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EDITORIAL

We are happy to present our Readers with the latest volume (XLI) of the Polish Yearbook of International Law. Although the COVID-19 pandemic – which has had a significant negative impact on the scientific life throughout last two years – is not over yet, we try to return to the normal mode of functioning.

Already in the Fall of 2021, a Polish-German colloquium was held in Bonn to commemorate important events which have impacted the current Polish-German relations. This particularly encompassed the 50th anniversary of the Treaty of Warsaw (the so-called 1970 Polish-German Agreement) and the 30th anniversary of the Treaty on the Final Settlement with Respect to Germany (the 2+4 Agreement concluded in 1990). The colloquium, originally planned for 2020, was postponed for one year due to the pandemic. The current volume of PYIL contains a selection of the texts presented during or in connection with this event. The German side is represented by professors Stefanie Schmahl, Christian Tomuschat, Robert Uerpmann-Wittzack, Stephan Hobe, Hans-Georg Dederer, Markus P. Beham and Andreas Kulick, while the Polish view is offered by professors Jan Barcz, Władysław Czapliński and Jerzy Kranz.

While the pandemic has had a negative impact on scientific life, it did not freeze history. In February of 2022 Russia invaded Ukraine, and this has had profound effects not only on the situation in the region but also globally. From the regional perspective, it is important to highlight that for 75 years Central Europe had not experienced any wars, and it seemed that the Second World War had effectively taught at least this part of the world how to prevent further conflicts. Yet today we are confronted with the impotence of the international community, verifying the limited extent to which the norms of international law, developed over decades, can actually prevent the emergence and expansion of military conflicts. The texts by Patrycja Grzebyk and Tero Lundstedt delve into the legal aspects of the Russian invasion (and possible ways of building the postwar reality).

These two texts should be seen as a continuation of the discussion which was started in the Polish Yearbook of International Law already in 2014 following the Russian aggression in Crimea.[1] And we feel now is a good time to investigate

[1] *See e.g.* N. Cwicinskaja, *The Legality and Certain Consequences of the "Accession" of Crimea to the Russian Federation*, XXXIV Polish Yearbook of International Law 61 (2014); R. Värk, *The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea*, XXXIV Polish Yearbook

and reassess the problems of state and individual responsibility; challenges to the protection of human rights (especially now when Russia is not a state-party to the European Convention); avenues of international criminal justice; and the economic dimensions of war. Therefore, our next volume will be in large part devoted to the problems created by and associated with the Russian invasion, and we strongly encourage authors to respond to our latest call for papers.

Beside the specific subjects presented above, the current volume also includes in its General Articles section texts by Grażyna Baranowska on the problems of pushbacks in Poland; by Aleksandra Gliszczyńska-Grabias on the recent case law of European courts concerning the Holocaust; and a text by Marek Świerczyński – co-authored with Remigijus Jokubauskas – on the problems of jurisdiction in cross-border civil proceedings concerning alleged violations of personality rights. In accordance with our tradition, the volume also includes a section dedicated to the Polish practice (i.e. Statement of Polish International Lawyers Concerning the Aggression of the Russian Federation Against Ukraine), and book reviews (by Hanna Kuczyńska and Md Mustakimur Rahman).

Last but not least, we would like to remind our Readers that the Polish Yearbook of International law is indexed in the following databases: the Emerging Sources Citation Index (ESCI) as a part of the Web of Science Core Collection (with the most recent Journal Citation Indicator of 0.06), Scopus, ERIH PLUS, Index Copernicus, Westlaw, Lexis-Nexis, EBSCO, HeinOnline, CEEOL, Czytelnia Online and the Central European Journal of Social Sciences and Humanities (CEJSH), while a number of previous volumes (since 2010) are available free of charge in the online library run by the Polish Academy of Science.[2] In 2022, the Yearbook was also included in a new open access product suite called the EBSCO Essentials.

We strongly encourage new authors to work with us and we thank our Reviewers, Readers and Authors for taking part in this scientific endeavor!

Karolina Wierczyńska,
Łukasz Gruszczyński,
Aleksandra Mężykowska

of International Law 115 (2014); Legal Advisory Committee, *The Opinion to the Minister of Foreign Affairs of the Republic of Poland on the Annexation of the Crimean Peninsula to the Russian Federation in Light of International Law*, XXXIV Polish Yearbook of International Law 275 (2014); O. Zadorozhnii, *To Justify against All Odds: The Annexation of Crimea in 2014 and the Russian Legal Scholarship*, XXXV Polish Yearbook of International Law 139 (2015).

[2] *See* https://journals.pan.pl/dlibra/journal/109853?language=en (accessed 30 July 2022).

SPECIAL SECTION: KOLLOQUIUM: 50 JAHRE DEUTSCH-POLNISCHER VERTRAG UND 30 JAHRE ZWEI-PLUS-VIER VERTRAG

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*Christian Tomuschat**

THE RELEVANCE OF TIME IN INTERNATIONAL LAW

Abstract: *Law is grounded in time and is constantly shaped by historical circumstances. Treaties, produced by voluntary acts at a given point in time, remain generally in force without a formal endpoint, while customary law arises from practice and lacks specific points of departure and conclusion. Through the practice of their application, both treaties and customary law may change their content and meaning to a far greater extent than domestic rules. Generally, international law resists retroactive application. However the recognition of sovereign equality to all States in the process of decolonization represents an example of profound change. While the problems deriving from armed conflict and former colonial domination must be assessed by the standards of their epoch and not by having recourse to the rules and principles of our time, at the same time it must be borne in mind that many of the acts considered perfectly lawful when they occurred were marred by deep injustices, producing effects which need to be addressed by the law of our time.*

Keywords: International law today, the law of all nations, treaties and custom, decolonization, retroactive application of modern international law

INTRODUCTION

The topic "Time in International Law" could hardly be framed any larger: it has truly encyclopedic dimensions. Human existence is grounded in time, and it is shaped by historical circumstances that are continually changing. It should be noted at the very outset that reflection on time in international law does not focus on time as such, which knows only one direction, namely straight ahead; but on the developments

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that unfold in the temporal dimension. *Tempora mutantur* is not a new insight. Human beings have always had to accommodate themselves to their epoch; they cannot eschew the ongoing changes. Nobody is able to escape the impact of their environment, and neither can the law be conceived as a firm and solid normative fortress that invariably determines societal life forever. While law is meant as a firm framework aimed at regulating the life of society, at the same time it is also subject to societal developments. If it remains too rigid without any close contact with the social realities it will inevitably break down one day. On the other hand, if it is reduced to a reflection of the prevailing circumstances, it runs the danger of losing its autonomy and control capacity, thereby forfeiting its predictability and reliability.[1]

1. TODAY'S UNIVERSAL LEGAL ORDER: DETERMINED AND SHAPED BY INTERNATIONAL LAW

It is by no means evident that in the current epoch of the 21st century a universal legal order, shaped by international law and recognized by all nations, actually exists. Almost all States of the globe have become members of the World Organization of the United Nations,[2] and through their accession they have confirmed that today a binding regulatory framework, based on certain fundamental principles, is in force for humankind as a whole. Although concluded as an ordinary international treaty, the UN Charter, extended and particularized by the Friendly Relations Declaration of 1970,[3] has today essentially taken on the quality of a world constitution.[4] It is from this legal basis that the international rule of law is derived.[5]

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[1] For a general reflection on the topic see also Société française pour le droit international (ed.), *Colloque de Paris. Le droit international et le temps*, Pedone, Paris: 2001; Ch. Djeffal, *A Reflection of the Temporal Attitudes of International Lawyers Through Three Paradigmatic Cases*, 45 Netherlands Yearbook of International Law 93 (2014).

[2] The few outsiders, Taiwan and Palestine, owe their diminished status to specific political circumstances: they do not reject in principle the governing international legal order, but rather in contrast desire to be recognized as equal members of the international community. On specific economic grounds Cook Islands and Niue have voluntarily renounced membership in the United Nations, entrusting the representation of their interests to New Zealand.

[3] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to UNGA Resolution 2625 (XXV), 24 October 1970.

[4] G. Abi-Saab, *The System of the Friendly Relations Declaration*, in: J.E. Viñuales (ed.), *The UN Friendly Relations Declaration at 50*, Cambridge University Press, Cambridge: 2010, at 12, 20.

[5] UNGA Resolution 70/118, 14 December 2015.

1.1. Legal Equality

A look back into the past reveals tremendous differences in the concept of international law. Through the process of decolonization of international law – which up to the 19th century had generally been characterized as European international law[6] – has since 1945 progressively become a truly universal legal order that applies to every people and to every State, no matter how their internal constitutional system of governance may be structured. The existence of international law, and its binding nature, is accepted in principle by almost all entities invested with public power. The universality of the normative system as such is no longer challenged except by extremist groups. The voices that in the past opposed, in particular, the continuity of the customary law that had arisen in the 19th century within the group of States with colonial possessions[7] have been overcome, or have simply turned silent.[8] It is particularly significant that all the superpowers of our time have joined the general consensus. Through their presence as permanent members in the Security Council, i.e. the most powerful institution of the United Nations, they have associated themselves so tightly with the World Organization that any withdrawal from the Charter appears more or less inconceivable, although in formal terms the Charter continues to exist only as an ordinary international treaty notwithstanding the precedence rule of Art. 103.[9] Thus a huge step has been accomplished from the second half of the 20th century up to the present time.

1.2. Transformation of the International Legal Order

In our contemporary epoch – where the democratic principle has found world-wide recognition and where agreement has been reached about non-recourse to armed force – international law obviously cannot maintain the same characteristics as in the period of European predominance in the world. Thus, the question as to the impact of time on international law may simply be answered by the general statement that the factual circumstances have two faces. Over the centuries they have

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[6] As a representative example see A.W. Heffter, *Das Europäische Völkerrecht der Gegenwart*, E.H. Schroeder, Berlin: 1844. Even the 8th edition from 1888, edited by F. Heinrich Geffcken, kept this title.

[7] *Cf.* M. Bedjaoui, *Towards a New International Economic Order*, Holmes and Meier, New York: 1979, at 134. By contrast, the classic viewpoint regarding the all-encompassing nature of international law was uncompromisingly defended by M. Virally, *The Sources of International Law*, in: M. Sørensen (ed.), *Manual of Public International Law*, Macmillan, London et al.: 1968, pp. 139-140.

[8] Even one of the fiercest critics of a European international law perverted by egoism, M. wa Mutua, *Why Redraw the Map of Africa?*, 16 Michigan Journal of International Law 1113 (1995), wrote that: "African states ... subscribe to international law" (p. 1122).

[9] The Charter contains no withdrawal clause, but at the founding Conference of San Francisco agreement was reached to the effect that denunciation would become inevitable should it emerge that the organization was unable to live up to its mandate to maintain international peace; *cf.* L.M. Goodrich, E. Hambro, *Charter of the United Nations. Commentary and Comments* (2nd ed.), World Peace Foundation, Boston: 1949, p. 143.

shaped the architecture of international law in accordance with the ever-changing variations in historical and political developments and societal value judgments, in all their manifold articulations.[10] But at the same time they remain subject to the disciplinary force of a body of rules. Facticity and normativity communicate with one another in a dialectic exchange process.

2. THE FOUNDATIONS OF THE CONTEMPORARY INTERNATIONAL LEGAL ORDER

So what is the current international legal order? At first glance this question may seem to be devoid of any meaningful sense. Today is today. Yet the international law which we know and as it is reflected in scholarly treatises and judicial pronouncements is, strictly speaking, the law of yesterday: its contents were formed in the past. Philosophical reasoning raises another difficulty: the precise point where "today" and "now" has come into existence is conceptually impossible to determine. What is being said and written today pertains to the past already at the moment of its formulation.[11] This observation is discomforting given the fact that, as already alluded to, international law does not stand set in stone before the eyes of the beholder, but remains involved in its underlying factual and evolutionary processes and cannot really be demarcated in a watertight manner. In this connection it should not go unnoticed that many great international jurists have more often than not opted for presenting their statements about the present connotation of a legal proposition as a kind of snapshot; valid for the actual moment only and quickly exposed again to the dynamic game of political forces.[12]

Another preliminary observation should be submitted before considering in greater detail the two most important sources of international law, i.e. treaties and customary law. In principle treaties, like international law in its entirety, pertain to the past even though they are concluded for the future, meaning that they are concluded at a given point in time, after which they are present in the world as a firm set of rules as set forth in the relevant text, subject to unreserved observation according to the principle: *pacta sunt servanda*. Customary law grows over time,

[10] *See* G. Winkler, *Zeit und Recht*, Springer, Wien / New York: 1995, p. 459: "Recht ist kein zeitloses Sollen ... kein Gefüge von zeitlosen Normen" ("Law is ... no system of timeles norms").

[11] Philosophy relies in this connection on the concept of "present awareness", which is estimated to last for about three seconds.

[12] *See e.g.* from the German literature U. Scheuner, *Solidarität unter den Nationen als Grundsatz in der gegenwärtigen internationalen Gemeinschaft*, in: Ch. Tomuschat (ed.), *Ulrich Scheuner. Schriften zum Völkerrecht*, Duncker & Humblot, Berlin: 1984, pp. 379-405. The general objective to evaluate international law within its societal framework was markedly pursued by J.H.W. Verzijl, *International Law in Historical Perspective*, Sijthoff, Leyden: 1968 (Vol. I); 1969 (Vol. II).

but at the point where it is supposed to be applied it presents itself as a finished set of norms, with the specificity that its origins lie in the past. Thus, where international law is applied the decision-maker resorts in large measure to decisions, experiences, and knowledge of the past that may not match the current political landscape. This disconnect would constitute a significant shortcoming of the law if the international community had not come up with the ways and means to break out from this 'backwardness' conundrum. In particular, the current climate change crisis can be expected to give a strong evolutive push to the normative status quo so that the general duty of cooperation (Art. 55 of the UN Charter; Principle 4 of the Friendly Relations Declaration[13]) may soon achieve some hitherto undefinable territorial gains vis-à-vis the principle of sovereign power and the jurisdiction of individual States.

2.1. International Treaties

With regard to the three main sources of international law the impact of time makes itself felt in different ways.[14] International treaties constitute a direct outflow (and output) of the principle of sovereign equality. Since they are intentional acts of volition, their origin can be identified by day, indeed almost by hour. In principle, as already mentioned, *pacta sunt servanda* is the determinative rule, currently also laid down in Art. 26 of the Vienna Convention on the Law of Treaties (VCLT).[15] Generally an expectation of durability accompanies the conclusion of international treaties. As a rule, formalized treaties are not provided with a clause limiting their temporal applicability, with the exception of routine business transactions. A famous exception to this practice was contained in the Treaty establishing the European Coal and Steel Community of 1951, whose applicability had been confined from the very outset to 50 years (Art. 97). In fact the States parties complied with this final date (23 July 2002), as in the meantime the all-encompassing entity of the European Community/European Union had emerged, which allowed for the remaining elements of the original partial integration to be fully integrated therein.

The VCLT does not contain any general rule about time limitations. It avoids any statement providing that a treaty – the objectives of which have not been reached or have become moot – could be affected.[16] No mention is made of *desuetudo* or obsolescence. Yet like any human action international treaties are subject to the vagaries of time, which may carry with it considerable challenges for the parties. It remains

[13] UNGA Resolution 2625 (XXV), 24 October 1970.

[14] In the present connection, only international treaties and customary law shall be dealt with.

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

[16] But see observations on the UN Charter in note 9.

true that the conclusion of a treaty is the primary temporal point of reference, but developments in the external circumstances cannot generally be ignored, and may even be foreseen by anticipation.

Art. 62 VCLT recognizes the *clausula rebus sic stantibus*, albeit under a number of restrictive conditions. As found by the ICJ in the dispute between Hungary and Slovakia about the water works along the river Danube, the *clausula* constitutes at the same time a rule of international customary law.[17] Essentially a change in the factual situation is considered legally irrelevant, unless

a. the existence of the controversial circumstances constituted an essential basis of the consent of the parties', and
b. the effect of the change is to radically transform the extent of obligations still to be performed under the treaty.[18]

This provision reflects paradigmatically the confidence in the stability of international treaties. Still, at the initial stages of the 20th century diplomatic language had used the pompous word of the "sanctity" of international treaties, and indeed the breach of the treaty establishing the neutrality of Belgium[19] in the First World War had been one of the leading accusations in the criminal indictment against the German Kaiser Wilhelm II.[20]

In accordance with general international law the VCLT attaches particular importance to the stability of international frontiers. The *clausula rebus sic stantibus* does not apply to treaties establishing an international boundary (Art. 62(2)(a)). Here the passage of time shall be entirely discarded in legal terms – a proposition which in view of the numerous territorial changes of the last two centuries was intended to contribute to good order in international relations, at least for the future. The International Court of Justice (ICJ) has fully endorsed this rule.[21] Only recently have tendencies emerged to conceive of the *clausula rebus sic stantibus* in an enlarged fashion, as a general emergency clause empowering a State to assert its interests in departure from the general rule requiring faithfulness to commitments entered into by treaty.[22] These tendencies have not yet been confirmed by authoritative judicial decisions.

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[17] ICJ, *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep 1997, 7, 38, para. 46.

[18] See the interpretation of this clause in *Gabčikovo-Nagymaros Project*, 65, para. 104.

[19] London Protocol, 19 April 1839, reprinted in: W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium*, Vol. 3(1): 1815-1945, de Gruyter, Berlin, New York: 1992, p. 162.

[20] Art. 227 of the Peace Treaty of Versailles, 28 June 1919, 104 LNTS 441.

[21] ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad),* Judgment, 3 February 1994, ICJ Rep 1994, 6, 37 para. 73.

[22] J. Kulaga, *A Renaissance of the Doctrine of Rebus Sic Stantibus?*, 69 International & Comparative Law Quarterly 477 (2020).

Obviously, the performance of international treaties may encounter particular obstacles after the emergence of armed conflict between the relevant States parties. A few years ago the UN General Assembly invited the International Law Commission (ILC) to consider this topic. The project was concluded in 2011 with a draft which states in principle that even in that eventuality treaties should not be negatively affected.[23] In an annex one finds an indicative list of treaties of which it may be generally assumed that they should remain in operation also in times of armed conflict, which is self-evident in respect of humanitarian treaties.[24] The General Assembly has commended the ILC for the work it has done but has only taken note of the project, refraining from issuing a final word of either approval or rejection.[25] It stands to reason that the continuity of a treaty notwithstanding a situation of armed conflict constitutes a highly political issue, in respect of which every State will look back to its own historical experiences.

Neither is a treaty insulated from the dynamics of international occurrences in its daily transactions. Its true test lies in its implementation. Every treaty is designed to shape reality and to serve as a mandatory guideline. On the other hand, more often than not it is the actual implementation of the clauses of a treaty which makes clear that the text requires interpretation and opens up margins of appreciation which both sides may use for their own benefit. A particularly complex chapter of conventional practice has been introduced by the international treaties on the protection of human rights, and in particular the European Convention on Human Rights (ECHR) and the two International Covenants of 1966. None of these treaties was drafted in a narrow-minded spirit. By distancing themselves from such narrow-mindedness the international instruments, with their high-sounding principles of simplicity and pathos, have been taken as beacons of orientation for the national guarantees of human rights. The interpretation of these treaties has eventually been entrusted to international bodies – in the case of the ECHR and the two parallel international instruments at the regional level – and even to international courts, which have been elevated to the rank of authentic interpreters. As an ineluctable consequence, in their practice a framework of substantive determinations has emerged which accompanies the official text, sometimes even overgrowing it. In this respect the development of these instruments has been largely taken away from their creators, i.e. the responsible political bodies.[26] The text cannot be liberated from the hands of its interpreters. A famous example is

[23] Annex to UNGA Res. 66/99, 9 December 2011.

[24] *Ibidem*.

[25] UNGA Res. 72/121, 7 December 2017.

[26] Analysis by F. Novak, *La conducta ulterior de las partes como regla principal de interpretación de los tratados*, 71 Revista Española de Derecho Internacional 101 (2019).

provided by the tensions between the United Kingdom and the European Court of Human Rights (ECtHR) with respect to the voting rights of prison inmates.[27] Many years were needed before a compromise could be found to the effect that the exclusion from voting should apply only to persons sentenced to long-term periods of deprivation of freedom on account of the most serious crimes.[28] Particular attention – and disapproval – was also paid to the jurisprudence of the ECtHR that the forceful returns to their country of origin of persons who had violently climbed over the boundary fortifications of the Spanish territories in North Africa were to be classified as mass expulsions in the sense of Art. 4 of Protocol No. 4 to the ECHR.[29] However, the judgment of one of the chambers of the Court was set aside a few years later by the Grand Chamber of the ECtHR.[30] Nonetheless, a constantly recurring phenomenon is that judicial practice and political expectations may diverge in the most surprising ways – which is the inevitable price of the rule of law derived from the principle of separation of powers.

Bowing to factual constraints, the VCLT has endorsed, in Art. 31(3)(b), the view that any subsequent practice in the application of a relevant treaty "shall be taken into account", provided that the practice evidences the agreement of the parties regarding its interpretation. In this connection the delimitation between practice, agreements between the parties, und tacit modification of the treaty is a very delicate and recurring issue. In many instances amendments of a treaty must follow a formal procedure that should not be bypassed. While in the case of bilateral treaties one can fairly easily gauge which factual elements may be relevant and should be taken into account, in the case of multilateral treaties the mass of relevant materials may achieve dimensions that can hardly be overseen if no central institution, like a conference of States parties and its secretariat, is able to indicate a specific direction in the attempts at interpretation.[31]

My colleague Georg Nolte, Special Rapporteur and present judge at the ICJ, has studied this problem for many years, and in 2018 succeeded in securing the approval by the ILC of a draft of conclusions on "Subsequent agreements and subsequent practice in relation to interpretation of treaties."[32] Thus we are now in possession of a text which in many detailed provisions specifies which impacts can be exerted

[27] The ECtHR disapproved in particular the automatic and undifferentiated exclusion from the right to vote in case of a sentence that orders deprivation of liberty: *Hirst v. the UK (2)* (App. No. 74025/01), 6 October 2005; *Greens and M.T. v. the UK* (App. Nos. 60041/08 and 60054/08), 23 November 2010.

[28] ECtHR, *Scoppola v. Italy* (App. No. 126/05), 22 May 2012.

[29] ECtHR, *ND und NT v. Spain* (App. Nos. 8675/15 and 8697/15), 3 October 2017.

[30] ECtHR (GC), *ND and NT v. Spain* (App. Nos. 8675/15 and 8697/15), 13 February 2020.

[31] *See e.g.*, statement by France (Alabrune) in the Sixth Committee of the UNGA, A/C.6/73/SR.20, 22 October 2018, 12, para. 74.

[32] Annex to UNGA Res. 73/202, 20 December 2018.

by the subsequent practice of the parties with respect to the substantive content of an international agreement. The text explicitly states that even a formally concluded conventional instrument may undergo variations of its substantive scope and meaning. The conclusions faithfully follow the determinations made by the VCLT in denying that consensual practice has any legally binding effect in a strict sense, although diplomatic practice – above all insofar as regards substantive details – may become a determinative factor. Only one linguistic inconsistency should be highlighted: In Conclusion 3 subsequent agreements and the subsequent practice of interpretation are characterized as 'authentic' means of interpretation. According to the general conceptual meaning, 'authentic' is tantamount to stating that the words concerned imply a final determination about the meaning. The ILC, however, wishes only to underline the particular evidentiary force of the factual elements produced by the parties, without excluding other sources of evidence.[33]

Since the consensual practice of the parties pertains to the factor of interaction between the numerous relevant stakeholders, the inquiry into the scope and meaning of a treaty provision cannot be satisfactorily determined by just one review at a specific point in time in the past, but must normally be constantly renewed with a clear focus on the relevant developments.

The extension of the conclusions of the ILC to the practice of international organizations (Conclusion 12), and hence also the practice of the United Nations – including the practice of expert bodies, in particular in the field of human rights (Conclusion 13) – falls outside the classic framework of the elements that are traditionally considered relevant and deserving of attention. Essentially, the practice of the States parties amounts to nothing else than an extension of the treaty-making power of the parties. On the other hand, the key question regarding the practice of the secondary institutions of a collective treaty is whether the organs of a treaty are free to emancipate themselves from the will of its creators. In this regard, numerous critical voices have emerged, many of which have expressed their concerns that the final product, for instance the original agreement of 1945 on the text of the UN Charter, could in the long run be taken away from its founders.[34] Again it is not the passage of time as such to which opposition is voiced, but the definition of the content of the existing agreement through factual practice without any judicial control.

In order to complete the picture that has been drawn up to now, reference should also be made to the well-known fact that most of the multilateral treaties being elaborated in our time attempt to improve their adaptability to the increasing challenges as a consequence of changing external circumstances by permitting secondary

[33] *See* ILC Report 2018, A/73/10, para. 52, commentary on Conclusion 3, paras. 2 and 4.

[34] *See e.g.,* Thailand, A/C.6/73/SR.22, 24 October 2018, para. 15; Israel, A/C.6/73/SR. 23 and 24 October 2018, para. 20.

law-making through established institutions. Late in the 20th century this strategy became fully recognized and made use of. Until that time the *traité-loi* stood at the centre of all considerations, based on the premise of a complete treaty that contains in its body the perfect range of all necessary regulations. One may note from the contemporary practice the two Vienna Conventions on Diplomatic and Consular Relations, in which institutions with the mandate of progressive development or adaptation to new challenges are not foreseen. The treaties on European integration comprised a contrary model, which as *traités cadre* were from the very outset designed to be refined and particularized during the course of their implementation. These European treaties organize dynamic processes in which new agreements need to be continually sought, in most fields through majority decisions, eliminating the potential of the veto power in international treaty law.

This part may be concluded with the general observation that a treaty is the tool par excellence of the international community. It cannot be denied that history is over and over again shaped by unrest, ruptures, and armed conflicts. Essentially, however, international treaties, under the auspices of the UN Charter, are generally employed as instruments for the creation of an environment where consensus is sought through peaceful means. Of course one cannot deny that the conclusion of multilateral treaties is normally characterized by inherent slowness. But it is also true that almost revolutionary changes can be brought about by means of treaty-making, as shown by the foundation of the United Nations or the European integration processes. A future global climate policy will doubtless be obligated, going much beyond the Paris Agreement of 2015, to lay down a comprehensive set of mandatory rules in the form of an international treaty.

2.2. International Customary Law

As a consequences of its conditions of existence, international customary law is oriented in a temporal direction: it emerges without a fixed date of origin. The definition given in Art. 38(1)(b) of the ICJ Statute continues to be considered as correct and well-suited, in particular in the jurisprudence of the ICJ, notwithstanding certain logical shortcomings. Yet it does not appear illogical, in contrast to the treaty as a legal device, to accept as binding legal rules certain patterns of conduct which have arisen from practice and are completed by *opinio juris*. Whereas treaties pertain in a certain sense to a meta-level, where the premises of the international legal order with its doctrine of sovereign equality require logical consistency in the law-making process; customary law constitutes rather an instrument of pragmatism and contains many fortuitous characteristics. The ILC has attempted here to establish more intellectual clarity and thereby to consolidate the reliability of the

international legal order.[35] Legal science, too, is untiring in its efforts to consolidate the woolly consistency of customary law, trying to define it by clearly perceptible criteria in order to provide it with greater predictability.[36]

The criterion of 'practice' refers to a process that can never be considered as definitively concluded. Customary laws evolves outside any formally regulated procedures, through the factual conduct of the legal entities deemed to be authorized to act at the level of international law. Long-lasting debates have been conducted about the question of what kind of "density" a practice must have before a corresponding *opinio juris* can emerge to support it. In the early epochs of international law the requirement of *diuturnitas* was many times asserted, i.e. of a long-lasting practice which in any event should comprise a couple of decades.[37] As a consequence of the claim of the oceans' coastal States to extend their jurisdiction to the mineral resources of the soil and the subsoil of the marine spaces off their coasts and the uses of extra-terrestrial space for commercial purposes, all of a sudden the concept of "instant customary law" appeared, i.e. of a new legal regime which emerged spontaneously in the face of unforeseen new factual developments, legitimated by a broad consensus supporting it.[38]

The ILC project on the identification of customary international law completely discards the criterion of length of time,[39] demanding instead that the practice must be sufficiently extensive and representative (Conclusion 8). This configuration of the rule stands in perfect harmony with the jurisprudence of the ICJ, which in the 2012 *Immunity of the State* case[40] confirmed its earlier holdings from the C*ontinental Shelf* cases of 1969 that the practice must be settled (French: "*pratique effective*"). A practice can only be deemed to be settled if it has stood the test of time, proving its suitability. The ILC project does not mention "instant custom", yet such short-

[35] See most recently the comprehensive presentation of international customary law by Sir Michael Wood, Special Rapporteur of the ILC, *First report on formation and evidence of customary international law*, UN Doc. A/CN.4/663, 17 May 2013, Yearbook of International Law Commission 2013 II/1, 109, 123-144; adopted as draft conclusions on identification of customary international during the 70th session of the ILC in 2018. Text: Annex to UNGA Res. 73/203, 20 December 2018.

[36] *See e.g.*, the collective volume edited by B. Krzan (ed.), *Essays in Memory of Professor Karol Wolfke*, 8(2) Wroclaw Review of Law, Administration and Economics (2018); B.S. Chimni, *Customary International Law: A Third World Perspective*, 112(1) American Journal of International Law 1 (2018).

[37] See the extensive discussion about this criterion by Michael Wood, *Second report on identification of customary law*, A/CN.4/672, 22 May 2014, 43, para. 58.

[38] Expression coined by B. Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian Journal of International Law 23 (1965).

[39] In consonance with the jurisprudence of the ICJ in the first judgment on the continental shelf, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, ICJ Rep 1969, 3, 43, para. 74.

[40] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*), Judgment, 3 February 2012, ICJ Rep 2012, 99, 22, para. 55.

term practices can certainly become the basis of a rule of customary law if as a legal yardstick it corresponds to the wishes and needs of the international community and is buttressed by broad consent.

The doctrine of the persistent objector aims at halting the course of time. Its essence is to maintain that a State which, during the slow process of emergence of a customary rule has consistently and openly pronounced itself against the inherent normative substance of that rule in *statu nascendi*, will not be bound by it after it has consolidated itself as an element of the positive legal order.[41] Empirical evidence shows that the doctrine of the persistent objector cannot rely on genuine factual findings. All the rules of the law of the sea were deeply marked by the UN Convention on the Law of the Sea (UNCLOS), including with regard to non-signatory States. In particular its provisions on the territorial sea, being defined as extending up to a breadth of 12 nautical miles, and on the exclusive economic zone that may stretch out into the sea for a breadth of 200 nautical miles, have received overwhelming support. Nowadays challenging these maritime boundaries would be a vain attempt.[42] Unfortunately the Special Rapporteur of the ILC for the topic of "Identification of Customary International Law" has propagated the persistent objector doctrine,[43] obtaining in this regard a majority in the ILC for his views.[44] Yet in the jurisprudence of the ICJ the persistent objector doctrine has only a weak basis in a few *obiter dicta* from judgments issued many decades in the past.[45] In the discussion of the Wood project many voices clearly manifested their dissent.[46] This criticism has not lost its relevance by way of the consensus that welcomed the project, since UN General Assembly Resolution 73/203 explicitly refers in footnote 6 to the preceding deliberations in the Legal Committee. Customary international law *à la carte* encounters in particular the argument that freedom of objection, with its attendant result of halting the emergence of a rule widely shared by the international

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[41] Precisely defined in: The American Law Institute, *Restatement of the Law Third: The Foreign Relations Law of the United States*, American Law Institute Publishers St. Paul, Minn.: 1987 (Vol. I), p. 24, para. 102, Comment d.

[42] Even the USA has recognized, at least tacitly, this new regulatory system of the different maritime zones, notwithstanding its refusal to ratify the UNCLOS.

[43] *Third report on identification of customary international law*, A/CN.4/682, 27 March 2015, 59-67, paras. 85-95.

[44] *See supra* note 32.

[45] ICJ, *Asylum (Colombia v. Peru)*, Judgment, 20 November 1959, ICJ Rep 1950, 266, 277-8; *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Rep 1951, 116, 131.

[46] Nicaragua, A/C.5/73/SR.20, 22 October 2018, 14, para. 91; Sri Lanka, A/C.6/73/SR.22, 24 October 2018, 6, para. 30; Canada. *ibidem*, 12, para. 72; Cyprus, A/C.6/73/SR. 23, 24 October 2018, 6, para. 43. Advocating instead for the maintenance of the persistent objector principle: Turkey, A/C.6/73/SR.22, 6, para. 27; South Africa, A/C.6/73/SR.23, 3, para. 13; Israel, *ibidem*, 4, para. 27; Iran, A/C.6/73/SR.24, 25 October 2018, 5, para. 29; Indonesia, *ibidem*, 10, para. 63.

community, would lead to a division of the world into a law for the stronger States on the one hand and the weaker ones on the other.[47]

All in all, customary law constitutes the conservative element of international law. It ensures the continuity of the international legal order without being subject any more to the criticism that it cements the former predominance of the European powers. Since the transition into the world of sovereign equality through the UN Charter, all traditional norms are placed under the supervision of a critical world public and are compelled to continually justify themselves in the ongoing processes for the development of the law in light of the changing environment. Whoever believes that there exists a citadel of reactionary forces in this regard refuses to take note of the extant realities.

3. THE IMPACT OF THE PASSAGE OF TIME ON ENTITLEMENTS UNDER INTERNATIONAL LAW

Time plays an important role in those special situations wherein the question arises whether rights and duties may change without any active intervention on the of the rights' holder or the duties' bearer.

3.1. Protection of Status Quo

In principle, international law protects existing legal entitlements. It leaves it to the stakeholders themselves to shape their legal positions by virtue of their sovereign decision-making power. The intervention by institutions of international organizations is a phenomenon of the recent epoch and has nothing to do with the simple course of time. According to the now-established concept of *jus cogens*, however, it has become possible that a treaty loses its validity by virtue of a newly-emerged *jus cogens* rule and becomes invalid (Art. 64 VCLT). In its original sense this article has never become operative since the entry into force of the VCLT: to date no State has ever had recourse to Art. 64 VCLT with a view to obtaining from the ICJ a declaration about the invalidity of a conventional provision on account of its incompatibility with a rule of *jus cogens*.

[47] *See also* G.R.B. Galindo, C. Yip, *Customary International Law and the Third World: Do Not Step on the Grass*, 16 Chinese Journal of International Law 251 (2017), pp. 266-268; P. Dumberry, *Incoherent and Ineffective: The Concept of Persistent Objector Revisited*, 59 International & Comparative Law Quarterly 779 (2017); P. Sreenivasa Rao, *The identification of customary international law: a process that defies prescription*, 57 Indian Journal of International Law 221 (2017). The Asian-African Legal Consultative Committee had expressed its approval of the consistent objector rule upon the proposal of its Chinese member S. Yee, *AALCO Informal Expert Group's Comments on the ILC Project on "Identification of Customary International Law": A Brief Follow-up*, 17 Chinese Journal of International Law 187 (2018), p. 191.

3.2. Retroactive Effect?

However, the question remains open whether – through a rule of *jus cogens* – the validity of treaties from an earlier time can be challenged. In connection with the right of self-determination highly complex legal issues might arise. The new concept of *jus cogens* has likewise raised the question of whether consolidated transactions outside the treaty sector might require a new assessment from today's perspective, possibly with significant legal consequences. Such retroactive consequences are in principle unknown in international law.

It is widely recognized that well into the 20th century peace treaties took little account of the demands of specific ethnic groups for self-determination. The right of self-determination, originally a purely political claim, has established itself as a mandatory legal principle only in the second half of the 20th century. In its advisory opinion in the *Chagos* case the ICJ found, somewhat boldly but certainly correctly, that the definitive consolidation took place through the General Assembly's decolonization resolution 1514 (XV) of 14 December 1960.[48] The treaties that put an end to the First World War[49] had all been implemented well before that date, and they cannot be called into question and rescinded after more than a century. The questions of today are of a different nature. Is there any people which, under today's conditions, has been denied the invocation of its right of self-determination based on any international legal or factual obstacles?

It should be recalled in the first place that under the detailed provisions on the right of self-determination in the Friendly Relations Declaration,[50] this right is not recognized with respect to ethnic groups within an organized system of governance in the form of a right of secession, with the (possible) exception of instances where such a group is denied full and equal participation in the conduct of the public affairs of their country.[51] In this regard it matters little how the State organization was brought about. This negative conclusion applies also to the formation of new States from the heritage of former colonial territories. This may sound unjust, particularly in situations where specific ethnic groups were not able to assert their aspirations during the process of post-colonial nation-building. However, where the rule of law applies no group should suffer any grave damages or inconveniences by living within boundaries to which it has not given its full consent or approval.

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[48] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Rep 2019, 95, 132-133, paras. 150-153.

[49] Named after the specific locations in and around the capital where they had been signed (Treaty of St. Germain, Treaty of Neuilly, Treaty of Trianon and Treaty of Sèvres), partly reprinted in W.G. Grewe (ed.), *Fontes Historiae Iuris Gentium*, Vol. 3(2): 1815-1945, de Gruyter, Berlin, New York: 1992, pp. 683-729.

[50] *See supra* note. 3.

[51] *Ibidem*, last paragraph in the comments on self-determination.

3.2.1. Africa

It is common knowledge that in Africa the boundaries of the former British and French territories had been drawn rather arbitrarily, without particular regard for the ethnic specificities of the territories. Furthermore, there is no doubt that at the time of the granting of independence to these peoples and territories the existing former colonial boundaries were mostly upgraded to new international frontiers. Here the question could have been raised whether some of the new boundary lines had to be evaluated as a massive violation of the right of self-determination because of their faulty separation of coherent tribal areas. However, the heads of State and Government of the African States had agreed at their summit meeting in 1964 (Cairo) not to raise the territorial issue in order to avoid armed territorial conflict that might endanger the newly achieved independence.[52] No precise criteria were at that time available which would have made the new geographical division of Africa more just and convenient. Since that agreement of 1964 has essentially stood the test of time for over half a century it would make little sense to stir up unrest from a legal perspective by demanding territorial readjustments. The right of self-determination has not been conceived as a weapon of destabilization of *justice à outrance*. On its part the ICJ has seen no ground to doubt the boundaries drawn by the colonial powers or to rectify them retroactively. The two cases of *Burkina Faso v. Mali* and *Cameroon v. Nigeria* provide the most significant evidence of this viewpoint, i.e. intended to maintain the demarcations as they took shape half a century ago.[53]

It should be noted in this connection that the decolonization process has created a home for all ethnic groups of Africa in one of the States as they exist now. Not a single group has been excluded from the process of consolidation. Whoever should at the present time claim a new design of the African map under the auspices of association with a tribe or a people is impacted by a conception that has little to do with modern Africa and its new dynamics. On the basis of the current interpretation of the scope and the meaning of self-determination there are no peoples in Africa that could at least with a minimum of plausibility argue that the fulfilment of the right to self-determination has been denied to them.

3.2.2. The Americas

On the American continent the colonial history approached its end with the liberation of the overseas provinces from the Spanish monarchy in 1809. Some remnants

[52] Resolution 16(I): Border Disputes Among African State, 1964, available at: https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf (accessed 30 June 2022).

[53] ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, 22 December 1986, ICJ Rep 1986, 554, 580-582, paras. 51-51; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 11 June 1998, ICJ Rep 2002, 303, 330 et seq.

of that time are discernible in the conflict between Guyana and Venezuela regarding the territories west of the Essequibo river, and the conflict between Guatemala and Belize where Guatemala, on the basis of transactions from the 19th century that are not easily transparent, has laid claim to half of the territory of Belize for itself. In both cases the dispute has recently arrived at the ICJ.[54] In the case of *Guyana v. Venezuela* time does play a role, but only a marginal one. Venezuela has refused since 1899 to comply with an arbitral award unfavourable to it without being able to adduce valid reasons for its refusal.[55] In the dispute between *Guatemala v. Belize* the determinative issue will be who has exerted effective territorial control and which population is living there. The lapse of time will buttress the claim of the litigant party able to show that it has manifested its governmental power in the contested territories for lengthy periods, excluding the jurisdiction of its opponent. New insights are not likely to be gained from that proceeding.

