats à l'épreuve de la guerre*, Brulyant, Bruxelles: 2002; K. Doehring, B.J. Fehn, H.G. Hockerts, *Jahrhundertschuld, Jahrhundertsühne: Reparationen, Wiedergutmachung, Entschädigung für nationalsozialistisches Kriegs- und Verfolgungsunrecht*, Olzog, München: 2001; C. Lorentz, *La France et les restitutions allemandes au lendemain de la seconde guerre mondiale (1943-1954)*, Ministère des affaires étrangères, Direction des archives et de la documentation, Paris: 1998; U. Kischel, *Wiedergutmachungsrecht und Reparationen: Zur Dogmatik der Kriegsfolgen*, 52(3) Juristen Zeitung 126 (1997); H. Rumpf, *Die Regelung der deutschen Reparationen nach dem Zweiten Weltkrieg*, 23(1/2) Archiv des Völkerrechts 74 (1985).

[8] Regulations Respecting the Laws and Customs of War on Land (1907), Annex to the Convention Hague IV.

[9] Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, 5 June 1945.

[10] H. Rumpf, *Die deutschen Reparationen nach dem Zweiten Weltkrieg. Völkerrechtswidrige Entnahmen vor einem Friedensvertrag,* 33(3) Deutschland in Geschichte und Gegenwart 10 (1985).

not only remedial in nature, but also performed repressive and corrective functions (disarmament, demilitarization, de-Nazification, democratization – so-called 4 "D").

2. FORMS OF WAR REPARATIONS

Reparation is a general term and takes the form of compensation, restitution or satisfaction and relates to the state or its subjects (natural and legal persons).[11] Compensation[12] can be provided either in a financial form or in kind (seizure of property, delivery of goods and services). Compensation comes into play if restitution is impossible, but the two are often lumped together. Restitution concerns the return of property (private or public), the restoration of lost rights, or a substitution.[13] Moreover, substitutes for reparations appear in practice in the form of aid as well as economic and financial cooperation on preferential terms,[14] which however is not the same as reparations in the strict sense.

More generally, reparations may relate to material and non-material damages suffered by a state in connection with an armed conflict. However, the state's claims also cover damage to its natural and legal persons, which typically concerns property losses.

The formula for reparations initially agreed upon during the Potsdam Conference (1945) was of a general nature and was not definitively settled, pending a peace settlement with Germany (which never happened). The Potsdam system thus turned out to be incomplete, and the last, multilateral chord was the Treaty on the Final Settlement with Respect to Germany of 12 September 1990 (the 2+4 Treaty) in which, by tacit agreement, the final settlement of reparations announced in earlier treaties was omitted.

3. THE SPECIFICITY OF INDIVIDUAL CLAIMS

A new element after the Second World War concerned individual financial claims for systematic and massive international crimes. This element is an important feature in the evolution of the problem of reparations after 1945.[15]

[11] Art. 34 ARSIWA; International Law Association (ILA), Resolution No 2/2010: Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues), 2010, Art. 1.1.

[12] Art. 36 ARSIWA.

[13] Art. 35 ARSIWA. See also A. Jakubowski, *State Succession in Cultural Property*, Oxford University Press, Oxford: 2015; W. Kowalski, *Restytucja i naprawianie szkód w zakresie polskiego dziedzictwa kulturowego. Regulacje prawne i działania władz polskich* [Restitution and compensation in the field of Polish cultural heritage. Legal regulations and the actions of Polish authorities], in: Góralski, Dębski (eds.), *supra* note 1, pp. 239-268.

[14] Agreement between Japan and the Republic of Korea Concerning the Settlement of Problems in Regard to Property and Claims and Economic Cooperation (1965), Arts. I and II; Reparations Agreement between Japan and the Republic of the Philippines (1956), Arts. 1, 2 and 3.

[15] R. Hofmann, *Compensation for Personal Damages Suffered during World War II*, in: *Max Planck*

3.1. Are individual claims part of reparations?

3.1.1. The obligation to make reparation for the injury caused by an internationally wrongful act is not questioned, but the form and scope of claims resulting from an armed conflict, and the procedure of their adjudication, are often unclear.

Compared to the First World War, the Second World War differed significantly in terms of the scale of special damages resulting from war crimes and crimes against humanity (genocide, concentration camps, deportations of the population, forced labour, forced prostitution) and various forms of cruel personal persecution. However, it was not clear in the first post-war regulations whether the crimes mentioned above constitute a separate title for individual claims.

3.1.2. The reparations from Germany provided for in the Potsdam Agreement were only reparations in kind (dismantling of industrial facilities, deliveries from current production, seizure of foreign property) carried out in the four occupation zones.[16] However, the problem of individual claims for crimes and persecution was not regulated in this agreement.

The 1946 Paris Agreement[17] did not comprehensively regulate individual claims relating to crimes and persecution. In Part I Art. 8, however, we find the first trace of the initial regulation of financial support for individuals persecuted by the Third Reich, (the so-called non-repatriable victims), i.e. a limited number of refugees deprived of compensation in their home countries, to which they could not return.

One may find a stipulation of the obligation to compensate for the persecuted prisoners of war in the Treaty of Peace with Japan (1951).[18] However, in the most important reparation-related treaties concluded after the Second World War with Japan there are no general references to individual claims for war crimes or crimes against humanity, which continues to be a source of legal disputes today.

The London Agreement on German External Debts (1953), concluded between Germany and a group of over thirty countries (but without the participation of the Soviet Union and Poland), did not distinguish individual compensation for crimes. In its Art. 5.2, the consideration of some categories of claims was postponed,[19] but the doctrine and jurisprudence of the German courts (aimed at protecting the economy and state finances) interpreted that clause as covering all claims arising

Encyclopedia of Public International Law (MPEPIL), February 2013, available at: https://bit.ly/3z4v3D0 (accessed 30 June 2022).

[16] Berlin-Potsdam Conference, Protocol of the Proceedings, 1 August 1945, Part III.

[17] Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Paris, 14 January 1946.

[18] Treaty of Peace with Japan, San Francisco, 8 September 1951, Art. 16.

[19] Agreement on German External Debts, London, 27 February 1953.

out of the Second World War, including individual claims for crimes committed by private entities.[20]

The London Agreement, however, provided in Art. 26 and in Annex VIII that the postponement provided for in Art. 5.2 does not apply to previously-agreed-upon payments. This "camouflage" concerned the German-Israel Agreement of 1952, i.e. various payments to Jewish victims of National Socialism. Thus these payments were not treated as deferred reparations.

It was not until the Interim Agreement (1952/1954)[21] between Germany and the three Western powers that a clear new category appeared, as Germany was obliged to pay compensation (*Entschädigung*) for Nazi persecution (in a separate Chapter IV).[22] Chapter VI, in turn, was devoted to the issue of reparations (*Reparationen*), an issue which was postponed until the final peace settlement with Germany.

3.1.3. As indicated above, at the beginning of the 1950s reparations (in the Potsdam formula) were postponed until the final peace settlement with Germany, but this issue remained within the competence of the Four Powers.[23] It was believed that burdening Germany with reparations was a potential security threat (i.e. a resurgence of neo-fascist or communist tendencies) and that this should be prevented by including Germany in new structures of economic, political, and military cooperation.

This however did not resolve the long-standing problem of compensation for the (especially foreign) victims of German crimes. Nevertheless the beginning of the 1950s brought about a significant turn in this regard: the problem of reparations would now focus solely on the aspect of individual financial claims for serious violations of international law.[24] This issue was left (with the approval of the Great Powers) to Germany, which, by agreeing to the payment of individual financial compensation, emphasized their *ex gratia* nature. It was, however, a rather pecu-

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[20] *See* J. Rumpf, *Die Entschädigungsansprüche ausländischer Zwangsarbeiter vor Gericht: Wie die deutsche Industrie mit Art. 5 Abs. 2 Londoner Schuldenabkommen die Klagen ausländischer Zwangsarbeiter/-innen abwehrte,* in: Kramer, Uhl, Wagner (eds.), *supra* note 3, pp. 86-102.

[21] Convention on the Settlement of Matters Arising out of the War and the Occupation, Bonn, 26 May 1952 (as amended by Schedule IV to the Protocol on the termination of the Occupation Regime in the Federal Republic of Germany signed at Paris on October 23, 1954) [*Überleitungsvertrag*], Bundesgesetzblatt 1955 II, p. 405.

[22] Agreement between the State of Israel and the Federal Republic of Germany, Luxembourg, 10 September 1952; Exchange of letters; Protocols No. 1 and No. 2 Drawn Up by Representatives of the Government of the Federal Republic of Germany and of the Conference on Jewish Material Claims Against Germany.

[23] Convention on relations between the Three Powers and the Federal Republic of Germany, Bonn, May 26, 1952 (as amended by Schedule I to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany signed at Paris on 23 October 1954) [*Deutschlandvertrag*] Arts. 2 and 7, Bundesgesetzblatt II, 1955, No. 8 of 31 March 1955.

[24] *See* R.M. Buxbaum, *From Paris to London: The Legal History of European Reparation Claims: 1946-1953,* 31(2) Berkeley Journal of International Law 323 (2013).

liar kind of free will, which concerned international crimes and resulted from the growing international pressure on Germany.

At the turn of the 1950s and 1960s, Germany concluded bilateral agreements with twelve Western countries (*Globalabkommen*), in which it undertook to pay lump sum compensation to their citizens – victims of National Socialist measures of persecution. These agreements refer to payments (*Leistungen*), consciously avoiding terms such as reparations or indemnities. The total amount of these payments was almost one billion DM.

At this point we come to an aspect that is called *Wiedergutmachung* in the German doctrine.[25] This specific political and legal concept refers to the set of procedures and norms related to property restitution and the payment of individual compensation to victims of National Socialist crimes and measures of persecution, both in Germany and abroad, which remain outside the framework of (the postponed) reparations. Comparing the *Wiedergutmachung* with the reparations in the Potsdam formula, in the first case we are dealing with individual payments, while in the second case it was about the settlement of war losses between states in a non-pecuniary form.

The *Wiedergutmachung*, however, was politically selective because it excluded (under various pretexts) victims (including Jewish ones) living in the Central and Eastern European countries.[26] It was only in the early 1990s when united Germany made *ex gratia* payments to foundations established in Poland, Russia, Ukraine, and Belarus, through which individual compensations were paid out. Their total sum was DM 1.5 billion, including DM 500 million for the "Polish-German Reconciliation Foundation." The next phase of individual payments took place as a result of multilateral negotiations concluded in Berlin on 17 July 2000. DM 1.812 billion was allocated to the victims living in Poland at that time.[27]

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[25] A. Lehmann-Richter, *Auf der Suche nach den Grenzen der Wiedergutmachung,* BWV, Berlin: 2008; H.-G. Hockerts, C. Moisel, T. Winstel (eds.), *Grenzen der Wiedergutmachung. Die Entschädigung für NS-Verfolgte in West- und Osteuropa 1945-2000,* Wallstein Verlag, Göttingen: 2006; C. Goschler, *Schuld und Schulden. Die Politik der Wiedergutmachung für NS-Verfolgte seit 1945,* Wallstein Verlag, Göttingen: 2005; C. Pawlita, *"Wiedergutmachung" als Rechtsfrage? Die politische und juristische Auseinandersetzung um Entschädigung für die Opfer nationalsozialistischer Verfolgung (1945 bis 1990),* Peter Lang, Frankfurt a.M.: 1993; Bundesministerium der Finanzen in Zusammenarbeit mit Walter Schwarz (ed.), *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland*, 6 Bde., München: 1973; E. Féaux de la Croix, H. Rumpf, *Der Werdegang des Entschädigungsrechts unter national- und völkerrechtlichem und politologischem Aspekt,* in: *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland,* vol. 3, München: 1985.

[26] Bundesgerichtshof, Judgment of 6 October 2016 (III ZR 140/15), Rdnr. 16; Bundesgerichtshof, Judgment of 2 November 2006 (III ZR 190/05); Bundesgerichtshof, Judgment of 26 June 2003 (III ZR 245/98) [29](a); Bundesverfassungsgericht, Decision of 28 June 2004 (2 BvR 1379/01), Rdnr. 38; Landgericht Bonn, Judgment of 5 November 1997 (1 0 134/92); Information from the Federal Government, Bundestag-Drucksache 13/4787 of 3 June 1996.

[27] Barcz, Jałowiecki, Kranz, *supra* note 3.