3.2.3. Europe

It does not need to be explained in detail that after the Second World War, under the authority of the Victorious Powers, dramatic territorial changes were effected. Within the framework of the Bonn Colloquium of 21 and 22 October 2021 the dispositions that were made to the detriment of Germany on the basis of the Potsdam Agreement of 1945[56] stood at the centre of the debates. In accordance with this agreement the German territories east of the Oder-Neisse line were placed under Polish or Soviet administration. Obviously the agreement, which had been brought about without any German participation, did not pursue the aim of bringing about immediately a transfer of territorial jurisdiction and, on legal grounds, could not even purport to do so. The general expectation was that a peace treaty would be concluded later. Until that time the boundary question was to remain open (Part IX, b). According to the established rules of international law such a cession could not take place without Germany's consent, and all attempts to construe a direct

[54] ICJ, *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Press Release No. 2018/17, 4 April 2018; *Guatemala's Territorial, Insular and Maritime Claim (Guatemala v. Belize)*, Press Release No. 2020/12, 24 April 2020.

[55] Detailed description of the facts in Guyana's Memorial, Vol. I, 19 November 2018, available at: https://www.icj-cij.org/files/case-related/171/171-20181119-WRI-01-00-EN.pdf (accessed 30 June 2022).

[56] Reprinted in: I. von Münch (ed.), *Dokumente des geteilten Deutschland*, Kroener, Stuttgart: 1968, at 32. The present writer believes that many times it was wrongly contested that the Potsdam resolutions issued by the Victorious Allied Powers – originally without France – constituted genuine international treaties. Clearly, the intention of the signatories was to enforce their stipulations as a mandatory commitment against Germany – a non-participating third State. Correct analysis by J.A. Frowein, *Potsdam Conference (1945)*, in: *Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford University Press, Oxford: 2012, pp. 392, 394.

effect must be deemed to have failed.[57] The legal position up to the conclusion of the Warsaw Treaty of 1970[58] implies more intricacies. Modern international law does not recognize acquisitive prescription,[59] and the Polish Government knew exactly that a definitive territorial title would depend on the provisions of a future peace treaty. On the other hand, the Warsaw Treaty brought about a considerable reinforcement of the Polish legal position.[60] It formally stated that the "existing boundary line ... shall constitute the western State frontier of the People's Republic of Poland" (Art. 1(1)). Even if the Warsaw Treaty, as steadfastly contended by the Federal Government of Germany, were to be interpreted solely as an instrument for the renunciation of recourse to armed force – an interpretation that cannot be derived from its text – nonetheless a claim to acquisition had been established that could not be revoked unilaterally. A further consideration to be derived from general international law deserves also to be taken into account here. Inasmuch as Poland, acting in the exercise of its administration powers, was authorized by the Federal Republic of Germany itself to settle Polish nationals in the in the territories which until that time had belonged to Germany, an additional layer of individual entitlements was piled above the determinative inter-State relationship. To the extent that in the years after 1949 human beings grew up in those territories they have acquired, by virtue of the right to the "*Heimat*", a status under human rights law that could not be removed unilaterally.[61] Although the defeat of the German Reich was marked by egregious breaches of the applicable human rights and humanitarian law, including the expulsion of millions of Germans from their ancestral territories of settlement,[62] the course of time was not halted by those unlawful operations.

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[57] The view expressed by K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 Revue générale de droit international public 242 (1957), according to which the transfer of sovereignty was effected by the Potsdam Agreement with immediate effect, is contradicted by the text of the Agreement.

[58] Federal Republic of Germany and Poland, Treaty Concerning the Basis for Normalizing Relations, 7 December 1970, ILM 10 (1971), 127.

[59] Little persuasive in this regard are M. Kohen, *L'influence du temps sur les règlements territoriaux*, in: *Société française pour le droit international*, Pedone, Paris: 2001, pp. 131, 138-143; and J. Wouters, S. Verhoeven, *Prescription*, in: *Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford University Press, Oxford: 2012, pp. 420, 424.

[60] For more on this issue from a German viewpoint, *see* J.A. Frowein, *Die Grenzbestimmungen der Ostverträge und ihre völkerrechtliche Bedeutung*, in: *Ostverträge – Berlin-Status, Münchener Abkommen, Beziehungen zwischen der BRD und der DDR*, Hansischer Gildenverlag, Hamburg: 1971, pp. 27, 30 f.; H. Steiger, *Rechtsfragen der Ostverträge 1970*, *ibidem*, pp. 43, 46-48.

[61] In terms of classic legal argumentation such a right to the *Heimat* cannot easily be inferred since the right to the *Heimat* was originally only discussed as to the benefit of an expelled population, *cf.* Ch. Tomuschat, *Das Recht auf die Heimat. Neue rechtliche Aspekte*, in: *Des Menschen Recht zwischen Freiheit und Verantwortung. Festschrift für Karl Josef Partsch*, Duncker & Humblot, Berlin: 1989, pp. 183-212, for a recent confirmation of the "right of return" see UNGA Res. 66/283, 3 July 2012, para. 1.

[62] See comments by a neutral observer, R.M. Douglas, *Orderly and Humane. The Expulsion of the Germans after the Second World War*, Yale University Press, New Haven und London: 2012.

Human rights protection is enjoyed by every person, independently of whether they belong to a "people of perpetrators" or to "a people of victims". From a human rights perspective, those attributes are entirely irrelevant. Accordingly, the persons who with the consent of the international community and the Federal Republic of Germany itself established themselves in those territories that were administratively separated from Germany have accumulated a capital of confidence of which they may not be deprived arbitrarily. In addition, after many decades that stock of legitimate confidence could have been used against any possible right of return of the expelled population.

This inference should not be taken to mean that the route should be clear for any kind of annexationist measures. It must always be a temptation for dictators with imperialist aspirations to conquer by means of a war of aggression territorial space for its own people, eventually referring to the vital rights of the "settlers". The Polish case has a different physiognomy however. I will refrain here from pronouncing myself about the lawfulness of the Potsdam Agreement of the three (four) Allied Powers. Here the only relevant issue to be examined is what consequences the lapse of time has possibly produced. From the above considerations it appears that the classic method of analysis – according to which research for a rule of customary law should focus solely on precedents from the inter-State dimension – cannot be the appropriate yardstick in a field where the general configuration has been profoundly marked by new basic norms of international law. Here again, it is not time as such that has operated as "movens"; what matters instead is the emergence of a new legal architecture with new paradigmatic bases.

3.2.4. Retroactivity of Rules of *Jus Cogens* in Respect of Grave Crimes?

As already mentioned, according to a consolidated principle any factual occurrences need to be measured against the applicable legal yardsticks of their time.[63] Recently there has been a tendency to shove aside that principle by introducing a new line of thought. This in particular regards the colonial history of Africa with its shameful highpoint – the slave trade;[64] which is taken as point of departure for sophisticated deductions according to which the nations that were in the past involved in that trade should be deemed obligated to provide reparation payments to the descendants of the victims.[65]

[63] The ILC has explicitly noted in Art. 13 ARSIWA that reparation claims presuppose the breach of an international norm applicable at that time.

[64] On the current legal position together with the historical antecedents of the ban, *cf.* P. Viseur Sellers, J. Getgen Kestenbaum, *Missing in Action. The International Crime of the Slave Trade*, 18 Journal of International Criminal Justice 517 (2020).

[65] *See* D. Diop, *La réparation des crimes contre l'humanité en Afrique. Impératif catégorique ou devoir contingent?*, in: L. Boisson de Chazournes et al. (eds.), *Crimes de l'histoire et réparations: les réponses du droit et*

To the extent that such claims are based on ethical requirements the realm of law is left. Today we certainly regret most sincerely that imperialist thinking was not aware of the dubious nature of the legal norms that governed the process of colonization with its numerous human victims, abstaining from establishing any safeguards for the benefit of the indigenous populations. This later awareness, however, cannot rearrange the legal position as it was understood and practiced at that time, but must be transformed into an incitement for political strategies and actions today.[66]

Inasmuch as such constructive initiatives are based on the legal instruments adopted in the early years of the 19th century concerning the prohibition of the slave trade, they have at least a firm normative basis.[67] However, a consistent system of secondary rules governing the consequences of internationally unlawful acts has emerged only late in the 20th century and has not yet found its completion, notwithstanding the Draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) project of the ILC concluded in 2001.[68] Moreover, whoever analyzes historical occurrences from the 19th century in light of the legal concepts of *jus cogens* and obligations *erga omnes* engages in a frivolous use of the time machine. Lawyers have to leave the judgment of the Thirty Year's War (1618-1648); the Napoleonic wars of conquest in Europe; and the German-French war of 1871 to historians. Lastly, the construction of a legal relationship between the nations responsible for the slave trade and the descendants of the victims of forced slavery has a fundamentally speculative nature. The descendants can neither be identified personally, nor can we recognize them conclusively as victims. The harm suffered by them cannot constitute damage of applicants living today.[69] By attempting to analyse epochs of the past based on the modern concepts of today one ends up with a multitude of logical contradictions that would require a comprehensive review of the legal order. Many proposals are carried out with good intentions, yet they pertain to legal policy and cannot be carried forward via the means of the law as it stands today. No one can be forbidden to characterize as unlawful events of

de la justice, Bruylant, Bruxelles: 2004, pp. 263-276; L. Sala-Molins, *Esclavage: Peut-on juridiquement envisager de ne pas réparer ?*, *ibidem*, pp. 179-185.

[66] In the Declaration of the Conference of Durban (2001) against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available at: https://www.un.org/WCAR/durban.pdf (accessed 30 June 2022), the relevant time limits are intentionally kept rather vague.

[67] *Cf.* W.G. Grewe, *The Epochs of International Law*, de Gruyter, Berlin, New York: 2000, pp. 554-549.

[68] Annex to UNGA Res. 56/83, 12 December 2001: Responsibility of States for internationally wrongful acts.

[69] Therefore the attempt by clear-sighted observers to leave the rigid scheme of international responsibility, replacing it by forms of political and moral conciliation through negotiations, would be welcomed: L. Moffett, K. Schwarz, *Reparations for the transatlantic slave trade and historical enslavement: Linking past atrocities with contemporary victim populations*, 36 Netherlands Quarterly of Human Rights 247 (2018).

the past if, from our present viewpoint, they appear indeed to constitute unlawful phenomena; but such judgments convey no more than ethical reprobation and do not provide legal recipes suited to address the current issues of today.[70] This conclusion applies also to the partitions of Poland carried out in the 18th and 19th centuries. It serves as a guide for political orientation and may serve as reminder, but does not make things "unhappened".

3.3. Prescription

Lastly it is worthwhile to take a short glance at the concept of extinctive prescription. In this last section no territorial issues shall be discussed; the focus will be exclusively on claims resulting from internationally wrongful acts regarding other breaches of international law. The ILC has dealt with these issues in its ARSIWA project solely under the headings of waiver and acquiescence (Art. 45). A general rule on prescription is lacking. This cautious approach is understandable, particularly against the backdrop of the ambition of the ILC to create a system of rules of secondary law that should be identical for all claims resulting from the commission of an unlawful act. However, it seems hardly conceivable that in the present conditions the content and context of the violated rule should be totally left aside. The violation of a duty of consultation will never have the same weight as the commission of an international crime, and between the two extremes many intermediate steps on a hierarchical scale can be found. All of these variations would have to be reflected in a legal regime of extinctive prescription. Furthermore, the ILC was conscious of the fact that rules conceived for classic inter-State relations are not automatically suitable for relationships of a special type, in particular in the field of human rights (Art. 55 ARSIWA).[71]

Two different types of prescription must be distinguished: on the one hand prescription as an objection in a formal proceeding for the settlement of a dispute; and on the other hand prescription as a legal ground for the substantive extinction of a claim. Purely procedural issues shall not be raised here. The focus will be exclusively on the question whether a legal entitlement may lose its existence solely through passage of time, taking into account only traditional inter-State relationships.

A cursory preliminary reflection results in the conclusion that a comprehensive general rule can hardly be found. Conflicts between States are settled in the most diverse fora. More often than not States prefer negotiations, the results of which are not transmitted to the public. Even where during an armed conflict massive damages have occurred, reparation claims may not be raised where political considerations

[70] An erroneous path is therefore embarked upon by N. Boschiero, *La traite transatlantique et la responsabilité internationale des Etats*, in: L. Boisson de Chazournes et al. (eds.), *supra* note 65, pp. 203-262.

[71] *See* Section 4 of the commentary of the ILC regarding this provision.

may make it inadvisable to commence formal proceedings. In other instances, troublesome periods pass into oblivion. Judicial decisions are rare. The relevant precedents that are referred to in the legal literature relate mostly to instances of diplomatic protection, where a government has tried to secure the rights of one of its nationals.[72] In today's international legal order, which is largely based on ethical value judgments, uneasiness would be palpable if some (state) actor contended that claims deriving from violations of the ban on the use of force or from serious breaches of human rights guarantees have been extinguished by prescription.

The ICJ has provided only a few clues as to the place of the concept of prescription in the international legal order. In the *Nauru* case it confined itself to the sibyllinic observation that it was incumbent on the Court to "determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[73]

No further authoritative statements can be found in the international jurisprudence. The practice of reparations is multiform and inconsistent. Regarding war damages in particular, States have many times preferred to conclude lump sum agreements; in other cases the passage of time renders moot any claims for reparation. A particular feature of such configurations is that no international judge endowed with jurisdiction to hear such claims is available. It is not by accident that the international humanitarian treaties have abstained from providing for judicial remedies in relation to any violations of their provisions.

CONCLUDING OBSERVATIONS

The multifaceted topic of time in international law provides little room for general conclusions. Time is the dimension in which, like all human artefacts, law exists, and international law is designed to fulfil a public order function in the world. It accompanies human societies according to their own codes of conduct on their path through history, conferring them a certain stability notwithstanding all the changes of the external circumstances. International law is much less subject to dictatorial usurpation than legal systems governing States' constitutional orders. Since it is the normative foundation of all States and, accordingly, of all human beings, no single State will ever succeed, under the conditions of a global world, to establish itself as the sole dominant nation. It cannot be denied that international law follows to a great extent the distribution of power in its various constellations, but usually

[72] *See e.g.,* G. Dahm, *Völkerrecht*, Kohlhammer, Stuttgart: 1961, p. 170.

[73] ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Judgment (Preliminary Objections), 26 June 1992, ICJ Rep 1992, 240, 254, para. 32.

only in a measured way, not in Sturm-und-Drang, and usually only after a period of reflection and consolidation.

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THE 1970 WARSAW TREATY AND THE CHALLENGES OF INTERPRETATIVE DECLARATIONS IN INTERNATIONAL TREATY LAW

Abstract: *The 1970 Warsaw Treaty lists a number of unilateral declarations, primarily on the part of the Federal Republic of Germany. Nowadays, in view of the fundamentally changed circumstances between Germany and Poland, these declarations no longer play a significant role. Nevertheless, it is interesting to dogmatically examine them, not only for legal historical reasons but also based on the acknowledged principle that the understanding of the present is always shaped by the past. This contribution aims to meet this challenge.*

Keywords: interpretative declarations, reservations, political declarations of intent, declarations on legal safeguards, Oder-Neisse line

INTRODUCTION

In 2020, the Agreement between the Federal Republic of Germany and the People's Republic of Poland concerning the basis for normalization of their mutual relations of 7 December 1970,[1] better known as the Warsaw Treaty, celebrated its 50th anniversary. Anniversaries generally constitute a good opportunity to critically examine and appreciate, in retrospect, the content of a treaty and its importance in

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[1] *Vertrag zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen über die Grundlagen der Norma-lisierung ihrer gegenseitigen Beziehungen*, 7 December 1970, *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 362.

the relationship between the contracting parties. With regard to the Warsaw Treaty, this applies not only to the object and purpose of the treaty, but also to the numerous unilateral interpretative declarations, mainly from the Federal Republic of Germany, which accompany the treaty and which are the focus of this contribution. Based on the general meaning of interpretative declarations in international treaty law, the article examines the content, meaning, and legal consequences of the unilateral declarations made on the occasion of the conclusion of the Warsaw Treaty. As will be shown, most of the formerly controversial debates can now be regarded as settled.

1. GENERAL MEANING OF INTERPRETATIVE DECLARATIONS IN INTERNATIONAL TREATY LAW

Declarations of interpretation are a common instrument in international treaty law. They are unilateral statements made by a State[2] to propose the correct understanding of one or more treaty provisions and are designed to influence the future interpretation of the treaty. Such a declaration, which is usually presented at the time of agreeing to the treaty,[3] aims to specify or clarify the meaning or scope of the treaty or certain of its provisions, but does not fundamentally call into question the binding nature of the treaty rules.[4] Rather, the interpretative declaration is based on the wording of the treaty, does not exclude or modify its legal effect, and remains within its framework. However, it makes clear that either a specific teleological or a general dynamic interpretation of the rules will not be supported by the declarant.[5] Instead, a specific, mostly narrow interpretation is regarded by the declaring state as binding when applying the treaty.[6]

1.1. Distinction Between Interpretative Declarations and Reservations

The practical legal problem associated with a declaration of interpretation is obvious. It is difficult to distinguish an interpretative declaration from a reservation in the

[2] Unilateral statements made by an international organisation are not the subject of this article.

[3] As to exceptions, *see* F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, North-Holland, Amsterdam: 1988, pp. 41-43.

[4] I. Cameron, *Treaties, Declarations of Interpretation*, in: A. Peters (ed.), *Max Planck Encyclopedia of Public International Law [Online]*, Oxford University Press, Oxford: 2020, mns. 1, 2.

[5] *Cf.* C. Tomuschat, *Admissibility and Legal Effects of Reservations to Multilateral Treaties*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 463 (1967), pp. 464-466; M. Heymann, *Einseitige Interpretationserklärungen zu multilateralen Verträgen*, Duncker & Humblot, Berlin: 2005, pp. 88-92.

[6] *See* A. Verdross, B. Simma, *Universelles Völkerrecht* (3rd ed.), Duncker & Humblot, Berlin: 1984, para. 736; W. Heintschel von Heinegg, *Vorbehalte zu Verträgen*, in: K. Ipsen (ed.), *Völkerrecht* (7th ed.), C.H. Beck, München: 2018, para. 17 mn. 4.

sense of Art. 2.1(d) of the Vienna Convention on the Law of Treaties (VCLT),[7] the main provisions of which reflect customary international law. In contrast to a declaration of interpretation, a reservation excludes the binding nature and legal effect of a treaty rule under all conceivable modalities of interpretation.[8] However, the distinction between genuine reservations and interpretative declarations is fluid.[9] This is true for formal reasons, because a unilateral declaration can, despite its designation as a declaration of interpretation, represent a reservation in the technical sense, often referred to as a "disguised reservation".[10] Furthermore, an interpretative declaration generally excludes interpretations of the treaty provision in question in a manner other than the interpretation submitted, at least for the declaring State. This comes very close to a reservation in substantive terms.[11]

Typically, the distinction between an interpretative declaration and a reservation only becomes an issue in the case of multilateral agreements. Within the framework of a bilateral agreement, the fact that there are no corresponding declarations of will and intent works against the legal possibility of being able to make a reservation. If a bilateral treaty is to be concluded despite such a dissenting opinion, this is only possible if the other party accepts the declaration of reservation as a new offer to conclude the treaty in a modified version.[12] In any case, it is necessary for bilateral treaties that the recipient of the declaration expressly or implicitly agrees to it in order to establish the necessary consensus.[13] In principle, this applies to both reservations and interpretative declarations. In the opinion of the International Law Commission, only simple declarations of interpretation – unlike qualified, or conditional, declarations of interpretation – should not require any acceptance, not even tacit, by the treaty partner.[14]

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[7] 1155 UNTS 331. The Vienna Convention was concluded on 23 May 1969 and entered into force on 27 January 1980.

[8] *Cf.* B. Kempen, C. Hillgruber, C. Grabenwarter, *Völkerrecht* (3rd ed.), C.H. Beck, München: 2021, para. 13 mn. 25.

[9] *See* A. von Arnauld, *Völkerrecht* (4th ed.), C.F. Müller, Heidelberg: 2019, p. 91.

[10] D.M. McRae, *The Legal Effect of Interpretative Declarations*, 49 British Yearbook of International Law 155 (1978), p. 162; see also Cameron, *supra* note 4, mn. 2.

[11] G. Dahm, J. Delbrück, R. Wolfrum, *Völkerrecht* (2nd ed.), Vol. I/3, De Gruyter, Berlin: 2002, para. 148, p. 577.

[12] *Ibidem*, p. 558.

[13] *See* M. Krajewski, *Völkerrecht* (2nd. ed.), Nomos, Baden-Baden: 2020, para. 4 mn. 52.

[14] *See* Guidelines 1.3 and 1.4 of the International Law Commission's Guide to Practice on Reservations to Treaties, UN Doc. A/66/10/Add.1. Further see the Report of the International Law Commission on the Work of its 63th Session (2011), GAOR 66 Session Supp. 10, UN Doc. A/66/10, pp. 75 et seq. As regards the difficulties in State practice to clearly differentiate between both forms of interpretative declarations, see Cameron, *supra* note 4, mn. 6.

1.2. Distinction Between Interpretative Declarations and Political Declarations of Intent or Legal Safeguards

Interpretative declarations must also be distinguished from political declarations of intent (*politische Absichtserklärungen*) and simple legal safeguards (*Rechtsverwahrungen*). A political declaration of intent usually involves clarifications of political issues that are indirectly related to the treaty, but do not affect its content.[15] For instance, in 1952 the USA declared its approval of the Treaty of Peace with Japan only with the express reference that the treaty did not contain any relinquishment of Japan's territorial claims before the outbreak of war, and that the treaty was not intended to represent recognition of the Yalta Agreement in favour of the USSR.[16] Similarly, on the occasion of the signing of the Moscow Treaty of 1970,[17] the Government of the Federal Republic of Germany (FRG) pointed out in its "Letter on German Unity" (*Brief zur deutschen Einheit*) that the provisions of the treaty neither affect nor undermine the FRG's goal to restore German unity.[18] In such cases, a contracting party to a treaty wishes to rule out any repercussions of the treaty on its positions with regard to other issues or with States not involved in the treaty. Political declarations of this kind do not restrict the obligations of the contracting parties any further than is agreed in the treaty text.

Declarations on legal safeguards point in a similar direction. In this case, the contracting party aims to protect itself against drawing conclusions on other legal questions from the fact of its conclusion of the treaty. It is a form of protective protest on the part of the declaring State against the establishment of an interpretation of the treaty that could be used against it; a declaration that it considers such an interpretation to be inappropriate.[19] For example, such a legal safeguard can consist of the fact that it should not be inferred from the conclusion of the treaty that one contracting party is obliged to recognise the other contracting party as a State.[20] As with a political declaration of intent, a legal safeguard is also about legal consequences that lie outside the treaty, even though they are, in a broad context, connected with the treaty.[21] A practical example of this is again the "Letter on German Unity", this time to the Basic Treaty (*Grundlagenvertrag*) which was concluded between the FRG and the German Democratic Republic (GDR) in

[15] *See* Heintschel von Heinegg, *supra* note 6, para. 17 mn. 3.

[16] American Journal of International Law 46 (1952), Supp. 96.

[17] *Vertrag zwischen der Bundesrepublik Deutschland und der Union der Sozialistischen Sowjetrepubliken* [Treaty between Germany and the Union of Soviet Socialist Republics], 12 August 1970, *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 354.

[18] Bulletin, *Presse- und Informationsamt der Bundesregierung* [Press and Information Office of the Federal Government], 17 August 1970, No. 109, p. 1094.

[19] A. McNair, *The Law of Treaties*, Clarendon, Oxford: 1961, pp. 430-431.

[20] *See* Kempen et al., *supra* note 8, paras. 13 mn. 24.

[21] *See* Verdross, Simma, *supra* note 6, para. 737.

1972.[22] In order to take into account the reunification requirement of its Basic Law, the Government of the Federal Republic of Germany made it clear that, from its point of view, the GDR was viewed as a State and thus as a subject of international law, but not as a foreign country.

1.3. Requirements and Legal Consequences of Unilateral Declarations in International Treaty Law

Regardless of whether a unilateral declaration constitutes a simple or qualified interpretative declaration, a declaration of political intent, a legal safeguard, or a reservation, it is necessary that the other contracting party is aware of it. The requirement of bringing the declaration to the knowledge of the other contracting party (*Empfangsbedürftigkeit*) follows from the principles of legal certainty and legal clarity, which are also relevant in international law.[23] A need for acceptance (*Annahmebedürftigkeit*), meaning the explicit or implicit consent of the other contracting party, is not required in the case of political declarations of intent and legal safeguards, as they are not inherently binding. However, in the case of reservations the other contracting party must either accept the reservation or raise an objection in accordance with the rules of the VCLT. In particular, Art. 20.4(b) VCLT requires States to react to reservations which they deem to be invalid. Otherwise, the rule of tacit acceptance applies (Art. 20.5).[24] For logical reasons, however, the possibility to object only applies to multilateral treaties. In the case of bilateral treaties, as mentioned the consensus between the two contracting parties must be established.[25] Thus a qualified declaration of interpretation within the framework of a bilateral treaty requires at least the tacit consent of the other contracting party, so that the intended binding effect of the declaration can develop and does not become meaningless. To put it in other words: If the other contracting party does not expressly object to the contracting party's unilateral declaration of interpretation, the declaration can be taken into account when interpreting the treaty.[26]

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[22] *Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik* [Treaty concerning the basis of relations between the Federal Republic of Germany and the German Democratic Republic], 21 December 1972, *Bundesgesetzblatt* [Federal Law Gazette] 1973 II, p. 425.

[23] *Cf.* Heymann, *supra* note 5, pp. 118-119; Horn, *supra* note 3, p. 44.

[24] Cameron, *supra* note 4, mn. 6.

[25] *See* Verdross, Simma, *supra* note 6, para. 732.

[26] *See* A. Aust, *Modern Treaty Law and Practice* (3rd ed.), Cambridge University Press, Cambridge: 2013, p. 116; Krajewski, *supra* note 13, para. 4 mn. 53.

2. LEGAL CHARACTERIZATION OF THE UNILATERAL DECLARATIONS ON THE OCCASION OF THE 1970 WARSAW TREATY

The Warsaw Treaty of 1970[27] is characterized by numerous unilateral declarations, especially on the part of the Federal Republic of Germany. Nowadays, in view of fundamentally changed circumstances – suffice it to mention here the Two+Four Treaty[28] and Germany's as well as Poland's membership in the European Union[29] – these declarations no longer play a significant role. Nevertheless, not only for legal historical reasons but also because our understanding of the present is always shaped by the past, it is interesting to dogmatically examine these unilateral declarations.

In order to determine the legal nature and effect of a unilateral declaration, the declaration must be interpreted in good faith. In addition, the ordinary meaning of the chosen formulation and the social and political context must be taken into account, as well as the will of the State that made the declaration.[30] It is precisely these contextualizing aspects that are of particular importance when classifying the unilateral declarations made by the Federal Republic of Germany on the occasion of the Warsaw Treaty.

2.1. Content of the Warsaw Treaty

The Warsaw Treaty entered into force with the exchange of the instruments of ratification on June 1972.[31] According to Art. I, para. 1 of the Treaty, the Federal Republic of Germany and the People's Republic of Poland agree that the Oder-Neisse line, as it was established at the Potsdam Conference in 1945,[32] forms the western State frontier of Poland. In Art. I, para. 2 and 3, both parties also reaffirm the inviolability of their existing frontiers, commit themselves to respect each other's territorial integrity, and declare that they have no territorial claims whatsoever against each other.

Since Poland was the first victim of the war of aggression unleashed by the German Reich, the border issue was inevitably the focus of the negotiations on the

[27] *See supra* note 1.

[28] *Vertrag über die abschließende Regelung in bezug auf Deutschland* [Treaty on the Final Settlement with Respect to Germany], 12 September 1990, *Bundesgesetzblatt* [Federal Law Gazette] 1990 II, p. 1318.

[29] While the Federal Republic of Germany was one of the six founding States, Poland joined the European Union in 2004.

[30] *See* Kempen et al., *supra* note 8, para. 13 mn. 27.

[31] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361; pronouncement in: *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 651.

[32] *Amtsblatt des Alliierten Kontrollrats in Deutschland, Ergänzungsblatt* Nr. 1 [Official Journal of the Allied Control Council in Germany, Supplement No. 1], pp. 17-18. For details on the negotiations and results of the Potsdam Conference, *cf.* G. Gornig, *Der völkerrechtliche Status Deutschlands zwischen 1945 und 1990: Auch ein Beitrag zu Problemen der Staatensukzession*, Wilhelm Fink Verlag, München: 2007, pp. 49 et seq.

Warsaw Treaty. Without an agreement on this issue, it would not have been possible for the Federal Republic of Germany and Poland to relax tensions and enter into good relations between themselves.[33] Art. I of the Warsaw Treaty therefore clearly establishes both parties' recognition of the western boundary line of Poland and its competence over the territories under its administration, as well as the obligation of the Federal Republic of Germany not to contest the legality of Poland's exercise of sovereign power (*Gebietshoheit*) therein.[34]

2.2. Reference to the Exchange of Notes Between the Federal Republic of Germany and the Three Western Powers in the Act of Approval by the German Bundestag

However, the Warsaw Treaty did not constitute a final ruling on the territorial status of the areas located east of the Oder-Neisse line.[35] Before the signing of the Warsaw Treaty, the Federal Government of Germany had exchanged notes with the three Western Powers, which were published in the Federal Law Gazette together with the Act of Approval by the German Bundestag.[36] Also, in the ratification document, which was handed over to the Polish Government on 3 June 1972, explicit reference is made to the Act of Approval with the attached notes.[37] The exchange of notes, which was important for the conclusion of the Warsaw Treaty, stipulates that the Federal Republic of Germany only acts in its own name and does not affect the rights and responsibilities of the Four Powers with regard to Germany, as expressed in the Berlin Declaration of 5 June 1945.[38]

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[33] *Cf. Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, at 10.

[34] *See* O. Luchterhand, *Die staatliche Teilung Deutschlands*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (3rd ed.), Vol. I, C.F. Müller, Heidelberg: 2003, para. 10 mn. 76; J.A. Frowein, *Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages*, 18 Jahrbuch für Internationales Recht 11 (1975), pp. 38 et seq. In a similar vein, *see also* W. Kewenig, *Die deutsche Ostpolitik und das Grundgesetz*, 26 Europa-Archiv 469 (1971), p. 478.

[35] *See* E. Klein, *Zur Rechtslage Deutschlands und der Deutschen nach dem Beschluß des Bundesverfassungsgerichts zu den Ostverträgen*, 25 Jahrbuch der Albertus-Universität zu Königsberg/Preußen 23 (1977), pp. 31-32; B. Zündorf, *Die Ostverträge: Moskau, Warschau, Prag. Das Berlin-Abkommen. Die Verträge mit der DDR*, C.H. Beck, München: 1979, p. 76. A different assessment is offered by J.A. Frowein, *Die deutschen Grenzen in völkerrechtlicher Sicht*, 34 Europa-Archiv 591 (1979), pp. 592-593, according to which territorial sovereignty is said to have passed to Poland under the condition subsequent of a peace treaty.

[36] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361, at 364-368; *cf. also Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, p. 10, at 10.

[37] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (149). *Further see* Zündorf, *supra* note 35, p. 274.

[38] The text of the 1945 Berlin Declaration is reprinted in: I. von Münch (ed.), *Dokumente des geteilten Deutschlands: Quellentexte zur Rechtslage des Deutschen Reiches, der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik*, Kröner, Stuttgart: 1968, pp. 19 et seq.

Consequently, the allocation of territory was only provisional, as a final settlement was reserved for a peace treaty regarding Germany as a whole. This was especially true because the three Western Powers had not approved a final assignment in the form of a forced cession or adjudication[39] of the former German eastern territories to Poland, either in the Potsdam Protocol or in the 1945 Berlin Declaration.[40] The legal disposition that was made in the Potsdam Agreement with regard to the Oder-Neisse areas can therefore only be characterized as an "administrative assignment", which the victorious powers were entitled to under international law even without the involvement of the defeated (German) State.[41] Basically, the Soviet Union and the People's Republic of Poland seem to have accepted this characterization, as Poland not only concluded the Görlitz/Gorlice Treaty with the GDR to establish the Oder-Neisse line as the State frontier in 1950,[42] but also called for a similar legal act from the FRG, namely what was to become the Warsaw Treaty.[43]

The Federal Republic of Germany could not recognize the final sovereignty of Poland over the areas in question in the Warsaw Treaty due to its lack of a power of disposal.[44] However, it was already clear at the time that even a reunified Germany would have to take into account the situation on which the Warsaw Treaty was based.[45] This is supported, firstly, by the fact that any other interpretation would have completely invalidated the Warsaw Treaty, the central subject of which was

[39] This was, however, the opinion of the Polish Government at the time, *cf*. K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 Revue Générale de Droit International Public 242 (1957), pp. 254-255; M. Lachs, *The Polish-German Frontier: Law, Life and Logic of History*, PWN, Warszawa: 1964, p. 33.

[40] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (158). *Further see* E. Klein, *Völkerrechtliche Aspekte des deutsch-polnischen Verhältnisses*, in: H. Unverricht, G. Keil (eds.), *De Ecclesia Silesiae: Festschrift zum 25jährigen Bestehen der Apostolischen Visitatur Breslau*, Jan Thorbecke Verlag, Sigmaringen: 1997, p. 117, at 118; S. Krülle, *Die völkerrechtlichen Aspekte des Oder-Neiße-Problems*, Duncker & Humblot, Berlin: 1970, pp. 242 et seq. Different assessment by E. Menzel, *Die Ostverträge von 1970 und der „Deutschland"-Begriff des Grundgesetzes*, 26 Die Öffentliche Verwaltung 1 (1973), pp. 2-3.

[41] *See* O. Kimminich, *Der Warschauer Vertrag – Grundlage oder Vernichtung privater Entschädigungsforderungen?*, 26 JuristenZeitung 485 (1971), p. 486; Gornig, *supra* note 32, pp. 60-61.

[42] *Abkommen zwischen der Volksrepublik Polen und der Deutschen Demokratischen Republik über die Markierungen der festgelegten und bestehenden polnisch-deutschen Staatsgrenze* [Agreement between the People's Republic of Poland and the German Democratic Republic concerning the demarcation of the established and existing Polish-German State frontier], 6 July 1950, *Gesetzblatt der DDR* [Law Gazette of the GDR] 1950, p. 1205.

[43] *See* O. Kimminich, *Ungelöste Rechtsprobleme der deutsch-polnischen Beziehungen*, 18(4) Zeitschrift für Politik 333 (1971), p. 334.

[44] *Cf*. Krülle, *supra* note 40, pp. 161 et seq. *Contra* A. Uschakow, *Die polnische Auslegung des Warschauer Vertrags*, in: *Auslegung der Ostverträge und gesamtdeutsche Staatsangehörigkeit*, Kulturstiftung der Deutschen Vertriebenen Verlag, Bonn: 1980, p. 49, pp. 53-65.

[45] See *Denkschrift der Bundesregierung* [Memorandum of the Federal Government], *Bundestags-Drucksache* [Bundestag printed matter] VI/3157, p. 10, at 10; *see also* Kimminich, *supra* note 43, pp. 345-346. Different assessment by Zündorf, *supra* note 35, p. 68; H. Steinberger, *Völkerrechtliche Aspekte des deutsch-sowjetischen Vertragswerkes vom 12. August 1970*, 31 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 63 (1971), pp. 72, 109.

the recognition of the Oder-Neisse line as a frontier. Secondly, the Estoppel principle under international law supported the assumption that any later peace treaty must be based, among other things, on the provisions of the Warsaw Treaty.[46] This finding was flanked by the Görlitz/Gorlice Treaty, in which the GDR accepted the Oder-Neisse line towards Poland as the existing State frontier. However, the problem was that the GDR claimed full identity with the former German Reich in this respect, which was in clear contradiction to international law.[47]

2.3. Information Letter by the Government of the People's Republic of Poland

In connection with the conclusion of the Warsaw Treaty, the Polish Government forwarded a comprehensive information letter to the Federal Republic of Germany in which it informed the Federal Government of Germany about, *inter alia*, measures to resolve the humanitarian problems with regard to family reunification and the departure of persons of German ethnicity.[48] However, the information letter does not deal with the exchange of notes between the Federal Government of Germany and the three Western Powers. The same applies to the published Act of Approval of the Polish Council of State to the Warsaw Treaty of 26 May 1972.[49] It can therefore be assumed that Poland implicitly approved the declaration of interpretation submitted by the Federal Government. This is all the more so because the Warsaw Treaty aimed to create a political climate of détente, but did not contain any detailed regulations on the ultimate transfer of territorial sovereignty.[50]

2.4. Final Communiqué of the Federal Government of Germany on the Warsaw Treaty

Nor does the Warsaw Treaty contain any provision relating to questions of nationality. The fact that the will of the Federal Republic of Germany was not directed

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[46] Rightly so according to K. Skubiszewski, *Poland's Western Frontier and the 1970 Treaties*, 67 American Journal of International Law 23 (1973), pp. 30-31; Frowein, *supra* note 34, p. 49.

[47] *See* E. Klein, *Wiedervereinigungsklauseln in Verträgen der Bundesrepublik Deutschland*, in: G. Brunner, T. Schweisfurth, A. Uschakow, K. Westen (eds.), *Sowjetsystem und Ostrecht*, Duncker & Humblot, Berlin: 1985, at 784-785, 789; *idem*, *An der Schwelle zur Wiedervereinigung Deutschlands*, 43 Neue Juristische Wochenschrift 1065 (1990), p. 1072; D. Colard, *Considérations sur les "traités de normalisation" signés par la R.F.A. avec l'U.R.S.S. et la Pologne*, 75 Revue Générale de Droit International Public 333 (1971), p. 350.

[48] *See Information der Regierung der Volksrepublik Polen* [Information by the Government of the People's Republic of Poland], *Bundestags-Drucksache* [Bundestag printed matter], p. 13, at 13-14. *Cf. also* E. Schmidt-Jortzig, *Der verfassungsrechtliche Gehalt des Warschauer Vertrages vom 7.12.1970 und seine völkerrechtlichen Bezüge*, 10 Der Staat 311 (1971), p. 334.

[49] *Cf. Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (149-150).

[50] For more details, see *Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, BVerfGE 40, 141 (164-165).

towards a change of nationality emerges from the declarations made by the Federal Government to its Polish partner. The declaration of the then Federal Minister for Foreign Affairs, printed in the final communiqué of the Federal Government of Germany on the Warsaw Treaty, states that the Federal Government emphasized at the conclusion of the negotiations that "*durch den Vertrag niemandem Rechte verloren gehen, die ihm nach unseren Gesetzen zustehen*" ("as a result of the treaty, nobody loses rights to which they are entitled under our laws").[51] The main focus of the declaration was undoubtedly on the former Citizenship Act of the German Reich (*Reichs- und Staatsangehörigkeitsgesetz*).[52]

The Federal Government of Germany therefore assumed, in a way that was recognizable for the Polish partner, that it was not authorized to make a significant substantial disposition on the legal status of (the divided) Germany, which also included the continuation or possible loss of German citizenship.[53] In doing so, as with the question of the Oder-Neisse line it referred to the overall responsibility that the Four Powers had for Germany as a whole. The three Western Powers also alluded to this overall responsibility in their notes on the Warsaw Treaty.[54] In the negotiations on the Warsaw Treaty, the Federal Government of Germany further affirmed that it could only act in its own name and that it would not be able to bind a reunified Germany. This view arises both from the Federal Government's memorandum on the Warsaw Treaty (*Denkschrift der Bundesregierung zum Warschauer Vertrag*)[55] and from the official final communiqué already mentioned.[56]

The declarations in the final communiqué represent unilateral declarations on the part of the Federal Republic of Germany. However, during the negotiations, the Polish contracting party assured itself of the background and legal significance of the declarations and received explanations from the German side, which it accepted without contradiction.[57] The Polish Government was therefore aware of the content and scope of the declarations and it did not trigger any protest. Hence, the

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[51] Bulletin, *Presse- und Informationsamt der Bundesregierung* [Press and Information Office of the Federal Government], 8 December 1970, No. 171, p. 1818, at 1819 [English translation by the author].

[52] *See* C. Arndt, *Die Verträge von Moskau und Warschau, Politische verfassungsrechtliche und völkerrechtliche Aspekte* (2nd ed.), Verlag Neue Gesellschaft, Bonn: 1982, pp. 187 et seq. As regards the interpretation of Art. 25.1 of the *Reichs- und Staatsangehörigkeitsgesetz* after the Warsaw Treaty came into force *cf.* E. Klein, *Deutsche Staatsangehörigkeit und Inlandbegriff*, 93 Deutsches Verwaltungsblatt 876 (1978), pp. 877-879; O. Kimminich, *Der Warschauer Vertrag und die Staatsangehörigkeit der "Polen-Deutschen"*, 24 Die Öffentliche Verwaltung 577 (1971), pp. 578-579.

[53] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (172).

[54] *Bundesgesetzblatt* [Federal Law Gazette] 1972 II, p. 361, at 365-368.

[55] *Denkschrift der Bundesregierung* [Memorandum of the Federal Government], Bundestags-Drucksache [Bundestag printed matter] VI/3157, p. 10, at 11.

[56] Bulletin, *supra* note 51, at 1818-1819.

[57] *Cf.* Arndt, *supra* note 52, p. 187; Frowein, *supra* note 34, p. 27.

Federal Government of Germany could assume that the declarations were accepted as significant instruments in accordance with Art. 31.2 VCLT.[58] Last but not least, this view is also expressed in Art. IV of the Warsaw Treaty, according to which any bilateral or multilateral international arrangements which the contracting parties had previously concluded or which concerned them, remained unaffected. On the part of the Federal Republic of Germany, these treaties include the Germany Treaty (*Deutschlandvertrag*) of 1952/54,[59] which contains a reservation in favour of the Western Powers with regard to Germany as a whole, including a peace treaty regulation.

2.5. Treaty on the Final Settlement with Respect to Germany and Subsequent German-Polish Treaties

Such a regulation of a peace treaty can be seen in the 2+4 Treaty of 1990,[60] which allowed the reunified Germany to regain full sovereignty, but in return demanded the recognition of the existing State frontiers.[61] Against this background, the German-Polish Border Confirmation Treaty of 1990,[62] which came into force in 1992, provides in Arts. 1 and 2 that the contracting parties confirm the Polish western frontier as regulated in the Görlitz/Gorlice Agreement and the Warsaw Treaty. The references to these two agreements are of a technical nature, which means that the frontier border established there is recognized as final.[63] In this case, Germany was fully authorized to act, and as a result there is no doubt that with the entry into force of the Border Confirmation Treaty the designated areas east of the Oder-Neisse line finally came under full Polish sovereignty.[64]

The transfer of sovereignty through the Border Confirmation Treaty did not in itself change the nationality of the German minority living in the Polish Oder-Neisse areas. There is no automatic change of nationality associated with a transfer of territorial sovereignty.[65] However, the Treaty between Germany and Poland of

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[58] *See Bundesverfassungsgericht* [Federal Constitutional Court], Decision of 7 July 1975, 1 BvR 274, 209/72, 195, 194, 184/73 and 247/72, *BVerfGE* 40, 141 (176).

[59] *Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten* [Convention on Relations between the Three Powers and the Federal Republic of Germany], 26 May 1952, as amended on 23 October 1954, *Bundesgesetzblatt* [Federal Law Gazette] 1955 II, p. 301, at 305.

[60] *See supra* note 28.

[61] For more details, *cf.* Gornig, *supra* note 32, pp. 77 et seq.

[62] *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über die Bestätigung der zwischen ihnen bestehenden Grenze* [Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them], 14 November 1990, *Bundesgesetzblatt* [Federal Law Gazette] 1991 II, p. 1329.

[63] Klein, *supra* note 40, p. 120.

[64] The concept of sovereignty was missing from the otherwise identical text of the Warsaw Treaty.

[65] In this regard there is unanimity in legal scholarship, *see e.g.*, Klein, *supra* note 40, p. 125; Frowein, *supra* note 35, p. 594; Kimminich, *supra* note 52, pp. 580-581.

Good Neighbourliness and Friendly Cooperation of 17 June 1991[66] indirectly addressed this question by establishing provisions on the protection of minorities. In addition, both States agreed that the Treaty of Good Neighbourliness does not deal with citizenship issues, as evidenced in and by an exchange of letters when the treaty was signed.[67]

CONCLUSIONS AND OUTLOOK

Overall, while the Warsaw Treaty had a rather limited normative effect it proved to be of eminent political importance for both States.[68] The interpretative declarations and notes of the Federal Government did not meet with opposition on the part of the Polish Government. A legal disagreement or dissent with respect to the scope of Art. I of the Warsaw Treaty can therefore not be assumed.[69] Nevertheless, for a long time, the treaty proved to be politically explosive, because according to the official German view territorial sovereignty was only transferred with the Border Confirmation Treaty of 1990, while according to the Polish official view this area had been under Polish sovereignty since 1945, or at the latest since the entry into force of the Warsaw Treaty in 1972. There was no agreement on the question of whether the Border Confirmation Treaty had a constitutive or only a declaratory effect. Under these circumstances, in 1990 the dilatory formula compromise was used, stating that for the future there is no question that the area east of the Oder--Neisse line is Polish, but that insofar as concerns the past both States remain free to represent their own opinion.[70] Via this clever trick the negotiators aimed to pave a way so as not to let the German-Polish relations fail because of disputes from the past. With regard to the question of territorial sovereignty, this goal has undeniably been achieved.

With regard to compensation issues, the bilateral debates sometimes boil up again.[71] However, these disputes do not fall under the aegis of the Warsaw Treaty,

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[66] *Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über gute Nachbarschaft und freundschaftliche Zusammenarbeit*, 17 June 1991, *Bundesgesetzblatt* [Federal Law Gazette] 1991 II, p. 1314.

[67] *Cf.* J. Barcz, J. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen im Zusammenhang mit dem Zweiten Weltkrieg*, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 625 (2005), pp. 633-634.

[68] *Cf.* Colard, *supra* note 47, p. 353.

[69] Kimminich, *supra* note 43, p. 337.

[70] *See* Klein, *supra* note 40, p. 121.

[71] *Cf.* R. Müller, *Wird Deutschlands Schuld immer größer?*, Frankfurter Allgemeine Zeitung, 2 October 2019, p. 10; J. Kranz, *Kriegsbedingte Reparationen und individuelle Entschädigungsansprüche im Kontext der deutsch-polnischen Beziehungen*, 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 325 (2020), pp. 325-326.

which is silent about both, the Polish confiscations on the one hand[72] and the German reparation and compensation payments to Poland on the other.[73] The official communiqué of the Federal Government of Germany on the Warsaw Treaty merely states that the Federal Government, by concluding this treaty, does not recognize the expulsion of the German population and the associated measures as lawful.[74] However, this finding is not to be seen as a declaration of interpretation, but only as a legal safeguard. The Federal Republic of Germany has only protected itself against Poland drawing conclusions from the Warsaw Treaty on the assertion of restitution or compensation claims.[75] Another statement in the communiqué points in a similar direction, according to which the Polish delegation at the conclusion of the Warsaw Treaty confirmed the declaration of August 1953,[76] in which Poland had expressly waived further reparation payments from Germany as a whole.[77] This does not necessarily answer the question of what consequences this declaration has for individual compensation claims by victims of National Socialist crimes.[78] What is certain however is that a unilateral declaration, in whatever form, would be neither suitable nor appropriate for dealing with this delicate and complex issue.

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[72] On this issue, *cf. e.g.*, O. Kimminich, *Die Menschenrechte in der Friedensregelung nach dem Zweiten Weltkrieg*, Gebr. Mann, Berlin: 1990, pp. 102 et seq.; *E. Klein*, *Diplomatischer Schutz im Hinblick auf Konfiskationen deutschen Vermögens durch Polen*, Kulturstiftung der Deutschen Vertriebenen Verlag, Bonn: 1992, pp. 47 et seq.

[73] On this topic, *cf. e.g.*, T. Irmscher, *Deutsch-polnische Vermögensfragen: Eine deutsche Sicht*, 3 WeltTrends Papiere 5 (2007), p. 20.

[74] Bulletin, *supra* note 51, at 1819.

[75] Frowein, *supra* note 34, p. 24.

[76] Declaration of the Government of the People's Republic of Poland on 23 August 1953, Zbiór Dokumentow, 1953, No. 9, p. 1830. For more details, see S. Żerko, *Reparationen und Entschädigungen in den Beziehungen zwischen Polen und der Bundesrepublik Deutschland (ein historischer Überblick)*, Instytut Zachodni Policy Papers No. 22, 2018, pp. 17-19.

[77] Bulletin, *supra* note 51, at 1819.

[78] With respect to this problem, *see* O. Dörr, *Offene Vermögensfragen zwischen Deutschland und Polen?*, in: M. Ludwigs, S. Schmahl (eds.), *30 Jahre Deutsche Einheit*, Recht und Politik, Beiheft 8, Duncker & Humblot, Berlin: 2021, pp. 127-139, with further references.

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CONTINUITY AND SUCCESSION OF STATES: THE FATE OF PRE-WAR GERMANY AND ITS IMPLICATIONS FOR THE 1970 TREATY OF WARSAW

Abstract: *This article explores whether the Federal Republic of Germany (FRG) is identical with pre-war Germany. The question is relevant for the understanding of the 1970 Treaty of Warsaw, because in the event it is identical, the FRG would be the predecessor State of Poland with regard to the former German territories east of the Oder-Neisse line and, therefore, competent to renounce any territorial title. By contrast, in the case of non-identity the FRG would only have been a third State with regard to these territories. However, even in case of identity, the scope of the Treaty of Warsaw seems ambiguous due to Allied reservations. Hence, it was wise to confirm the transfer of sovereignty in 1990.*

Keywords: German Reich, Oder-Neisse line, annexation, incorporation, separation

INTRODUCTION

Is pre-war Germany dead? A State ceases to exist when its entire territory becomes the territory of one or more other States.[1] For the purposes of this article, four parts of pre-war Germany must be distinguished:

1. The western occupation zones, where the Federal Republic of Germany (FRG or the Federal Republic) was established in 1949;

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[1] *See* G. Gornig, *Der völkerrechtliche Status Deutschlands*, Wilhelm Fink Verlag, München: 2007, p. 6.

2. The Soviet occupation zone, which became the German Democratic Republic (GDR);
3. Berlin – or at least West Berlin – where the Allied Powers retained ultimate control until 1990; and
4. The territories east of the Oder-Neisse line, which now belong to Poland and, insofar as the region of Königsberg/Kaliningrad is concerned, to Russia.

Today, three of these territories belong to the Federal Republic of Germany and the fourth mostly to Poland and partly to Russia. Hence, pre-war Germany is dead unless the Federal Republic of Germany is identical with pre-war Germany.

For the purposes of this article, it is not necessary to consider the status of the Saar region, which came under the jurisdiction of the Federal Republic as of 1957.[2] Nor is it necessary to establish the exact status of East Berlin.[3] In fact, the eastern part of Berlin either basically shared the special status of the western part, as Art. 1(1) of the 2 + 4 Treaty[4] suggests by referring to "the whole of Berlin", or it became part of the GDR, as the latter claimed.[5]

Whether the FRG is identical with the German Reich that evolved from the North German Confederation in 1870/1871,[6] or whether it is a successor State is relevant for understanding the legal implications of the Treaty of Warsaw.[7] If the Federal Republic, which concluded the Treaty of Warsaw in 1970, was not identical with pre-war Germany, it could not decide on the status of the territories beyond the Oder-Neisse line because the Federal Republic, as a new State, would never have had any control over these territories. It would have been a third State both with regard to the border between Poland and the GDR and the status of territories formerly belonging to pre-war Germany. Hence, the Federal Republic could only have promised not to raise any claims with regard to these territories; claims which would have been manifestly ill-founded anyway. The situation is more complex if the Federal Republic was identical with pre-war Germany. In this case, all parts of the pre-war German territory would belong to the Federal Republic unless and

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[2] *See* Gesetz über die Eingliederung des Saarlandes of 23 December 1956, Bundesgesetzblatt 1956 I, p. 1011.

[3] For an overview *see* J.A. Frowein, *Berlin (1945-91)*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2009, available at: https://doi.org/10.1093/law:epil/9780199231690/e1257 (accessed 30 June 2022), para. 12.

[4] Treaty on the Final Settlement with respect to Germany (signed on 12 September 1990), 1696 UNTS 115.

[5] *See generally* R. Scholz, *Der Status Berlins*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I, *Grundlagen von Staat und Verfassung*, C.F. Müller, Heidelberg: 1987, pp. 363-366 (paras. 9, 28-35).

[6] Regarding continuity between the North German Federation of 1866/1867 and the German Reich, *see* Gornig, *supra* note 1, pp. 15-16.

[7] Agreement between Poland and Federal Republic of Germany concerning the basis for normalization of their mutual relations (signed on 7 December 1970), 830 UNTS 327.

until they had become the territory of another State. In this hypothesis, the Federal Republic would be the predecessor of Poland with regard to the territories east of the Oder-Neisse line, and it would have been competent to renounce any claim to these territories; unless it would have been hindered from doing so by Allied reservations dating back to the unconditional surrender of 1945.

Different theories on the fate of pre-war Germany and the status of the Federal Republic and the German Democratic Republic have been developed after 1945.[8] Some of them are deeply rooted in a specific historical and political context. Viewed against the background of the entire history since 1945 and the current state of international law, only two theories seem realistic. One of them is a tale of identity; and the other a tale of discontinuity. According to the former, the Federal Republic is identical with pre-war Germany; while according to the latter the Federal Republic is a new State, pre-war Germany having ceased to exist at some date after 1945. This article traces both theories against the background of post-war history and considers their impact on the understanding of the Treaty of Warsaw. In the end, the question remains whether the entire controversy still matters.

In principle, the transfer of territorial sovereignty from one State to another State must be assessed according to the rules in force at the time when the transfer of sovereignty takes, or took, place.[9] However, the necessary assessment is not limited to the application of objective criteria. Rather, the perception of the States concerned and the degree of recognition by other States also play an important role.[10] Where a legal situation remains unclear for a long time before being settled, an ex-post analysis may help to analyse what actually happened.

The personal background of the author may influence this legal analysis,[11] and therefore it seems appropriate to make explicit that the author of this article was born in the western part of Berlin, where he passed his first legal State examination in 1990. In his youth, he used stamps of the *Deutsche Bundespost Berlin*, which were different from the stamps issued by the *Deutsche Bundespost*, and his first identity card was not the grey one of the Federal Republic but a green, "provisional" one[12] issued by the authorities of Berlin.

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[8] For an overview *see* R. Bernhardt, *Die Rechtslage Deutschlands*, 26(11) Juristische Schulung 839 (1986), pp. 841-843.

[9] J. Crawford, *Brownlie's International Law*, Oxford University Press, Oxford: 2019, p. 207.

[10] *See also* W. Czapliński, *La continuité, l'identité et la succession d'Etats – Evaluation de cas récents*, 26(2) Revue Belge de Droit International 374 (1993), p. 379.

[11] For more on this problem, *see also* L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR*, Martinus Nijhoff, Leiden: 2003, pp. XXX-XXXI.

[12] German: "behelfsmäßiger Personalausweis".

1. 1945-49

1.1 Continuity of pre-war Germany as a State without a Government

In 1945, Germany was defeated but it did not disappear. The unconditional surrender of 8 May 1945 did not mark the end of German statehood. Although the creation of a new State requires effective government, a temporary loss of government does not affect existing statehood. In this situation, continuity trumps effectivity.[13] Even without effective government, a State continues to exist unless its entire territory is incorporated by one or more other States. State continuity in the absence of effective government has been confirmed in recent history by the cases of Somalia, Afghanistan, and Iraq, which continue to exist even though they lost effective government in the 1990s and the early 2000s, respectively.[14] The contrary theory, espoused by Hans Kelsen in 1945,[15] has not asserted itself.[16] Hence, Germany did not become *terra nullius* in 1945.

It is commonly assumed that the Allies would have had the power to annex Germany in 1945.[17] In fact the UN Charter, which is considered to outlaw any annexation today, was concluded after the unconditional surrender and after the Berlin Declaration of 5 June 1945,[18] and it entered into force after the Conference of Potsdam.

It may be taken for granted that today the prohibition against annexing foreign territory does not apply only to aggressors, but also to States invading another State in legitimate self-defence.[19] However, this broad reading of the prohibition of annexation can hardly be extended to the time before the entry into force of Art. 2(4) of the UN Charter. Rather, insofar as regards the time between 1932 and 1945 one must distinguish between annexations grounded on aggression and annexations by States acting in self-defence. The first have not been recognized as valid after 1945. This is true not only for Germany's annexation of the territories of, *inter alia*, Czechoslovakia and Austria, but also for the Soviet Union annexing

[13] J. Wouters et al., *International Law*, Hart, Oxford: 2019, p. 217.

[14] *See also* J. Crawford, *Creation of States*, Oxford University Press, Oxford: 2007, pp. 694-695.

[15] H. Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 93(3) American Journal of International Law 518 (1945), pp. 520-523.

[16] *See also* Czapliński, *supra* note 10, p. 377.

[17] O. Dörr, *Die Inkorporation als Tatbestand der Staatensukzession*, Duncker & Humblot, Berlin: 1995, pp. 95-102; K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, 23(1/2) Archiv des Völkerrechts 31 (1985), p. 32.

[18] Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the provisional Government of the French Republic, signed in Berlin on 5 June 1945, 68 UNTS 190.

[19] R. Hofmann, *Annexation*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2020, available at: https://doi.org/10.1093/law:epil/9780199231690/e1376 (accessed 30 June 2022), para. 24.

the Baltic States.[20] By contrast, there is no evidence that annexing territories of the German aggressor State would have been unlawful.

But even if the Allied Powers *could have* annexed the entire German territory, it clearly results from post-war documents that they did not do so. According to the Berlin Declaration,[21] they assumed "supreme authority with respect to Germany" while making clear that this did "not effect the annexation of Germany". Thus, Germany became "occupied".[22]

1.2 The fate of German territories east of the Oder-Neisse line

Since pre-war Germany was not extinguished in 1945, Poland did not acquire *terra nullius*. Rather, it took over the territories east of the Oder-Neisse line from pre-war Germany. German consent was not required for this transfer. Having the power to annex Germany as a whole, the Allies also had the power to annex part of the German territory, be it for themselves or in favour of a third State, i.e. Poland.[23] In fact, the Berlin Declaration asserts the power to "determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."

It is less clear whether they really did so in 1945. This has been the object of a long controversy between the Federal Republic and Poland and their respective legal scholars.[24] The Potsdam Agreement[25] seems ambiguous on this point. Chapter VIII B of the Potsdam Agreement placed these territories "under the administration of the Polish State" while reserving "the final delimitation of the western frontier of Poland" for a "peace settlement". On the other hand, the context made clear that the transfer was intended to become permanent. This is shown, in particular, by the expulsion and deportation of the German population from the Oder-Neisse

[20] Mälksoo, *supra* note 12, pp. 24 et seq.; K. Marek, *Identity and Continuity of States in Public International Law*, Librairie Droz, Genève: 1968, pp. 283-330, 338-416; for the Baltic States *see also* Czapliński, *supra* note 11, pp. 386-387.

[21] *See supra* note 18.

[22] *See* Crawford, *supra* note 10, p. 120.

[23] *See* Skubiszewski, *supra* note 17, pp. 32-33.

[24] For Poland *see e.g.* J. Barcz, *The Federal Republic of Germany's Confirmation of the Polish-German Boundary as the Basis for New Relations between Poland and United Germany*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, Elipsa, Warszawa: 2011, pp. 135-144; J. Kranz, *Polish-German Legal Controversies – an Attempt at Synthesis*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, Elipsa, Warszawa: 2011, pp. 422-423; K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 Revue générale de droit international public 242 (1957), pp. 242-258; Skubiszewski, *supra* note 17, pp. 31-41. For the FRG, *see e.g.* J.A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, 48 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 7 (1990), pp. 16-17; Gornig, *supra* note 1, pp. 50-65; O. Luchterhandt, *Die staatliche Teilung Deutschlands*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I: *Historische Grundlagen*, C.F. Müller, Heidelberg: 2003, p. 460 (§ 10, para. 76).

[25] Protocol of the Proceedings of the Berlin Conference, 1 August 1945, available at: https://history.state.gov/historicaldocuments/frus1945Berlinv02/d1383 (accessed 30 June 2022).

territories, which was organized in part by the Allied powers themselves under Chapter XII of the Potsdam agreement.[26] However, since the peace settlement envisaged in 1945 was not realised, doubts remained.

2. 1949-1990: THE FRG AND GDR AS TWO GERMAN STATES

2.1 Initial concurring claims for continuity

During the early period of the Post-Second World War relations, both German governments stuck to the idea of German unity and both claimed to be the true representative of the German people.[27] This comes closer to a dispute over who is the genuine German Government than to the creation of two new, independent States. It resembles to the situation in China after 1949, when the Governments in Beijing and in Taipei both claimed to be the legitimate representative of the single Chinese State.[28] As long as both Governments claim continuity with the former State, there is no ground for the *de jure* creation of a new State.

The original version of the Basic Law adopted by the FRG on 23 May 1949[29] clearly showed the West German continuity claim. According to the preamble, the German people in the Western German Länder had acted also on behalf of those Germans who could not participate. According to its former Article 23, the Basic Law would apply at first only to the Western German Länder, whereas it should enter into force in other parts of Germany after their accession.

As for the GDR, the Treaty of Zgorzelec of 1950, which fixed the border between Poland and the GDR, equally refers to the idea of German unity.[30] In fact, Art. 1 of the agreement confirms the "State frontier between Germany and Poland", not between the GDR and Poland. Moreover, the Preamble refers to the German people, thus showing that the GDR claimed to speak for Germany as a whole.[31]

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[26] *See* Skubiszewski, *supra* note 17, p. 32.

[27] For the FRG, *see* Luchterhandt, *supra* note 25, p. 458 (§ 10, para. 74); For the GDR, *see* J. Hacker, *Der Rechtsstatus Deutschlands aus der Sicht der DDR*, Verlag Wissenschaft und Politik, Köln: 1974, pp. 105-115; *see also* Czapliński, *supra* note 10, p. 380.

[28] *See* L. Chen, *An Introduction to Contemporary International Law*, Oxford University Press, Oxford: 2015, pp. 48-51.

[29] Bundesgesetzblatt 1949, p. 1.

[30] Agreement concerning the demarcation of the established and existing Polish-German State frontier (signed on 6 July 1950), 319 UNTS 93.

[31] R.W. Piotrowicz, S.K.N. Blay, *The Unification of Germany in International and Domestic Law*, Rodopi, Amsterdam: 1997, p. 52.

2.2 The fate of the GDR as a separate State

The GDR soon abandoned its claim for continuity and considered itself to be a new State, pre-war Germany having ceased to exist in 1945.[32] It has already been shown that the assumption that German statehood ended in 1945 cannot be upheld. Rather, the GDR's claim of independence must be interpreted as the establishment of a new State on part of the territory of pre-war Germany.[33] This separation from pre-war Germany was definitely concluded when the GDR and the Federal Republic were both admitted to the United Nations and thus recognized as independent States by the international community in 1973.[34]

The GDR existed until 1990, when it acceded to the Federal Republic of Germany by unilateral declaration, an option provided for by the original Article 23 of the FRG Basic Law,[35] which was still in force at that time. There can be no serious doubt that German unification constituted an incorporation of the GDR into the Federal Republic.[36] Hence the GDR, which had been established in 1949 by way of separation from pre-war Germany, ceased to exist in 1990, while the identity of the Federal Republic remained unchanged.

2.3 The FRG's claim for continuity

Whereas the GDR, which existed between 1949 and 1990, had appeared as a new State on the international stage, the Federal Republic did not abandon its claim of continuity with pre-war Germany.[37] The most striking evidence of this claim can be found in the West German citizenship law. In fact, the people is a constitutive element of any new State. If the Federal Republic of Germany had been a new State, established on the western territories of pre-war Germany, citizenship could not have extended in principle beyond the German population living on the territory of the new State. Granting FRG citizenship *ipso jure* to all German inhabitants of the GDR would have been unlawful. The Federal Republic, however, continued to

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[32] Hacker, *supra* note 28, pp. 116-132; *see also* Czapliński, *supra* note 10, pp. 380-381; Piotrowicz, Blay, *supra* note 32, p. 25.

[33] *See* Crawford, *supra* note 14, pp. 457-458.

[34] *Ibidem*, p. 458; R. Bernhardt, *Deutschland nach 30 Jahren Grundgesetz*, de Gruyter, Berlin: 1980, pp. 13-14; *see also* Czapliński, *supra* note 10, p. 382.

[35] *See* Protocol of the Proceedings of the Berlin Conference, *supra* note 29.

[36] Crawford, *supra* note 14, pp. 674, 686; Czapliński, *supra* note 10, p. 383; R. Dolzer, *Die Identität Deutschlands vor und nach der Wiedervereinigung*, in: Isensee, Kirchhof (eds.), *supra* note 25, pp. 676-677 (§ 13 para. 12); Dörr, *supra* note 17, pp. 148-151, 399-404; *see also* J. Barcz, *Das Pariser Protokoll vom 17. Juli 1990 und die Grenze zwischen Polen und dem vereinten Deutschland*, in: Ch. Koch (ed.), *Politik ist die Praxis der Wissenschaft vom Notwendigen*, Martin Meidenhauer Verlagsbuchhandlung, München: 2010, p. 325; Barcz, *supra* note 25, pp. 146, 154.

[37] *See* Memorandum of the Foreign Office of the FRG of June 1961, reprinted in J. Jurina, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1961*, 23 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 405 (1963), pp. 452-458.

apply the *Reichs- und Staatsangehörigkeitsgesetz* of 1913, i.e. the pre-war citizenship law, according to which all pre-war German citizens and their descendants were and continued to be FRG citizens.[38] This corresponds to an identity tale. If the FRG were identical with pre-war Germany, the loss of territory east of the inner-German border would not automatically entail the loss of citizenship for Germans living east of the new border.[39] Hence, the Federal Republic could in principle apply its unchanged pre-war citizenship law at least as a kind of an "open door"[40] for GDR citizens.

Therefore, the West German Federal Constitutional Court was able to declare in its 1987 *Teso* decision that the Federal Republic of Germany had held itself to be identical with the German Reich right from the beginning.[41] At the same time however, even official statements of the West German authorities remained ambiguous about German identity.[42] In 1973, the same Federal Constitutional Court had introduced an equivocal concept of partial and non-exclusive identity.[43] The idea that two different States could both be identical with the same original State finds no support in general international law. Moreover, the identity claim is incompatible with the Court's further statement that both German States were parts of a still existing, overarching German State without functioning institutions, which was therefore unable to act.[44] If the Federal Republic of Germany was identical with pre-war Germany, the latter would have been able to act through the institutions of the Federal Republic. Hence, Władysław Czapliński has called the German position "confused",[45] and this view has been shared by a series of West German legal scholars.[46]

It is true that international law is flexible. However, the concept of partial identity has never been either broadly recognized by the international community, nor is it

[38] *See* R. Grawert, *Staatsvolk und Staatsangehörigkeit*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. II: *Verfassungsstaat*, C.F. Müller, Heidelberg: 2004, p. 129 (§ 16, para. 45); Luchterhandt, *supra* note 25, p. 461 (§ 10, paras. 77-78).

[39] *See* R. Jennings, A. Watts, *Oppenheim's International Law*, Vol. 1, Oxford University Press, Oxford: 2008, p. 224; *cf. also* Art. 6 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession of 19 May 2006, Council of Europe Treaty Series No. 200; *but see also* Crawford, *supra* note 9, pp. 418-421.

[40] *See* Luchterhandt, *supra* note 25, p. 461 (§ 10 para. 77).

[41] Bundesverfassungsgericht, Decision, 21 October 1987 – 2 BvR 373/83, 77 Entscheidungen des Bundesverfassungsgerichts 137 (1988), p. 155.

[42] *See also* Crawford, *supra* note 14, p. 682.

[43] Bundesverfassungsgericht, Judgment, 31 July 1973 – 2 BvR 1/73, 36 Entscheidungen des Bundesverfassungsgerichts 1 (1974), p. 16; *see also* W. Geiger, *Zur Rechtslage Deutschlands*, 36(41) Neue Juristische Wochenschrift 2302 (1983), pp. 2302-2304.

[44] Bundesverfassungsgericht, *supra* note 44, p. 23.

[45] Czapliński, *supra* note 10, p. 380: "position ... confuse"; *see also* p. 382.

[46] *E.g.* R. Bernhardt, *Die deutsche Teilung und der Status Gesamtdeutschlands*, in: Isensee, Kirchhof (eds.), *supra* note 5, p. 339 (§ 8, Rn. 32); Luchterhandt, *supra* note 24, pp. 458-459 (§ 10, para. 74).

necessary in order to explain what happened between 1945 and 1990. Whilst the GDR, which held per-war Germany to be extinguished in 1945, clearly contradicted the FRG continuity claim, other States – including the western Allies – were more cautious. Even the 1990 4+2 Treaty avoids any clear statement in favour of FRG continuity with pre-war Germany.[47] This led James Crawford to conclude in 2006 that the FRG had not been identical with the German Reich, at least until 1990.[48]

3. THE STATUS OF WEST BERLIN

The status of West Berlin is a touchstone for the FRG's identity claim. Until 1990, the three western Allies had retained ultimate control over the western part of Berlin, although its status had been largely assimilated to that of a Land of the Federal Republic.[49] West Berlin had been part of pre-war Germany, and if the Federal Republic had been identical with pre-war Germany West Berlin would have been part of the Federal Republic while still under Allied occupation. The Federal Republic would simply have regained full control over this part of its territory on 3 October 1990. If, by contrast, the Federal Republic was a new State, West Berlin would not have been part of it until 1990 for lack of effective control. In this case Berlin, or at least West Berlin, would have been the only part of pre-war Germany subsisting until 1990;[50] all the other parts having been incorporated into the FRG, the GDR, Poland and – insofar as the region of Kaliningrad is concerned – the USSR. In this case, pre-war Germany would have ceased to exist on 3 October 1990, when the last part of its territory was incorporated into the Federal Republic.

In the Quadripartite Agreement on Berlin, France, the USSR, the United Kingdom and the United States agreed on 3 September 1971 that West Berlin "continue[d] not to be a constituent part of the Federal Republic of Germany and not to be governed by it".[51] Whilst the latter assertion is compatible with both views on the status of Berlin, the former suggests that the city was a part of a pre-war Germany distinct from the Federal Republic. Hence, the Federal Republic would not have been identical with pre-war Germany. The 2 + 4 Treaty does not settle whether West Berlin had been part of the Federal Republic before 1990, but it does provide some

[47] Crawford, *supra* note 15, pp. 686-687.

[48] *Ibidem*, pp. 466, 684; *but see* Czapliński, *supra* note 10, pp. 381-382 with a preference for the continuity claim.

[49] For more on the special status of Berlin, *see* Luchterhandt, *supra* note 25, pp. 444-446 (§ 10 paras. 45-51); C. Pestalozza, *Berlin – ein deutsches Land*, 23(4) Juristische Schulung 241 (1983), pp. 241-254; H. Sendler, *Berlin – juristisch betrachtet aus der Sicht eines richterlichen Praktikers*, 24(6) Juristische Schulung 432 (1984), pp. 432-434.

[50] This is the view taken by Crawford, *supra* note 14, pp. 464-466, 683-684.

[51] Part II(B) of the Quadripartite Agreement on Berlin of 3 September 1971, 880 UNTS 115.

arguments against identity. According to its Art. 1(1), "[t]he united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin." The article thus treats Berlin separately from the FRG. Hence, it could be understood to provide the Four Powers' consent to incorporate Berlin, i.e. the last remaining part of pre-war Germany, into the Federal Republic of Germany. However, the phrasing does not necessarily contradict the idea of identity between pre-war Germany and the Federal Republic. Rather, it could simply clarify that the special status of Berlin as a territory under Allied control had come to an end.

James Crawford has tried to construe identity through some kind of merger.[52] However, this seems hardly convincing. German unification in 1990 was clearly framed as an incorporation of the GDR, and perhaps Berlin, into the Federal Republic. The idea that such an incorporation should establish identity between the incorporating State and another State contradicts general concepts of incorporation.[53] Hence, either the Federal Republic is a new State created in 1949, or it has been identical with pre-war Germany right from its beginning.

4. CONSEQUENCES FOR THE ODER-NEISSE BORDER AND THE 1970 TREATY OF WARSAW

The question of the identity or non-identity of the FRG with the pre-war German State determines the scope of the Treaty of Warsaw, in which the Federal Republic of Germany accepted the western border of Poland in 1970. In fact, Art. 1 of the Treaty of Warsaw not only confirmed the Oder-Neisse line as the Western border of Poland and its inviolable character, but the Federal Republic declared in Art. 1(3) that it had "no territorial claims" against Poland and that it would "advance none in the future."[54] If the Federal Republic were a new State established on the western part of the German territory, that new State had never gained effective control over the territories east of the Oder-Neisse line and these territories had never become part of the Federal Republic. Hence, the Federal Republic could confirm, of course, that it had no territorial claims on these territories, which was true anyhow, but it could not take any relevant decision with regard to sovereignty over these territories. The transfer of sovereignty from pre-war Germany to Poland did not affect the Federal Republic as a third State. At the same time, the Federal Republic, if distinct from pre-war Germany, could not have taken any decision binding upon

[52] Crawford, *supra* note 15, p. 688.
[53] *See also* Czapliński, *supra* note 10, p. 376.
[54] English translation reproduced in 830 UNTS 334.

pre-war Germany,[55] which continued to exist until 1990. Hence, Western Germany's implicit reservation with regard to Germany as a whole would have been correct.

If, by contrast, the Federal Republic were and had been identical with pre-war Germany, the territories east of the Oder-Neisse line would have been former territories of the State now called the Federal Republic of Germany. In this case, the Federal Republic, as the former sovereign, would be the predecessor of Poland with regard to these territories. Hence, the Federal Republic would have been able in principle to take a binding decision on the loss of its territorial title. The identity tale thus puts Poland in a better position with regard to the scope of the Treaty of Warsaw.

Even in case of identity however, the Allies' reservation with regard to Germany as a whole could have hindered the Federal Republic from taking a definite decision in 1970.[56] In fact, the Berlin Declaration of 1945 had asserted the Allies' power to determine the status of the territories east of the Oder- Neisse line, and the Potsdam Agreement had envisaged a peace settlement for that purpose.[57] According to its Art. IV, the 1970 Treaty of Warsaw does not prejudice "any bilateral or multilateral international agreements which" Germany and Poland "have previously concluded or which affect them." Both the Berlin Declaration, which was published in the United Nations Treaties Series,[58] and the Agreement of Potsdam can be considered to be such international agreements concerning Germany and, insofar as the territories east of the Oder-Neisse line are concerned, also Poland.[59] Therefore, the Four Power's reservation regarding Germany as a whole, its territory, and a final peace settlement cast doubt on the scope of the Federal Republic's undertaking, even if the Federal Republic were the predecessor of Poland.

CONCLUSION: DOES HISTORY MATTER?

To sum up, the lack of a formal peace settlement had left the formal status of the Oder-Neisse line somewhat unclear until 1990, although there are good reasons to contend that the border had become final either in 1945 or soon thereafter, and in

[55] *See* Piotrowicz, Blay, *supra* note 32, p. 58.

[56] *See* Bundesverfassungsgericht, Decision of 7 July 1975 – 1 BvR 274/72, 40 Entscheidungen des Bundesverfassungsgerichts 141 (1976), pp. 172-175; Bernhardt, *supra* note 8, p. 844; R. Geiger, *Grundgesetz und Völkerrecht*, C.H. Beck, München: 2010, pp. 63-64; Gornig, *supra* note 1, pp. 71-73; *but cf.* Kranz, *supra* note 25, p. 425 stressing the FRG's room for manoeuvre.

[57] *See supra* Section 1.2.

[58] *See supra* note 18.

[59] *See also* Frowein, *supra* note 25, p. 18; J.A. Frowein, *Potsdam Conference (1945)*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2009, available at https://doi.org/10.1093/law:epil/9780199231690/e379 (accessed 30 June 2022), para. 14.

any event long before 1990.[60] Due to Allied reservations with regard to "Germany as a whole", the Warsaw Treaty of 1970 could not disperse all doubts even if one assumes that the Federal Republic, which relinquished any present or future claim with regard to the territories east of the Oder-Neisse line at that time, was identical with pre-war Germany. It seems wise, therefore, that the border was unequivocally confirmed in 1990 both by Art. 1 of the 2 + 4 Treaty and by the Polish-German Border Treaty.[61, 62] Hence, any doubts as to the legal status of the former German territories which now belong to Poland have been removed.

The idea that the Federal Republic of Germany is not identical with pre-war Germany may seem odd for German legal scholars. Nevertheless, some doubts about the identity of today's Germany with pre-1945 Germany persist. It is true that the general presumption of continuity[63] corroborates Germany's identity claim. However, continuity is not necessary to explain the Federal Republic's undisputed ongoing responsibility for the acts of the German Reich. Assuming a case of State succession would lead to more or less the same results. If the Federal Republic of Germany, which was established in 1949, were to be considered a new State, it assumed all rights and obligations of the German Reich under the law of State succession, being the successor both of pre-war Germany and of the GDR. It is true that general international law does not provide for State succession into membership in International Organisations,[64] however most International Organisations were established after 1945 and pre-war Germany never had been a member of them. In 1952, there was a debate on which German State was able to ratify the International Telecommunication Convention of 2 October 1947,[65] but since then all questions of German membership in pre-war Organisations have been settled.

More than 50 years after the Treaty of Warsaw and more than 30 years after German unification and the German-Polish Border Treaty of 1990, there are no open issues left that would require settling the question of whether the FRG and Pre-war Germany are identical. Therefore, the fate of the German Reich in terms of identity or State succession may remain in the mist of history.

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[60] *See also* Frowein, *supra* note 24, p. 19; but see Gornig, *supra* note 1, pp. 77-83 for a constitutive transfer of sovereignty in 1990.

[61] Treaty concerning the confirmation of the existing Polish-German state frontier, signed in Warsaw on 14 November 1990, Bundesgesetzblatt 1991 II, p. 1329; 1708 UNTS 377.

[62] *Cf. also* Barcz, *supra* note 25, p. 326; J. Barcz, *Some Reflections on the 25th Anniversary of the Polish-German Treaty*, 11 Przegląd Zachodni 145 (2017), pp. 146-148.

[63] *See* Crawford, *supra* note 14, pp. 675, 701, 715; Gornig, *supra* note 1, p. 9.

[64] Crawford, *supra* note 10, pp. 427-428.

[65] International Telecommunication Union, Plenipotentiary Conference, Minutes of the second meeting held on 8 October 1952 at 16 h, Document No. 54-E, in: ITU, Documents of the Plenipotentiary Conference (Buenos Aires, 1952), available at: https://search.itu.int/history/HistoryDigitalCollectionDocLibrary/4.8.51.en.101.pdf (accessed 30 June 2022).