German payments under *Wiedergutmachung* continue in various forms to this day.[28] The overwhelming majority of these allowances, both in the past and now, are intended for the victims of the Holocaust.

3.1.4. In line with the German doctrine and practice, the concept of reparations covers a wide spectrum of claims arising from the war, including individual claims by victims of German crimes and persecution.

This position undoubtedly corresponded to the financial and political interests of Germany. However, if in the early 1950s the Potsdam reparations were postponed until the final peace settlement with Germany as a whole, this should also apply to the aforementioned individual claims. Meanwhile, irrespective of the deferral of reparations, both before and after unification Germany also paid individual benefits, even though – according to the German doctrine – they were to be considered as reparations.

The contradiction outlined above can be avoided when individual claims are not treated as reparations. Paradoxically, had it not been for a broad understanding of the term 'reparations' it would not have been necessary to justify the lack of or limitations on individual payments for crimes by a prior waiver of reparations by a given state, because in the absence of a multilateral regulation the matter of these payments was left to the discretion of the Federal Republic of Germany.

In the judgments of German courts one can sometimes find rulings mitigating the dominant line of the doctrine and jurisprudence and stating that individual claims are separate from reparations.[29] However, according to the German Federal Constitutional Court these claims can only be pursued through the victims' home state.[30]

3.1.5. Insofar as regards individual claims, the post-war legal regulations only gradually categorized them and did not contain clear and comprehensive provisions. In this respect German law has lacked a legal basis for the compensation of foreign victims, and in practice their claims became the subject of bilateral legal or political agreements.

Payments under *Wiedergutmachung* prove that individual claims for compensation are separate from the Potsdam reparations. However, there are no obstacles

[28] Bundesministerium der Finanzen, *Entschädigung von NS-Unrecht. Regelungen zur Wiedergutmachung,* April 2019. Leistungen der öffentlichen Hand auf dem Gebiet der Wiedergutmachung (vom 1. Oktober 1953 bis 31. Dezember 2018) – EUR 76,659 billion, including EUR 48,313 billion according to Bundesentschädigungsgesetz (BEG).

[29] Bundesverfassungsgericht (BVerfG), Decision of the Second Senate of 13 May 1996, 2 BvL 33/93 (Rdnr. 24, 56, 57).

[30] Bundesgerichtshof, Judgment, 6 October 2016, III ZR 140/15 (Rdnr. 16).

to treating individual injuries as part of reparations as broadly understood, nor to regulate them by contractual means, including in peace treaties, with the participation and through the mediation of states. However, this needs to be clearly stated in order to avoid the inevitable ambiguities. The unilateral interpretation of legal concepts by German authorities does not have to be decisive for other countries.

3.2. The right to individual compensation and the possibility of individual redress

The second important question is whether, and on what legal basis, victims of international crimes are entitled to instigate individual compensation claims, and how they can be pursued.[31] Should these claims be based on specific rules of international law, and can they only be pursued through the victims' home state?

3.2.1. The general rule contained in Article 3 of the Hague Convention IV and in Art. 91 of the Additional Protocol I of 1977 relates to relations between states. There is no indication in these articles that they cover individual claims for war crimes or crimes against humanity. These norms do not constitute a sufficient basis for individual claims against a state, but do indicate its potential international liability. Therefore specific regulations of international or national law are required and indispensable. A feature of post-conflict situations is often the lack of such norms (both international and national). An individual rarely has access to an international court, and the individual pursuit of claims against a foreign state at the international level is usually carried out with the participation of or through the home state.

3.2.2. At the international level, a barrier that hinders or prevents the individual pursuit of claims arising from an armed conflict is usually the lack of a peace treaty or other applicable agreements, and/or the lack of sufficiently precise references in these treaties to the claims in question, as well as the lack of a competent international court.

In domestic law, we are usually dealing with the jurisdictional immunity of a foreign state,[32] i.e. the lack of jurisdiction of a national court (court of the victims' home state or a court of a third state) to hear individual claims of victims against another

[31] M. Bothe, *Remedies of Victims of War Crimes and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgment on the Jurisdictional Immunity of States,* in: A. Peters et al. (eds.), *Immunities in the Age of Global Constitutionalism,* Brill, Leiden-Boston: 2014; C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law,* in: A. Randelzhofer, C. Tomuschat (eds.), *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights,* Kluwer Law International, The Hague: 1999.

[32] United Nations Convention on Jurisdictional Immunities of States and their Property (2004).

state's actions (*acta iure imperii*).[33] The dominant tendency in the jurisprudence is to recognize state immunity as a legal procedural barrier.[34]

Some domestic courts also recognize that the investigation of individual claims arising from an armed conflict against a foreign State is a political issue for which a national court is not the adequate forum (doctrine of non-justiciable political question; *forum non conveniens*; or act of state doctrine). This is the case law of the American and Japanese courts.[35]

Following an armed conflict, another obstacle in pursuing individual claims is sometimes a treaty regulation that requires that the financial and economic capabilities of the defeated state be considered. A state waiving such claims on behalf of its nationals may have a similar effect.

One can see and feel the constant tension between states' immunity and the protection of human rights, and against this background perceive the inconsistent jurisprudence of domestic courts and the restrained attitude of international courts.[36] In this respect it seems advisable – albeit not easy – to keep a minimum balance between the interests of a state and the interests of an individual.

All these elements mean that victims are often deprived of the means and procedures for redress, and the responsibility of the perpetrator state is limited. How-

[33] Peters et al. (eds.), *supra* note 31; Ch. Tomuschat, *The international law of state immunity and its development by national institutions, 44 Vanderbilt Journal of Transnational Law 1105 (2011);* Amnesty International, *Germany v. Italy: The Right to Deny State Immunity When Victims Have No Other Recourse*, 24 November 2011, available at: https://www.amnesty.org/en/documents/ior53/006/2011/en/ (accessed 30 June 2022); W. Czapliński, *L'immunité de l'Etat devant la Cour suprême polonaise: l'affaire Natoniewski*, 56 Annuaire français de droit international 217 (2010); N. Paech, *Staatenimmunität und Kriegsverbrechen*, 47 Archiv des Völkerrechts 36 (2009).

[34] US Court of Appeals, District of Columbia Circuit, *Hugo Princz v. Federal Republic of Germany,* 26 F. 3d 1166, 1 July 1994; ECtHR, *Al-Adsani v. United Kingdom* (App. No. 35763/97), 21 November 2001; Polish Supreme Court, *Winicjusz Natoniewski v. Republika Federalna Niemiec,* IV CSK 465/09, 29 October 2010; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening),* Judgment, 3 February 2012, ICJ Rep 2012, p. 99; ECtHR, *Jones et al. v. United Kingdom* (App. nos. 34356/06 and 40528/06), 14 January 2014; Supreme Court of Canada, *Kazemi Estate v. Islamic Republic of Iran,* SCC 62, 10 October 2014; United States District Court, Southern District of New York, *Rukoro et al. v. Federal Republic of Germany,* Opinion & Order, 6 March 2019.

[35] US District Court for the District of New Jersey, *Burger-Fischer v. Degussa AG,* 65 F. Supp. 2d 248 (1999), 21 September 1999; US District Court for the District of New Jersey, *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424 (D.N.J. 1999), 28 October 1999; US District Court for the Northern District of California, *In re World War II Era Japanese Forced Labor Litigation,* 114 F. Supp 2d 939 (N.D. Cal. 2000), 21 September 2000; US Court of Appeals, District of Columbia Circuit, *Hwang Geum Joo, et al., v. Japan,* 413 F.3d 45 (D.C. Cir. 2005), 28 June 2005; Japanese Supreme Court, *Nishimatsu Construction Co. v. Song Jixiao et al.,* Judgment of 27 April 2007.

[36] P. Webb, *International Law and Restraints on the Exercise of Jurisdiction by National Courts,* in: M.D. Evans (ed.), *International Law,* Oxford University Press, Oxford: 2018, pp. 316-348; C.I. Keitner, *Authority and Dialogue: State and Official Immunity in Domestic and International Courts,* in: G. Chiara, V Guglielmo (eds.), *Whither the West? Concepts of International Law in Europe and the United States*, Cambridge University Press, Cambridge: 2021; J. Kranz, *L'affaire Allemagne contre Italie ou les dilemmes du droit et de la justice*, in: Peters et al. (eds.), *supra* note 31, pp. 116-127.

ever, in a few countries there are special and restricted attempts by national courts to contest this immunity. They are dictated by the lack of adequate protection measures for victims of international crimes and concern cases (in the USA and Canada) [37] of sponsorship by a foreign state of terrorism; or serious violations of international law, e.g. war crimes or crimes against humanity (Greece, Italy,[38] and Poland). However, this is a risky path in which – under the pretext of protecting human rights – the activism of the domestic courts can have adverse legal effects.

3.2.3. The development of international law is gradually strengthening the position of an individual, including giving national or international institutions the possibility of pursuing individual claims for violation of international law by a state or a private subject (e.g. enterprises).

Some treaties grant individual rights and offer possibilities for direct claims (lawsuits, complaints) against the state before international bodies (e.g. the European Court of Human Rights, the UN Human Rights Committee). This relates, *inter alia*, to the extraterritorial application of the European Convention on Human Rights and Fundamental Freedoms in case of armed conflict. However, this does not translate into the admissibility of pursuing every claim, nor is it a general challenge to the jurisdictional immunity of a state.

In the absence of a treaty basis, the institution of so-called 'diplomatic protection' applies, i.e. the pursuit of claims by a state of on behalf of its nationals whose rights and interests have been injured by another state in violation of international law in a situation where these victims cannot pursue their claims in the ordinary way.

This protection usually comes down to political pressure, which is finalized in the form of an agreement on the creation of special foundations or commissions (national or international) to cover the individual claims of the victims (on a flat-rate basis).

In favorable legal and political circumstances, domestic courts do allow individual civil lawsuits against foreign or domestic legal persons (but not against the state).[39]

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[37] 28 US: Code, Chapter 97 – Jurisdictional Immunities of Foreign States, paras. 1605A and 1605B (Alien Tort Claims Act (ATCA) of 1789; Foreign Sovereign Immunities Act (FSIA) of 1976; Torture Victim Protection Act (TVPA) of 1992; Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA); Justice Against Sponsors of Terrorism Act (JASTA) of 2016; Canada: Loi portant sur l'immunité des États étrangers devant les tribunaux (1985), Art. 6(1). Canada: *Tracy v. Iran,* 2017 ONCA 549 (CanLII); US: Supreme Court, *Bank Markazi, Aka Central Bank of Iran v. Peterson et al.,* Judgment of 20 April 2016; District Court for the District of Columbia, *Cynthia Warmbier, et al., v. Democratic People's Republic of Korea*, Judgement of 24 December 2018.

[38] *See* G. Boggero, *The Legal Implications of Sentenza No. 238/2014 by Italy's Constitutional Court for Italian Municipal Judges: Is Overcoming the "Triepelian Approach" Possible?,* 76 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 203 (2016).

[39] US Court of Appeals for the Second Circuit, *Filártiga v. Peña-Irala, 630 F.2d 876*, 30 June 1980.

For example, at the end of the 1990s in the United States an American court decided to settle a class action suit brought against Swiss banks concerning individual claims from the period of the Second World War.[40] However, in the case of collective lawsuits (class actions) against German companies for individual compensation for forced labor during that war, the American courts and the US administration rejected a judicial solution,[41] opting for a multilateral political settlement (finalized on 17 July 2000 in Berlin). There is also a certain regression in the jurisprudence of US courts regarding the prosecution of American companies violating certain human rights abroad.[42]

According to the Supreme Court of South Korea, individual claims of Korean nationals for forced labour in Japanese factories during the Second World War were not covered by the 1965 agreement between the two countries,[43] in which the parties (considering the relevant economic and financial circumstances of Japan) waived each other's claims on their own behalf and on behalf of their nationals. As a consequence, in 2018, this court awarded damages from several large Japanese companies (but not from the Japanese state).[44]

To sum up, individual claims for compensation for international crimes require specific legal regulations (national or international). Their admissibility is evidenced by the evolution presented above, as well as the doctrinal[45] and institutional[46] *de lege ferenda* postulates.

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[40] US District Court for the Eastern District of New York, Swiss Banks Settlement: In re Holocaust Victim Assets Litigation.

[41] *Burger-Fischer v. Degussa AG;* see also US District Court for New Jersey, *Brief of the Republic of Poland as amicus curiae in Burger-Fischer v. Degussa AG,* 28 July 1999, available at: https://bit.ly/3t0LDQm (accessed 30 June 2022).