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THE GERMAN-POLISH TREATIES OF 1970 AND 1990/1991 AND THE QUESTION OF REPARATIONS

Abstract: *The article takes the renewed demands of the Polish government as an opportunity to examine the question of whether Germany is obliged to pay reparations to Poland. Based on an analysis of the international agreements concluded since 1945, it can be shown that the Polish government's demands on Germany are unfounded.*

Keywords: reparations, London Debt Agreement of 1953, Polish-German Treaty of 1970, 2+4 Treaty, reparations and individual claims

INTRODUCTION

Recently the current Polish government has repeatedly stressed that the question of reparations of the Polish Republic against the Federal Republic of Germany has not been resolved so far,[1] and that none of the developments after the Second World War contributed to a final solution. As a consequence, this article will investigate the history of said developments and try to answer the question of whether or not reparations for the massive breach of international law – and particularly the mass murders committed by the national socialist regime in Germany against the Polish

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[1] *See e.g.* Polish Foreign Minister Czaputowicz, *Unsere Verluste waren viel viel größer*, Spiegel online, 4 September 2018, available at: https://www.spiegel.de/politik/ausland/polen-will-reparationen-haben-das-recht-ueber-entschaedigungen-zu-reden-a-1226455.html; *see also* J. Christof, *Beglichene Schuld? - Deutsche Reparationen nach dem Zweiten Weltkrieg?*, mdr, 6 April 2021, available at: https://www.mdr.de/zeitreise/reparation-ddr-100.html (both accessed 30 June 2022).

population – have been compensated by the successors of what was the legal subject of Germany between 1933 and 1945.[2]

1. THE NOTION OF REPARATIONS UNDER INTERNATIONAL LAW

The term "reparations" in international law refers to payments made by one state in order to compensate for its breaches of international law.[3] Any obligation to make reparations must be established – according to the prevailing legal opinion – with respect to the states that contributed to the war in which the respective damages took place. In older times the prevailing opinion was that it was the right of the victorious power to get what it could as a form of compensation. For example, Art. 231 of the Treaty of Versailles of 1919 ending First World War had designated Germany as the sole guilty party in the war, which enabled all other countries involved in the war to seek compensation and reparations against the German Reich. In the following part of this article, we will historically go through the years after 1945 and thereby delimit the question of reparations from the question of individual compensation of victims of war.

2. THE HISTORICAL DEVELOPMENT

2.1. 8/9 May 1945

As is well known, on 8/9 May 1945 the German army declared its unconditional surrender, which meant that all acts of warfare in Europe came to an end. At that point, no reparations had been given or taken.

2.2. Potsdam Agreement of 1945

The first legal document of relevance is the Potsdam Agreement of the four allied and occupying powers of 2 August 1945.[4] In this Agreement it was stipulated that the Soviet Union could take its reparations out of its zone of occupation in Germany and could /should thereby include Polish claims for reparation, which also should be taken from the Soviet occupied zone.[5] On 14 January 1946 the three Western allied occupying powers – namely the United States of America, the United King-

[2] For an early account in the literature *see* H. Rumpf, *Die deutsche Frage und die Reparation*, 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 344 (1973).

[3] *See* A. de Zayas, *Reparation*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. IV, North-Holland, Amsterdam, New York: 2004, pp. 185 et seq.

[4] For the text *see* Mitteilung über die Dreimächtekonferenz von Berlin ("Potsdamer Abkommen"), 2 August 1945, available at: http://www.documentArchiv.de/in/1945/potsdamer-abkommen.html (accessed 30 June 2022).

[5] *See* note 4 under subsection IV "Reparations from Germany".

dom of Great Britain and Northern Ireland, and the French Republic – agreed on a division of valuables from the Western-occupied zones of Germany.

2.3. London Debt Agreement of 1953

Next, the London Debt Agreement was concluded on 27 February 1953.[6] The London Debt Agreement ended negotiations about the treatment of Germany's debts with foreign countries as of 1953. These stemmed to a great extent from the economic help of the post-war period, particularly that of the so-called Marshall Plan of the United States of America. Moreover, the war debts of the German Reich and loans given to Germany by American banks after the end of the war determined the debt of Germany. The London Debt Agreement also included the final part of reparations from Germany under the Versailles Treaty of 1919. Altogether the debt was summed up to the amount of 29.3 billion Deutsche Mark, and was reduced at the end of the negotiations to a sum of 14.8 billion Deutsche Mark, all inclusive. This sum was the basis for a yearly German re-payment obligation, which started in 1953 with a first tranche of 340 million Deutsche Mark.

The parties to the London Debt Agreement were France, the United Kingdom, the United States of America, Belgium, Ceylon, Denmark, Greece, Iran, Ireland, Italy, Yugoslavia, Canada, Liechtenstein, Luxemburg, Norway, Pakistan, Sweden, Switzerland, Spain and South Africa. All debt among the Western parties themselves was deferred. No regulation was made in the agreement with regard to any debt on the part of the Federal Republic of Germany toward the Eastern European countries. Those debts were regulated according to an agreement by the Soviet Union with the Republic of Poland. There was however no global agreement. Furthermore, the German Democratic Republic did not accept any reparation obligations because it did not consider itself as the legal successor of the (fascist) German Reich. As a consequence, there were no more reparations to the Soviet Union from the Western zone, but only from the Soviet-occupied zones. Those reparations included the ones owed to Poland.[7]

2.4. Protocol of 1957

In a final protocol of 4 July 1957[8] Poland officially recognized that with respect to the Soviet Union all Soviet obligations from the Potsdam Agreement were attained. The result of this final protocol was confirmed in 2005 in a position paper of the Polish Foreign Ministry.

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[6] *See* Bundesgesetzblatt (BGBl.) 1953 II, 331, 556.

[7] *See* D. Blumenwitz, *Die Frage der deutschen Reparationen*, in: H.J. Cremer et al. (eds.), *Tradition und Weltoffenheit des Rechts, Festschrift für Helmut Steinberger*, Springer, Berlin: 2002, pp. 63 et seq.

[8] For more on this, *see* Ministry of Foreign Affairs, *Legal Advisory Committee on Polish World War II-Related Reparation Claims with Respect to Germany, Position Paper, 10 February 2005*, 14(1) The Polish Quarterly of International Affairs 138 (2005).

2.5. Polish-German Treaty of 1970

The German-Polish Treaty of 1970, which was signed on 7 December 1970,[9] did not itself include any regulation of the question of reparations.

However, preceding and concurrent with the negotiations of the German-Polish Agreement of 1970 there was also an unofficial understanding between the Chairman of the Polish United Worker's Party Władysław Gomułka and Federal German Chancellor Willy Brandt that the Federal Republic of Germany would grant a USD 10 billion credit to the Socialist Republic of Poland – to be paid over a period of ten years – in order to terminate any claims for reparations by the Polish Government.[10]

2.6. The 2+4 Treaty of 1990

The 2+4 Treaty of 12 September 1990[11] does not explicitly mention any claims for reparations.

It is a widespread opinion that this so-called 2+4 Treaty – a treaty between the two then still-existing German states and the four occupying powers (the United States of America, the Soviet Union, France and the United Kingdom) was the latest possible point in time to make claims for reparations,[12] and that after the conclusion of this treaty all such claims for reparations would be dissolved. One argument in support of this position was that the moratorium according to Art. 2, para. 2 of the London Debt Agreement had expired.

2.7. The Charter of Paris of 1990

The Charter of Paris of 1990[13] took positive note of the 2+4 Treaty. This Charter was, so to speak, the overture for the new relations between the countries in Europe following the end of the Soviet occupation of Eastern Europe.

2.8. The Germany – Poland Treaty of 1991

On 17 June 1991 the Federal Republic of Germany and the Polish Republic concluded a treaty on good neighbourliness.[14] This treaty did not regulate at all any questions of assets. According to the common understanding the installation of a compensation fund was a voluntary act on the part of Germany based on moral inspirations.

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[9] BGBl. 1972 II 361.

[10] *See* R.A. Blasius (ed.), *Akte zur Auswärtigen Politik der Bundesrepublik Deutschland, 1970, vol. 1, 1 January – 30 April 1970*, R. Oldenbourg, München: 2001, p. 2201.

[11] BGBl. 1990 II 131/7 in force since 15 March.

[12] Ministry of Foreign Affairs, *supra* note 8, p. 141.

[13] Charter of Paris for a New Europe, available at http//www.OSCE.org/de/mc/39518 (accessed 30 June 2022).

[14] BGBl. 1991 II, Nr 33, 1315 and exchange of letters between the Polish and the German Foreign Minister of 17 June 1991, BGBl. 1991 II, Nr. 33, 1327.

Thus at the end one must conclude that existing Polish claims for reparations had been renounced in a declaration of 1 January 1954 vis-à-vis the entire Germany, although it was declared only with respect to the German Democratic Republic. Moreover, in favour of Germany one can argue about the legal title of forfeiture, which does exist as a general principle of law in international law.[15]

Today Germany has for a long time relied *bona fide* on the fact that Poland would no longer raise any claims of reparation. In addition, any such claims for reparations would today be limited.

This does not however refer to the question of individual claims. Germany's possible reparations would be limited to those against the state of the Federal Republic of Germany. This had not changed despite a certain tendency in international law toward a growing practice of individual claims, like in the cases of Distomo,[16] Varvarin,[17] and Kunduz.[18] These cases may reflect a certain tendency toward the individualization of international law. But neither the International Court of Justice, nor the German Federal Constitutional Court, have ever recognized such individual claims.[19] The same would arguably apply to any individual claims of Germans arising from their first resettlement out of Poland.

CONCLUSIONS

The massive violations of international law, as well as the cruel mass murder of the Polish population during the Second World War established claims of the Polish state against the Federal Republic of Germany and the German Democratic Republic as successor states of the German Reich. But in the London Debt Agreement the concrete regulation of reparation claims more or less exempted West Germany from claims of the Polish Republic. This was one of the reasons why during the negotiations of the 1970 Treaty between Germany and Poland the Polish renunciation of any further reparation claims was confirmed. Finally, the 2+4 Treaty of 1990,

[15] For more on the tacit consent and acquiescence basis of forfeiture *see* N.S. Marques Antunes, *Acquiescence (2006)*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, available at: https://bit.ly/3LkSFpt and D. König, *Tacit Consent/Opt Out Procedures (2013)*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law*, available at: https://bit.ly/3lj0gKC (both accessed 30 June 2022).

[16] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep 2012, p. 99.

[17] LG Bonn 10.12.2003 – 1 O 321/02; OLG Köln, 28.7.2005 – 7 U 8/04; BGH 2.11.2006 III ZR 190/05 and 2007, III ZR 190/05; BVerfG 13.02.2013, 2 BvR 2660/06/2 BvR 2660/06/2 BvR 487/07.

[18] LG Bonn 11.12.2013, 1 O 460/11; OLG Köln 30.4.2015, 7 U 4/14; BGH 24.3.2016. III ZR 140/15; BVerfG 18.11.2020, 2 BvR 477/17.

[19] *See supra* notes 16-18.

which does not contain any regulation of reparations, makes it clear that there are no more reparation claims from Poland against the Federal Republic of Germany.

In addition, such claims cannot take the form of individual claims as a possible consequence of the individualisation of international law, because such individualisation has not been recognized by the International Court of Justice to be part of international law.

Thus any prospective claims of the Polish government against Germany which were mentioned at the beginning of this article are unfounded. This does not, however, exclude that the two countries – which live together as good neighbours – could express their good neighbourliness in (a) common project(s) sponsored by a German-Polish Foundation into which the Federal Republic of Germany would pay a considerable amount. Such a fund could promote the idea that such realized projects are particularly aimed at stimulating German-Polish friendship among young people.

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MINORITY PROTECTION IN GERMAN-POLISH RELATIONS – HISTORICAL INFLUENCE AND CURRENT RELEVANCE

Abstract: *The anniversaries of the 1970 Warsaw and the 1990 2+4 Treaties give occasion to revisit the matter of minority protection in German-Polish relations. The interwar system established a problematic unevenness that tainted its acceptance, particularly from the Polish perspective. After 1990 the minority issues achieved an increased, albeit moderate, relevance in German-Polish relations. To some extent the 1991 Polish-German Treaty on Good Neighbourly Relations and Friendly Co-operation retains the unevenness of the inter-war period, as Art. 20(1) recognizes a German minority in Poland, but refuses to acknowledge a Polish minority in Germany. However, currently the thorniest issues concern various situations related to the "Silesians" in Poland, which the Polish government does not recognize as a protected minority under the European Council Framework Convention for the Protection of National Minorities.*

Keywords: minorities, inter-war period, 1991 Polish-German Treaty, Framework Convention for the Protection of National Minorities

INTRODUCTION

Minority protection – a topic that was front and centre in German-Polish relations in the inter-war period – has received much less attention since the end of the Second World War. However, the anniversaries of the 1970 Warsaw[1] and the 1990

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[1] Treaty between the Federal Republic of Germany and the People's Republic of Poland Concerning the Basis for Normalizing Their Mutual Relations (signed on 7 December 1970) 830 UNTS 327.

2+4 Treaties,[2] milestones in the improvement of a historically strained relationship, offer the occasion for an inquiry into the current relevance of minority protection in the relations between both countries.

In the following, I first explain the challenges of defining "minority" in international law (Section 1). Thereafter, the historical development of minority protection, with a particular focus on Germany and Poland, will be traced from the inter-war period (Section 2) to the end of the Cold War (Section 3.1) and until today (Section 3.2). In Section 4, I discuss current challenges in German-Polish relations pertaining to minority issues, focusing on the (non-)recognition of the Polish minority in Germany (4.1); the special situations of Silesians in Poland (4.2); as well as an ongoing dispute over a territorial and administrative reform affecting the rights of the German minority in the Opole (Oppeln) region (4.3). Section 5 concludes this contribution.

1. (NOT) DEFINING "MINORITY" IN INTERNATIONAL LAW

The search for a definition of what constitutes a "minority" for the purposes of the present discussion – usually the starting point of a doctrinal inquiry into any legal matter – already gives us pause. No definition of the term has been universally accepted.[3] Neither the heyday of minority protection in the inter-war period;[4] nor the negotiation, adoption and discussion of the central post-1945 instruments on minority protection; nor Art. 27 of the International Covenant on Civil and Political Rights (ICCPR);[5] nor the European Council Framework Convention for the Protection of National Minorities (FCNM)[6] have filled this void. However, since the 1920s, it has been established that minority protection is built on two central

[2] Treaty on the Final Settlement with Respect to Germany (signed on 12 September 1990), 1696 UNTS 115.

[3] *See e.g.* R. Hofmann, *Menschenrechte und der Schutz nationaler Minderheiten*, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 587 (2005), p. 599; R. Hofmann, *Minderheitenschutz in Europa – Überblick über die völkerrechtliche Lage*, 52 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 (1992), p. 2; C. Henard, *Minorities, International Protection*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), para. 1.

[4] *Cf.* A. Meijknecht, *Minority Protection System between World War I and World War II*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022); G. Dahm, *Völkerrecht* (1st ed.), W. Kohlhammer, Stuttgart: 1958, Vol. I, pp. 393 et seq.; H. Lauterpacht, *Guggenheim's International Law* (8th ed.), Longmans, Green & Co., London: 1955, Vol. I – Peace, pp. 711 et seq. *See also infra* Section 2.

[5] International Covenant on Civil and Political Rights (signed on 16 December 1966), 999 UNTS 171 and 1057 UNTS 407. *See also infra* Section 3.1.

[6] European Council Framework Convention for the Protection of National Minorities, 1 February 1995, ETS No. 157. *See also infra* Section 3.2.

pillars, as famously summarized by the Permanent Court of International Justice (PCIJ) in 1935 in the *Minority Schools in Albania* Advisory Opinion:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs. In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.
>
> The *first* is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect *equality* with the other nationals of the State.
>
> The *second* is to ensure for the minority elements suitable means for the *preservation of their racial peculiarities, their traditions and their national characteristics*.
>
> These two requirements are indeed *closely interlocked*, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.[7]

Thus, equality and identity form the core principles of minority protection.[8] The equality principle means substantive equality, i.e. not the obligation to treat everybody exactly the same but rather to take into account the relevant and often differing circumstances, which might even necessitate differential treatment.[9] The identity principle requires respect for a minority's specific and separate identity – in religious, cultural, linguistic or other forms.[10] These two principles, as the PCIJ noted in the above-cited *Albanian Minority Schools* case, are interlinked, since denying the minority's identity automatically amounts to discrimination, and unequal treatment affects minority identity.

However, the quote above indicates further central characteristics of minority protection, which pertain to its relationship to human rights protection. International and regional human rights instruments focus on the individual. Human beings enjoy

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[7] PCIJ, *Minority Schools in Albania*, Advisory Opinion, 6 April 1935, PCIJ Series A/B No. 64, p. 17 (emphases added).

[8] *See also* Henard, *supra* note 3, para. 21.

[9] *Ibidem*.

[10] *Cf. e.g.* R. Hofmann, *Minorities, European Protection*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2007), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), paras. 21 et seq.

human rights for the mere sake of their individual existence.[11] By contrast, minority rights, through their element of minority identity, require group membership and thus have a collective side to them.[12] Therefore, minority rights may display both individual and collective aspects: the rights of the individual to identify as part of a minority and be treated equally, as expressed for example in Art. 27 ICCPR;[13] and the right of the minority as a collective to respect for their identity and equality.[14] In addition to, and as a consequence of the aforesaid, minority protection inheres a rationale beyond that of international human rights protection. Minorities are protected not merely for the sake of their existence, but furthermore because their protection is pivotal for the maintenance of international peace and security.[15] Hence besides serving individual and group interests, minority rights also serve the general interest of states in ensuring that their populations, both majority and minority, "liv[e] peaceably alongside" each other and "co-operat[e] amicably",[16] as clashes between ethnic, religious or other minorities have historically been an important root cause for war and other armed conflicts.[17]

While a universally accepted definition of "minority" is still lacking, and the most important international and regional instruments, such as Art. 27 ICCPR and the FCNM, merely employ the term without undertaking to define it, two points deserve emphasis. First, an attempt to provide a definition by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the (then) UN Human Rights Commission,[18] has received the most widespread recognition in practice and scholarship.[19] According to the criteria he laid out, a "minority" has both objective and subjective characteristics.[20] Objectively, a minority denotes a group that is numerically inferior to the rest of the population, with ethnic, religious, or linguistic features different from the rest of the population and with a non-dominant position within the state, but whose members are citizens of that state. Subjectively, there needs to exist "a will on the part of the members of the

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[11] For a *locus classicus see* H. Lauterpacht, *An International Bill of the Rights of Man*, Oxford University Press, Oxford: 2013 (reprint of the 1945 edition); H. Lauterpacht, *International Law and Human Rights*, Stevens & Sons, London: 1950.

[12] *Cf.* D. Kugelmann, *Minderheitenschutz als Menschenrechtsschutz – Die Zuordnung kollektiver und individueller Gehalte des Minderheitenschutzes*, 39 Archiv des Völkerrechts 233 (2001), p. 234.

[13] *Ibidem*, pp. 240 et seq.

[14] *See* with respect to the international system for minority protection of the inter-war period, Meijknecht, *supra* note 4, paras. 6 et seq.

[15] Hofmann, *supra* note 3, p. 588.

[16] *Minority Schools in Albania*, p. 17.

[17] Hofmann, *supra* note 3, p. 588.

[18] *See* F. Capotorti, S*tudy on the rights of persons belonging to ethnic, religious and linguistic minorities*, United Nations, 1979, E/CN.4/Sub.2/384/Rev.1, in particular p. 96.

[19] *Cf. e.g.* Hofmann, *supra* note 10, para. 4; *see also* A. v. Arnauld, *Völkerrecht* (4th ed.), C.F. Müller, Heidelberg: 2019, pp. 350 et seq.

[20] *See* Capotorti, *supra* note 18, p. 96; *see also* Henard, *supra* note 3, paras. 4 et seq.

group to preserve their own characteristics",[21] in other words a feeling of identity and solidarity.[22] Second, inasmuch as there is no universally accepted definition thereof, and since international instruments (speaking here within the European context) use the term "minority" but do not attempt to provide a definition for the purposes of a given agreement,[23] it has been widely accepted that while self-identification should be taken into account, in the end what constitutes a "minority", and who belongs to such a group, remains within the appreciation of the member states to these instruments, notably as regards the FCNM.[24]

2. THE HISTORICAL BAGGAGE OF MINORITY PROTECTION FROM THE INTER-WAR PERIOD

Minority protection, particularly in the Polish-German context, has a complicated history. While the historical precursors of minority protection, then mainly concerned with religious minorities, date back to the Edict of Nantes (1598), the Peace Treaty of Westphalia (1648) and the Treaties of Vienna (1615) and Karlowitz (1699) between the German and Ottoman Empires,[25] the first system of international protection of the rights of *national* minorities was created in the aftermath of the First World War. The post-1919 order, built around the Versailles Treaties and the League of Nations, re-adjusted large parts of territories – located mainly in Eastern Europe – as a consequence of the fall and/or disintegration of the German, Austrian and Ottoman Empires. Both the new states which were created and the old ones which were re-established (like Poland) faced the challenge of dealing with considerable national minorities, perhaps most notably the Germans in Poland. The inter-war system of international minority protection was built on treaties – or on sections in broader peace treaties – with these so-called "new" states, including *inter alia* Poland, Yugoslavia, Czechoslovakia, Bulgaria, Romania and Hungary.[26] The system was built around the "guarantee of the League of Nations":[27] The League warranted the inviolability of minority rights, requiring the approval of the majority of the League Council to modify them; and the League, through its Council, was

[21] Capotorti, *supra* note 18, p. 96.

[22] Arnauld, *supra* note 19, p. 351.

[23] For a somewhat differing view under Art. 27 ICCPR, *see CCPR General Comment No. 23: Article 27 (Rights of Minorities)*, adopted at the Fiftieth Session of the Human Rights Committee, 8 April 1994, CCPR/C/21/Rev.1/Add.5.

[24] *Cf.* Henard, *supra* note 3, para. 15; Hofmann, *supra* note 3, pp. 599 et seq.

[25] *Cf.* for further references, Henard, *supra* note 3, paras. 30 et seq.; Hofmann, *supra* note 10, paras. 8 et seq.

[26] *Cf.* Meijknecht, *supra* note 4, paras. 10 et seq.

[27] *Cf. e.g.* Art. 12(1) of the Treaty between the Principal Allied and Associated Powers and Poland (signed at Versailles on 28 June 1919).

to ascertain the observation of these rights by way of a petition system, with the possibility to ultimately submit the matter to the PCIJ, which frequently had to deal with minority matters in various Advisory Opinions and judgments.[28]

Therefore, the post-First World War system of minority protection had two built-in major deficiencies. First, it relied on an ineffective petition system (between 1919 and 1939 only 16 out of 758 admissible petitions reached the agenda of the League Council), which was further limited because a direct path to the PCIJ as the principal judicial organ of the League – by its nature an inter-state court that could hear only inter-state cases and issue advisory opinions upon requests by the League Assembly and Council – was foreclosed to the minorities themselves.[29] Second, and more importantly, while seeking to establish a system premised on the principle of equality (i.e. of minorities),[30] the minority system instituted among the states was itself built on inequality. Some states were more equal than others, i.e. whereas the "new" states, such as Poland, had to submit themselves to the rules of minority protection, the old established states, notably the Allied and Associated Powers, were not subject to the same obligations regarding minorities in their territories. Such built-in inequality in a system that proclaimed to be premised on the principle of equality naturally undermined and discredited itself – and the legal norms of minority protection with it.[31] The states that had to adhere to it, like Poland, perceived the minority protection system of the inter-war period as an infringement on their sovereignty or, in turn, as an illustration of their inferior position in the concert of states in comparison to the exclusive club of the Allied and Associated Powers.[32] Thus, it should come as no surprise that from the outset the minority protection system generated a considerable amount of hostility and spurred efforts to circumvent it, or even outright boycott it;[33] as Poland opted to do from 1934 onwards.[34] This doomed the system[35] even before it eventually collapsed with the outbreak of the Second World War.

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[28] For a list of these cases, *see* Meijknecht, *supra* note 4, paras. 24 et seq.; *see also* G. Alfredsson, *German Minorities in Poland, Cases Concerning the*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2010), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022).

[29] Meijknecht, *supra* note 4, paras. 21 et seq.

[30] *See supra* Section 1 for further explanation.

[31] *See also* S. Sierpowski*, Die Stellung Polens zu den Bestimmungen des Völkerbundes über die nationalen Minderheiten*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 43.

[32] *See* Meijknecht, *supra* note 4, para. 9.

[33] *Ibidem*, paras. 26 et seq.

[34] *Cf.* C.A. Macartney, *National States and National Minorities*, Russell & Russell, New York: 1968, p. 503.

[35] *See e.g.* D. Blumenwitz, *Minderheiten und Volksgruppenrechte – Aktuelle Entwicklung*, Kulturstiftung d. dt. Vertriebenen, 1992, p. 39. However, for a more nuanced view, also emphasizing some successes of the inter-war minority protection system, *see* S. Bartsch, *Erfolge im Schatten des Scheiterns – Das Minderheitenschutzverfahren des Völkerbundes*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, pp. 67 et seq.

3. MINORITY PROTECTION AFTER 1945

The development of international and regional minority protection after the Second World War may be roughly sub-divided into two periods. The first spans from 1945 until the end of the Cold War (Section 3.1), and the second encompasses the three decades since then (Section 3.2).

3.1. Minority Protection until 1990

As explained above,[36] the unequal application of a system built on the rationale of equality discredited not only the League minority protection system, but also tainted the idea of "minority" group protection for several decades after 1945. While after the First World War emphasis was put on minorities as a collective, and these were protected as groups rather than as individual members belonging to a specific minority, the post-1945 thinking focused on the individual. The earlier post-1919 group focus was perceived as spurring, instead of taming, national tensions and threatening, instead of fostering, peace and security, particularly in Eastern Europe. Therefore, the Universal Declaration of Human Rights (UDHR) of 10 December 1948 did not make mention of minorities and minority protection, but limited itself strictly to laying out the rights of individuals rather than of groups or persons belonging to groups. Given the hostility towards the League's minority protection system, this omission was not accidental, although neither was it considered or intended to leave a considerable gap in protection. Rather, "[t]his absence [...] reflected the then prevailing attitude that international protection of minority rights, construed as group rights, could be supplemented by an effective system of human rights protection based on individual rights [...]."[37] Consequently, minority protection was left out of the post-Second World War peace treaties; and the 1948 UDHR as well as the 1950 European Convention on Human Rights (ECHR) merely contain provisions, in Art. 2 UDHR and Art. 14 ECHR respectively, pertaining to the right of the individual to non-discrimination.

On the factual side of things, one may add the almost cynical observation that the adoption of such an individualistic view and the refusal to establish any international minority protection system resembling the inter-war order was made possible by the *fait accompli* of the devastation of the Second World War and the Holocaust. Religious minorities, notably of Jewish faith, had either emigrated or had been killed, and national minorities had been considerably reduced to a fraction of their pre-1939 numbers. Taking Poland as the prime example, within less than a decade

[36] *See supra* Section 2.

[37] Hofmann, *supra* note 10, para. 11.

it had been turned from a multi-ethnic, multi-national and multi-religious country into a largely homogenous state in terms of ethnicity, nationality and religion.[38]

Nevertheless, in the 1960s the view started to take hold that a radical individualism was unable to capture certain needs for protection in the light of wide-spread discrimination based on race, ethnicity, religion and nationality, among others. Hence, in the mid-1960s, the adoption of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) in 1965 and of the ICCPR in 1966 (in force since 1976) brought about some change. The CERD Committee has since then interpreted the provisions of CERD, particularly Art. 5, in order to safeguard minorities beyond their mere protection against individual discrimination.[39] Even more importantly, Art. 27 ICCPR enshrines an individual human right of "persons belonging to [ethnic, religious or linguistic minorities] not to be denied [...], in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." To some extent, Art. 27 ICCPR is a compromise between a collective and an individual view of minority rights. Although framed as an individual right of each member of the minority, it acknowledges and relies on the collective element of belonging to a group that shares certain common aspects and identity, and the right to live according to such aspects and identity. However, it is noteworthy that Art. 27 ICCPR mentions ethnic, religious and linguistic, but not national, minorities.

The 1975 Helsinki Final Act of the then Conference on Security and Co-Operation in Europe (CSCE) demonstrates, however, a change in the way of thinking about minority protection, explicitly recognizing the obligation of each state to respect the rights of national minorities on their territories and granting them equality before the law.[40] Still, the Warsaw Treaty of 1970[41] did not make mention of the protection of minority rights. This was primarily because of the political and historical baggage associated with minority rights during the inter-war period, which the German and Polish governments intended not to let burden the more pressing issue of a border agreement – and also because of the above-mentioned fact that the atrocities of the Second World War and its aftermath made the minority issue less pivotal than it had been during the inter-war period following 1919.

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[38] *See e.g.* P. Eberhardt, *Ethnic Groups and Population Changes in Twentieth Century Eastern Europe – History, Data and Analysis*, Routledge, London: 2015, pp. 74 et seq., 112 et seq., 137 et seq.

[39] *See* Hofmann, *supra* note 10, para. 12.

[40] *See* Conference on Security and Co-Operation in Europe, Final Act, Helsinki, 1 August 1975, p. 6.

[41] For a near-contemporaneous assessment of the Warsaw Treaty five years after its adoption, *see* H.-A. Jacobsen, *Fünf Jahre Warschauer Vertrag: Versuch einer Bilanz der Beziehungen zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen 1970-1975*, 58 Die Friedens-Warte 161 (1975).

3.2. Minority Protection since 1990

As was the case with many other legal and political areas, the end of the Cold War circa 1990 brought about significant changes in the system of minority protection, most notably in the German-Polish relations which are of particular interest for the present inquiry. Again, it was the CSCE that led the way for the promotion of minority rights. The June 1990 Concluding Document of the Copenhagen Meeting of the CSCE (Copenhagen Final Document) sets out, in its part IV, an elaborate list of rights of "persons belonging to national minorities" – thereby maintaining an individualistic approach to minority protection.[42] Para. 30 of the Copenhagen Final Document notes – in the spirit of the inter-war minority protection system – that "respect for the rights of persons belonging to national minorities [...] is an essential factor for peace, justice, stability and democracy in the participating States."[43] It also acknowledges, in a similar vein, the two central principles of minority protection, i.e. equality and identity.[44] This includes recognition that positive measures may be needed in order to warrant equality.[45] The Copenhagen Final Document also emphasizes that it is for each person to determine, upon their "individual choice", whether or not they "belong to a national minority".[46] In its following paragraphs it details the protected rights of persons belonging to national minorities, including the right to use freely their mother tongue in public and private relations, and to establish and maintain educational, cultural and religious institutions, organizations or associations, and to maintain unimpeded contacts with members of their minority within and outside their country.[47] Furthermore, the Document condemns and vows to take positive actions to prevent the root causes of minority discrimination, such as "racial and ethnic hatred, anti-semitism" or "xenophobia".[48] The 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (DRM) warrants similar rights and guarantees on the international level, along the lines of Art. 27 ICCPR.[49]

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[42] Concluding Document of the Copenhagen Meeting of the Conference on Security and Co-Operation in Europe, Copenhagen, 29 June 1990, paras. 30-40.

[43] *Ibidem*, para. 30.

[44] *Ibidem*, paras. 31, 32 (chapeau) and 33.

[45] *Ibidem*, para. 31.

[46] *Ibidem*, para. 32.

[47] *Ibidem*, paras. 32.1-32.6.

[48] *Ibidem*, para. 40.

[49] *See* United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN GA Res. 47/135 of 18 December 1992.

Insofar as regards German-Polish relations after the fall of the Berlin Wall, while the 2+4 Treaty[50] did not address issues of minority protection, the 1991 Polish-German Treaty on Good Neighbourly Relations and Friendly Co-operation[51] contains, in its Arts. 20-22, several detailed provisions on minority protection (in particular Art. 20(3)), as well as positive obligations of both countries for the promotion of the persons protected under the Treaty (Art. 21). Art. 20(2) of the Treaty refers to the international standards of minority protection as acknowledged and developed in a number of treaties and instruments since 1945, including the UDHR, the ECHR, the ICCPR, the Helsinki Final Act and the Copenhagen Final Document, emulating the list of protected rights in Art. 20(3) as set out in the latter.[52] In the spirit of Art. 27 ICCPR and the Copenhagen Final Document, the 1991 Treaty takes an individualistic approach,[53] once again on the basis of the principles of equality and identity.[54] However, despite displaying all the characteristics of post-1945 international minority protection, there is nevertheless a remnant of the inter-war inequality left in the 1991 Polish-German Treaty. As an attentive reader of Art. 20(1) will detect, whereas it establishes the mutual obligations of the German and Polish states to respect and promote the rights enshrined in Arts. 20 and 21 of the Treaty, with respect to Poland it warrants these rights for "persons belonging to the German minority in Poland", while in relation to Germany it does so only regarding "persons of German citizenship with Polish ancestry." Thus, the Treaty acknowledges a German national minority in Poland, but does not do the same with respect to persons of Polish origin residing in Germany.[55] While this is arguably of no significance regarding the individual rights guaranteed by the Treaty,[56] such a distinction, as will be demonstrated subsequently,[57] is of political relevance in German-Polish relations, as well as of legal relevance with respect to the currently most important regional instrument for the protection of minority rights in Europe, i.e. FCNM.

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[50] However, it constituted the political prerequisite for striking an agreement between the two nations; see J. Barcz, *Den Minderheitenschutz Betreffende Klauseln in den neuen bilateralen Verträge Polens mit den Nachbarstaaten*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 282.

[51] Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourship and Friendly Cooperation (signed on 17 June 1991), 1708 UNTS 463.

[52] *Cf.* the almost identical wording in paras. 32.1-32.6 of the Concluding Document of the Copenhagen Meeting of the Conference on Security and Co-Operation in Europe.

[53] *See also* W. Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 American Journal of International Law 163 (1992), p. 170.

[54] *Cf.* Art. 20(1). *See also supra* Section 1.

[55] *Cf. also* Blumenwitz, *supra* note 35, pp. 82 et seq.

[56] However, for a nuanced discussion on the matter *see* Barcz, *supra* note 50, pp. 291 et seq.

[57] *See infra* in this section as well as Section 4.1.

Greeted with considerable scepticism around the time of its adoption,[58] this Convention, binding on all members of the Council of Europe (CoE), including Poland and Germany, has become, over the course of the past 20 years, the centrepiece of minority protection in Europe.[59] Unlike its CoE sister, the European Charter for Regional or Minority Languages,[60] it approaches matters of minority protection by applying a broader thematic scope, and thus gives rise to a wide array of rights, ranging from, *inter alia*, political and media (Art. 9) to linguistic (Art. 10 and 11) and educational rights (Art. 12-14). Moreover, it provides, in Arts. 24-26 FCNM, procedures for evaluation and implementation, whereby CoE Member States are required, pursuant to Art. 25 FCNM, to submit detailed reports every five years on the status of protection of the rights enshrined in the FCNM. The CoE Council of Ministers is entrusted with monitoring the rights' protection in each Member State (Art. 24 FCNM) and evaluating "the adequacy of the measures taken" by each Member State (Art. 26 FCNM).[61] Together with the 1991 Polish-German Treaty, the FCNM constitutes the central instrument of minority protection in Germany and Poland, and therefore will serve as the main yardstick for evaluating the role and relevance of minority rights in present-day German-Polish relations.

4. THE CURRENT RELEVANCE OF MINORITY PROTECTION IN GERMAN-POLISH RELATIONS

Issues relating to minority rights in present-day German-Polish relations pertain to a wide array of matters. This section presents a selection of some of the most important issues. After examining the overall situation with respect to minority rights protection of mutual relevance in both countries (with a specific emphasis on the German policy towards recognizing a Polish minority in Germany) (4.1), the inquiry turns to two more specific matters: the special situation of the Silesians in Poland (4.2); and the recent dispute over the land and administrative reform in and around the city of Opole (Oppeln) (4.3). As mentioned above, the focus will be on the rights enshrined in the FCNM, with occasional references to those contained in the 1991 Treaty. An important source of information will thus be the most recent country reports and opinions of the Advisory Committee under the auspices of the FCNM.

[58] *See* R. Hofmann, *Die Rolle des Europarats beim Minderheitenschutz*, in: M. Mohr (ed.), *Friedenssichernde Aspekte des Minderheitenschutzes in der* Ära *des Völkerbundes der Vereinten Nationen in Europa*, Springer, Berlin, Heidelberg: 1996, p. 145.

[59] *See*, nine years later, R. Hofmann, *Menschenrechte und der Schutz nationaler Minderheiten*, 65 Zeitschrift für ausländisches *öffentliches* Recht und Völkerrecht 587 (2005), p. 587.

[60] European Charter for Regional or Minority Languages, Strasbourg, 5 November 1992, ETS No. 148.

[61] *See also* Hofmann, *supra* note 10, paras. 33 et seq.

4.1. The Overall Situation

The central aspect of minority protection in German-Polish relations with respect to Germany is that, from the persistent perspective of the German government, there is no such thing as a Polish national minority in Germany.[62] This reflects the position expressed in the previously-noted different wording of Art. 20(1) of the 1991 Treaty[63] and pertains in particular to the scope of protection under the FCNM. According to Art. 3(1) of the FCNM, "[e]very person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice." However, it has been the constant position of the German government since signing and ratifying the FCNM that since the FCNM does not provide for a definition of "national minority", "[i]t is therefore up the individual Contracting Parties to determine arbitrarily the groups to which the Framework Convention shall apply after ratification."[64] According to the German government, only autochtonous minorities fall within the purview of the FCNM, meaning that population groups, in order to be recognized as national minorities in Germany, must meet five criteria:

- "the members of the group are German nationals;
- they differ from the majority population in that they have their own language, culture and history, i.e. their own identity;
- they wish to maintain this identity;
- they have traditionally been resident in Germany (in most cases, for centuries) and
- they live in Germany within traditional settlement areas."[65]

Since German citizens of Polish origin in Germany do not fulfill the latter two criteria – in particular they have not been traditionally resident in Germany for centuries,[66] – the German government does not regard them as a national minority for the purposes of the FCNM.[67] Consequently, there persists an unevenness, or inequality if you will, in German-Polish relations on minority matters: Polish citizens

[62] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, Fifth Report submitted by Germany, pursuant to Article 25, paragraph 2 of the Framework Convention for the Protection of National Minorities – received on 31 January 2019, ACFC/SR/V(2019)001, pp. 131 et seq.

[63] *See supra* Section 3.1.

[64] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 62, p. 131.

[65] *Ibidem*, p. 132.

[66] Citizens of Polish origin traditionally settling in parts of the German Reich, as in Upper Silesia or East Prussia, are not covered by the Convention, as these regions are no longer part of German territory, *cf. ibidem*.

[67] *Cf. ibidem*.

of German origin enjoy minority status under the FCNM in Poland;[68] while German citizens of Polish descent lack such status under the Convention in Germany.

As regards the overall situation of persons belonging to the German minority in Poland, besides the matters pertaining to the Silesians and the Opole dispute (which are addressed in specific sub-sections), the picture is a mixed one. As has been said, Poland recognizes a German minority in Poland,[69] which comprises roughly 150,000 people, or 0.4% of the overall Polish population, with more than half of them resident in the Opole area.[70] Polish law provides them with minority protection, most notably in Art. 35 of the Polish Constitution of 1997 and the 2005 Act on National and Ethnic Minorities and on the Regional Languages (2005 Polish Minorities Act).[71] An attempt to overhaul the Act failed after the adoption of an amendment by the Sejm was vetoed by the President of the Republic in 2015.[72] The FCNM Advisory Committee Opinion on Poland of 6 November 2019 recognizes the continued access of persons belonging to national minorities, including the German minority, to the rights enshrined in the FCNM through the 2005 Act and other instruments, and particularly emphasizes that funds spent on minority language teaching have been increased, leading to a 65% rise in the number of students learning German.[73] On the other hand, the Opinion also notes that there remains "a persistent if not worsening situation for [...] minorities, including from political figures, but also at the level of social interaction, in schools or bars or restaurants."[74] Moreover, members of the "German minority [...] have been targeted by extremist groups owing to their association with a neighbouring state."[75]

4.2. The Special Situation of the Silesians

With its long-standing Polish, Austrian and Prussian influences, Silesia and the Silesians constitute a special case. While traditionally settled by Germans since the Middle Ages, the territory of Silesia has changed hands many times, notably from Habsburg Austria to the Prussia of Frederick the Great, back to Poland after the

[68] However, regarding the special case of the Silesians in present-day Poland, *see infra* 2.

[69] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, Fourth Opinion on Poland – adopted on 6 November 2019, ACFC/OP/IV(2019)003, pp. 2, 8. *See also* Art. 20(1) of the Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourship and Friendly Cooperation.

[70] Deutscher Bundestag, Wissenschaftliche Dienste, *Die deutsche Minderheit in Polen*, WD 2 – 3000 – 022/18, 20 March 2018, p. 4.

[71] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 4.

[72] *Ibidem*, p. 5.

[73] *Ibidem*, pp. 5 and 37.

[74] *Ibidem*, p. 6.

[75] *Ibidem*.

First World War , back again to the German Reich during the Second World War, and back again to Poland after 1945. The situation post-1945 led many Silesians to immigrate to Germany and many ethnic Poles to move to Silesia.[76] Given its close historical link to Germany and its high historical importance in German-Polish relations, notably in the inter-war period,[77] I devote a few lines to the current situation of the Silesians in Poland.

An ongoing dispute over Art. 3 FCNM pertains to whether or not to recognize the Silesians as a national minority in Poland. According to the 2011 Polish census, no less than 846,700 persons identified as Silesians, "far more than for any of the recognized minorities" in Poland.[78] As with the German citizens of Polish descent in Germany,[79] the issue of Silesians' minority status is thus a politically sensitive one, given the sizable number of persons belonging to these groups and the considerable legal and administrative consequences following a recognition of their minority status under the FCNM. While many Silesians perceive themselves as separate – in terms of language, culture, and tradition – from Poles (or even Germans for that matter), the Polish government disagrees, holding "that the language, culture and tradition of Silesians are not separate from the Polish language, culture and tradition but rather form 'an integral part thereof' and that Silesian is a variant of the Polish language."[80] Similarly to the discussion with respect to the German citizens of Polish descent in Germany, the lack of an authoritative and universally-accepted definition of "national minority" in the FCNM leads to tensions between the margin of appreciation of FCNM member states to determine what constitutes a national minority for the purposes of the FCNM, and the right of free self-identification enshrined in Art. 3 FCNM.

An interesting aspect of the minority rights of Silesians was brought before the European Court of Human Rights (ECtHR) in the case of *Gorzelik and Others v. Poland*. In this dispute the applicants alleged a breach of Art. 11 of the ECHR because they had been refused permission to register an association called "Union

[76] For a brief summary of the history of Silesia, *see* ECtHR (GC), *Gorzelik and others v. Poland* (App. No. 44158/98), 14 February 2004, para. 13.

[77] For a comparison of selected cases and advisory opinions pertaining to various German interests in Upper Silesia, *see* M. Hartwig, I. Seidl-Hohenveldern, *German Interests in Polish Upper Silesia Cases*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2013), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022); *see also* Alfredsson, *supra* note 29.

[78] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 8.

[79] *See supra* Section 4.1.

[80] *See* Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 8; *see also* Advisory Committee on the Framework Convention for the Protection of National Minorities, Comments of the Government of Poland on the Fourth Opinion of the Advisory Committee on the implementation of the Framework Convention for the Protection of National Minorities by Poland – received on 6 April 2020, GVT/COM/IV(2020)002, p. 10.

of People of Silesian Nationality."[81] The Grand Chamber declined to address the specific matter whether the Silesians qualified as a "national minority", focusing instead on the matter at issue, i.e. whether the association should have been registered under the above denomination and thus as an "association of a national minority", which under Polish law entails certain further privileges, including with respect to national and local elections.[82] The Court emphasized that determining what constitutes a "national minority" "must, by the nature of things, be left largely to the State concerned,"[83] for no international instrument, including the FCNM, authoritatively defines the term.[84] Moreover, the Court found that the Polish authorities had not denied a group of Silesians to form any kind of association, but rather merely this specific kind of association, which recognized their minority status. Moreover, it held that Poland did neither infringe upon the association's right to speak on behalf of the minoritynor violate certain electoral privileges, such as the right of members of the association to run as candidates in elections as members of the association and thus, in turn, as representatives of the minority. In the opinion of the Polish authorities, this would have sparked unrest among many other groups claiming the same status and therefore led to considerable tensions within Poland, let alone to pressure to acknowledge a wide range of other groups as "national minorities" against the official policy of the Polish government. The Court accepted Poland's assessment as falling within its margin of appreciation.[85] Consequently, it declined to find a violation of Art. 11 in the *Gorzelik* case.

4.3. The Opole Dispute

In recent years a dispute has arisen pertaining to the situation of the German minority in the region of the city of Opole (Oppeln), where over half of the people identifying themselves as belonging to the German minority in Poland reside. The FCNM Advisory Committee Opinion on Poland of November 2019 describes the dispute in the following terms:

> With effect from 1 January 2017, nine localities in three municipalities (Dobrzeń Wielki, Komprachcice, and Prószków) which are on the Official Register for German as a supporting language, were incorporated into the city of Opole. Opole has only a small German minority population [...]. This administrative-territorial reform has also led to a lower percentage of persons identifying with the German minority in the remainder of

[81] ECtHR (GC), *Gorzelik and Others v. Poland* (App. No. 44158/98), 14 February 2004, para. 3.
[82] *Ibidem*, para. 105.
[83] *Ibidem*, para. 67.
[84] *Ibidem*, para. 68.
[85] *Ibidem*, para. 105.

> these three municipalities. Two additional localities with a significant German minority population were incorporated into the city of Opole.[86]

The administrative reform, incorporating several municipalities with a high percentage of persons belonging to the German minority into the larger city of Opole, which has only a small percentage of such persons, has an effect on several rights enshrined in the FCNM.

Art. 10 of the FCNM grants national minorities the right to use their minority language in relations with the administrative authorities. The 2005 Polish Minorities Act permits registration in the Official Register of those municipalities where persons belonging to a certain national minority constitute at least 20% of the local population.[87] Due to the territorial reform in the Opole region, the overall percentage in what now has become part of the city of Opole is below the 20% threshold, meaning that in the said municipalities now incorporated in the city of Opole the German minority effectively loses its right to use German in their dealings with administrative authorities. Similarly, the 2005 Polish Minorities Act requires a 20% threshold for topographical indications such as town signs to also be mandatory in the minority language, with the administrative reform in Opole thus leading also to such topographical signs being taken down in nine municipalities, which concerns the corresponding right under Art. 11 of the FCNM.[88]

Most critically in terms of the present dispute, Art. 16 of the FCNM provides that: "The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention."

The territorial and administrative reforms in Opole have had the effect that "following the 2018 municipal elections, representatives of the German minority in [the] former villages have no representative in the Opole City council, while they used to have several in the municipalities to which they previously belonged."[89] Moreover, the replacement of bilingual town signs in several localities and municipalities due to their falling below the 20% threshold after the incorporation in the city of Opole is also relevant in terms of the guarantees of Art. 16 of the FCNM.

Overall, the Polish authorities have underlined that the administrative and territorial reform in the Opole region was undertaken solely for economic motives,

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[86] Advisory Committee on the Framework Convention for the Protection of National Minorities, *supra* note 69, p. 30, para. 115.

[87] *Ibidem*, p. 30, para. 113.

[88] *Ibidem*, pp. 31-32, paras. 120, 122.

[89] *Ibidem*, p. 45, para. 182.

intended to "contribute to the development of Opole, and consequently the entire region."[90] However, the reform was carried out in a very short time frame (18 months from its announcement to its entry into force), and notwithstanding the fact that local consultations demonstrated the "overwhelming opposition" of the local population in the affected towns and villages.[91] The Opole dispute has led to the most significant tensions in German-Polish relations regarding minority issues in recent years, and will continue to be of relevance in the upcoming years.

CONCLUDING REMARKS

Minority protection, discredited by the deficient League system of the inter-war period[92] and dormant for most of the Cold War,[93] has since 1990 achieved an increased, albeit moderate, relevance in German-Polish relations, both legally and politically. Insofar as regards the scope of protection, the most important instruments are the 1991 German-Polish Treaty and the 1995 FCNM, the latter in force with respect to Poland since 2001 and with respect to Germany since 1998.[94]

However, issues pertaining to minority status and their scope of protection in German-Polish relations retain an element of the inglorious post-1919 era, since they continue an aspect of unevenness that has the potential to strain the bilateral minority protection regime: Polish citizens of German origin enjoy minority protection; whereas German citizens of Polish descent in Germany do not. This is particularly due to the lack of a definition of "minority" in the FCNM, thus granting to each Member State considerable margin of appreciation in defining which groups it treats as a "national minority" and which it does not.[95]

In current German-Polish relations, besides the German refusal to recognize a Polish minority in Germany and the Polish refusal to acknowledge a Silesian minority in Poland, the dispute about the Opole administrative and territorial reform constitutes perhaps the most prominent matter of contention regarding minority protection.[96]

[90] *Ibidem*, p. 45, para. 181.
[91] *Ibidem*, pp. 45-46, para. 184.
[92] *See supra* Section 2.
[93] *See supra* Section 3.1.
[94] *See supra* Section 3.2.
[95] *See supra* Section 1 and 4.1. and 2.
[96] *See supra* Section 4.3.

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THE GERMAN-POLISH CULTURAL PROPERTY DEBATE – CAN PRAGMATIC SOLUTIONS OVERCOME A CONVOLUTED CONTROVERSY?**

Abstract: *This contribution discusses the unresolved claims of Poland and Germany arising from the destruction, removal, and appropriation of cultural property during and immediately following the Second World War; viewed against the background of the 50th anniversary of the 1970 Warsaw Treaty and the 30th anniversary of the 1990 2+4 Treaty. It provides an analysis of the extent to which these and other bilateral treaties between Germany and Poland impose legal obligations to restore or compensate for the destruction or loss of cultural property. Finally, it suggests pragmatic solutions to overcome the convoluted political, diplomatic and legal debates in the spirit of "cultural internationalism" and in line with the proposals of the Copernicus Group of Polish and German historians.*

Keywords: cultural property, restitution, Berlinka, Second World War, Potsdam Agreement, reparations, cultural internationalism

INTRODUCTION

The year 2020 marked the 50th anniversary of the 1970 Warsaw Treaty[1] and the 30th anniversary of the 1990 2+4 Treaty.[2] The latter treaty provides for the conc-

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[1] Agreement between Poland and Federal Republic of Germany concerning the basis for normalization of their mutual relations (signed on 7 December 1970), 830 UNTS 327.

[2] Treaty on the Final Settlement with Respect to Germany (signed on 12 September 1990), 1696 UNTS 115.

lusion of the 1990 Frontier Treaty,[3] which is complemented by the 1991 Treaty on Good Neighbourship and Friendly Cooperation.[4] As regards cultural cooperation more specifically, Germany and Poland signed an additional treaty, i.e. the 1997 Agreement on Cultural Cooperation.[5]

All of these treaties have in common the spirit of fostering mutual relations between Germany and Poland. Yet few political issues have remained so continuously controversial between Germany and Poland as the question of unreturned cultural property in the wake of the Second World War.[6] From a German perspective, the most prominent sore point is the so-called Berlinka[7] which is, or was, part of the former Prussian State Library and which is located in Kraków today.[8] From a Polish perspective, the biggest issue is the unmet reparation claims for extensive destruction and looting of Polish cultural property.[9] Politicians, diplomats, and legal scholars of both sides have taken, or contributed to, maximalist positions favouring the interests and concerns of their own state,[10] thereby solidifying what have become deeply entrenched and seemingly irreconcilable views.

This contribution sets out to present the current debate as regards the unresolved claims of Poland and Germany (1). It continues to analyse whether, and to what extent, the aforementioned treaties impose legal obligations to restore, or compensate for the destruction or loss of cultural property (2). Finally, this contribution endeavours to outline possible pragmatic solutions to overcome the convoluted political, diplomatic and legal debates (3).

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[3] Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them (signed on 14 November 1990), 1708 UNTS 377.

[4] Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourship and Friendly Cooperation (signed on 17 June 1991), 1708 UNTS 463.

[5] Agreement between the Federal Republic of Germany and the Government of the Republic of Poland Concerning Cultural Cooperation (signed on 14 July 1997), 2060 UNTS 221.

[6] *Cf.* M. Zybura. *Das deutsche Kulturerbe in Polen in den deutsch-polnischen Beziehungen im Kontext des Nachbarschaftsvertrages von 1991*, in: J. Barcz & K. Ruchniewicz (eds.), *Akt der guten Nachbarschaft. 30 Jahre Vertrag über gute Nachbarschaft und freundschaftliche Zusammenarbeit zwischen Polen und Deutschland*, Elipsa, Warszawa: 2017, p. 199.

[7] *See* K. Ziemer, *Poland and Germany: What Past, What Future?,* 14 The Polish Quarterly of International Affairs 50 (2005), p. 58.

[8] *See* K. Wierczyńska, *The Polish-German Cultural Heritage Relationship in 1990-2019 – Main Controversies and Areas of Progress,* 4 Santander Art and Culture Law Review 221 (2018), pp. 223 and 226.

[9] *Ibidem*, pp. 224-226, 237, and 245.

[10] For a recent example *see* B. Sierzputowski, *Public International Law in the Context of Post-German Cultural Property Held within Poland's Borders. A Complicated Situation or Simply a Resolution?,* 33 Leiden Journal of International Law 953 (2020).

1. UNRESOLVED CLAIMS OF GERMANY AND POLAND

1.1. German Cultural Property within its Former Eastern Territories

The issues surrounding restitution of German cultural property situated outside of Germany is complex, since it does not simply concern cultural artefacts removed from German territory during the war or its subsequent occupation. Rather, towards the end of the Second World War, in order to bring cultural property out of the reach of Allied bomber units, relevant items were evacuated by the Germans themselves to Silesia, which at that time formed part of the German state.[11] However, at the end of the Second World War and with the conclusion of the 1945 Potsdam Agreement,[12] these items, located in territories to the east of the Oder-Neisse line, suddenly found themselves under Polish control.

From the beginning, the Federal Republic of Germany took the view that any questions concerning the German-Polish border would need to be resolved by a future peace treaty.[13] Until such point, Germany viewed Poland only as the *de facto* administrator of the former territories of Germany located east of the Oder-Neisse line.[14] Consequently, Germany considered the issue of cultural property located in those territories to be the subject of future peace treaty negotiations.[15]

In contrast, Poland took the 1945 Potsdam Agreement as an authoritative and ultimate solution of the issue.[16] The Polish state viewed the territories to the east of the Oder-Neisse line as "Regained Territories", which formed an integral part of Polish state territory.[17] Therefore the Polish government subsequently treated German property, including cultural property, located in the territories assigned to it under the 1945 Potsdam Agreement as "abandoned property" which, as a con-

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[11] For more on the immediate fate of the Prussian State Library, *see* J. Gortat, *'Berlinka'. Ein besonderer deutsch-polnischer Erinnerungsort*, Convivium. Germanistisches Jahrbuch Polen 105 (2017), pp. 109-110; B. Jurkowicz, *The Collection of the Prussian State Library. Polish, German, or European Cultural Heritage?*, in: K. Ziemer (ed.), *Memory and Politics of Cultural Heritage in Poland and Germany,* Cardinal Stefan Wyszyński University in Warsaw, Warszawa: 2015, pp. 118-119.

[12] For more on the 1945 Potsdam Agreement, *see* J.A. Frowein, *Potsdam Conference (1945),* in: *Max Planck Encyclopedia of Public International Law (2009),* available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022).

[13] *See* D.-E. Khan, *Boundary Settlements of Germany after World War II*, in: *Max Planck Encyclopedia of Public International Law (2009),* available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), para. 3.

[14] *See* A. Jakubowski, *State Succession in Cultural Property,* Oxford University Press, Oxford: 2015, p. 112; *see additionally* Frowein, *supra* note 12, paras. 5, 9, and 14-15; Jurkowicz, *supra* note 11, pp. 121-122.

[15] *See* Jakubowski, *supra* note 14, p. 112.

[16] *Ibidem.*

[17] *See* E. Klein, *Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher,* 15 February 2005/4 April 2005, available at: https://bit.ly/3ItoSv3 (accessed 30 June 2022), pp. 28, 39, and 52.

sequence, could be legally appropriated by Poland.[18] Hence, in line with this view the Prussian State Library was, or could be, considered to have been passed on to Poland, irrespective of the features or origin of the cultural property.[19]

This view was further substantiated by the moral argument that this German cultural property only constitutes a fraction of the cultural property destroyed by Germany[20] and was therefore owed to Poland as a form of restitution-in-kind.[21]

The counter-argument presented by Germany postulates that the removal and confiscation of cultural property during occupation was, and is, forbidden under international humanitarian law,[22] specifically under Art. 56 of the 1907 Hague Regulations Concerning the Laws and Customs of War on Land.[23] Hence, from this German perspective Poland must return such cultural property to Germany.

The main point of contention in this regard is a collection previously housed in the Prussian State Library which is commonly referred to as the "Berlinka" (meaning "from" or "of Berlin" in Polish), which is currently stored in the Biblioteka Jagiellońska in Kraków.[24] It has been described as "one of the largest and most influential repositories of materials in the German language"[25] and contains amongst its prized items handwritings, letters and autographs by, *inter alia*, Johann Wolfgang von Goethe, Ludwig van Beethoven, and August Heinrich Hoffmann von Fallersleben.[26]

1.2. Destroyed and Looted Polish Cultural Property

On the other side stands the destruction and looting of Polish cultural property during the Second World War. The 2018 Netflix documentary "Struggle: The Life and Lost Art of Szukalski", produced by Leonardo DiCaprio and his father, introduced a larger audience to the cultural and personal consequences of the wi-

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[18] *See* A. Jakubowski, *Territoriality and State Succession in Cultural Heritage,* 21 International Journal of Cultural Property 375 (2014), pp. 385 and 387; Wierczyńska, *supra* note 9, pp. 238-239.

[19] *See* Jakubowski, *supra* note 14, pp. 278-279; Jurkowicz, *supra* note 11, p. 121.

[20] *See* Jakubowski, *supra* note 14, p. 111; Jakubowski, *supra* note 18, pp. 385 and 387.

[21] *See* Jakubowski, *supra* note 14, pp. 278-279; Jakubowski, *supra* note 18, p. 279. Cf. P. Stec, *Das Problem der Beseitigung der Auswirkungen des 2. Weltkrieges im Bereich der Kulturgüter und Archivalien in den deutsch-polnischen Beziehungen im Lichte des Vertrags über gute Nachbarschaft und freundschaftliche Zusammenarbeit,* in: W.M. Góralski (ed.), *Historischer Umbruch und Herausforderung für die Zukunft, Der deutsch-polnische Vertrag über gute Nachbarschaft und freundschaftliche Zusammenarbeit vom 17. Juni 1991. Ein Rückblick nach zwei Jahrzehnten*, Elipsa, Warszawa: 2011, pp. 386-387.

[22] *See* Jakubowski, *supra* note 18, p. 387.

[23] *See* Jakubowski, *supra* note 14, p. 278. *Cf.* Wierczyńska, *supra* note 8, p. 238.

[24] *See* Jurkowicz, *supra* note 11, p. 119; Wierczyńska, *supra* note 8, pp. 223, 226, and 237.

[25] Jakubowski, *supra* note 18, p. 385. *See also* Jurkowicz, *supra* note 11, pp. 117-119.

[26] The latter being the author of a poem ("Das Lied der Deutschen") of 1841, which later became the official German national anthem of the Republic of Weimar (Deutsches Reich, 1919-1933). Today's national anthem consists of the third verse only.

de-scale destruction of Polish artwork during the bombing of Warsaw in 1939,[27] and Philippe Sands' bestseller "East West Street" gave stage to DaVinci's "Lady with the Ermine", looted from the National Museum in Kraków by the Germans and subsequently decorating the wall of Hans Frank's countryside retreat.[28] Overall, it is estimated that some 500,000 artworks and 22 million books were stolen from Polish territory or destroyed during the Second World War.[29]

It is undisputed that the taking and destruction of cultural property by Germany in the occupied territories constituted a violation of the 1907 Hague Regulations[30] and entailed the obligation to return the respective cultural property and to pay compensation in the amount of the value of demolished cultural objects.[31]

However, in 1953 Poland made a unilateral declaration rejecting any future claims regarding reparations, effective 1 January 1954,[32] including claims both against the Federal Republic of Germany and the German Democratic Republic.[33]

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[27] *See* IMDB, *Struggle: The Life and Lost Art of Szukalski* (2018), available at: https://www.imdb.com/title/tt9316022/ (accessed 30 June 2022).

[28] *See* P. Sands, *East West Street. On the Origins of Genocide and Crimes Against Humanity,* Weidenfeld & Nicolson, London: 2017, pp. 253-254.

[29] *See* Wydział Restytucji Dóbr Kultury, *FAQ*, available at: http://dzielautracone.gov.pl/faq (accessed 30 June 2022); Wierczyńska, *supra* note 8, p. 225.

[30] *See* G. Carducci, *L'Obligation de Restitution des Biens Culturels et des Objets d'Art En Cas de Conflit Armé: Droit Coutumier et Droit Conventionnel avant et après la Convention de La Haye de 1954. L'Importance du Facteur Temporel dans Les Raports entre les Traités et la Coutume*, 2 Revue Générale de Droit International Public 289 (2000), p. 305.

[31] *See* the first sentence of Art. 3 of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land. *See also* Wierczyńska, *supra* note 8, pp. 228 and 238.

[32] *See* W. Czaplinski, *Concept of War Reparations in International Law and Reparations after World War II,* 14 The Polish Quarterly of International Affairs 60 (2005), pp. 78-79. For the German view, as expressed by the research service of the German parliament, *see* Wissenschaftliche Dienste des Deutschen Bundestags, *Völkerrechtliche Grundlagen und Grenzen kriegsbedingter Reparationen unter besonderer Berücksichtigung der deutsch-polnischen Situation*, 28 August 2017, WD 2-3000-071/17, p. 18: "Mit Rücksicht darauf, daß Deutschland seinen Verpflichtungen zur Zahlung von Reparationen bereits in bedeutendem Maße nachgekommen ist [...], hat die Regierung der Volksrepublik Polen den Beschluß gefaßt, mit Wirkung vom 1. Januar 1954 auf die Zahlung von Reparationen an Polen zu verzichten, um damit einen Beitrag zur Lösung der deutschen Frage [...] zu leisten." *See also* Wissenschaftliche Dienste des Deutschen Bundestags, *Leistungen Deutschlands aufgrund des nationalsozialistischen Unrechts an Opfer in mittel- und osteuropäischen Staaten sowie an Opfer des SED-Regimes. Gesetzliche Grundlagen, völkerrechtliche Verträge und Zahlen*, 10 October 2017, WD 2-3000-093/17, WD 4-3000-083/17, WD 7-3000-125/17, p. 5; Wissenschaftliche Dienste des Deutschen Bundestags, *Griechische und polnische Reparationsforderungen gegen Deutschland*, 14 June 2019, WD 2-3000-066/19, p. 10.

[33] *See* J. Kranz, *Kriegsbedingte Reparationen und individuelle Entschädigungsansprüche im Kontext der deutsch-polnischen Beziehungen*, 80 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 325 (2020), p. 362; J. Kranz, *Deutsch-polnische Rechtskontroversen. Versuch einer Synthese*, in: W.M. Góralski (ed.), *Historischer Umbruch und Herausforderung für die Zukunft, Der deutsch-polnische Vertrag über gute Nachbarschaft und freundschaftliche Zusammenarbeit vom 17. Juni 1991. Ein Rückblick nach zwei Jahrzehnten*, Elipsa, Warszawa: 2011, pp. 489-491; H. Rumpf, *Die deutsche Frage und die Reparationen*, 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 344 (1973), pp. 350-351.

Already earlier the Soviet Union had promised to satisfy Poland out of its own reparations, implying that Poland itself could not seek reparations independently.[34]

This Polish renunciation of reparation claims was confirmed in the course of negotiations of the 1970 Warsaw Treaty by the Polish Foreign Minister[35] and continuously upheld until 1989[36] and beyond.[37] Germany has issued multiple statements to the extent that Poland has, in effect, waived any remaining reparation claims.[38] In addition, for Germany all matters concerning reparation, restitution, and compensation as a consequence of the Second World War are final and settled ever since the 1990 2+4 Treaty, because the intention of the framers of the treaty was explicitly "to conclude the final settlement with respect to Germany".[39] Occasionally, the moral argument is added that Germany has already provided reparations for the crimes committed during Nazi rule through various channels.[40]

Today however, Poland argues for a restrictive interpretation of its 1953 declaration, according to which the waiver would only encompass war reparations on the basis of the 1945 Potsdam Agreement.[41] Against this backdrop, in 2004 the Polish parliament passed a declaration that Poland had not yet received sufficient financial

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[34] *See* Report on the Tripartite Conference at Berlin, The Department of State Bulletin, Vol. XIII, No. 319 (5 August 1945), Chapter IV Section 2. *See also* P. D'Argent, *Reparations after World War II,* in: *Max Planck Encyclopedia of Public International Law* (2009), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), paras. 7 and 16. According to S. Żerko, *Reparationen und Entschädigungen in den Beziehungen zwischen Polen und der Bundesrepublik Deutschland (ein historischer Überblick)*, 22(II) IZ Policy Papers 12 (2018), p. 14, this reparation regime, however, scammed Poland out of effective reparations.

[35] *See* Czaplinski, *supra* note 32, p. 79. This view is also put forward by the research service of the Bundestag, *see* WD 2-3000-071/17, *supra* note 32, p. 19; WD 2-3000-093/17, WD 4-3000-083/17, WD 7-3000-125/17, *supra* note 32, p. 5; WD 2-3000-066/19, *supra* note 32, p. 10.

[36] *See* Czaplinski, *supra* note 32, p. 79; Kranz (*Kriegsbedingte Reparationen), supra* note 33, p. 364 with further references.

[37] *See* Position Paper of the Ministry of Foreign Affairs Legal Advisory Committee on Polish World War II-related Reparations Claims with Respect to Germany, Warsaw (10 February 2005), 1 The Polish Quarterly of International Affairs 138 (2005), pp. 139-140. *See also* T. Urban, *Historische Belastungen der Integration Polens in die EU*, Aus Politik und Zeitgeschichte 32 (2005), pp. 38-39.

[38] *See* Deutscher Bundestag, Antwort der Bundesregierung vom 13. Oktober 1999, BT-Drs. 14/1786, p. 5; Bundesregierung, Regierungspressekonferenz vom 2. August 2017, available at: https://www.bundesregierung.de/breg-de/aktuelles/pressekonferenzen/regierungspressekonferenz-vom-2-august-844344 (accessed 30 June 2022). *See also* WD 2-3000-071/17, *supra* note 32, p. 19; WD 2-3000-066/19, *supra* note 33, p. 9.

[39] *See* WD 2-3000-071/17, *supra* note 32, p. 4.

[40] *See* WD 2-3000-093/17, WD 4-3000-083/17, WD 7-3000-125/17, *supra* note 32, pp. 4-5; WD 2-3000-066/19, *supra* note 32, p. 9. *See also* D'Argent, *supra* note 34, para. 38 ("the various compensation measures implemented by Germany constitute the most significant and most far-reaching atonement programme ever established").

[41] *See* Kranz (*Deutsch-polnische*), *supra* note 33, p. 491. *Cf.* the comparison with Poland's renunciation in respect of Japan, *Kranz (Kriegsbedingte Reparationen), supra* note 33, p. 365.

compensation.[42] Poland also maintains that in 1953 it had been under inescapable Soviet influence and therefore made the declaration under duress, thus rendering it invalid.[43] The position that Poland had been unlawfully pressured to renounce its claims has also been supported by Polish scholars,[44] and it was recently underscored by the research service of the Polish parliament (the Sejm).[45] It worthy of note that these views have been, in turn, rejected by Germany, as was equally underscored by the research service of the German parliament (the Bundestag).[46]

1.3. Underlying conundrums

The cause of this convoluted legal debate – fuelled by occasionally awkward diplomacy and the claims of populist or, even, revisionist politicians[47] – lies in the conundrums flowing from the practice of the at first three, and later four, Allied Powers at the Potsdam Conference. With regard to questions of territory and reparations, their practice was somewhat outside the tracks of contemporaneous laws.[48]

For example, according to the 1945 Potsdam Agreement the Allies chose to place the German territories east of the Oder-Neisse line expressly "under the administration of the Polish State" adding that "for such purposes" the territories "should not be considered as part of the Soviet zone of occupation."[49] This legal construct cast doubt on the legal status of those territories and, thus, on the applicable law: if the clause "under the administration of the Polish State" meant that Poland was only entrusted by the Allies to exercise their powers as belligerent occupants for the time being, then Poland had to comply with the law of belligerent occupation

[42] Resolution of the Sejm of the Republic of Poland on Poland's rights to German war reparations and on unlawful claims against Poland and Polish citizens made in Germany (in Polish), 10 September 2004, Monitor Polski 2004, no. 39, item 678. *See also* the reference to this position in WD 2-3000-071/17, *supra* note 32, p. 4.

[43] *See* the reference to this position in WD 2-3000-066/19, *supra* note 32, p. 10. This argument is less convincing when seen in light of Poland's membership within the United Nations or other declarations made by it as part of the Communist bloc. *See* Czaplinski, *supra* note 32, pp. 78-79; M. Fischer, *Der Zwei-plus-Vier-Vertrag und die reparationsberechtigten Drittstaaten*, 78 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1003 (2018), pp. 1031-1032; L. Kleinert, *Neue Initiative der polnischen Regierung in Sachen deutscher Weltkriegsreparationen – Germany v. Italy 2.0?*, Völkerrechtsblog, 20 April 2018, available at https://bit.ly/3NFFwJ9 (accessed 30 June 2022).

[44] *See* Żerko, *supra* note 34, pp. 7 and 17-19, with further references.

[45] Biuro Analiz Sejmowych, *Legal opinion on the possibility of Poland seeking compensation from Germany in connection with international agreements for damage suffered during the Second World War*, 6 September 2017, BAS-WAP-1455/17.

[46] *See* WD 2-3000-066/19, *supra* note 32, p. 9. *Cf.* Kranz (*Kriegsbedingte Reparationen*), *supra* note 33, p. 366.

[47] *Cf.* Fischer, *supra* note 43, p. 1007; Gortat, *supra* note 10, pp. 115-117; Jurkowicz, *supra* note 11, pp. 123-124.

[48] *See* Frowein, *supra* note 12, para. 14.

[49] *See* Report on the Tripartite Conference at Berlin, The Department of State Bulletin, Vol. XIII, No. 319 (5 August 1945), Chapter IX, Section B.

and, accordingly, for example, with Art. 56 of the 1907 Hague Regulations as regards German cultural property.[50] However, if the very same clause meant that Poland enjoyed full territorial jurisdiction over the German territories to the east of the Oder-Neisse line,[51] the applicable public international law regime was rather unclear. At most, one might think of the contemporaneous customary law of state succession, which however might have been applicable by analogy only.[52]

Another example stems from the Second World War reparations which were "distinctively characterised by pragmatism and diversity."[53] This quote can be read as a rather euphemistic description of those events which did not fit into then-established legal practice, especially after the First World War.[54] Whereas the Allies entered into regular peace treaties with other axis powers already in 1947,[55] any such peace treaty with Germany was postponed.[56] These peace treaties provided for reparations including by confiscation of (private) enemy property located within Allied state territories.[57] The defeated states, in turn, were burdened with compensating the former owners, who were typically their own nationals.[58] In contrast, in the Potsdam Agreement, which concerned Germany as a whole, the Allies seemed to have empowered themselves to take reparations unilaterally, i.e. not on the basis of a peace treaty with Germany, but by the confiscation of property and other assets situated inside and outside German territory.[59] It is hardly surprising that against this background Poland also considered itself to be entitled to appropriate German property, including cultural property, in the German territories east of the Oder-Neisse line.

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[50] *See* Klein, *supra* note 17, p. 40.

[51] *See* W. Czaplinski, *Das Potsdamer Abkommen nach 50 Jahren aus polnischer Sicht*, 72 Die Friedens-Warte 49 (1997), p. 50.

[52] *Cf.* Czaplinski, *supra* note 51, p. 52.

[53] D'Argent, *supra* note 34, para. 1.

[54] *See* Czaplinski, *supra* note 32, p. 73; D'Argent, *supra* note 34, para. 2.

[55] *See* D'Argent, *supra* note 34, para 22; F. Arndt, *Peace Settlements after World War II,* in: *Max Planck Encyclopedia of Public International Law* (2011), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), para. 3

[56] *See* D'Argent, *supra* note 34, paras. 9 and 11; Arndt, *supra* note 55, para. 4; J. Kranz, *Shadows of the Past in Polish-German Relations,* 14 The Polish Quarterly of International Affairs 5 (2005), p. 21.

[57] *See* H.-G. Dederer, *Enemy Property,* in: *Max Planck Encyclopedia of Public International Law* (2015), available at: http://opil.ouplaw.com/home/EPIL (accessed 30 June 2022), para. 47; Eritrea Ethiopea Claims Commission, Partial Award, *Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32 between The State of Eritrea and The Federal Democratic Republic of Ethiopia,* 17 December 2004, para. 128. *See also* Eritrea-Ethiopia Claims Commission, Partial Award, *Loss of Property in Ethiopia Owned by Non-Residents – Eritrea's Claim 24,* 19 December 2005, XXVI RIAA 429 (2009), para. 24.

[58] *See* Dederer, *supra* note 57, para. 47.

[59] *See* D'Argent, *supra* note 34, paras. 7, 9-11, and 16; Frowein, *supra* note 12, para. 5; Klein, *supra* note 17, pp. 52-53.

2. OBLIGATIONS TO RETURN CULTURAL PROPERTY BETWEEN GERMANY AND POLAND

The current legal situation is subject to contravening interpretations of the legal and historic developments in the aftermath of the Second World War and, consequently, contradictory results until the present day. Nevertheless, one may still ask whether any specific legally binding obligations exist to restore cultural property, or grant reparations for the destruction and loss of cultural property, springing from post--war German-Polish treaty relations.

According to Art. III of the 1970 Warsaw Treaty, both parties committed to further steps towards the complete normalisation and comprehensive development of their mutual relations. In particular, they agreed that the expansion of their co-operation in cultural matters lies in their common interest. Clearly however, this broad formulation does not give rise to any legally-binding commitments insofar as regards the restitution of, or compensation for, cultural property.

Interestingly, the 1991 Treaty on Good Neighbourship and Friendly Cooperation is more specific with regard to cultural property. According to Art. 28(2), the parties agree to take special care of the places and cultural objects located within their territory which bear witness to historical events, as well as cultural and scientific achievements and the traditions of the respective other party. They further agree to ensure free and unhindered access to these places and objects and to take care that such access is enabled in the event it cannot be granted directly by the state itself. Furthermore, the parties agree to implement joint initiatives in this field in a spirit of understanding and reconciliation.[60] In addition, Art. 28(3) emphasises the parties' commitment, in this very same spirit, to resolve the problems relating to cultural property and archival materials, starting with individual cases.[61]

However, in the end the 1991 Treaty on Good Neighbourship and Friendly Cooperation also does not include provisions establishing explicit obligations to restore cultural property or to pay reparations for destroyed, looted, or otherwise lost cultural property.[62] At the same time however, in the negotiations on the 1991 Treaty, Germany and Poland agreed that 500 million marks should be paid

[60] The German text reads: "Die Vertragsparteien werden sich der auf ihrem Gebiet befindlichen Orte und Kulturgüter, die von geschichtlichen Ereignissen sowie kulturellen und wissenschaftlichen Leistungen und Traditionen der anderen Seite zeugen, besonders annehmen und zu ihnen freien und ungehinderten Zugang gewährleisten beziehungsweise sich für einen solchen Zugang einsetzen, soweit dieser nicht in staatlicher Zuständigkeit geregelt werden kann. Die genannten Orte und Kulturgüter stehen unter dem Schutz der Gesetzte der jeweiligen Vertragspartei. Die Vertragsparteien werden gemeinsame Initiativen in diesem Bereich im Geiste der Verständigung und der Versöhnung verwirklichen."

[61] The German text reads: "Im gleichen Geiste sind die Vertragsparteien bestrebt, die Probleme im Zusammenhang mit Kulturgütern und Archivalien, beginnend mit Einzelfällen, zu lösen."

[62] *Cf.* Wierczyńska, *supra* note 8, p. 232.

to Polish victims of crimes committed during the Second World War.[63] However Germany did not want these payments to be treated as reparations but rather as "humanitarian aid" or "voluntary financial payments" respectively, to be handled by the Foundation for Polish-German Reconciliation.[64]

The most recent treaty, the 1997 Agreement on Cultural Cooperation, regulates the cooperation of both states in the fields of culture, education and science. In particular, Art. 10 includes the commitment of both parties to facilitate the access of citizens of the other party to its archives, libraries, museum collections as well as other institutions; and Art. 17 envisions the creation, and activities, of cultural institutions of one state within the other.[65] While the most pertinent provision regarding restitution and reparations in regard to cultural property is Art. 15, this provision simply refers to Art. 28 of the earlier 1991 Treaty, which does not entail any legally-binding treaty obligations insofar as regards the restitution of, or compensation for, cultural property.[66]

3. OUTLOOK: IN SEARCH OF PRAGMATIC SOLUTIONS

In sum, the obligations under the 1970 Warsaw Treaty, the 1991 Treaty on Good Neighbourship and Friendly Cooperation, as well as the 1997 Agreement on Cultural Cooperation are mainly procedural and organisational in nature. The very few substantive – and at the same time vague and nonspecific – treaty obligations on closer cultural cooperation have been half-heartedly implemented at best. Relevant stakeholders have confirmed upon enquiry that there has been no systematic cooperation since at least 2014 and that currently matters are at a standstill in terms of substantive movements on both sides as regards the restitution of, and reparations for, cultural property. The current case-by-case approach followed by Germany and Poland under the 1991 Treaty has been described as "*ad hoc* and rather chaotic, as well as woefully slow."[67] It should be noted however that Germany and Poland

[63] *Ibidem*.

[64] *See* S. Garsztecki, *Deutsche Kriegsreparationen an Polen? Hintergründe und Einschätzungen eines nicht nur innerpolnischen Streites*, Polen-Analysen 2 (2018), p. 4; Kranz, *supra* note 56, pp. 494-495; Wierczyńska, *supra* note 8, p. 232.

[65] Art. 17(2) gives examples of such already existing institutions: the Goethe-Institutes in Warsaw and Cracow; the German Academic Exchange Service Regional Office Warsaw; and the Polish Institutes in Berlin, Düsseldorf, and Leipzig.

[66] *See* Wierczyńska, *supra* note 8, p. 233.