[42] Supreme Court of the United States, *Kiobel v. Royal Dutch Petroleum Co. et Al.,* No. 10-1491, 17 April 2013.

[43] Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between Japan and the Republic of Korea, 22 June 1965, Art. II.1.

[44] P. Eckerd, *South Korea court orders Mitsubishi of Japan to pay for forced labor during WWII,* 29 November 2018, Jurist, 29 November 2018, available at: https://bit.ly/3MV3eBe; M. Marotta, *South Korea court orders Japan steelmaker to compensate WWII slave laborers,* Jurist, 31 October 2018, available at: https://bit.ly/3GmZTse (both accessed 30 June 2022).

[45] D. Augenstein, *Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights,* 27(3) European Journal of International Law 669 (2016); Hofmann, *supra* note 15.

[46] ILA, Resolution 1/2014: Reparation for Victims of Armed Conflict. Procedural Principles for Reparation Mechanisms; ILA, Resolution No 2/2010 (supra note 11); UN General Assembly, Resolution 60/147: Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,16 December 2005; International Law Commission, Draft articles on crimes against humanity, Yearbook of the International Law Commission, 2019, vol. II, Part Two, Art. 12.

3.3. Waiver of individual claims by a state

The third problem with individual claims relates to their waiver by a state on behalf of its nationals. After the end of a conflict, states (both those defeated and victorious) often give up their respective claims for reparation, either unilaterally or reciprocally. This may cover both claims arising from ordinary damages and losses of war, as well as individual claims arising from international crimes. The question arises whether international law limits a state's ability to do so, and if so to what extent?

3.3.1. The concept of war reparations includes the principles of reasonableness and proportionality, as confirmed in many post-war treaties that emphasize the limited financial capacity of states.[47]

A waiver of reparation claims by a state is in practice not unusual and is based on political and/or economic reasons. However, it requires specification (with regard to both the subject and object) in a relevant legal act; otherwise controversies may arise. First, such a waiver does not always cover individual claims, and if it does it is often unclear whether it concerns individual claims for crimes and persecution. Second, in the context of the protection of victims' rights, the question arises whether and to what extent such a waiver is permissible.

Views on this issue vary. The first option consists in the waiver by a state of its own right to act in form of diplomatic protection, which however does not override the still-existing individual claims of its nationals (as they are not claims of the state).[48] In the second variant, a state waives claims on its own behalf and on behalf of its nationals against the other state and its nationals[49] – then as a rule (although

[47] Potsdam Agreement, 1945, Protocol of the Proceedings, part II(B), para. 19; Paris Reparations Treaty (1946), Art. 4(C)(ii)(c); Treaty of Peace with Italy (1947), Arts. 74A(1) and (3), 74B(3); Treaty of Peace with Japan (1951), Art. 14(a); Überleitungsvertrag, *supra* note 21, Chapter IV, para. 3; Versailles Treaty (1919), Arts. 232-234; Art. 34 ARSIWA and commentary (5) and Art. 35(b) ARSIWA. See also Eritrea Ethiopia Claims Commission, *Eritrea's Damages Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia,* Final Award, The Hague, 17 August 2009, paras. 18 and 26.

[48] ICJ, Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Dissenting Opinion of Judge Cançado Trindade, para. 72; Jurisdictional Immunities of the State (Germany v. Italy), Rejoinder of Italy, 10 January 2011, para. 3.13; Gutachten zur Frage der Vereinbarkeit des deutsch-polnischen Abkommens vom 31.10.1929 mit der Reichsverfassung, in: E. Kaufmann (ed.), *Autorität und Freiheit*, Schwartz, Göttingen: 1960 (quoted after D. Blumenwitz, *Das Offenhalten der Vermögensfrage in den deutsch-polnischen Beziehungen*, Bonn: 1992, pp. 152-153).

[49] Treaty of Peace with Bulgaria (Paris, 10 February 1947) – Arts. 26(4), 28(1); Treaty of Peace with Finland (Paris, 10 February 1947), Art. 29(1); Treaty of Peace with Hungary (1947) – Arts. 30(4) and 32(1); Treaty of Peace with Romania (1947) – Arts. 28(4) and 30(1); Treaty of Peace with Italy (1947), Arts. 76(1) and 77(4); Treaty of Peace with Japan (1951), Art. 14(b); Überleitungsvertrag (*supra* note 21), Charter VI, Arts. 3(1) and 5; Bekanntmachung – vom 8.10.1990 – der Vereinbarung vom 27/28. September 1990 zu dem Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten (in der geänderten Fassung) sowie zu dem Vertrag zur Regelung aus Krieg und Besatzung entstandener Fragen (in der geänderten Fassung) (in Kraft getreten am 28. September 1990) – Bundesgesetzblatt 1990 II Nr. 42, p. 1386; State Treaty

not always) it settles accounts with its nationals.[50] Occasionally a victorious state seizes – on the basis of a treaty and without compensation – the private property of natural and legal persons of the defeated state.[51]

In 2011, the South Korean Supreme Court ruled[52] that Korean women who were victims of Japanese persecutions (so-called 'comfort women') during the Second World War were entitled to compensation by the Korean state because the Korean state failed to initiate the settlement procedure provided for in Art. 3 of the 1965 Agreement between Japan and South Korea, and as a result it was not possible to establish whether the individual claims of these women fall within the waiver of Art. 2 of this agreement.[53] The issue of the compensation in question was successfully settled in an arrangement of 2015 between the two countries.[54] The victims' claims against the Korean state (referred to the 2011 Supreme Court ruling) were rejected in 2018 by a Korean court as unfounded.[55]

3.3.2. Disputes as to the scope of a state's waiver of certain claims appeared after 1945 also in Polish-German relations. On 23 August 1953, the Polish government announced that it was renouncing reparations from Germany. In this document we read:

> Considering that Germany has already largely satisfied its reparations obligations (*Reparationen*) and that the improvement of the economic situation in Germany is in the interest of its peaceful development, the Government of the Polish People's Republic,

for the Re-establishment of an Independent and Democratic Austria (1955), Arts. 23 and 24; Versailles Treaty (1919), Arts. 71, 297(b) and (i). *See also* Japanese Supreme Court, *Nishimatsu Construction Co. v. Song Jixiao et al.*, Judgment, 27 April 2007, para. 3.

[50] *See e.g.,* BVerfG. Beschluß vom 13. Januar 1976 in den Verfahren über die Verfassungsbeschwerden gegen das Reparationsschädengesetz vom 12. Februar 1969.

[51] *E.g.,* Berlin-Potsdam Conference, Protocol of the Proceedings, 1 August 1945, Part III.1; Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Paris, 14 January 1946, Part I, Art. 6; Treaty of Peace with Bulgaria (Paris, 10 February 1947), Art. 25(1); Treaty of Peace with Hungary (1947), Art. 29(3); Treaty of Peace with Roumania (1947), Art. 27(1); Treaty of Peace with Italy (1947), Art. 7925(1); State Treaty for the Re-establishment of an Independent and Democratic Austria (1955), Art. 22; Treaty of Peace with Japan (1951), Art. 14(a)2; Überleitungsvertrag (*supra* note 21), Chapter VI, Art. 5; Versailles Treaty (1919), Art. 297.

[52] Constitutional Court of Korea, Challenge against Act of Omission Involving Article 3 of the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan [1965], 2006Hun-Ma788, KCCR: 23-2(A) KCCR 366, 30 August 2011.

[53] *See supra* note fn. 43.

[54] Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion, 28 December 2015, available at: https://www.mofa.go.jp/a_o/na/kr/page4e_000364.html (accessed 30 June 2022).

[55] *Court dismisses comfort women's suit against government for signing 2015 agreement with Japan*, Hani, 17 June 2018, available at: http://english.hani.co.kr/arti/english_edition/e_international/849403.html (accessed 30 June 2022).

> wishing to make a further contribution to the settlement of the German problem in a peaceful and democratic spirit and in accordance with the interests of the Polish nation and all peace-loving nations – decided on 1 January 1954 to renounce the payment of reparations to Poland, thus making a further contribution to the solution of the German question.[56]

In light of the post-war practice of states, this waiver was nothing unusual. Its causes were political in nature, as was the waiver of the Soviet Union made on the previous day.[57] Both acts concerned reparations from Germany (not from East Germany). In the Polish-Soviet Protocol of 1957, the obligations regarding reparations "from Germany" were deemed to be wholly fulfilled.[58] The Polish People's Republic also formally ended the state of war with "Germany".[59]

The provisions of the Potsdam Agreement granting Poland reparations from the share of reparations of the Soviet Union can be assessed critically if one considers the nature of the relationship between the two countries. The Polish waiver, however, remains valid, which has been repeatedly confirmed by the Polish government.[60] The real subject of the dispute, however, concerns the scope of this waiver.[61] Should the view of the German side be decisive in this respect?

In the still unchanged opinion of the German authorities, the Polish waiver of 1953 covered all claims arising from the war.[62] Note, however, that compared to the express provisions of some post-war treaties,[63] Poland did not waive claims "on

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[56] Statement by the Government of the People's Republic of Poland on the decision of the Government of the USSR regarding Germany, Warsaw, 23 August 1953, Zbiór Dokumentów 1953, no. 9, pp. 1830-1832.

[57] Protokoll zwischen der UdSSR und der DDR über den Erlaß der deutschen Reparationszahlungen und über andere Maßnahmen zur Erleichterung der finanziellen und wirtschaftlichen Verpflichtungen der Deutschen Demokratischen Republik, die mit den Folgen des Krieges verbunden sind, vom 22. August 1953 – Europa-Archiv (1953), 2. Halbjahr, p. 5974 f.

[58] Final protocol on deliveries made to the People's Republic of Poland on account of its participation in reparations from Germany, 4 July 1957, in: S. Dębski, W.M. Góralski (eds.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944-2004* [Problem of reparations, compensation and payments in the Polish-German relations 1944-2004], PISM, Warszawa: 2004, vol. II, p. 336.

[59] Resolution of the State Council of 18 February 1955 on ending the state of war between the Polish People's Republic and Germany – Monitor Polski 1955.17.172.

[60] Response of the Undersecretary of State at the Ministry of Foreign Affairs (8 August 2017) to interpellation no. 3812; Response (2 July 2012) of the Undersecretary of State at the Ministry of Foreign Affairs to interpellation no. 5933; Response (13 August 2015) of the Undersecretary of State at the Ministry of Foreign Affairs to interpellation no. 33816.

[61] *See also* Barcz, Kranz, *supra* note 1, pp. 66-75.

[62] H.-J. Küsters, D. Hofmann (eds.), *Deutsche Einheit. Dokumente zur Deutschlandpolitik. Sonderedition aus den Akten des Bundeskanzleramtes 1989/90*, München 1998 – Gespräch des Bundeskanzlers Kohl mit Präsident Bush, Camp David, 24 Februar 1990, pp. 863-864; *ibidem*, Vorlage des Ministerialdirektors Teltschik an Bundeskanzler Kohl, 15. März 1990, p. 956.

behalf of its nationals" or "all claims arising out from the war", and the formula for the waiver of claims "against Germany and its legal and natural persons" was not applied.

As regards the interpretation of the waiver of 1953, it is important to compare its substance with the text of the Polish – Japanese agreement of 1957 (i.e. before the conclusion by Germany of the so-called *Globalabkommen*). It contained an article clearly different from the formula of 1953: "The Polish People's Republic and Japan renounce each other's claims arising out from the war between the two countries on their own behalf, as well on behalf of their institutions and nationals, against the other state, its institutions, and nationals."[64] This comparison strengthens the Polish interpretation of the content of the waiver of 1953, which, as a unilateral act, is subject to a restrictive interpretation.[65]

In the consistent opinion of the Polish authorities, this waiver related only to reparations in the Potsdam formula.[66] For many years Poland has demanded the payment of individual compensations from Germany. These efforts, however, remained fruitless until the unification of Germany.

3.3.3. Negotiations on the 2+4 Treaty (1990) formally meant that it was possible to return to the deferred question of reparations. However, this did not happen due to the resistance of West Germany, shared by the Great Powers.[67] Other countries of the former Allied coalition did not demand a return to this issue, and it was ignored in the 2+4 Treaty.

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[63] For a typical example, see the Treaty of Peace with Bulgaria (1947) which provides in Art. 26.4: "Bulgaria waives on its own behalf and on behalf of Bulgarian nationals all claims against Germany and German nationals outstanding on 8 May 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before 1 September 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war and all claims for loss or damage arising during the war." *See also* Treaty of Peace with Japan (1951).