[67] Wierczyńska, *supra* note 8, p. 233.

have successfully cooperated in the field of cultural affairs before, for example in the designation of cultural heritage sites within the framework of UNESCO.[68]

Against this background of a deplorable legal, diplomatic, and political stalemate, pragmatic solutions need to be developed which aim at mutually beneficial ways of accommodating the interests of both sides in the preservation of, and access to, cultural property located in the other state's territory. An approach along the lines of "cultural internationalism",[69] favouring a cooperative exchange of cultural property, might be the key.[70] The search for solutions for the return of cultural property, particularly in the European Union, should be sought beyond the territories of nation states in the form of a "collaborative regime".[71]

The most prominent example to follow might be the so-called Copernicus Group established by German and Polish historians, and consisting of political and cultural scientists as well as journalists.[72] It is of note that 2020 not only marked the 50th anniversary of the Warsaw Treaty and the 30th anniversary of the 2+4 Treaty, but also the 20th anniversary of both the establishment of the Copernicus Group in May 2000 and the elaboration and publication of a Working Paper in November 2000 which presented pragmatic proposals for the mutual enjoyment of cultural property (it might also be worth noting that the Copernicus Group seized the opportunity of the 30th anniversary of the 1991 Treaty on Good Neighbourship and Friendly Cooperation to issue an appeal in June 2021 calling for a deepening and intensifying of the bilateral German-Polish relations).[73] Coming back to its paper of 2000, the group suggested a multi-step approach addressed to the German and Polish governments – based on the 1991 Treaty – to resolve the controversial issues

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[68] In addition to the cultural heritage relevant for both states – such as the Castle of the Teutonic Order in Malbork (Marienburg) and the Medieval Town of Toruń (Thorn), both of which are inscribed into the UNESCO World Heritage List in 1997 – there also exists the jointly administered Muskauer Park/Park Mużakowski, inscribed in 2004, as well as the Centennial Hall in Wrocław (Breslau), inscribed in 2006 with the support of Germany. *See* UNESCO, World Heritage List, available at: https://whc.unesco.org/en/list (accessed 30 June 2022). *See also* A. Jakubowski, *World Heritage, Cultural Conflicts and Political Reconciliation,* in: A. Durbach and L. Lixinski (eds.), *Heritage, Culture and Rights. Challenging Legal Discourses,* Bloomsbury, London: 2017, pp. 259-260.

[69] *See,* prominently, J.H. Merryman*, Two Ways of Thinking about Cultural Property,* 80 American Journal of International Law 831 (1986). *See also* L.V. Prott, *The International Movement of Cultural Objects,* 12 International Journal of Cultural Property 225 (2005).

[70] *See* Jurkowicz, *supra* note 11, pp. 128-129.

[71] *See* J.A.R. Nafziger, *A Blueprint for Avoiding and Resolving Cultural Heritage Disputes,* 9 Art, Antiquity and Law 3 (2004).

[72] *See* Deutsches Polen-Institut, Kopernikus Gruppe, available at: https://www.deutsches-polen-institut.de/politik/kopernikus-gruppe/ (accessed 30 June 2022).

[73] *See* Aufruf der Kopernikus-Gruppe zum 30. Jahrestag des Deutsch-Polnischen Nachbarschaftsvertrags, available at: https://www.deutsches-polen-institut.de/assets/Kopernikus-Gruppe/Aufruf-Kopernikus-Gruppe-Juni-2021.pdf (accessed 30 June 2022).

and consolidate the contravening positions of both parties.[74] It would seem that the essential elements of the Copernicus Group's proposals could form the basis for a new German-Polish roadmap consisting, *inter alia*, of the following segments:

1. raising public awareness of the massive and mostly irrecoverable deliberate destruction of cultural property;
2. drawing up and verifying – by an independent expert body – lists of lost cultural property presumed to be situated in the territory of the other party, together with the obligation to return without undue delay cultural objects illegally removed during the war or subsequent occupation;
3. establishing a German-Polish cultural heritage foundation which governs cultural property through joint management measures, including for example permanent loans to museums, art collections, libraries etc. of the other party so as to accommodate the genuine interests in preserving national cultural identity, and/or the creation of facsimiles to be provided to the other party;
4. archival materials should be distributed in accordance with their current territorial, personal, historical or national significance.

Such a German-Polish practice could, in turn, contribute to a *ius post bellum*[75] with regard to cultural property, as well as to the public international law on the restoration of cultural property, the removal or subsequent transfer of which cannot be characterised as having been clearly illegal within their historical legal context, but which is of outstanding national importance to a people or state today.[76]

[74] *See* Deutsches Polen Institut, Kopernikus-Gruppe. Arbeitspapier II der Kopernikus-Gruppe, available at: https://www.deutsches-polen-institut.de/politik/kopernikus-gruppe/arbeitspapier-ii/ (accessed 30 June 2022).

[75] On *ius post bellum see generally* C. Stahn, J.S. Easterday, J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations,* Oxford University Press, Oxford: 2014.

[76] *Cf.* on the return of the Benin Bronzes the statement Auswärtiges Amt, Erklärung zum Umgang mit den in deutschen Museen und Einrichtungen befindlichen Benin-Bronzen, 30 April 2021, available at: https://www.auswaertiges-amt.de/de/newsroom/benin-bronze/2456786 (accessed 30 June 2022).

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THE POLISH-GERMAN BORDER IN THE LIGHT OF THE 2+4 TREATY AND THE POLISH-GERMAN TREATY ON THE CONFIRMATION OF THE BORDER BETWEEN THEM

Abstract: *The essence of the "border problem" between Poland and the FRG reaches back to the provisions of the Potsdam Agreement of 1945. The Polish position was unambiguous from the beginning: the border on the Odra and Nysa Łużycka rivers was established under international law in the Potsdam Agreement, while the subsequent actions undertaken within the framework of the "peace settlement" could only have complementary, declaratory significance. On the other hand, in the FRG an official legal position was developed according to which the former eastern German territories were only given to Poland (and the USSR) "under their administration", and the final decision on the border was left to be taken by the future unified Germany in a "peace treaty" or a "peace settlement". This position was not changed by the Normalization Treaty between Poland and the FRG of 1970, because it was interpreted in the FRG as only a "treaty about the renunciation of force", an element of a modus vivendi which was to last until the unification of Germany. On the other hand, the Zgorzelec Treaty of 1950 between Poland and the GDR was interpreted as not binding for the future unified Germany. Such a position deeply destabilized political relations between the FRG and Poland in the post-war period and had a conflict-generating significance in a number of areas. At the beginning of 1990 the political changes in Poland coincided with the process of German unification. The democratic opposition in Poland, and thereafter the government of Tadeusz Mazowiecki, unequivocally supported the right of the German people to self-determination, at the same time expecting an unequivocal position on the Polish-German border. This fundamental problem was closed in 1990 under two international agreements: the Treaty on the Final Settlement with Respect to Germany (2+4 Treaty) and the Treaty between the*

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Federal Republic of Germany (united Germany) and the Republic of Poland on the confirmation of the border between them. Thus for thirty-plus years now the "border problem" has been removed from the agenda of political discussions in Polish-German relations, which proves the effectiveness and durability of the agreement reached, which was reflected in both treaties.

Keywords: Potsdam Agreement, 2+4 Conference, Polish-German relations, unification of Germany, Polish-German community of interests

INTRODUCTORY REMARKS

At the beginning of 1990, Polish Foreign Minister Krzysztof Skubiszewski drew attention to the need to build a "Polish-German community of interests" and stated that "there can't be any border problem on the eve of German unification."[1] This was a statement of fundamental importance, as the political changes in Poland coincided with the process of German unification. This fundamental problem was closed the same year under two international agreements: the Treaty on the Final Settlement with Respect to Germany, signed on 12 September 1990[2] (2+4 Treaty), which closed the 2+4 Conference (Poland participated in certain parts of this Conference and had an influence primarily on the substance of the border clauses concerning the united Germany); and the Treaty between the Federal Republic of Germany (united Germany) and the Republic of Poland on the confirmation of the border between them, signed on 14 November 1990.[3]

The essence of this problem reaches back to the provisions of the Potsdam Agreement of 2 August 1945, in which the Allied Powers, exercising their competences after taking over the highest power in Germany due to its unconditional surrender, handed over the eastern German territories to Poland (and part of East Prussia to the Union of Soviet Socialist Republics (USSR)), at the same time establishing the western border of Poland on the Odra and Nysa Łużycka rivers. The border was to be finally "delimited" or "determined" in the future "peace settlement" – a concept that went beyond the traditional understanding of a peace treaty.

Due to the deepening political conflict in Europe after the Second Word War, such a "peace settlement" with Germany never happened (from 1949 there were two

[1] From the speech delivered on 22 February 1990 during the 6th Polish-German Forum.

[2] BGBl. 1990, Part II, pp. 1317.

[3] Journal of Laws 1992, No. 14, item 54 (in Polish). *See* J. Barcz, K. Ruchniewicz (eds.), *Ein historischer Akt. 30 Jahre Vertrag* über *die Bestätigung der deutsch-polnischen Grenze an Oder und Lausitzer Neiße*, Elipsa, Wrocław-Warszawa: 2022.

German states – the Federal Republic of Germany (FRG) and the German Democratic Republic (GDR)). The Polish position was unambiguous from the beginning: the border on the Odra and Nysa Łużycka rivers was established under international law in the Potsdam Agreement, while the subsequent actions undertaken within the framework of the "peace settlement" could only have complementary, declaratory significance. This position was the subject of works of all the leading Polish experts in international law, including Alfons Klafkowski, Józef Kokot, Manfred Lachs, Bogdan Wiewióra, Ludwig Gelberg, Krzysztof Skubiszewski, Jerzy Tyranowski, and Lech Janicki.

On the other hand,[4] in the FRG an official legal position (*Rechtsposition*) was developed according to which the former eastern German territories were only given to Poland (and in part to the USSR) under their "administration", and the final decision on the border was to be taken by the future unified Germany in a "peace treaty" or a "peace settlement" (*Friedensvertragvorbehalt*). This position was not changed by the Normalization Treaty between Poland and the FRG of 7 December 1970,[5] because it was interpreted in the FRG as only a "treaty about the renunciation of force", an element of a *modus vivendi* until the unification of Germany. On the other hand, the Zgorzelec Treaty of 6 July 1950[6] between Poland and the GDR was at first ignored by the FRG, and the FRG, after establishing diplomatic relations in the early 1970s with the GDR, interpreted it as not binding for the future unified Germany. Such a position deeply destabilized political relations between the FRG and Poland in the post-war period and had a conflict-generating significance in a number of areas, such as citizenship, property relations, legal cooperation, place names, minority protection issues, etc.

In the fall of 1989, at the beginning of the process of unification of Germany, this was thus the "legal position" of the FRG. The democratic opposition in Poland, and thereafter the government of Tadeusz Mazowiecki, unequivocally supported the right of the German people to self-determination, while at the same time expecting an unequivocal position on the Polish-German border. Nevertheless, during his visit to Poland in November 1989 (during which the Berlin Wall fell in the night of 9-10 November), Chancellor Helmut Kohl referred consistently to the

[4] The legal positions of both parties – Poland and the FRG were described in J. Barcz, J.A. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen in Zusammenhang mit dem Zweiten Weltkrieg*, 65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 625 (2005).

[5] Agreement between Poland and Federal Republic of Germany concerning the basis for normalization of their mutual relations (signed on 7 December 1970), 830 UNTS 327. *See* J. Barcz, K. Ruchniewicz (eds.), *Akt normalizacyjny. 50 lat Układu o podstawach normalizacji stosunków PRL-RFN z 7 grudnia 1970 roku* [The normalization act. 50 years of the Normalization Treaty between PPR and FRG], Elipsa, Wrocław-Warszawa: 2021.

[6] Treaty between the Polish Republic and the Democratic Republic of Germany on the delimitation of the existing Polish-German border, signed on 6 July 1950 in Zgorzelec, Journal of Laws 1950, No. 51, item 465.

above-mentioned "legal position" of the FRG and avoided taking an unequivocal position on the status of the Polish-German border under international law; the ten-point plan of German unification announced by him on 28 November 1989 did not contain any references to the border with Poland. In the face of such circumstances, the government of Tadeusz Mazowiecki took steps to include Poland in the relevant parts of the 2+4 Conference (which – with the participation of four powers – dealt with the "external aspects" of the unification of Germany). In parallel, the confirmation of the Polish-German border on the Odra and Nysa Łużycka rivers was discussed in both trilateral relations (Poland, the FRG and GDR) and bilateral relations (Poland-FRG). These actions were aimed at putting an end to all reservations about the legal status of this border (raised previously in the FRG) in the relations between Poland and the united Germany. This was all the more important because in this case – in view of the arguments arising from the "legal position" of the FRG – the principles on succession of states in treaties establishing borders (which by law should be binding on the successor) may have turned out to be insufficient, especially since the unification of Germany took the form of the accession (incorporation) of the GDR into the FRG.

1. THE POLISH-GERMAN BORDER IN THE LIGHT OF THE 2+4 CONFERENCE

For the confirmation of the Polish-German border as the final border under international law, the Treaty on the Final Settlement with Respect to Germany, signed on 12 September 1990 (entered into force on 15 March 1991), was of fundamental importance. It was negotiated during a conference attended by the United States, Great Britain, France and the USSR as well as the two German states (2+4 Conference), which – exercising the right to self-determination – restored "German state unity." The participation of the above-mentioned four states was necessary because they had – as the Allied Powers of the Second World War – "rights and responsibilities for Berlin and Germany as a whole" resulting from the unconditional surrender of the Third Reich and their assumption of supreme power in Germany. While the extent of these "rights and responsibilities" was contested between the USSR and the three Western powers, their existence on the eve of German unification was not in question.

According to the Ottawa communiqué of 13 February 1990, the subject of the 2+4 Conference was to be "the external aspects of the establishment of German unity, including the issues of security of the neighboring states." In fact however, the Conference was the proverbial "tip of the iceberg", because the problems discussed within it were at the centre of the debate on the geopolitical future of the European

continent, and the 2+4 Treaty was accompanied by a network of multilateral and bilateral international agreements which became the basis for the "new political architecture" of Europe. Needless to say, the arrangements reached at that time had a direct impact on the place of the "new democracies" of Central and Eastern Europe (CEE) in the emerging European "political architecture", and for Poland were of existential significance.[7]

While the formal goal of the 2+4 Conference was to end the "rights and responsibilities of the four powers for Berlin and Germany as a whole", nevertheless it was necessary to regulate in parallel the membership of the united Germany in the (political, military and economic) alliances, and to regulate the presence of foreign troops on the territory of unified Germany and the status of Berlin. The political goal of the three Western powers and the FRG (and in the final phase also of the GDR) was to ensure the membership of the united Germany in NATO and in the European Community. The negotiation of the USSR's consent to such a scenario of German unification also required understanding on the rules for the withdrawal of Soviet troops from the territory of the then-GDR and the withdrawal of the GDR from the Warsaw Pact and COMECON. The undisputed condition for reaching such groundbreaking decisions was to put an end to all doubts raised previously in the FRG about the final nature of the border on the Odra and Nysa Łużycka rivers under international law, and (which is usually forgotten) the borders of the USSR on the territory of the former East Prussia. Following Polish diplomatic activities, this issue was included in the main agenda of the 2+4 Conference.

The provisions of the 2+4 Treaty confirmed that the borders of the united Germany are final in the light of international law, put an end to the "rights and responsibilities" of the four powers (on the day of unification, on 3 October 1990, Germany became a fully sovereign state, and until the 2+4 Treaty entered into force the four powers suspended their "rights and responsibilities"); regulated the political and military status of the united Germany – including above all opening the way for its membership in NATO and the European Communities; and agreed on the withdrawal of Soviet troops from (former) territory of the GDR by the end of 1994 (which was implemented despite the dissolution of the USSR). These groundbreaking decisions were a consequence of the arrangements made, in particular, during the meeting of M. Gorbachev and G. Bush in Washington (31 May – 3 June 1990), and above all during the visit of Chancellor H. Kohl to the USSR (in Moscow and the Caucasus) (14-16 July 1990).

[7] *See* J. Barcz, *Sprawy polskie podczas Konferencji „2+4". Potwierdzenie granicy polsko-niemieckiej i odszkodowania od Niemiec. Studium z historii dyplomacji i prawa międzynarodowego* [Polish affairs during the "2+4" Conference. Confirmation of the Polish-German border and reparations from Germany. A study on the history of diplomacy and international law], Elipsa, Warszawa: 2021.

The common denominator for the decisions taken at that time was the pace of German unification. When analyzing the course and results of the 2+4 Conference, one must be aware that between the fall of the Berlin Wall on the night on 9-10 November 1989, the signing of the 2+4 Treaty (12 September 1990), and the formal unification of Germany (3 October 1990), less than a year had passed. The 2+4 Conference itself, the formal beginning of which was the Ottawa Communiqué published on 13 February 1990, and which ended with the signing of the 2+4 Treaty on 12 September 1990, thus lasted almost exactly seven months. At that time, the political fate of Europe was decided. For Poland, the 2+4 Treaty meant a direct neighborhood with unified Germany and at the same time an end (along with the bilateral treaty on the confirmation of the Polish-German border, signed shortly thereafter, on 14 November 1990) of the reservations previously made by the FRG regarding the status of the border on the Odra and Nysa Łużycka rivers. Thus, the fundamental status problem was eliminated, opening the way to building a Polish-German "community of interests" (as proposed by Minister Krzysztof Skubiszewski). The decision to withdraw the Soviet troops from the territory of the (former) GDR also facilitated the withdrawal of Soviet troops from Poland, and the direct neighborhood with a NATO member state and the European Community (united Germany) created favourable conditions for Poland's negotiations on membership in both of these organizations, i.e. for Poland to join the European group of democratic states.

Poland was the only country outside the 2+4 group that participated in some parts of the 2+4 Conference, on matters "related to its security, especially the border", and as a country that was expressly mentioned in the 2+4 Treaty. The treaty was officially notified to Poland, and Poland responded officially to the content of the notification. Apart from the essential aspects of European security policy, two issues were particularly important from the Polish point of view: to put an end to the reservations put forward previously by the FRG about the status of the Polish-German border under international law; and the problem of compensation from Germany for the victims of Nazi crimes.

- The first issue, of existential importance for Poland, became one of the four main topics of the 2+4 Conference. Thanks to the decisive support of the four Allied Powers from Second World War (and the GDR), the various reservations expressed by Chancellor Helmut Kohl were overcome and satisfactory agreements were achieved: the 2+4 Treaty directly referred to the borders of the united Germany and, along with the provisions of the so-called Protocol

of Paris,[8] put an end to the doubts raised previously in the FRG about the ultimate character of the Polish-German border under international law. Moreover, this issue was the subject of a "complementary" regulation in the Agreement of 27-28 September 1990 (between the FRG and the three Western powers), pursuant to which, *inter alia,* Art. 7(1) of the so-called *Deutschlandvertrag*, to which the FRG previously referred when constructing its so-called reservation related to the "peace treaty" (*Friedensvertragvorbehalt*), was abrogated. Finally, the 2+4 Treaty announced the conclusion of a bilateral treaty between Poland and the united Germany. It was signed on 14 November 1990 and confirmed the Polish-German border.

- The second issue, reparations from Germany, was resolved differently. The four powers, as parties to the Potsdam Agreement, had the legitimacy to revert to the matter of interstate reparations (only such were the subject of the Potsdam formula). However, due to the pace of the unification process of Germany, the potential number of countries involved (the Third Reich was at war with about a hundred countries), and the importance of the political challenges related to the unification of Germany, the Western powers decided from the beginning – to which the USSR agreed after some tactical hesitations in the first stage of the 2+4 Conference – to reject the possibility of including this issue in the "final settlement". Poland could effectively raise the issue of inter-state reparations (we should keep in mind that in the Potsdam formula Poland satisfied its claims exclusively from the part of reparations falling to the USSR) only if the four powers included this matter on the agenda of the Conference. This however did not happen. Nevertheless, there was still the matter of the claims of individual victims of Nazi crimes, which was the subject of careful attention and provided an important context for the deliberations of the Conference and the 2+4 Treaty (mainly due to Poland, Jewish organizations, the USA and the USSR). Parallel to the 2+4 Conference, bilateral talks on a "pragmatic solution" were held (which were stimulated by the talks between Prime Minister Tadeusz Mazowiecki and Chancellor Helmut Kohl during Kohl's visit to Warsaw in

[8] The so-called Paris Protocol of 17 July 1990:

- 4. The Four Allied Powers declare that the borders of the united Germany shall be of definitive nature, which cannot be impaired by any external event or circumstance.
- The Minister of Foreign Affairs of the Polish Republic states that, in the Polish Government's opinion, this declaration does not constitute the Four Powers' guarantee of borders.
- The Minister of the Federal Republic of Germany states that he accepted the fact that the Polish Government did not perceive this declaration as a guarantee of borders. The FRG joins the Four Allied Powers' declaration and stresses that the events or circumstances the declaration refers to, shall not take place – that is it provides for neither a peace treaty nor a peace settlement.
- The GDR subscribes to this declaration of the FRG.

November 1989). United Germany was obliged (in the context of the 2+4 Treaty) to continue the compensations paid so far and to negotiate compensations for previously-omitted victims (Art. 2 of the Implementing Agreement to the Unification Treaty and the Agreement of 27-28 September 1990). This led to the conclusion by the FRG (i.e. United Germany) of a network of agreements with the CEE countries, Jewish organizations, and the USA in the following years. This bloc included the 1991 agreement with Poland and the participation of Poland in the 2000 agreement, under which the victims of Nazi crimes in Poland received about PLN 6 billion (the largest sum received by any of the CEE countries). While these payments were modest in comparison with the magnitude of the harm, they nevertheless provided concrete support to the surviving victims. Until today, this "pragmatic solution" still enables various types of support to be provided to victims of Nazi crimes, which is coordinated by the Foundation for Polish-German Reconciliation (established under the agreement of 1991).[9]

To sum up the activities of Polish diplomacy from the period of the 2+4 Conference, it can be said that they ended with full success. The 2+4 Treaty, signed on 12 September 1990, confirmed in Art. 1 the final nature of the borders of united Germany; obliged united Germany to conclude a bilateral treaty with Poland with the aim to confirm the Polish-German border in bilateral relations; and – most importantly – closed the issue of a "peace settlement" by emphasizing (see the statement contained in the so-called Paris Protocol of 17 July 1990, which constituted the context of the 2+4 Treaty within the meaning of the Vienna Convention on the Law of Treaties) that a "peace treaty" and a "peace settlement" were out of the question.[10]

Thus, the basic argument used in the "legal position" of the FRG in order to challenge the final nature of the Potsdam Agreement decision concerning the border on the Odra and Nysa Łużycka rivers under international law has become irrelevant. The participation of the four powers in bringing about such a general decision was necessary (it was ensured by the 2+4 Treaty). With the expiration of their "rights and responsibilities" they also lost all competences in this context,

[9] *See* J. Barcz, *The 1989-1991 Watershed in Polish-German relations and the issue of compensation for victims of Nazi crimes living in Poland (the Agreement of 16 October 1991)*, Przegląd Zachodni 203 (2019).

[10] *See* J. Barcz, *Das Pariser Protokoll vom 17. Juli 1990 und die Grenze zwischen Polen und dem vereinten Deutschland*, in: Ch. Koch (ed.), *Politik ist die Praxis der Wissenschaft vom Notwendigen. Helmut Ridder (1919-2007)*, Peter Lang, München: 2010, pp. 317 et seq.

and the Polish-German border became a normal border between two states, not encumbered by any reservations or guarantees.[11]

2. THE BILATERAL TREATY BETWEEN POLAND AND GERMANY ON THE CONFIRMATION OF THE BORDER BETWEEN THEM

This Treaty, signed on 14 November 1990, is brief. It consists of a preamble and four articles. From a legal point of view, the Treaty does not establish the border between Poland and the unified Germany, but confirms the "existing" border. So it is of a declaratory nature. As mentioned, this corresponds to the consistent Polish position that the constitutive act establishing the border was the Potsdam Agreement. The declarative nature of the provisions of the Treaty is clearly indicated by its name and the provisions of Art. 1, in which the "existing border" was "confirmed" in reference to its course defined in the treaties previously concluded by Poland with the GDR and the FRG.[12]

The Treaty no longer referred to the Potsdam Agreement, as its provisions on the "peace settlement" had become obsolete, which should be taken into account and emphasized. The provisions of Art. 2 contain at first glance the traditional formula concerning the inviolability of the border "now and in the future", but in addition to the obligation to unconditional respect for territorial integrity, they also include an obligation to unconditionally respect the "sovereignty" of both parties. Such an obligation was not included in the provisions of the Normalization Treaty of 7 December 1970. It is particularly important due to the fact that in the past, in the FRG's "legal position" Poland's sovereignty in the Western and Northern Territories (former eastern territories of Germany) was questioned.

[11] Commenting on this issue, Minister Krzysztof Skubiszewski stated (speech delivered on 26 July 1990 in the Polish Sejm): "The Powers' involvement in ensuring the definitive character of Germany's existing boundaries is not equal to guarantees in terms of international law. In particular the Polish-Garman boundary is not the subject of such a guarantee. From the beginning, the Polish government held the view that assurances from the Powers in the matter of the boundaries' lasting nature and the removal of all doubts directed at us is necessary. The participation of the Powers is necessary. But a guarantee is something else. After the experience of Yalta, we prefer not to have anyone's guarantee. It often has the opposite effect than the certainty and peace that the word 'guarantee' implies. Let the Polish-German boundary in its present course be a normal boundary, one like all others, without creating a special situation and a special position of the Powers in connection with this territorial regulation. This could lead to undesirable developments. A guarantor is at times owed something and at times takes advantage of this special status. Polish experiences in this respect are not good. In Paris we have reached the appropriate balance between necessary assurances and our independence."

[12] Minister Krzysztof Skubiszewski stated in this context: "The treaty which we have just signed confirms the Polish-German border existing at the moment of the treaty's signing; that is a border delimited and demarcated in the field in keeping with the agreements mentioned in Article 1 of the treaty." *See* 5 Zeszyty Niemcoznawcze PISM 27 (1990).

Art. 3 states that both states "have no territorial claims against each other and that they will not put forward any such claims in the future." Art. 4 contains the so-called "final clauses". The Treaty does not contain a reservation that the parties may not infringe other international agreements concluded by or relating to them. Such reservations, contained in Art. IV of the Normalization Treaty of 7 December 1970, opened the way for the interpretation of the Treaty in the FRG, at least according to its "legal position".

In Germany, the ultimate nature of the border between Poland and reunified Germany is, as understood by international law, fully respected. However, this does not mean a departure from the above-mentioned "legal position" in relation to the past, i.e. the post-war period. In Germany, the position which denies that the Potsdam Agreement is of a constitutive character as regards the establishment of the border on the Odra and Nysa Łużycka rivers is dominant (incidentally, such an effect is associated with the Treaty of 7 December 1970). The consequence of this are disputes in the German doctrine of international law as to the act under which such a constitutive decision was made in relation to the united Germany: some representatives of the doctrine see the constitutive act in the 2+4 Treaty; others in the bilateral treaty confirming the Polish-German border.

However, contrary to the post-war period, when the "legal position" of the Federal Republic of Germany had extremely destabilizing consequences in the field of political, diplomatic and legal relations with Poland, after the conclusion of the 2+4 Treaty and the bilateral treaty confirming the existing border, these types of consequences "died out" due to the fact that the status of the Polish-German border under international law is no longer being questioned by Germany.[13]

Finally, attention should also be paid to the moral and emotional aspects of the Treaty. It should be realized that from the German point of view, the Treaty finally closed the "border issue" with Poland, and thus confirmed that part of the former eastern German territories belong to Poland. This was related to the emotions of the German population which was displaced from these territories.[14] This was reflected in the negotiations and in the text of the Treaty (see the fifth recital in the preamble).

[13] A good example is putting an end to the claims of former German property owners in the Polish Western and Northern Territories, which were declared non-existent in the Barcz-Frowein Expertise of 2004 (J. Barcz, J.A. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen in Zusammenhang mit dem Zweiten Weltkrieg*, 65 Zeitschrift für ausländisches, öffentliches Recht und Völkerrecht 625 (2006). Such a position was accepted by both governments, and finally by the European Court of Human Rights (ECtHR), rejecting the claims of the Prussian Trust in its ruling (ECtHR, *Preussische Treuhand GmBH & Co. KG a.A. v. Poland* (App. No. 47550/06), 7 October 2008. For more details, *see* J. Barcz, K. Podstawa, *Long Shadow of History: on the Decision of the European Court of Human Rights of October 2008*, 18(1) The Polish Quarterly of International Affairs 43 (2009).

[14] *See* considerations of Minister H.-D. Genscher on this (H.-D. Genscher, *Erinnerungen*, Siedler, Berlin: 1995, pp. 890 et seq.).

In his speech immediately after signing the Treaty on November 14, 1990, Prime Minister Tadeusz Mazowiecki said in this context:

> Our nation's suffering during the war was immense and immeasurable. Even the number of victims will not account for them. How monstrous were the sufferings suffered in our land, if we add to the victims of Poland the victims of the Jewish people. In the aftermath of the war, as a result of the decisions of the great powers, Poland, deprived of its pre-war eastern territories, received lands in the west as compensation. We found this decision righteous. We consider it inevitable, indisputable. Today, together with Minister Skubiszewski, on behalf of Germany, you [Minister Genscher] signed the act of irreversibility of this decision. But recalling the words of the bishops "we ask for forgiveness", one must also speak of the suffering of the German nation, which was related to the shift of Poland from the East to the West. We underline that there is no arithmetic in the calculations of the victims. Every harm remains harm, every misfortune – misfortune; no matter what harm, what misfortunes we have suffered.[15]

CONCLUSIONS

For over thirty years now, the "border problem" has been removed from the agenda of political discussions in Polish-German relations, which proves the effectiveness and durability of the agreements reached, which was reflected in both the 2+4 Treaty and the Treaty of 14 November 1990.

In conclusion I would like to mention two issues that have acquired a certain meaning in the present political discussion in Poland.

Firstly, even in serious works in the field of Polish political history, the question is raised whether so many efforts should have been devoted in 1989/1990 to the matter of the Polish-German border.[16] For a lawyer dealing with international law, this question is more than rhetorical. Krzysztof Skubiszewski, in his fundamental work,[17] emphasized that if the state border is questioned, one of the pillars of statehood is being questioned. The unification of Germany was the moment when it was possible to put an end to various reservations on the part of the Federal Republic

[15] Minister Krzysztof Skubiszewski also referred to this problem in his speech: "In his highly constructive speeches in recent months, the Federal Chancellor, Mr. Kohl has repeatedly pointed to the plight of people who have lost their homes and their homelands as a result of border changes in this part of Europe. This is what the aggression and destruction of the European order, which existed until 1939, led to. Today, however, Poles and Germans need peace in their hearts and minds. We must look not backwards but towards the future. We have to get along with each other." The text of both speeches in 5 Zeszyty Niemcoznawcze PISM 15 (1991).

[16] *See* A. Dudek, *Od Mazowieckiego do Suchockiej. Pierwsze rządy wolnej Polski* [From Mazowiecki to Suchocka. First governements of free Poland], Znak, Kraków: 2019, p. 98.

[17] K. Skubiszewski, *Zachodnia granica polski w świetle traktatów* [The Western Polish border in the light of the treaties], Instytut Zachodni, Poznań: 1975.

of Germany in relation to the border on the Odra and Nysa Łużycka rivers. This was successfully achieved by drawing conclusions both from the interwar period and after 1945.

Secondly, there are also accusations, in the context of the current ruling PiS government, about returning to the "matter of reparations from Germany" by arguing that during the 2+4 Conference this matter was neglected and that there was thus an "opportunity" to effectively pursue "reparations".[18] It takes a great deal of ignorance and ill will to make such accusations. In view of the decisive position of the four powers, there were no chances of a return to inter-state claims (in the Potsdam formula), and forcing the matter against the position of the great powers could only weaken Poland's position on the fundamental issue, i.e. putting an end to doubts about the Polish-German border. Then – as has been mentioned – in the context of the 2+4 Treaty a reunified Germany was obliged to make payments to forgotten victims of Nazi crimes. The adopted "pragmatic formula" (mainly due to Polish efforts) made it possible (and still enables) to provide concrete support to the still living victims of Nazi crimes. This is what the measures taken now should focus on, and not on unrealistic mirages about the possibility of receiving astronomical sums from Germany almost 80 years after the end of the Second World War.

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The designation of the Treaty of 14 November 1990 as a "historical act" is perfectly justified. It put an end – together with the 2+4 Treaty – to the Federal Republic of Germany's previous reservations about the finality of the Polish-German border under international law. At the same time, it opened the way to building a Polish-German "community of interests" in a united Europe, as postulated by Minister Krzysztof Skubiszewski. It should be recalled that the negotiations on the 2+4 Treaty and the Border Confirmation Treaty contributed to the development of the concept of a "big" Polish-German Treaty on good neighborhood and friendly cooperation; which was signed on 17 June 1991 and which set the stage for such a "community of interests", paving Poland's way to the European Union.[19]

[18] *See especially* A. Mularczyk, PiS politician and chairman of the parliamentary committee for reparations (the committee has ceased to exist in the term of the Sejm since 2019). *See* sources given, among others in: A. Leszczyński, *Jak Mazowiecki ugiął się przed Niemcami, czyli baśń o straconych reparacjach. Pamięć Mularczyka wymaga reparacji* [How Mazowiecki bowed to the Germans, or a fairy tale about lost reparations. Mularczyk's memory requires reparations], OkoPress, 17 October 2017, available at: https://bit.ly/3L2e1YE (accessed 30 June 2022).

[19] *See* Barcz, Ruchniewicz, *supra* note 3.

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STATE BOUNDARIES AND THIRD STATES – ISSUE OF OPPOSABILITY. REMARKS ON THE POLISH-WEST GERMAN NORMALIZATION TREATY OF 1970

Abstract: *The Western boundary of Poland was established by the Potsdam Agreement of 1945 and confirmed by the Boundary Agreement between Poland and the GDR of Gőrlitz of 1950. Poland exercised administration with respect to the adjudicated territories, but she made efforts to get the boundary recognized and confirmed by the FRG. This happened on the basis of the Warsaw Treaty of 1970. Boundary treaties are usually considered as objective regimes. It is disputable whether the Warsaw Treaty of 1970 can be classified as such a regime.*

Keywords: Potsdam Agreement, Polish-German border, objective regimes in international law, treaties and third parties

INTRODUCTION

The treaty between Poland and the Federal Republic of Germany of 7 December 1970 on the basis for the normalization of their mutual relations was intended to create a legal framework for the development of relations between the two countries, and at the same time between the two political blocs in Europe. The disputed border was the axis of the ideological, economic and political conflict between Western Europe and the allies of the Union of Soviet Socialist Republics (USSR).

The assumption of power in Germany by the SPD-FDP coalition in 1969 made it possible for the interested states to establish mutual relations. However, the key issue for deepening cooperation was the resolution of the territorial dispute that

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had existed between the two countries since the end of the Second World War. Both Poland and Germany played politics with the border issue. The policy of the ruling communists in Poland was perfidious, as they used the uncertain situation of the Polish western border to justify the need to maintain an alliance with the USSR (read: subjugating Poland within the Eastern Bloc).

1. THE POLISH-GERMAN BOUNDARY: 1945-1950-1970

1.1. The Potsdam Agreement

The Allied heads of states decided at the Yalta (Crimea) summit in February 1945 that Poland would lose its former Eastern territories in favour of the USSR (i.e. those annexed by the Soviets in 1939), based on the policy of fait accompli. Poland would however be compensated with substantial accessions in the West by moving its western frontier farther west at the expense of Germany. The precise course of the border was to be decided later.

By the time the Allied leaders assembled again in Potsdam in July-August 1945, the Eastern territories of Germany were effectively occupied by the Red Army, and the Soviet authorities had transferred the administration of the lands to a pro-Soviet Polish provisional government. Although the United States and Great Britain strenuously protested against this unilateral action, they accepted it and agreed to the placement of all the territory east of the Oder-Neisse Line[1] under Polish administrative control (except for the northern part of East Prussia, which was incorporated into the Soviet Union).[2] Successive Polish governments cited the Potsdam Agreement as the basis for their final border decision. In turn, Germany tried to prove that the solution adopted in Potsdam was not final. Interestingly, both sides had serious weighty arguments to support their positions. It is enough to state that according to the German position, the Potsdam Agreement was not binding upon Germany, as Germany was absent at the conference and never recognized its consequences. Moreover, the so-called "German Eastern territories" were put under Polish administration, not Polish sovereignty, and territorial decisions were left to be determined by a future peace settlement. On the other hand, Poland maintained that Allies had the power and authority to decide on the German boundaries; that the territories transferred to Poland were described as former German territories;

[1] Former German territories east of a line running from the Baltic Sea through Swinemunde, and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier, should be placed under Polish administration.

[2] According to the Potsdam agreement, the section of the western frontier of the USSR which is adjacent to the Baltic Sea should pass from a point on the eastern shore of the Bay of Danzig to the east, north of Braunsberg-Goldep, to the meeting point of the frontiers of Lithuania, the Polish Republic and East Prussia.

that they were excluded from the Soviet occupation zone; and that the population of German ethnicity in Poland should be resettled to Germany.[3]

The decisions and regulations quoted above show that both parties presented good arguments in favour of their legal positions. All subsequent agreements concerning territorial issues in Polish-German relations referred to the line established at Potsdam as the basis of the frontier. It was however very difficult to propose an acceptable legal basis for the territorial transfer. A rational explanation was that it was an adjudication by the Great Powers. Their leaders issued a declaration on 5 June 1945 by which they took a supreme power over Germany. Although the Allied Powers did not intend to annex Germany,[4] they reserved the right to decide on the shape of the territory of the German state, including the tracing of German boundaries.[5] This was done at Potsdam. The fact that no German government took part in the conference did not matter. Firstly, there was no legitimate German government representing the German state at that time. Secondly, the rights of the Allied Powers with respect to Germany were not contractual, but stemmed from the unconditional surrender of the German state. However, the US Secretary of State J. Byrnes undermined the final character of the Oder-Neisse boundary in September 1946 by referring to a possible future peace settlement. Poland then became very active in its attempts to obtain a confirmation of its Western boundary.[6]

Poland exercised the administration of territories described in Polish legislation as the areas north and west of the pre-war boundary with Germany on the basis of the

[3] For more on different aspects of the legal disputes between Poland and Germany, *see e.g.* K. Skubiszewski, *Poland's Western Frontier and the 1970 Polish-German Treaties*, 67(1) American Journal of International Law 23 (1973); L. Gelberg, *The Warsaw Treaty of 1970 and the Western Boundary of Poland*, 76(1) American Journal of International Law 119 (1982); W. Czapliński, *The New Polish-German Treaties and Changing Political Structure in Europe*, 86(1) American Journal of International Law 163 (1992); W.M. Góralski (ed.), *Polish-German Relations and the Effects of the Second World War*, PISM, Warszawa: 2006, *passim*; J. Kranz, *Polish-German Legal Controversies – An Attempt at Synthesis*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, *20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations*, Elipsa, Warszawa: 2011; J.A. Frowein, *Legal Problems on the German Ostpolitik*, 23(1) International and Comparative Law Quarterly 105 (1974); J.A. Frowein, *The Reunification of Germany*, 86(1) American Journal of International Law 152 (1992); C. Arndt, *Legal Problems of the German Eastern Treaties*, 74(1) American Journal of International Law 122 (1980); K. Hailbronner, *Legal Aspects of Unification of the Two German States*, 2 European Journal of International Law 18 (1991).

[4] According to K. Skubiszewski, a customary right of subjugation fully justified a taking of control over Germany.

[5] In the advisory opinion in the *Jaworzina* case (B, No. 8, p. 20) the Permanent Court of International Justice (PCIJ) stated that the peace treaties concluded after the First World War provided that the victorious powers reserved a right to fix boundaries of new states established in result of the dismemberment of Germany, Austria and Hungary; and that this competence should be exercised by the Assembly of the League of Nations or/and the Conference of Ambassadors.