[64] Accord relatif au rétablissement des relations normales entre la République populaire de Pologne et le Japon, 8 février 1957 (Journal of Laws 1957, No. 49, item 233): "Article IV. La République populaire de Pologne et le Japon renoncent réciproquement à toute réclamation de leurs Etats ainsi que de la part de leurs organisations et de leurs ressortissants contre l'autre Etat, ses organisations et ses ressortissants, résultant de la guerre entre les deux pays."

[65] ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (2006), para. 7; ICJ, Case Concerning the Frontiers Dispute (Burkina Faso/Republic of Mali), Judgment, 22 December 1986, ICJ Rep 1986, p. 554, para. 39.

[66] *See* Memorandum of the Polish government to the conference of deputy foreign ministers on Germany, London, January 1947, text in: Góralski, Dębski (eds.), *supra* note 1, vol. II (*Dokumenty),* pp. 190-196; United Nations. Economic and Social Council. *Commission of Human Rights, Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity* (Note by the Secretary-General) (E/CN.4/1010, 24 November 1969). Information concerning the criteria for determining compensation to the victims of war crimes and crimes against humanity – Poland (pp. 35-41).

[67] *See supra* note 62.

Some problems arise concerning the legal consequences of this omission for Germany and for third countries, members of the former coalition (especially regarding the scope of this implicit waiver).

3.3.3.1. In principle, the waiver of reparations should be an express act. However, the silence of the Great Powers and the lack of protests against the adopted formula of 2+4 was of legal significance, as it occurred in the context of a treaty that could have regulated this issue.

An acquiescence does not exist in a *vacuum*, and it can create a legal obstacle that prevents a State from claiming something that is contradicted by its previous act or omission (*non venire contra factum proprium*; estoppel). As a consequence, a conviction arose on the part of the united Germany that a return to the issue of reparations was legally pointless. In the light of the consent or tacit agreement of the former coalition States, they cannot currently in good faith demand reparations (i.e. the Potsdam formula) from Germany.

3.3.3.2. The question thus arises: Was the 2+4 Treaty an agreement to the detriment of third States resulting in the lapse of their reparation claims?

The principle in international law is that a treaty does not create either obligations or rights for a third State without its consent (*principle pacta tertiis nec nocent nec prosunt*). This does not mean, however, that treaties cannot have certain legal effects on third countries (e.g. territorial regimes). A complete answer requires, *inter alia*, an explanation of the scope of the *tacitly* renounced reparations and the nature of the competence of the Great Powers.

In accordance with the post-war regulations, the issue of reparations, the borders of Germany, and the rights and responsibilities relating to Germany as a whole (including its unification) fell within the competence (supreme authority) of the Four Powers. Their representation of the entire Allied coalition was not questioned, neither in Potsdam nor during the negotiations on the 2+4 Treaty.

When assessing whether and to what extent the Potsdam Agreement was consistent with customary law or with Arts. 34 and 35 of the Vienna Convention on the Law of Treaties (VCLT)[68] concerning the *pacta tertiis* principle, the extraordinary circumstances of 1945 must be taken into consideration. In Germany, the customary nature of the norms (in force already in 1945) contained in Arts. 34 and 35 VCLT is emphasized, and it is also highlighted that Art. 75[69] (which is not of

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

[69] *See* M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Martinus Nijhoff, Leiden: 2009, Art. 75, pp. 914-918.

this nature) only concerns future events[70] and does not constitute an exception to the aforementioned principle.[71]

Let us note however that – as an expression of international responsibility for the war – the supreme authority of the Great Powers resulted primarily not from the Potsdam Treaty, but from the Berlin Declaration.[72] Subsequent treaties, declarations, and decisions were instruments for the implementation of this responsibility. According to the International Law Commission, the legal effects of treaties imposing certain obligations on aggressor States are not covered by the provisions of Art. 35 VCLT.[73] Thus Art. 75 can be treated as a kind of counterbalance to the legal position of Germany.[74]

It is important to keep in mind that we are dealing here with the context of international responsibility for war, and not of the application of the law of treaties. Therefore, the decisions of the Great Powers and the situation of Germany in 1945 should not be viewed from the perspective of *res inter alios acta*.[75]

The 2+4 Treaty was concluded with the participation of two German States, but the consent of the Four Powers was required. This situation should be regarded as a continuation of the rights and responsibilities of the Great Powers relating to Germany as a whole (as provided for in 1945), and the *tacit* acceptance of other States should be seen in this context. Therefore there is no need to consider the omission of the issue of reparations in the 2+4 Treaty in terms of *pacta tertiis* or *res inter alios acta*.[76]

In conclusion, the Potsdam reparations finally lost their relevance with the entry into force of the 2+4 Treaty, i.e. with the unification of Germany.

3.3.3.3. The silence of the Great Powers and the lack of protests against the adopted formula of 2+4 was of legal significance because it occurred in the context of a treaty that could have regulated this issue. Viewed in this light, the States of the former coalition cannot, in good faith, demand reparations (the Potsdam formula) from Germany.

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[70] Vienna Convention on the Law of Treaties (1969), Reservations: Germany (upon ratification).

[71] Ch. Tomuschat, *Article 75,* in: O. Corten, P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruylant, Bruxelles: 2006, pp. 2657-2675.

[72] Th. Schweisfurth, *International Treaties and Third States,* 45 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 670 (1985).

[73] Commentary to Art. 31 ARSIWA.

[74] Villiger, *supra* note 69, p. 918.

[75] In this sense see C. Laly-Chevalier, F. Rezek, *Article 35,* in: Corten, Klein (eds.), *supra* note 71, pp. 1433-1434; O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties. A Commentary,* Springer, Berlin-Heidelberg: 2012, p. 623: "obligations imposed upon the aggressor State were to be considered as sanctions, the basis of the obligations concerned therefore being the concept of State responsibility."

[76] For a different opinion, *see* M. Fischer, *Der Zwei-plus-Vier Vertrag und die reparationsberechtigten Drittstaaten,* 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1016 (2018).

It should not be hastily concluded that the fact that the 2+4 Treaty did not contain any reference to reparations definitively closed the chapter of individual claims by victims of German crimes. Although in Germany's official opinion the term 'reparations' was intended to cover all claims arising from the war, this position has turned out to be not entirely accurate. During the period of Germany's unification, the prevailing belief was that the 2+4 negotiations should not be burdened with this issue and that a pragmatic solution should be sought in the form of bilateral agreements with Germany.[77]

After unification, Germany continued its former individual payments and created a legal basis (both bilateral and/or multilateral) for new ones, including in relations with Poland. For the US government and American courts, the problem of individual claims was not a closed chapter, as Germany could see in the cases of the 1992, 1995 and 2000 agreements.[78] In these agreements, Germany was obliged to make compensation (not *ex gratia* payments) to American nationals who were victims of German crimes.

3.3.4. In conclusion, the waiver by a state of the claims of its legal subjects is confirmed in international practice and is, in principle, admissible.[79] The scope of the waiver should, however, be precisely formulated, especially in the context of the not always clear and unambiguous scope of the concept of reparations.

4. WHAT HAS POLAND RENOUNCED?

4.1. For many years, Poland has been demanding individual compensation for its nationals who were victims of German crimes and persecution. This position was confirmed during the unification of Germany, although Poland did not file any reparation claims in the Potsdam sense. Apart from the 2019 statements,[80] no Polish government has questioned the validity of the 1953 waiver.

Chancellor Helmut Kohl in 1989-1990 referred to the London Agreement, arguing that the Polish waiver of reparations in 1953 covered all claims arising out of the war.[81] However, there is no reason why the German legislator, court, or government should know better than the Polish government what the latter has renounced.

It should also be recalled that there were no legal effects for Poland under the London Agreement, as Poland and the Soviet Union were not parties to it. Let us also note

[77] *See* Barcz, Kranz, *supra* note 1, pp. 96-126.

[78] *Ibidem*, pp. 158-164.

[79] A. Bufalini, *On the Power of a State to Waive Reparation Claims Arising from War Crimes and Crimes against Humanity,* 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 465 (2017).

[80] Interview of the Prime Minister of the Republic of Poland for German newspapers from the Funke-Mediengruppe group on 21 August 2019.

[81] *Dokumente*, *supra* note 62, pp. 534-535 (Gespräch des Bundeskanzlers Kohl mit Ministerpräsident Mazowiecki, Warschau, 14. November 1989).

that when negotiating the 1970 treaty between Polish People's Republic and Federal Republic of Germany, as well as during the negotiations on the 2+4 Treaty, Germany demanded that Poland confirm the abovementioned waiver, which it did not do.[82]

Thus, it would be difficult to prove that in 1990/1991 there was a *bona fide* impression on the part of Germany that Poland resigned from the pursuit of individual claims.[83] Chancellor Helmut Kohl finally saw the need to regulate this issue, but he emphasized that these payments may only apply to severely injured victims (the so-called *Härtefälle*) and be of an *ex gratia* nature.[84]

4.2. In justifying his policy in 1989-1991, the Chancellor presented the loss of the eastern territories of the Reich and the frontier on the Odra and Nysa Łużycka as a price for the unification of Germany, and not as a result of the war. There were many voices in the Federal Republic of Germany that in view of the "annexation" of the eastern territories of the Reich, Poland should itself pay compensation to the victims of National Socialist persecution. In a similar fashion, others viewed the issue of reparations as having been finally closed as a result of Germany's far-reaching territorial concessions in the 2+4 Treaty.[85] Combining reparations with the change of borders and the loss of eastern territories was sometimes accompanied by the juxtaposition of Allied crimes committed against Germany and Germans.[86]

These opinions are contradictory and confuse causes with effects. They also have provided a convenient excuse for delays in individual payments to victims in Central and Eastern Europe.

4.3. In the Polish-German agreement of 1991 concerning the contribution of the German government to the Foundation established in Poland, it is clearly stated that: "The government of the Republic of Poland will not pursue further claims of Polish citizens that could arise in connection with Nazi persecution. Both Governments agree that this should not restrict the rights of nationals of both States."[87]

[82] Vorlage des Regierungsdirektors Mertes und des Legationsrats I Hanz an Bundeskanzler Kohl, in *Dokumente (supra* note 62), p. 878.

[83] For a different opinion, *see* Fischer, *supra* note 76, pp. 1035-1036.

[84] *See supra* note 81.

[85] Fischer, *supra* note 76, pp. 1036-1038; Entschädigung von Zwangsarbeiterinnen und Zwangsarbeitern für erlittenes Unrecht durch Verbrechen von Betrieben der deutschen Wirtschaft im NS-Regime – Antwort der Bundesregierung vom 13. Oktober 1999 (Deutscher Bundestag, Drucksache 14/1786); Rumpf, *supra* note 7, p. 101; H. Rumpf, *Die deutsche Frage und die Reparationen*, 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 344 (1973), p. 364.

[86] J. Kranz, *Wollt ihr den totalen Krieg? Political, Moral and Legal Aspects of the Resettlement of German Population After World War II,* 7(2) Polish Review of International and European Law 9 (2018).

[87] *E.g.* Agreement in the form of exchange of notes on the payment by the German government of DM 500 million to the account of the "Polish-German Reconciliation Foundation", 16 October 1991 (exchange of personal notes Kastrup - Żabiński).

This section means that individual claims for German crimes existed at the international law level, irrespective of the Polish waiver of 1953, both before and after German unification. While the Polish government has refrained from exercising diplomatic protection in relation to these claims, both sides have agreed that this is not tantamount to depriving citizens of their rights. If it were to be otherwise – that is if the unification of Germany closed all claims arising from the war – then this part of the agreement would not make sense, and there is no basis for presuming that the parties included norms of no significance or purpose in the agreement.

4.4. In light of the above comments, some German opinions are imprecise and arbitrary. At present, the issue of reparations is closed. There is no specific legal basis or legal path (national or international) on which claims in the Potsdam sense or individual claims for war crimes could be pursued against Germany today. Beneficiaries of German payments through the "Polish-German Reconciliation" Foundation waived further claims.[88]

The scope and amount of any new payments depends on the agreements of particular countries or organizations with the Federal Republic of Germany. As long as the victims are still alive, new pragmatic solutions should not be ruled out.

[88] Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft" vom 2. August 2000, in: Kraft getreten am 12. August 2000 (Bundesgesetzblatt 2000 I 1263), para. 16.