[6] In the judicial practice of the Hague courts there is a clear trend toward finding that state parties acting towards a delimitation of boundary intend to proceed in as complex and durable as possible way. *See* the advisory opinion of the PCIJ in the *Mosul* case (*Art. 3, para 2 of the Treaty of Lausanne*, PCIJ Publ. Seria B,

Potsdam agreement. According to K. Skubiszewski,[7] the notion of administration can be understood in various ways. In some cases it equates to sovereignty (like in case of Cyprus on the basis of the treaties of Constantinople and Berlin of 1878, annexed by the UK in 1914); while in other cases it should not be interpreted as a transfer of sovereignty (like in the cases of Saarland in 1919, or the Italian colonies in Africa after the conclusion of peace treaty with Italy in 1947). While as regards the Polish case Skubiszewski interpreted "administration" in favour of Polish sovereignty, his arguments however are not convincing. In modern legal writing a clear distinction is drawn between administration and sovereignty.[8]

The purpose of the administration over the former German territories was to meet the needs of the Polish population, and to integrate the newly-acquired northern and eastern territories with the rest of the country. Administration was exercised in several steps. A decree of 13 November 1945 on the administration of the so-called "recovered territories"[9] established private legal relations; it was confirmed by the judgment of the Polish Supreme Court of 5 September 1946 and resolutions of panels of 7 judges of the Polish Supreme Court of 21 May and 11 June 1948. The law in force in Poznań (the biggest and most important town in pre-war western Poland, albeit with a long German legal tradition dating back to the era of the partitions of Poland) was expanded into the former German eastern territories. Following the expiration of a military administration in Poland on 17 December 1945, the organization of public administration and the judiciary of the Poznań region was also expanded to include areas north and west of the pre-war border.[10] The judgment of the Polish Supreme Court of 26 March 1946 held that all Polish nationals residing in the recovered territories were subject to Polish law. This decision was important, as it opened the way toward the regulation of nationality in the recovered territories. In accordance with the Potsdam agreement, the population of German origin would be resettled to Germany. The first general census of 14 February 1946 demonstrated that the number of Germans in the

No. 12, at 20 [1925]); the judgment of the International Court of Justice (ICJ) in the case of *Sovereignty over Certain Frontier Land (Belgium/Netherlands)*, ICJ Rep 1959, pp. 209, 221-2; and as to modern jurisprudence *see* Case concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad), ICJ Rep 1994, pp. 6, 24. *See also* G. Nesi, *Boundaries*, in: M. Kohen, M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law*, Edward Elgar, Cheltenham: 2018, pp. 220-221. The said directive should apply in case of a boundary established by third parties.

[7] K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, 23(1/2) Archiv des Völkerrechts 31 (1985).

[8] R. Wilde, *International Territorial Administration*, Oxford University Press, Oxford: 2008; B. Knoll, *The Legal Status of Territories Subject to Administration by International Organizations*, Cambridge University Press, Cambridge: 2008, *passim*.

[9] This expression was used by the communist state for propaganda purposes, in order to show an alleged historical title to the territories acquired after the Second World War.

[10] Postwar Polish legislation did not refer to nor describe new boundaries.

newly-acquired territories amounted to 2 million persons, while the number of Poles was ca. 2.8 million (1.3 million of immigrant population and 1.5 million of natives). There was a numerous Polish minority in Germany before the Second World War, and most of them remained in their residences; while new inhabitants expulsed from the former Polish territories annexed by the USSR arrived (on the basis of international agreements concluded by Poland with its eastern neighbours). Members of the Polish minority were subjected to an ethnic verification, and subsequently they were granted Polish nationality and allowed to remain in Poland. On the other hand, a number of Germans were forced to stay in Poland and they were also granted Polish nationality. The reasoning behind this was pragmatic: Polish immigrants in the recovered territories were unable to operate the machines and industrial devices left by the Germans,[11] and they needed their assistance. The process of granting Polish nationality was completed by the Polish Nationality Act of 8 January 1951. Finally, on 18 February 1955 the Polish Council of State (*Rada Państwa*, the collective supreme state agency) passed a resolution on the cessation of a state of war between Poland and Germany.

It can be concluded that Poland exercised effective power with respect to the former German territories within the framework of their administration. Referring to the development of international law, we can speak about *effectivités*, considered by some authors as an indispensable factor of a territorial power.[12] The problem of exercising effective control over a territory arises however most often in situations where the power exercising effective control does not have legal title to the territory in question. In judicial practice however (which doesn't say a lot owing to intertemporal issues), the ICJ has rejected most arguments based on human, economic, historical or geographical factors relied upon by the parties to the dispute. Its decisions have been based largely on questions of legal title, as well as the principle of uti possidetis iuris.[13] If there is legal title, *effectivités* play a confirmatory role. On the other hand, if the legal title is controversial or competing claims are present, *effectivités* become more decisive. *Effectivités* are therefore relative.

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[11] A Polish-Soviet agreement of 16 August 1945 on a compensation for damages suffered during the Nazi occupation also referred to the Potsdam agreement as a foundation of reparations, including in the territorial dimension. The Soviets excluded items situated in the territory of Poland from confiscation.

[12] For more on the role of effectiveness as a premise of title to territory, *see* M.N. Shaw, *The International Court of Justice and the Law of Territory*, in: C.J. Tams, J. Sloan (eds.), *The Development of International Law through the International Court of Justice*, Oxford University Press, Oxford: 2013, pp. 151ff, Nesi, *supra* note 6, at 215.

[13] With respect to intertemporal reasons, we can refer to, for example, the judgment of the ICJ in *Temple Preah Vihear (Merits)* case, ICJ Rep 1962, p. 6, 15: "The Parties have also relied on other arguments of a physical, historical, religious and archaeological character, but the Court is unable to regard them as legally decisive." In the contemporary case law, *see Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, ICJ Rep 2008, p. 12.

The fate of the Polish-German border was unclear. Lawyers from Western occupation zones persistently protested against any territorial changes concerning Germany. The concept of a continuous existence of the German Reich as a passive subject of international law dominated in German constitutional law (and consequently in the German approach to international law), at least since 1948. Communist-dominated politicians in the Soviet occupation zone were also unwilling to accept any territorial losses in the east of the country, as those changes would have been difficult to accept for the population. Finally, some of the Polish legal writing argued that the transfer of the German Eastern territories was not final, and the area would perhaps be returned to Germany after the conclusion of a peace treaty.

1.2. The agreements of Görlitz/Zgorzelec

The creation of two German states in 1949 changed the international situation. On 6 June 1950 the governments of Poland and the German Democratic Republic (GDR) adopted a common declaration on delimitation of the established and existing international boundary.[14] It also envisaged the adoption of further agreements concerning, in addition to a formal delimitation of the boundary, questions such as border checkpoints, river navigation rights, and the establishment of a small open border zones.

The declaration was confirmed and developed by an agreement of 6 July 1950[15] on delimitation and demarcation of the boundary. Its preamble referred to the Potsdam protocol, in which the boundary was established. It also stressed that it should be the basis for the stabilization and strengthening of friendly cooperation, notwithstanding the war experiences. This reference can be considered as acceptance of a certain form of international responsibility on the part of the GDR for war damages. Art. 1 of the said agreement described the course of the border, referring to the wording of the Potsdam protocol. This line should constitute a boundary between Poland and Germany (and not the GDR). According to Art. 2, the delimitation also covered air space, water rights, and underground property rights. The parties obligated themselves to the demarcation of the frontier, and a special commission was established for that purpose. The demarcation act was signed at Frankfurt/Oder on 27 January 1951.[16]

The conclusion of the Görlitz/Zgorzelec agreement created a number of difficulties. The East German authorities considered themselves legitimate to represent the

[14] A monumental work by J.H.W. Verzijl, *International Law in Historical Perspective*, vol. 3, Brill/Nijhoff, Leiden: 1970, p. 166, refers to para. IXB of the Potsdam Agreement as a provisional agreement, developed in the treaty of Görlitz/Zgorzelec.

[15] Journal of Laws 1951, No. 14, item 106.

[16] Both instruments were published in UNTS 319, p. 93 (first in 1959).

democratic, post-war order of Germany. The agreement did not constitute a treaty of cession of a part of German territory; instead it only confirmed the solution agreed upon in Potsdam. The validity of the agreement was undermined by the lack of recognition of the GDR by the Western world. According to the West German government, the border line established in Görlitz/Zgorzelec was only a temporary administrative border and was subject to revision by a final peace treaty.[17] The Federal Republic of Germany (FRG) rejected any agreement concerning borders concluded by the GDR. This position was supported by the three Western powers, i.e. the USA, United Kingdom and France, who passed a special declaration on 12-18 September 1950.[18] The Western Powers declared that pending all-German democratic elections and the possible (re)unification of the country, the FRG government was the only freely and democratically elected German authority,[19] and therefore the body uniquely capable to represent Germany on the international plane, and that the Görlitz agreement was not opposable to the German state.[20]

1.3. The Warsaw Treaty of 1970

West Germany continued to refuse to recognize the boundary line until 1970. In 1969, however, the Social-Democratic Party (SPD) won the parliamentary elections and appointed a new government led by Chancellor W. Brandt. He started a new Eastern policy directed at improving relations with the Eastern European states. In effect, two important treaties were signed in 1970: the first with the Soviet Union (12 August), and the second with Poland (7 December). The former agreement concentrated on the non-use of force in mutual relations. As to the latter one, the parties to the normalization treaty of 7 December 1970 presented different approaches to their obligations. Poland claimed that the treaty had a triple meaning: it regulated the boundary issues; it was equivalent to recognition by the FRG, and it created the basis for the normalisation of mutual relations (whatever that meant). On the other hand, the FRG emphasized the renunciation of the use of force in bilateral relations, and the inviolability of frontiers.[21]

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[17] In fact all instruments of the Allied powers referred to a peace settlement and not a peace treaty. The conclusion of peace treaties was foreseen with the Axis powers only.

[18] 10 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 667 (1950).

[19] Nota bene, democracy was not an indispensable premise for recognition of a state, in particular in the 1950s.

[20] A. Klafkowski, *Granica polsko-niemiecka po II wojnie światowej* [Polish-German border after the Second World War], Wydawnictwo Poznańskie, Poznań: 1970, at 18, stated that the Görlitz agreement would be the basis of the Polish-German boundary even in the case of possible unification of Germany. This opinion – expressed by one of the most eminent lawyers connected with the Polish government – was surprising, as Poland (together with other states of the Soviet bloc) at that time rejected the possibility of the unification of Germany.

[21] Art. 3 recognized as inviolable all boundaries in Europe, including the Oder-Neisse line as Western boundary of Poland.

The Warsaw Treaty of 1970 is relatively short. It was composed of a short Preamble (five paragraphs) and five articles, four of which contained stipulations relevant from the perspective of international legal relations between the parties. Art. I confirmed that the existing frontier along the rivers Oder-Lausitzer Neisse constituted the Western boundary of Poland. The parties declared that they do not have mutual territorial claims. In Art. III both parties obligated themselves to undertake the normalization of bilateral relations. The treaty also confirmed the principle of non-use of force, peaceful settlement of disputes, and respect for preceding international agreements. Art. I was of crucial importance: it confirmed the existing border, referring to the Potsdam protocol as the basis therefore.

The concept of a pact confirming existing boundaries was not new. In the Rhenish Pact of 16 October 1925, Germany, France, Belgium, the UK and Italy mutually guaranteed the frontiers established in the treaty of Versailles. The pact did not create any new obligations. From a legal point of view, the lack of a guarantee for the German-Polish boundary also established by the treaty of Versailles did not modify Germany's legal position with respect to said border.

The normalization treaty of 1970 played an important political and legal role.[22] It paved the way for the Helsinki process of the Conference on Security and Co-operation in Europe. In this article we do not deal with that issue. Instead we concentrate upon the importance of the treaty from the point of view of general international law. In particular we ask the question: What were the effects of the Warsaw Treaty in relations with third states?

2. THE *PACTA TERTIIS* PRINCIPLE IN THE LAW OF TREATIES

It is interesting to ask why Poland strived to conclude an agreement with the FRG in order to confirm a boundary which had earlier been established by the Potsdam protocol and a bilateral agreement with the neighbouring State? Poland recognized the GDR and considered both German republics as new States. In the eyes of the Polish government there was no link between the Oder-Neisse boundary and the FRG.

The principle *pacta tertiis nec nocent nec prosunt* is obvious and widely-accepted in international law. It means that every international arrangement is binding exclusively between its parties, and does not have any effect upon third States. The rule, codified in Art. 34 of the Vienna Convention on the Law of Treaties (VCLT), is

[22] For a contemporary evaluation of the 1970 Treaty in mutual relations between Poland and Germany *see* J. Barcz, K. Ruchniewicz (eds.), *Akt normalizacyjny. 50 lat układu o podstawach normalizacji stosunków PRL-RFN of 7 December 1970* [The normalization act. 50 years of the Normalization Treaty between PPR and FRG], Elipsa, Wrocław-Warszawa: 2021, passim.

undoubtedly customary law.[23] In principle, exceptions are provided in some of the following provisions of the Convention. We can only agree with Sir Gerald Fitzmaurice that rules governing treaties and third parties are so fundamental, self-evident, and well-known, that they do not really require the citation of much authority in their support.[24] This stance was confirmed by Sir H. Waldock in his Reports for the ILC.[25] The first monograph on the topic (R. Roxbourgh, *International Conventions and Third States*) was published in 1917.

One could assume that every international agreement should be opposable by third parties, which are however under an obligation to respect all arrangements. All States are under a duty to recognize and respect situations of law or of fact established by lawful and valid treaties which tend by their nature to have effects *erga omnes*. The States should also abstain from frustrating or hindering the application and execution of treaties concluded by other States.

Such a general presumption would be disputable. According to Art. 35 VCLT, treaties can provide for obligations for third States. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be a means of establishing the obligation and the third State expressly accepts that obligation in writing. The consent of the third party is a precondition of an opposability of such obligation. An exception to that rule has been provided in Art. 38 VCLT. Rules in a treaty can become binding on third States through international custom – if such customary rule meets all the criteria necessary for the formation of customary norms. Finally, a mandatory obligation would limit a possible scope of recognition, which is a prerogative of a sovereign State.

3. OBJECTIVE REGIMES AND THE LAW OF TREATIES

Notwithstanding Art. 38 VCLT, a question can be posed whether there are any other categories of treaties being exceptions to the *pacta tertiis* rule. Those treaties

[23] As illustration we quote some examples only. In the *Free Zones of Upper Savoy and District of Gex* case the PCIJ held that "Article 435 of the Treaty of Versailles is not binding upon Switzerland, who is not a Party to that Treaty, except to the extent to which that country accepted it" (PCIJ Publ. Series A/B, No. 46, at 141). The same court stated in the *Certain German Interests in Polish Upper Silesia* case that "[a] treaty only creates law as between the States which are parties to it; in case of doubt, no rights can be deduced from it in favor of third States" (PCIJ Publ. Series A, No. 7, p. 29). A similar statement can be found in the advisory opinion on *Customs Régime between Germany and Austria* (PCIJ Publ. Series A/B No. 41, 48 (1931)), with respect to the Treaty of St. Germain, and in the *Island of Palmas* case before the Permanent Court of Arbitration ("whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third powers") RIAA 2, at 842 (1928). We quote also Lord McNair, *Law of Treaties*, Oxford University Press, Oxford: 1961, p. 309.

[24] G. Fitzmaurice, *5th Report*, 2 Yearbook of International Law Commission (1960), p. 69 (84).

[25] H. Waldock, *3rd Report*, 2 Yearbook of International Law Commission (1964), p. 6.

by their very nature can produce effects upon third States. One of such categories of treaties concerns "objective regimes".[26] The VCLT does not refer to this concept, proposed by learned writers and accepted in practice (although examples in judicial practice are rare). The validity of objective regimes was indirectly confirmed by Arts.11 and 12 of the Vienna Convention on Succession of States in respect of Treaties (VCSST).

The notion of an objective regime was proposed by the subsequent Special Rapporteurs on the law of treaties, G. Fitzmaurice and H. Waldock (in their reports of 1960 and 1964, respectively). It covered the effects of treaties concerning the use of maritime or land territory of a State, region etc. if the intention of the parties is to create in the general interest obligations and rights relating to a particular region, State, territory, locality, river, waterway, or to a particular area of sea, seabed, or airspace. The parties to the specific treaty may include among their number any State having territorial competence with reference to the subject-matter of the treaty. The treaty should be effective *erga omnes,* i.e. the parties to the treaty need to decide that the regime created by the treaty should be respected by third States. After discussion, the International Law Commission rejected the inclusion of objective regimes into the draft Convention for two reasons: firstly, it might undermine the principle of sovereign equality of States; and secondly all issues dealing with objective regimes were covered by what became Arts. 34-38 VCLT.

The concept of objective regimes has often been invoked in international practice. The jurisprudence of the Hague courts referring to the concept includes: the *ss. Wimbledon* case (in respect of the status of the Kiel Canal); the Advisory Opinion on *Reparation for injuries suffered in the service of the UN* (as to the opposability of the international legal personality of the organization); Art. 2(6) of the UN Charter in respect of non-member States, in the *Gabčikovo-Nagymaros* case; the Antarctic Treaty of 1959 (in particular its Art. X); the *Aland Islands* case (concerning the opposability of the convention concluded in 1856 between Russia, France, and Great Britain, to Sweden and Finland), and numerous others.[27] In all those cases the parties to the treaties concerned intended to establish a political status for the

[26] S. Subedi, *The Doctrine of Objective Regimes in IL and the Competence of the UN to Impose Territorial or Peace Settlements upon the States*, 37 German Yearbook of International Law 162 (1994); F. Salerno, *Treaties Establishing Objective Regimes*, in: E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011; C. Fernández de Casadevante Romani, *Objective Regime*, in: *2010 Oxford Public International Law*, available at http://opil.ouplaw.com (accessed 30 June 2022); M. Fitzmaurice, *Third Parties and the Law of Treaties*, 6 Max Planck Yearbook of United Nations Law 37 (2002), pp. 66ff.

[27] *See* para. 6; A.D. McNair, *The Law of Treaties*, Oxford University Press, Oxford: 1986 (in particular Chapter XIV Dispositive and Constitutive Treaties); Fitzmaurice, *supra* note 26, pp. 84ff.; Ph. Cahier, *Le problème des effets des traités à l'égards des Etats tiers*, RCADI 140 (1974), p. 589. As to Polish authors, *cf.* A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International treaties. Theory and practice], Prawo i Praktyka Gospodarcza, Warszawa: 2006, at 313.

respective territories and/or regimes of a (possibly) permanent nature. On the other hand, the treaties referred to are so various that it would be very hard to enumerate rules common to all of them.

An important element of objective regimes is that they must be opposable *erga omnes*. This means that all States have an interest in respecting the obligations resulting from the treaty. Such an interpretation is strictly connected with the formula presented in the judgment of the ICJ in the *Barcelona Traction* case. However, it seems that the expression used by the ICJ was closer to a peremptory norm of international law, and reflected the substance of *jus cogens*. The notion of obligations *erga omnes* is today connected with the implementation of international responsibility of States and poses the question of the right of third States (non-parties to the treaty) to claim reparation for violations. McNair proposed another explanation. According to Waldock's definition, international agreements through which states parties dispose of their real rights do not establish objective regimes if no general interest of the international community is involved. Treaties establishing objective regimes must affect situations or rights that are not (or not any more) considered disposable due to the existence of a prevailing general interest in the certainty of the law. As the objective regime established by the treaty needs to be unique and indivisible, it necessarily affects third states. These kinds of treaties produce *erga omnes* effects only because they involve real rights, and not because they serve a common interest of the international community.[28]

4. BOUNDARY TREATIES AS OBJECTIVE REGIMES

Boundary treaties are concluded between the neighbouring States. This manifest truth was confirmed by the ICJ in the *Libyan Arab Jamahiriya/Chad* case, in which it stated that "[t]he fixing of a frontier depends on the will of the sovereign States directly concerned."[29] The consent of the parties concerned is the only criterion for the legality of territorial changes.

The parties concluding a boundary treaty intend to create a possibly permanent solution.[30] By definition it is not eternal, because a boundary treaty can be amended at any time by the parties, but not by third parties.

Art. 11 VCSST confirms the special status of boundary treaties in international law.[31] It is however uncertain whether this particular category of treaties can be con-

[28] A.D. McNair, *Treaties Producing Effects "Erga Omnes"*, in: *Scritti di diritto internazionale in onore di T.Perassi*, vol. II, Giuffre, Milano: 1957, at 23. *See also* McNair, *supra* note 27, at 256-257.

[29] Case *concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Rep. 1994, at 23 (para. 45).

[30] *Temple of Preah Vihear* case, ICJ Rep., p. 34.

[31] The special status is further confirmed by two additional factors. Firstly, boundary treaties are excluded from the operation of the *rebus sic stantibus* rule. Art. 62 VCLT refers in this respect to treaties establishing

sidered as objective regimes. It can be argued that establishing, tracing, and respecting an interstate boundary always constitutes an action in favour of international peace and security, and therefore is in the collective interest of the international community. On the other hand, however, the fate of the boundary is separate from the fate of the boundary treaty. The objective nature of the regime concerns rather the boundary itself, and not the treaty constituting its basis.[32]

A list of authors confirming the *erga omnes* character of boundary treaties is long and includes S. Bastid,[33] M. Shaw,[34] J. Tyranowski,[35] C. Fernandez de Casadevante Romani,[36] and C. Laly-Chevallier.[37] The same conclusion was reached by several authors in the context of Arts.11 and 12 VCSST, for example by S. Subeda,[38] M. Fitzmaurice,[39] and P. Reuter.[40]

An express confirmation of the nature of boundary treaties as an *erga omnes* regime can be found in the award concerning *Territorial Sovereignty and Scope of the Dispute between Eritrea and Yemen*.[41] According to the award, the treaty of peace of Lausanne was (in the technical sense) *res inter alios acta* as to Yemen, which was the bearer of the territorial title. The parties of the Treaty of Lausanne could not have transferred territorial title elsewhere without the consent of Yemen. Boundary and territorial treaties made between two parties are *res inter alios acta* vis-à-vis

a boundary. In the *Frontier Dispute (Burkina Faso/Mali)* case, the ICJ stated that Art. 62 covered both delimitation treaties and treaties ceding or attributing territory. However, it did not concern agreements concerning the status of territory. Secondly, boundary treaties cannot be terminated nor withdrawn from unilaterally by any party.

[32] The ICJ stated that "[o]nce agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court. States' territorial regime must remain objective, which of course would not be the case if treaties establishing a boundary were likely to be terminated [e.g.] by application of the *rebus sic stantibus* theory." *See* the *Case concerning Territorial Dispute (Libyan Arab Jamahiriya/Chad*), cited above, at 37 (para 72).

[33] S. Bastid, *Les traités dans la vie internationale*, Economica, Paris: 1986, p. 155.

[34] M. Shaw, *Boundary Treaties and Their Interpretation*, in: E. Rieter, H. de Waele (eds.), *Evolving Principles of IL. Essays in Honour of Karel C. Wellens*, Brill, Leiden: 2012, pp. 239ff.

[35] J. Tyranowski, *Sukcesja państw a traktaty w sprawie granic* [The succession of states and treaties concerning boundaries], Wydawnictwo Naukowe UAM, Poznań: 1979, at 114.

[36] C. Fernandez de Casadevante Romani, *supra* note 26, para 15.

[37] C. Laly-Chevallier, *Commentary Art. 36 VCLT*, in: O. Corten, P. Klein (eds.), *The Vienna Conventions on the Law of Treaties, Commentary*, Oxford University Press, Oxford: 2011, para. 14.

[38] S. Subeda, *The Doctrine of Objective Regimes in International Law and the Competence of the United Nations to Impose Territorial or Peace Settlements on States*, 37 German Yearbook of International Law 162 (1994), in particular at 173 (in very firm and categorical, although disputable, words: "Boundary treaties, because of their sensitivity in international relations, have always been considered a classic example of objective regimes") and 181.

[39] Fitzmaurice, *supra* note 26, at 77.

[40] P. Reuter, *Introduction au droit des traités* (3rd ed.), PUF, Paris: 1995, p. 113.

[41] Award of 9 October 1998, RIAA vol. XXII, pp. 209-332, para. 153. The Arbitral Tribunal was composed of Professor R.Y. Jennings, President Judge S.M. Schwebel, Dr. A.S. El-Kosheri, Mr. K. Highet, Professor R. Higgins.

third parties. But this special category of treaties also represents a legal reality which necessarily impinges upon third states, because they have effect *erga omnes*. On the other hand, the ICJ rejected the *erga omnes* nature of the boundary treaty in the case concerning *Frontier Dispute (Burkina Faso/Mali)*,[42] in which it found that a possible boundary treaty between both States would not be opposable to Niger.

There is a problem related generally to *pacta tertiis*, but particularly important in the case of objective regimes. First, the agreement that organizes (imposes) the objective regime confers rights and obligations on third countries. Most often, the rights and obligations are closely related. The VCLT in Arts. 35-36, provides for a procedure that conditions the effectiveness of agreements with third countries on their consent. Objective regimes are not exempted from these provisions.[43] If this view is correct, all countries subject to the objective regime should be required by the parties to the agreement to accept their obligations in writing. Meanwhile, the practice as regards the legal situation of third countries has departed from such a formalized requirement. It is unclear whether consent should take the form of an express consent, or can be a weaker and less formal assent. Moreover, one can encounter the opinion that the construction of consent to submit to an objective regime is similar to acquiescence as a condition for the opposability of the emerging customary norm. Protest is of key importance in relieving the state of its obligations in this situation. This proposal is very tempting and in line with the informal nature of international law, but at the same time it should be borne in mind that the jurisprudence of international courts implies the principle that restrictions on state sovereignty cannot be presumed.

States have a certain freedom to react to international agreements concluded by other states, especially when it comes to protecting their rights. In a decentralized system of international law, each state assesses its own legal situation and, if necessary, may take such measures as it deems necessary to protect its rights.[44] In this case, protest remains the basic tool, although the use of countermeasures cannot be ruled out, in accordance with the rules governing the international responsibility of States. Contrary to the views of some doctrines, the possibility of counteracting the conclusion and application of an agreement in the event of its breach of other

[42] ICJ Rep 1986, p. 554, at 577-578, para. 46.

[43] Wyrozumska, *supra* note 27, p. 314.

[44] *Cf.* arbitral award, *Air Service Agreement* case, RIAA 18, 416, para. 81: "Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'."

international obligations by the parties to the agreement seems doubtful. The exception is the breach of *erga omnes* obligations provided for in Art. 48 of the Draft articles on Responsibility of States for Internationally Wrongful Acts.

Even if we accept a view that boundary treaties can be considered as objective regimes, the question arises whether this is correct in respect of all boundary treaties.

J. Tyranowski[45] drew a distinction between three categories of boundary treaties:

a. treaties establishing boundaries, and therefore confirming a title to territory. This category is very large and includes i.a. peace treaties containing provisions on territorial arrangements;
b. treaties complementary to the establishment of a boundary. It is unclear whether treaties confirming the frontier (including recognition) belong to this category, especially if concluded with third States.
c. treaties establishing a special regime of the boundary. They can contain provisions providing for a recognition or confirmation of the boundary, and a detailed description (demarcation) of the frontier.[46]

Seen from the above perspective, the 1970 Warsaw Treaty cannot be classified as a boundary treaty. Its significance lies in the recognition of the border by a third country (in relation to the creation of the border), which is a condition for normalization. It is much easier to accept the thesis that the boundary system is based on the Görlitz agreement and it is opposable *erga omnes*.

5. THE ODER-NEISSE BOUNDARY AND THIRD STATES

Notwithstanding possible *erga omnes* character of boundary treaties under international law, Poland undertook numerous attempts to get her Western frontier confirmed (recognized) by third States. It seems that the Polish government was aware of the relatively weak legal basis of the border, even though the Polish title became stronger and stronger with the lapse of time. In particular, Poland expected the Great Powers to confirm the Potsdam decision. It was quite easy to obtain such a statement from the USSR in several legal instruments, including in particular Art. 5 of the Polish-Soviet treaty of 8 April 1965 on friendship, cooperation and mutual assistance. As to other communist States, reference to the Oder-Neisse boundary

[45] Tyranowski, *supra* note 37, p. 112.

[46] A number of rules concerning boundary treaties can be found in the modern jurisprudence of the ICJ on territorial disputes, referred to by H. Thirlway, *Territorial Disputes and Their Resolution in the Recent Jurisprudence of the International Court of Justice*, 31 Leiden Journal of International Law 117 (2018); Shaw, *supra* note 36; M.G. Kohen, *La relation titres/effectivités dans la jurisprudence récente de la Cour internationale de justice (2004-2012)*, in: D. Alland et al. (eds.), *Unité et diversité de droit international. Ecrits en l'honneur du Professeur Pierre-Marie Dupuy*, Brill, Leiden: 2014, p. 599.

can be found in a treaty with Czechoslovakia of 13 June 1958 which was based on the Potsdam agreement, as well as the treaty of friendship concluded with the GDR on 15 March 1967. Some other treaties (including an agreement with Romania of 6 April 1967, and with Hungary of 16 May 1968) provided for guarantees of the inviolability of borders and territorial integrity of Poland, although they did not refer directly to the Oder-Neisse boundary. As to the Western States, France supported the final character of the Poland's Western boundary (we refer here to e.g. a speech of General Ch. De Gaulle in the Polish Parliament on 8 September 1967). The USA and UK did not question the boundary, but on several occasions they referred to the rights and responsibilities of the Four Powers with respect to Germany as a whole, which suggests that the issue of the border remained somehow open. The position of the Four Powers in relation to the Polish-German boundary was finally settled with the conclusion of the 2+4 Treaty on 12 September 1990.

FINAL REMARKS

The German Bundestag ratified the Warsaw Treaty on 17 May 1972. On the same day it passed a resolution stating that the treaty concerned the renunciation of the use of force in mutual relations; that it was a kind of a modus vivendi; and that a future unified Germany would not be bound by the treaty. The resolution was necessary in order to satisfy the requirements of German constitutional law. However it was illogical, taking into account the concept of the identity of state in international law. The FRG claimed to be a state identical to the German Reich (i.e. the German state created in 1871). The identity of the state consists in the identity of international law and obligations, and not in the physical identity of all elements of the state (territory, population, state authority). Thus, in the Warsaw Pact Germany confirmed the border on behalf of the German state (separate from East Germany, which was a new state), and a possible future sovereign resulting from the (then) hypothetical unification of both German states would be bound by this recognition decision. Such reasoning was confirmed by the 2+4 Treaty, as well as the Polish-German treaty of 14 November 1990 on the confirmation of the existing Polish-German boundary. *Nota bene*, the significance of the 1990 treaty between Poland and the (reunified) FRG is the same as the 1970 Warsaw Treaty between Poland and the "old" FRG.

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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] S*ee 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

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[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.

GENERAL ARTICLES

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ESCALATION OF THE CONFLICT BETWEEN RUSSIA AND UKRAINE IN 2022 IN LIGHT OF THE LAW ON USE OF FORCE AND INTERNATIONAL HUMANITARIAN LAW**

Abstract: *The aim of this article is to assess the military operation started on 24 February 2022 by Russia against Ukraine in light of the law on use of force, having in mind all the justifications officially expressed by Russian authorities and in light of international humanitarian law. The author claims that there is no justification for the Russian military action and thus it must be qualified as aggression. This, due to the serious violation of the peremptory norm, implies obligations on the part of states and international organizations (i.e. the international community). In addition, the current conduct of hostilities clearly shows that it is mainly Russian forces which neglect international humanitarian law principles, which might amount to war crimes.*

Keywords: Ukraine, Russia, war, international armed conflict, war, war crimes, international humanitarian law, use of force, aggression

INTRODUCTION

In February 2014 Russia invaded Crimea and subsequently occupied it and illegally annexed it, thus committing an act of aggression.[1] The occupation of Crimea

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[1] *See* V. Bílková, *The Use of Force by the Russian Federation in Crimea,* 75 Heidelberg Journal of International Law 27 (2015); W. Czapliński et al. (eds.), *The Case of Crimea's Annexation Under International Law*, Wydawnictwo Scholar, Warszawa: 2017; T.D. Grant, *Aggression Against Ukraine. Territory, Responsibility, and International Law*, Palgrave Macmillan, New York: 2015; P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, XXXIV Polish Yearbook of International Law 39 (2014); S. Sayapin, E. Tsybulenko (eds.), *The Use of Force against Ukraine and International*

triggered the application of the law of international armed conflicts (although it is debatable whether this implied the existence of an international armed conflict on the territory of the whole of Ukraine and Russia).[2]

In the following weeks, in the eastern part of Ukraine (the Donbas region) the conflict between separatists – supported by Russia – and Ukraine evolved. It is debatable whether Russian involvement was direct (by sending its own armed forces and other armed groups) or indirect (by sending arms and logistical and financial support); or whether Russia had any control over the separatists and if so, whether it was an effective or only of an overall character. The findings (which still need to be verified by the European Court of Human Rights due to, e.g., the inter-state application of the Netherlands against Russia – nos. 8019/16, 43800/14 and 28525/20 regarding its role in the downing of flight MH17 in eastern Ukraine on 17 July 2014) would impact the possibility to assign the responsibility to Russia for the further use of force against Ukraine and the alleged violations of international humanitarian law and human rights law during the hostilities in Eastern Ukraine. It would also impact classification of the conflict in Eastern Ukraine from the point of view of international humanitarian law, as depending on the kind of involvement the conflict could be classified as only non-international or as both a non-international one (between the separatists and Ukraine) and an international one (between Russia and Ukraine).

In 2014 and 2015 two ceasefire agreements were signed (Minsk I of 5 and 19 September 2014, and after further negotiations Minsk II – of 12 February 2015). According to Minsk II, the immediate cessation of hostilities starting on 15 February 2015 was agreed upon. All foreign military formations had to be withdrawn, as well as heavy weaponry by both sides at equal distances in order to create a security zone. The Donbas region was considered as part of Ukraine, but Ukrainian authorities were obliged to adopt a new constitution and to implement a law granting special status to certain areas of the Donetsk and Luhansk regions.[3] As a result of those actions, Ukraine would regain control over 400 kilometers of

Law – Jus ad Bellum, Jus in Bello, Jus Post Bellum, T.M.C. Asser Press, Den Haag: 2018.

[2] *See* common Art. 2 of the 1949 Geneva Conventions on the Protection of War Victims (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, which usually is interpreted as a definition of an international armed conflict, although its literal reading indicates that the Geneva Conventions differentiate between armed conflict between states and all cases of partial or total occupation of the territory of the state, even if the said occupation met with no armed resistance. In the latter case, the 1949 GCs should also be applied, but it does not necessarily mean that an international armed conflict is taking place, which would imply the application of international humanitarian law to the whole territory of both engaged states.

[3] Text of the Package of measures for the Implementation of the Minsk agreements available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf (accessed 30 June 2022).

the border with Russia.[4] The Package of Measures for the Implementation of the Minsk Agreements was endorsed by the UN Security Council in Resolution 2022 of 17 February 2015.

Unfortunately, both sides failed to engage in the full implementation of Minsk II. Russian forces were still present in Donbas, but at the same time Ukrainian authorities did little to adopt legal measures introducing a new constitution and new regime for Donbas. Regular exchanges of fire took place (followed by other ceasefires), but they were not so devastating as the hostilities in 2014 and 2015.[5] Tens of thousands of Russian soldiers were stationing near the Ukrainian border (and allegedly in Donbas), but in the middle of February 2022 this number rose to around 190.000 soldiers.[6] On 24 February 2022 Russia began a "special military operation" against Ukraine which appeared to be a full-fledgeda Full-fledged invasion.[7]

The aim of this article is to assess the military operation commenced by Russia against Ukraine in February 2022 in light of the law on use of force, having in mind all the justifications officially expressed by Russian authorities and in light of international humanitarian law (IHL). The author concludes that there is no legal justification for the Russian military action, and thus it must be qualified as aggression. Inasmuch as the prohibition of aggression is a peremptory norm, its violation triggers obligations on the part of the international community to cooperate to bring an end, through lawful means, to any serious breach of this kind of norm. This excludes any kind of support for the aggressor. In addition, the current conduct of hostilities clearly shows that it is mainly Russian forces which neglect basic international humanitarian law principles, which might amount to war crimes. As the prohibition of certain war crimes is also considered as *jus cogens,* their violation also triggers the above-mentioned obligations on the part of the international community.

1. USE OF FORCE

In a situation of tension between two states, the accumulation of 190.000 soldiers on the border with Ukraine (both the Russian-Ukrainian and Belarussian-Ukrainian borders) must be perceived as a clear violation of the prohibition of a threat to use

[4] S. Kardaś, W. Konończuk, *Minsk 2 – a fragile truce*, Ośrodek Studiów Wschodnich, 12 February 2015, available at: https://bit.ly/39hJl8E (accessed 30 June 2022).

[5] *See e.g.* Uppsala Conflict Data Program, Department of Peace and Conflict Research, *Ukraine*, available at: https://ucdp.uu.se/country/369; K. Nieczypor, A. Wilk, P. Żochowski, *The Donbas crisis: between bluff and war*, OSW, 6 April 2021, available at https://bit.ly/3PcYMze (both accessed 30 June 2022).

[6] D. Brown, *Ukraine conflict: Where are Russia's troops?*, BBC News, 23 February 2022, available at: https://www.bbc.com/news/world-europe-60158694 (accessed 30 June 2022).

[7] SC/14803, 23 February 2022.

force (Art. 2(4) of the UN Charter[8]). With the commencement of the invasion on 24 February 2022, accompanied by attacks on targets throughout the whole of Ukrainian territory, Russia violated in a most manifest way the prohibition of the use of force enshrined in Art. 2(4) of the UN Charter. It engaged in actions described as acts of aggression in Resolution 3314 (1974) by the UN General Assembly (GA) and incorporated into Art. 8*bis* of the Rome Statute.[9] Firstly, it was an invasion and/or attack by the armed forces of one State on the territory of another State, as Russian armed forces entered Ukrainian territory from the territory of Belarus, from the East, and from the South, i.e. Crimea; and it was also a military occupation, however temporary, resulting from such invasion or attack – in violation of Art. 3(a) of Resolution 3314.[10] Secondly, it was comprised of the bombardment by the armed forces of one State against the territory of another State, and/or the use of weapons by one State against the territory of another State (a violation of Art. 3(b)), as targets were hit by land forces, air forces or naval forces in the whole of Ukraine, including its western parts like the cities of Luck or Lviv, the latter of which is situated less than 100 kilometers from the Polish border. Thirdly, Russia's acts constituted the blockade of the ports or coasts of one State by the armed forces of another State (a violation of Art. 3(c)); having in mind, for example, the blockade of the port of Mariupol and ports of the Sea of Azov, which made it impossible to export Ukrainian grain and trapped almost one hundred ships with foreign banners.[11] Fourthly, it was an attack by the armed forces of one State on the land, sea or air forces, or marine and air fleets of another State (a violation of Art. 3(d)) – as all kinds of Ukrainian forces were attacked. Fifthly, the sending by or on behalf of one State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein, constitutes a violation of

[8] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[9] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[10] It must be stressed that Ukrainian authorities overused the notion of "occupant", as according to Art. 42 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land a "territory is considered occupied when it is actually placed under the authority of the hostile army" and the "occupation extends only to the territory where such authority has been established and can be exercised"; therefore the control over certain communication lines is not sufficient to constitute an occupation of a particular territory. Only those terrains where Russia managed to establish its authority could be considered as occupied; see e.g. the announcement that: "Ignoring the presence of the Russian authorities in the territory of Enerhodar by the city and districts' authorities is considered criminal" as proof that Enerhodar was effectively occupied by Russian armed forces, available at: https://twitter.com/loogunda/status/1508683652217122816 (accessed 30 June 2022).

[11] K. Ahmed, *UN warns Russian blockade of Ukraine's grain exports may trigger global famine*, The Guardian, 18 April 2022; *Ukraine: UN expert warns of global famine, urges end to Russia aggression*, OCHR, 18 March 2022, available at: https://bit.ly/3suVBsS (accessed 30 June 2022).

Art. 3(g); here one can cite the example of the Wagner group, a mercenary group with the alleged aim, among others, of assassinating the Ukrainian president.[12] In addition, Belarus is also responsible for the aggression commenced on 24 February 2022, as it allowed Russia to use its territory to perpetrate an act of aggression against Ukraine in violation of Art. 3(f).

The general part of the definition of aggression in the UNGA's Resolution 3314 requires that the use of force must be "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." This means that all possible justifications for the use of force enshrined in the UN Charter must be assessed.

Vladimir Putin stated:

> They did not leave us any other option for defending Russia and our people, other than the one we are forced to use today. In these circumstances, we have to take bold and immediate action. The people's republics of Donbas have asked Russia for help. In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation. The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime. To this end, we will seek to demilitarise and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation.[13]

Despite this statement, Russia cannot be deemed to be acting in self-defence as no armed attack was conducted against Russia. Even if there were some exchanges of fire between Ukraine and the separatists, no Russian territory was attacked and there was no imminent threat that it would be attacked (hence the legally debatable concept of anticipatory self-defence is also excluded). Reference to the threats related with expansion of

[12] A. Speri, *Russia's Newest Weapon in Ukraine May be Mercenaries Linked to Putin*, The Intercept, 31 March 2022, available at: https://bit.ly/3wdKaqw; R. Lawless, *Are Mercenaries in Ukraine?*, Lieber Institute, 21 March 2022, available at: https://lieber.westpoint.edu/are-mercenaries-in-ukraine/ (both accessed 30 June 2022).

[13] *Address by the President of the Russian Federation*, Kremlin, 24 February 2022, available at: http://en.kremlin.ru/events/president/transcripts/67843 or (as the Kremlin's websites are currently often unavailable) the address could be also found at: https://rusemb.org.uk/fnapr/7088 (both accessed 30 June 2022). See also the Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to UN addressed to the Secretary-General, S/2022/154, 5 March 2022.

NATO[14] are legally unacceptable,[15] as the last group of states neighbouring with Russia which joined NATO – namely Poland, Lithuania, Latvia, and Estonia – did so in 1999 or 2004; thus it is ridiculous to refer to an accession process which took part 20 years ago to justify the use of force against another neighbor state which is not a NATO member. The UN Charter is very clear in Art. 2(1) about the sovereign equality of states, which implies the right to shape their foreign policy and security, including choice of military alliance(s), according to their free will. Analysis of the documentation of NATO-Russian relations[16] clearly proves NATO's will to cooperate with Russia on its terms; and even in the case of such blatant ongoing aggression against a sovereign state, NATO limited itself to statements that it will defend the territory of its members. Neither the UN Charter, nor customary law recognize a right to use force in order to prevent a state from joining a particular security organization.

Russia opted to use the same maneuver as in the case of Crimea, so it recognized the two separatist republics as states on 21 February 2022, and then claimed that was acting in the "execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Luhansk People's Republic, ratified by the Federal Assembly on February 22" in their request to act in collective self-defence. However, Russian recognition of the two separatist republics did not create new states,[17] thus no authorities from Donetsk or Luhansk could ask for Russia's intervention on their behalf.[18]

Moreover, it is very much subject to debate whether or not the population living in Donbas had a right to secede in order to secure its right to self-determination.

[14] See the following excerpt from the Address by the President of the Russian Federation (*ibidem*) concerning:

> the fundamental threats which irresponsible Western politicians created for Russia consistently, rudely and unceremoniously from year to year. I am referring to the eastward expansion of NATO, which is moving its military infrastructure ever closer to the Russian border. (...) Even now, with NATO's eastward expansion the situation for Russia has been becoming worse and more dangerous by the year. Moreover, these past days NATO leadership has been blunt in its statements that they need to accelerate and step up efforts to bring the alliance's infrastructure closer to Russia's borders. In other words, they have been toughening their position. We cannot stay idle and passively observe these developments. This would be an absolutely irresponsible thing for us to do. Any further expansion of the North Atlantic alliance's infrastructure, or the ongoing efforts to gain a military foothold of the Ukrainian territory, are unacceptable for us. Of course, the question is not about NATO itself.

[15] J.A. Green, Ch. Henderson, T. Ruys, *Russia's Attack on Ukraine and the Jus Ad Bellum*, Journal on the Use of Force and International Law (2022), published online, DOI: 10.1080/20531702.2022.2056803, pp. 5 ff.

[16] R. Kupiecki, M. Menkiszak (eds.), *Documents Talk NATO-Russia Relations After the Cold War*, The Polish Institute of International Relations, Warszawa: 2020, available at: https://bit.ly/3N3p5pK (accessed 30 June 2022).

[17] It is too early to state that both people's republics have "capacity to enter into relations with the other states", which is one of the qualifications of a state mentioned in Art. 1 of the 1933 Montevideo Convention on the Rights and Duties of States (165 LNTS 19). Despite support for Russia's policy towards the Donetsk and Luhansk regions expressed by few states (e.g. Belarus, Central African Republic, Nicaragua, Sudan, Syria or Venezuela), so far none of them have officially recognized either of the republics.

Firstly, there is no distinct "people" in Donbas to whom the right to self-determination could apply (interestingly, the Russian-speaking population is affected by Russia's military operations to the same extent as the Ukrainian speakers); secondly, the right to self-determination is nowadays understood as the right to exercise a certain autonomy (which could be understood as the request to establish a special regime).[19] The lack of the progress in the establishment of such a special regime for Donbas raises concerns, but there were no massive human rights violation which would justify the use of force in order to execute the remedy of secession (and in any case the involvement of a third state would still be unlawful).[20] Thirdly, there is no information about any use of force which would amount to an armed attack against the allegedly-independent Luhansk and Donetsk People's Republics, which excludes references to self-defence as it is understood in the UN Charter and international customary law.

Russia has argued that it is acting in defence of the Russian (i.e. Russian-speaking) people. However, the alleged genocide against Russian people in Donbas was not noted by any human rights body nor the OSCE, which closely monitors the situation in the region. In addition, the Responsibility to Protect (R2P) doctrine endorsed by the UN in the 2005 World Summit Outcome Document (paras. 138-140) still requires actions within the framework of the UN Charter to be based on either the concept of self-defence (i.e. an armed attack is required to use force) or on authorization by the Security Council (SC). Russia has never attempted to discuss the situation in Donbas as a situation requiring the SC's action based on the R2P concept. It has never used any peaceful means to settle disputes (fact-finding committees; the International Court of Justice (ICJ); human rights-based claims, except app. no. 36958 of 22 July 2021 in European Court of Human Rights focused on the situation in Crimea, etc.) to verify information about the alleged crimes committed against the Donbas population. Consequently, the awaited conclusions of the ICJ concerning the question whether acts of genocide occurred in the Luhansk and Donetsk oblasts of Ukraine; and whether on that basis Russia could recognize

[18] The legality of interventions in a civil war is debatable; *see* Ch. Redaelli, *Intervention in Civil Wars. Effectiveness, Legitimacy and Human Rights*, Oxford University Press, Oxford: 2021.

[19] G. Wilson, *Crimea: Some Observations on Secession and Intervention in Partial Response to Müllerson and Tolstykh*, 14 Chinese Journal of International Law 217 (2015), p. 219; Th. Christiakis, *Les conflits de secession en Crimée et dans l'est de l'Ukraine et le droit international*, 141 Journal de droit international 733 (2014), pp. 737ff; *see also* the oft-cited case of the Supreme Court (Canada), *Reference re. secession of Quebec*, Judgment, 20 August 1998, 2 SCR 217, paras. 126 and 138.

[20] *See e.g.* UN Office of the High Commissioner, *Report on the Human Rights Situation in Ukraine, 1 August 2021-31 January 2022*, 28 March 2022, available at: https://www.ohchr.org/en/documents/country-reports/report-human-rights-situation-ukraine-1-august-2021-31-january-2022 (accessed 30 June 2022).

the so-called "Donetsk People's Republic" and "Luhansk People's Republic" and implement a "special military operation" against Ukraine cannot be overestimated.[21]

Even if any of the above-mentioned justifications based on a broadly understood right to self-defence would be found convincing by anyone, the use of force in self-defence must still comply with the principles of necessity and proportionality.[22] A full-fledged invasion, including the siege of Kyiv and bombardment of Western part of Ukraine, are *prima facie* questionable from the point of view of proportionality.[23] Although Russia could claim that such a massive military operation was necessary to prevent any further armed attacks from Ukraine,[24] an operation aimed at changing the regime is unacceptable from the point of view of the principle of proportionality and the general respect for the sovereignty and independence of states. It is true that Western states did a lot to undermine the current legal regime[25] by the 2003 military operation against Iraq (or expanding its actions, originally based in UN SC resolution 1973 of 2011, by the abuse of the institution of no-fly zone Libya to topple Qaddafi), and Russia could compare its politics of denazification to e.g. "de-Baathification".[26] Interestingly, Russia during the war has started to use the argument of the alleged works of Ukraine on dirty bombs and tactical nuclear weapons,[27] so sooner rather than later Russia will definitely refer to the need to prevent the use of weapons of mass destruction, i.e. the same explanation which USA used in 2003. Tellingly, in Putin's Address of 24 February 2022 the Western operations against Serbia, Iraq, Syria, and Libya were mentioned. However, these isolated breaches of the prohibition to use force did not establish any new custom-

[21] International Court of Justice, Press Release No. 2022/4, *Ukraine institutes proceedings against the Russian Federation and requests the Court to indicate provisional measures*, 27 February 2022, available at: https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf (accessed 30 June 2022).

[22] *See e.g.* ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, ICJ Rep 2003, p. 161, paras. 73, 77.

[23] *Cf.* ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, Judgment, 19 December 2005, ICJ Rep 2005, p. 168, para. 147 ("The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end").

[24] On the problems related with the assessment of proportionality in the use of force, *see* J. Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge University Press, Cambridge: 2004, pp. 155ff; D. Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum*, 24(1) European Journal of International Law 235 (2013).

[25] *See more* P. Grzebyk, *Impact of Western military interventions on the evolution of law on use of force*, in: M. Madej (ed.), *Western Military Interventions After the Cold War. Evaluating the Wars of the West,* Routledge London: 2019, pp. 188 ff.

[26] Term "de-Baathification" means the purge of thousands of former members of Saddam Hussein's Baath Party from the public service positions, mostly from the government and from the Iraqi security services. *See e.g.* https://www.cfr.org/backgrounder/iraq-debaathification (accessed 30 June 2022).

[27] Reuters, *Russia, without evidence, says Ukraine making nuclear "dirty bomb"*, The Intercept, 6 March 2022, available at: https://reut.rs/3FFA8TK (accessed 30 June 2022).

ary law (*abusus non tollit usum*). Russia frequently and (rightly) severely criticized the Western operations in Serbia, Iraq, Syria or recently in Afghanistan,[28] thus it is illogical for it to rely on them as precedents in order to commit its own aggression in 2022.

The aforementioned UNGA Resolution 3314, implies that a state can commit several acts of aggression (i.e. that the state is responsible for aggression as such; but that within an ongoing aggression subsequent acts of aggression can be committed and can be treated separately). This also implies that, for example, the occupation of Crimea which commenced in 2014 does not give any right to expand the aggression by other acts of aggression. The underlying idea is to separate different acts of aggression in order to put pressure on an aggressor to stop each of them and prevent further ones (which is why in Art. 3(a) of the UNGA Resolution 3314 States decided to separate invasion, occupation, and annexation in order to not suggest that an invasion must result in occupation or annexation).

Commission of the chain of acts of aggression (no matter how stretched-out over time) cannot be justified by the classification of a situation as an international armed conflict (or – as some prefer – as the situation to which the law of international armed conflicts is applied) in light of international humanitarian law. This is emphasized by the preamble of 1977 Protocol Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts (AP I),[29] which emphasizes "that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations." The fact that there is ongoing conflict between particular states due to the occupation of a part of territory claimed by both states does not give the right to escalate and commit other acts of aggression. That is why, for example, some states officially declared the incident of 25 November 2018 in Kerch Strait (when Ukrainian warships attempting to pass through Kerch Strait from the Black Sea to the Azov Sea were blocked by a Russian tanker and subsequently attacked by Russian forces) as a separate act of aggression of Russia against Ukraine.[30]

Consequently, the "special military operation" Russia started in February 2022 must be classified as a flagrant breach of the UN Charter and as an aggression, which

[28] *See e.g.* S/PV.8848, 30 August 2021.

[29] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978), 1125 UNTS 3.

[30] *See e.g.* the reactions of Estonia (https://bit.ly/3yseeBx), Lithuania (https://bit.ly/39U9afb), the UK (https://bit.ly/3w6isNV) (both accessed 30 June 2022).

was confirmed in the UN General Assembly[31] and Human Rights Council[32] in their resolutions. The same conclusion was confirmed in statements of the Institut de Droit International,[33] International Law Association,[34] American Society of International Law,[35] European Society of International Law,[36] and in many national ILA branches statements[37], i.e. by members of bodies devoted to the analysis of international law norms.

The prohibition of aggression is a peremptory norm,[38] thus its violation triggers certain obligations on the part of the international community if a breach of such obligation is serious, i.e. it involves a gross or systematic failure by the responsible state to fulfill its obligations. As Russia systematically attacks Ukraine and has committed and continues to commit various acts of aggression, there is no doubt that the breach is serious. In Art. 41 of the 2001 Articles on State Responsibility for Internationally Wrongful Acts[39] (as well as in Art. 42 of the 2011 Articles on International Organizations' Responsibility for Internationally Wrongful Acts[40]), the International Law Commission stressed that the international community should cooperate to bring an end, through lawful means, to any serious breach of this kind of norm; and additionally it should not recognize as lawful a situation created by such a serious breach, nor render aid or assistance in maintaining such a situation. This conclusion was described as "now recognized in international law" in the Commentary to the 2019 Draft Conclusions on Peremptory Norms of International Law.[41] Consequently, states cannot invoke, for example, neutrality laws (regulated

[31] A/ES-11/1, 2 March 2022.

[32] A/HRC/RES/49/1, 7 March 2022.

[33] *Déclaration de l'Institut de Droit International sur l'Aggression en Ukraine*, 1 March 2022, available at: https://www.idi-iil.org/fr/declaration-de-linstitut-de-droit-international-sur-lagression-en-ukraine/ (accessed 30 June 2022).

[34] *ILA Statement on the Ongoing and Evolving Aggression in and against Ukraine*, 3 March 2022, available at: https://www.ila-hq.org/index.php/news. See also *Statement by Members of the International Law Association Committee on the Use of Force*, 4 March 2022 published in many languages on https://bit.ly/39guRWx (both accessed 30 June 2022).

[35] *Statement of ASIL President Catherine Amirfar Regarding the Situation in Ukraine*, 23 February 2022, available at: https://www.asil.org/sites/default/files/pdfs/ASIL_Statement_Situation_in_Ukraine.pdf (accessed 30 June 2022).

[36] *Statement by the President and the Board of the European Society of International Law on the Russian Aggression against Ukraine*, 24 February 2022, available at: https://bit.ly/3kZEeMX (accessed 30 June 2022).

[37] *See* https://www.ila-hq.org/index.php/news; the Polish Branch published its statement on 22 February 2022, available at https://przegladpm.blogspot.com/2022/02/list-grupy-polskiej-ila.html (accessed 30 June 2022). There is also additional Statement of Polish Lawyers of 4 March 2022 available in the section Polish Practice in International Law in current volume.

[38] *See e.g.* Yearbook of the International Law Commission, 2001, vol. II, Part Two (A/56/10), p. 85.

[39] *Ibidem*.

[40] Yearbook of the International Law Commission, 2011, vol. II, Part Two, A/66/10.

[41] *Report of the International Law Commission on the Work of its 71st Session* (29 April – 7 June and 8 July – 9 August 2019), UN Doc A/74/10, p. 194. In the Commentary to the 2001 Articles on State Responsibility for

in the 1907 Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land and in the 1907 Hague Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War), as the current international system does not allow for neutrality in response to violations of such peremptory norms as the prohibition of aggression. Arts. 2(5) and 2(6) of the UN Charter require solidarity with the attacked state. In the case of Russia's aggression, it has been impossible to achieve a UN SC resolution condemning its action and imposing enforcement measures, which is why the "Uniting for Peace" procedure was adopted[42], as a result of which the UN SC can call an emergency session of the GA, which can then make appropriate recommendations based on the UN Charter principles. This procedure was commenced with the UN SC Resolution 2623 of 27 February 2022, and now it is possible to use the GA and refer to its decisions in order to end serious breaches of peremptory norms.[43]

The international community has positive obligations in response to the breach of a peremptory norm, with inaction and disturbance of efforts on the part of other states to apply international procedures to stop the breach of the peremptory norm being a violation of these obligations. These obligations should also impact, for example, the interpretation of conventions such as the 1936 Montreux Convention Regarding the Regime of the Straits,[44] which were part of the system where neutrality played greater role, but now they need to be interpreted in light of the UN principles, including the prohibition to use force and solidarity with the victim of aggression.

Two consequences of serious breaches of peremptory norms for the international community must be mentioned. Firstly, no state in the world can support Russia in its aggression. This would mean that any transfer of weapons to Russia, services provided to Russian military staff, or engagement in trade which is clearly a source of financing current aggression are prohibited. Secondly, in light of the statement of the GA in resolution A/ES-11/1 of 2 March 2022, in which it deplored "in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter" and demanded that "the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State"; the adoption of the resolution of the Human Rights Council no. 49/1 of 7 March 2022 which "[c]ondemns in the strongest possible terms

Internationally Wrongful Acts, A/56/10, p. 114, the conclusions concerning obligations of states to cooperate to end serious breaches of peremptory norms were described as those which "may reflect the progressive development of international law."

[42] A/377(V), 3 November 1950.

[43] *See more* R.J. Barber, *Cooperating Through the General Assembly to End Serious Breaches of Peremptory Norms*, 71 International and Comparative Law Quarterly 1 (2022).

[44] 173 LNTS 213.

the human rights violations and abuses and violations of international humanitarian law resulting from the aggression against Ukraine by the Russian Federation"; and the ICJ's order of 16 March 2022 on provisional measures in which the Court indicated that "the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine", no state can claim that it is unaware of the circumstances of the internationally wrongful act. Therefore, any cooperation with the aggressor (e.g. transfer of weapons) could be classified as aid or assistance in the commission of an internationally wrongful act (Art. 16 of the ILC's Articles on State Responsibility), which is itself a breach of a peremptory norm. Consequently counter-measures *should* (not "could") be applied against any aiding/assisting state, as once again the international community's obligation is triggered according to Art. 42 of the aforementioned ILC Articles. Even if states have different views concerning the scope and type of the response which needs to be undertaken, they undoubtedly need to assess the situation and work on the recommendations within the GA.

2. INTERNATIONAL HUMANITARIAN LAW

The conflict between Russia and Ukraine is an international armed conflict, to which the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land with its Regulations;[45] the 1949 Geneva Conventions on Protection of War Victims and its 1977 Protocol Additional relating to the Protection of Victims of International Armed Conflicts; as well as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, together with its first protocol[46] are all applicable. Ukraine and Russia are parties to all of these agreements, as well as subject to the binding rules of customary law.[47] Unfortunately, in October 2019 Russia withdrew from the declaration made by the Union of Soviet Socialist Republics at the time of the ratification of the Additional Protocol I in accordance with Art. 90(2), recognizing ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the International Fact-Finding Commission. Therefore, in the case of any violation of IHL, it is impossible, without a separate agreement, to engage the International Humanitarian Fact-Finding Commission. However, it should be added that even before 2019 Ukraine was also not willing to engage the aforementioned Commission to verify allegations concerning war crimes.

[45] Available at: https://ihl-databases.icrc.org/ihl/INTRO/195 (accessed 30 June 2022).

[46] Convention for the Protection of Cultural Property in the Event of Armed Conflict with the Protocol (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 240.

[47] J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law,* Vol. I-III, Cambridge University Press, Cambridge: 2005; updated online version available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (accessed 30 June 2022).

In the assessment of the legality of the means of warfare used in the current war, in which Russia has allegedly used landmines, cluster munitions, thermobaric, vacuum bombs, and white phosphorus, it needs to be stressed that neither Russia nor Ukraine are parties to the 1998 Oslo Convention on Cluster Munitions; nor is Russia is a party to 1997 Ottava Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; while Ukraine deposited its documents of ratification in December 2005, and it ratified the 1996 Amended Protocol II to the 1980 Convention on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. In addition, according to Customary Rules 81-82 "when landmines are used, particular care must be taken to minimize their indiscriminate effects" and "a party to the conflict using landmines must record their placement, as far as possible." Based on these binding customary rules, Russia is obliged to at least warn about the planting of landmines and to use only those landmines which can be detected with standard demining equipment; meaning that Russia cannot use booby-traps which are in the form of apparently harmless portable objects, such as children's toys (e.g. butterfly mines which look like toys[48]). Ukraine, as it is a party to the Ottava Treaty, should not use landmines at all, but Russia accuses it of violation of its obligations and denies any use of landmines on its part.[49]

The mere use of cluster munitions or landmines is not considered as a war crime in light of the Rome Statute, therefore it is difficult to argue that landmines or cluster munitions should be considered as weapons which are by their nature intended to cause superfluous injury or unnecessary suffering, or which are inherently indiscriminate in violation of the international law of armed conflicts.[50] Nevertheless, even if this weapon is not prohibited it still cannot be used in an indiscriminate manner, e.g. in cities where there is a dense urban environment, where it is impossible to distinguish military targets from civilian objects, or against the civilian population, and these kinds of actions are classified as war crimes.[51]

Both states to the conflict, as parties to the 1980 Convention on Certain Conventional Weapons[52] together with all its protocols, should not use, for example, any weapon the primary effect of which is to injure by fragments which escape de-

[48] W. Wilde, *Fact Check: Is Russia using butterfly mines in Ukraine?*, DW, 15 March 2022, available at: https://www.dw.com/en/fact-check-is-russia-using-butterfly-mines-in-ukraine/a-61120270 (accessed 30 June 2022).

[49] *See e.g.* RIA Novosti news, available at: https://ria.ru/20220302/dnr-1776111551.html, 2 March 2022; https://ria.ru/20220302/miny-1776096271.html; 2 March 2022 (both accessed 30 June 2022).

[50] Art. 35(2) API; Art. 8 Rome Statute; Arts. 70-71 of the Customary Rules of IHL.

[51] Art. 57(4) AP I; Art. 8(2)(b)(i) and (ii) and (iv) Rome Statute.

[52] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III) (adopted 10 October 1980, entered into force 2 December 1983), 1342 UNTS 137.

tection in the human body by X-rays (therefore the use of Molotov Cocktail against soldiers is prohibited, as the result of such an attack is that small pieces of glass can remain in the human body); nor can incendiary weapons be used against civilian populations, individuals, or objects. It is also prohibited to attack, by air-delivered incendiary weapons, a military objective located within a concentration of civilians. In the case of other than air-delivered incendiary weapons, their use is possible when a targeted military objective is clearly separated from a concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to ensure the avoidance, and in any event to minimize, the incidental loss of civilian life, injury to civilians, and damage to civilian objects. However, thermobaric (vacuum) bombs or white phosphorus are not classified as incendiary weapons, as they are not primarily designed to set fire or to cause burn injuries, although they depend on a chemical reaction. For example, in the case of thermobaric bombs, their aim is to generate blast and pressure; its primary task is not to set fire. It is tempting to consider a thermobaric weapon as causing superfluous injury or unnecessary suffering (Art. 35(2) AP I) as "it just blows your lungs out of your mouth. It kind of turns you inside out",[53] but at the same time it "is not calculated to inflict suffering beyond that justified by military necessity."[54] As this kind of weapon is in the arsenal of "specially interested states" – i.e. China, UK, USA and Russia – it is impossible to deduct that this weapon is, based on customary law, considered as indiscriminate by nature.

Therefore, Russia can legally use cluster munitions, landmines, incendiary weapons, and thermobaric bombs or white phosphorus against military targets in general. These means cannot however be used – the same as with any other kind of weapon – against civilians and civilian objects and they cannot be used in a manner which would be indiscriminate – for example in densely populated urban areas, or when it is possible to use some other kind of weapon to achieve the same military results without exposing civilians to risk of death or injury.[55] It is worth recalling that Russia recently supported the adoption of several UN SC resolutions or presidential statements in which it noted the "threats posed by landmines, explosive remnants of war (ERW) and improvised explosive devices (IEDs)."[56] It is thus all the more disturbing that Russia has no problems with causing those threats in the current conflict.

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[53] L. Greenemeier, *What is the 'Mother of All Bombs' That the US Just Dropped on Afghanistan*, Scientific American, 13 April 2017, available at: https://bit.ly/3w4dVv4 / (accessed 30 June 2022).

[54] M. Montazzoli, *Are Thermobaric Weapons Lawful*, Liber Institute, 23 March 2022, available at: https://lieber.westpoint.edu/are-thermobaric-weapons-lawful/ (accessed 30 June 2022).

[55] ODIHR, *Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine since 24 February 2022 by Professors Wolfgang Benedek, Veronika Bílková and Marco Sassòli*, ODIHR.GAL/26/22/Rev.1, 13 April 2022, p. 31.

[56] Just in 2021, *see e.g.* S/RES/2589, 18 August 2021; S/RES/2592, 30 August 2021; S/RES/2612,

In the first two days of the current escalation of the conflict, Russians were attacking mainly military targets (military airports; deposits of weapon or fuel, Ukrainian armed forces etc.). Unfortunately, in the following days civilian buildings were destroyed by Russian armed forces, such as schools, kindergartens, apartments, hospitals etc. In all these cases, without proper fact finding it is impossible to state whether international humanitarian law was violated, as it has to be verified whether all those objects maintained their civilian character – in other words it must be verified that they were not used or planned to be used for military purposes.[57] It is telling that Russia in each case when a hospital or school has been bombed has justified its attack by stressing that it was used, for example, by a certain battalion;[58] or supplying reprints of alleged intercepted talks between soldiers in which they complain that particular apartments are housing both civilians and fighters,[59] which would turn those apartments into military targets. Attacks on humanitarian corridors were justified by Russia by the fact that Ukrainians allegedly used school buses for manoeuvre shelling,[60] and in the case of the theatre of Mariupol – which sheltered hundreds of civilians – the explosion was allegedly provoked by Ukrainians as Russia did not engage in any attack at that time.[61] Similarly, an attack on a television tower was justified by the argument that this tower was part of the Ukrainian military infrastructure.[62] All these justifications might well be examples of lies, but without objective verification it would be difficult to talk about the responsibility of Russia and its soldiers. It also must be stressed that despite the fact that the Ukrainians are defending their country against aggression, this does not give them more rights under IHL. Ukrainian combatants (including their commanders, as

20 December 2021; S/PRST/2021/8, 8 April 2021.

[57] Art. 52(2) AP I. It is telling that in the draft of the resolution submitted by Belarus, Democratic People's Republic of Korea, the Russian Federation, and Syrian Arab Republic in Security Council (S/2022/231) on 23 March 2022 it was emphasized that the SC "Demands from all parties concerned full respect for provisions of international humanitarian law in connection with objects indispensable to the survival of the civilian population and civilian infrastructure that is critical to enable the delivery of essential services in armed conflict, and to refrain from deliberately placing military objects and equipment in the vicinity of such objects or in the midst of densely populated areas, as well as not to use civilian objects for military purposes." As can be seen, the protection of civilian objects was thus linked with the reminder that they cannot be used for military purposes and their protection can be secured only if they are not in the vicinity of military objectives.

[58] *See e.g.* statements of Dmitry Polyanskiy, First Deputy Permanent Representative of Russia to the UN of 9 March 2022, available at: https://twitter.com/Dpol_un/status/1501688008621363205; or statement of 7 March 2022, available at: https://russiaun.ru/en/news/070322n (both accessed 30 June 2022).

[59] *See* Twitter account of Ukrainian Parliament, e.g. https://bit.ly/37ChXBz (accessed 30 June 2022).

[60] *See e.g.* statements of Michail Mizincev of 10 March 2022 cited in: https://russian.rt.com/ussr/news/974261-ognevye-tochki-v-avtobusah; or statements of Vladimir Putin of 9 March 2022 cited in: http://kremlin.ru/events/president/news/67953 (both accessed 30 June 2022).

[61] *See e.g.* https://bit.ly/3wn4Psh (accessed 30 June 2022).

[62] *See* https://russian.rt.com/ussr/news/969829-minoborony-udar-sbu-pso (accessed 30 June 2022); as well as the analysis of the attacks against television towers in ODIHR report, *supra* note 55, p. 27.

well as the commander-in-chief, who is the President of Ukraine) are legal targets; those civilians who are taking part in hostilities, i.e. throw Molotov cocktails, disturb the movement of military vehicles, provide strategic information to Ukrainian armed forces, steal military equipment etc. are also not protected during this kind of engagement and can be attacked.[63] The fact that the President of Ukraine was urging its own population to fight against the "occupants"[64] could be understood as encouragement to form and participate in *levée en masse*. While civilians who join *levée en masse* are entitled to the status of combatants/prisoners of war, at the same they lose their protection against attacks and thus they can be lawfully killed.[65]

There are some facts from Mariupol, Bucha, Irpin and many other Ukrainian cities and villages which are against the Russian narration of the complete legality of their conduct of hostilities. Even if sieges are allowed, Russia should not prevent the delivery of humanitarian aid, as starvation is prohibited and its use as a method of warfare is a war crime.[66] Forcing men from Donbas to serve in the Russian army is also a war crime, as Donbas is still Ukrainian territory and compelling its citizens to serve in a hostile army is prohibited.[67] In addition, the extremely high number of destroyed hospitals and schools and the total destruction of the city of Mariupol indicates an indiscriminate conduct of hostilities, which is a war crime.[68] Also, the destruction of agricultural infrastructure and killing of farmers trying to cultivate the soil is a war crime, as these are civilians and farmlands are objects indispensable to the survival of the civilian population.[69] Kidnapping, taking as hostages, or shooting public officials are also war crimes;[70] as is attacking protesters in the occupied cities,

[63] *See* Art. 51(3) AP I.

[64] S. Watts, *Are Molotov Cocktails Lawful Weapons?*, Liber Institute, 2 March 2022, available at: https://lieber.westpoint.edu/are-molotov-cocktails-lawful-weapons/ (accessed 30 June 2022).

[65] Art. 4(6) GC III and Art. 48 AP I.

[66] Art. 8(2)(b)(xxv) Rome Statute; Art 51(1) AP I. See information from ICRC on its team being unable to reach Mariupol, 1 April 2022, available at: https://www.icrc.org/en/document/ukraine-icrc-team-unable-reach-mariupol-renewed-attempt-tomorrow (accessed 30 June 2022). *See also* T. Dannenbaum, *Siege Starvation: A War Crime of Societal Torture*, 22 Chicago Journal of International Law 368 (2021-2022).

[67] Art. 8(2)a(v) and (b)(xv) Rome Statute; Art. 23(h) 1907 HR; Art. 130 GC III; Art. 147 GC IV. See also Reuters, *Conscripts sent to fight by pro-Russia Donbas get little training, old rifles, poor supplies*, 4 April 2022, available at: https://reut.rs/3L73Oda (accessed 30 June 2022).

[68] Art. 8(2)(b)(iv) Rome Statute; Art. 51(4) AP I. K. Collins et al., *Russia's Attacks on Civilian Targets Have Obliterated Everyday Life in Ukraine*, New York Times, 23 March 2022, available at: https://nyti.ms/3FDknwf; M. Wall, *Russia's devastation of Mariupol, Ukraine visible from space in satellite photos*, Space 25 March 2022, available at: https://www.space.com/russia-ukraine-invasion-mariupol-damage-satellite-photos (both accessed 30 June 2022).

[69] Art. 8(2)(b)(xxv) Rome Statute; Art. 54(2) AP I. Iurii Mykhailov, *Russian Bomb AG Machinery Warehouses, Says Ukrainian AG Journalist*, Successful Farming, 15 March 2022, available at: https://bit.ly/3ssOt0h (accessed 30 June 2022).

[70] Art. 8(2)(a)(i) and (viii) and (b)(i) Rome Statute; Art. 147 GC IV; Art. 11 AP I. See also CBS, *Russian troops tortured and executed a village mayor and her family, Ukrainian officials say*, CBS News, 4 March 2022, https://cbsn.ws/3N6Oejs (accessed 30 June 2022).

as protesting is not direct participation in hostilities and in this case law enforcement measures must be applied.[71] Last but not least, shooting persons in Russian hands without a proper trial is a war crime, as is torturing or raping anyone.[72]

All the violations of IHL committed by Russian armed forces result in the responsibility of Russia (as is also the case of the Ukrainian armed forces which are accused of, for example, abuse of prisoners of war or using illegal means and methods of warfare, including attacks against civilian objects[73]). All those violations which amount to war crimes entitle states to prosecute individuals (including the commanders and civilian superiors who did not prevent them and did not repress them[74]).

Inasmuch as the basic rules of international humanitarian law are considered as peremptory norms, the above-mentioned comments concerning the obligations of the international community to respond to the serious breaches of peremptory norms are relevant in the context of the prevention of war crimes. Those obligations are emphasized by the letter of common Art. 1 of 1949 GCs and Art. 1 AP I, which expect all state parties to not only respect IHL but also to ensure respect for it. As in case of GCs, all states in the world are their parties, which means that all states in the world need to take concrete actions to prevent any further violations. An example of this kind of action was the referral of the situation in Ukraine to the International Criminal Court and the opening of investigations by some states (e.g. by Estonia, Germany, Lithuania, Poland, Slovakia, and Sweden).

CONCLUSIONS

Russia violated the prohibition of threat or use of force enshrined in Art. 2(4) of the UN Charter. Due to the gravity of its violations, undoubtedly Russia has committed and is still committing acts of aggression. In an international armed conflict such as the one ongoing on the territory of Ukraine, all four 1949 GCs and 1977 AP I are applicable, as well as the 1907 HC IV with its annex and the 1954 Hague Convention with its first protocol, and customary law. Unfortunately, the facts clearly demonstrate the basic rules of international humanitarian law have been and

[71] Art. 8(2)(b)(i) Rome Statute; Art. 147 GC IV; Art. 11 AP I. R. Sulivan, *Russian troops 'open fire on Ukrainian protesters' in Kherson*, The Independent, 21 March 2022, available at: https://bit.ly/38khzrO (accessed 30 June 2022).

[72] Art. 8(2)(a)(i), (ii) and (iii) Rome Statute; Art. 130 GC III; Art. 147 GC IV; Art. 11 AP I. T. John et al., *Bodies of 'executed people' strewn across street in Bucha as Ukraine accuses Russia of war crimes*, CNN, 3 March 2022, available at: https://edition.cnn.com/2022/04/03/europe/bucha-ukraine-civilian-deaths-intl/index.html (accessed 30 June 2022).

[73] ODIHR, *supra* note 55, p. 26.

[74] Art. 28 Rome Statute; Art. 87 AP I.

are being transgressed; i.e. the principle of distinction, principle of proportionality, and the principle of not causing unnecessary suffering have all been violated. As the prohibition of aggression and prohibition of certain war crimes are considered as peremptory norms, this means that the international community (states and international organizations) has a legal obligation to undertake appropriate measures to stop violations and to not recognize the results of those violations. No subject of international law can support an aggressor, as this could amount to aiding and assisting in aggression, and in consequence would constitute a violation of obligations to properly react to the serious breaches of peremptory norms.

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HOW TO RESOLVE THE TERRITORIAL CONFLICTS IN UKRAINE: *UTI POSSIDETIS JURIS* AND AN INTERNATIONAL LAW-BASED PROPOSAL FOR POWER-SHARING[1]

Abstract: *In this article, I present a proposal for an international law-based formula for mediating territorial conflicts and apply it to the case of Crimea in Ukraine. Although the tragic Russian attack which commenced on 24 February 2022 has made the mediation even more difficult, once a ceasefire is achieved my formula is capable of providing legally solid compromises to the Ukrainian territorial questions that fit into the contemporary international legal framework concerning territory. Naturally, any realistic solution will require concessions on the part of all stakeholders (primarily Crimea, Ukraine, and Russia). In short, the formula offers for Ukraine the return of its territorial integrity, for Crimea internal self-determination in the form of a meaningful territorial autonomy, and for Russia a few indirect perks and guarantees, mostly related to a possible demilitarization of the Crimean Peninsula. The analysis can also be useful for Donbas, for which the formula offers recognition of some limited autonomous rights.*

Keywords: international law, Russia, Ukraine, Crimea, territorial conflicts

INTRODUCTION: THE POST-SOVIET ARCHIPELAGO OF TERRITORIAL CONFLICTS

It is nothing new that there are a lot of territorial conflicts worldwide. In the area of post-Soviet space alone, there are more-or-less seven active conflicts – in Azerbaijan

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[1] First presented in my PhD dissertation *From Kosovo to Crimea – The Legal Legacies of the Socialist Federal Dissolutions* (Unigrafia, 2020).

(Nagorno-Karabakh); Georgia (Abkhazia and South Ossetia); Moldova (Transnistria); Russia (Chechnya); and Ukraine (Crimea and the Donbas).

What might come as a surprise to many observers however is that these conflicts are the direct results of a particular international law rule – called *uti possidetis* (*juris*) – which has been used to determine the borders of most of the existing United Nations (UN) Member States. Given this pivotal role in shaping the political map of the world and its long history of application, many scholars give *uti possidetis* the prestigious label of a "doctrine".

Uti possidetis has a dual role in the post-Soviet space. Its utilization helped to make the breakup of the Union of Soviet Socialist Republics (USSR) relatively peaceful, but the price to pay was the subsequent territorial conflicts.

The main research question of this article is how an in-depth understanding of *uti possidetis* and its application in the 1990s can both explain as well as to help mediate the post-Soviet territorial conflicts in Ukraine. While the approach is mainly legal in nature, section 3 presents a proposal for a political solution to the conflicts in Ukraine.

The outline of the article is as follows: Section 1 establishes the international legal rules concerning territory, with focus on *uti possidetis* and the proposed conflict-resolution formula based on it. Section 2 summarizes the relevant history of Ukraine and Crimea. Section 3 combines the proposed formula with the facts in the case of Ukraine, and the article ends with analytical conclusions.

1. LEGAL RULES CONCERNING TERRITORY

Three main legal rules concerning territory are the right to self-determination; the territorial integrity of states; and *uti possidetis*. The first two are more commonly used, but also often in contradiction with one another. All peoples have a right to self-determination, but an external and tangible form of this self-determination (i.e. secession) is usually blocked by the host state's right to territorial integrity. All else being equal, territorial integrity takes priority and unilateral secession is prohibited.[2]

However, the dissolution of a state works according to a different legal formula. The framework changes, as there is no longer a host state whose territorial integrity is to be protected. In this case, the primary rule is the peoples' right to self-determination, and the third rule – *uti possidetis* – is used to determine the boundaries of the emerging states. Accordingly, in 1991 Ukraine had a right to become an independent state as there was no longer a need to protect the territorial integrity of the (dissolved) USSR. Crimea did not have the same right as it was formally part of Ukraine, which had a right to territorial integrity.

[2] Confirmed for example by the UNGA Resolutions 2625 (Declaration of principles of international law, 24 October 1970) and 61/295 (13 June 2007), both of which state that the right to self-determination cannot be construed as dismembering or impairing the territorial integrity of states.

1.1. *Uti Possidetis* Juris

Uti possidetis is an international legal rule derived from the ancient Roman civil law principle of *uti possidetis, ita possideatis*.[3] It is used – in absence of an agreement between the parties that settles the question otherwise – as the go-to rule to delineate emerging state borders wherever there is a case of secession or a state's dissolution. In effect, the application of *uti possidetis* creates a new, territorially sovereign state by transforming former administrative borders into international borders at the moment of independence. For example, in 1957 the United Kingdom accepted the independence of its colony British Ghana, and *uti possidetis* legally established within which borders this new state would be constituted. The colonial unit turned overnight – via universal international recognition and admission to the UN – into the Republic of Ghana within these former administrative borders and with full sovereignty over this territory.[4]

One of the main tenets of *uti possidetis* is that the emerging states must accept the pre-existing boundaries. The conceptual logic is that a change of sovereignty does not, by itself, change the status of a boundary.[5] The International Court of Justice (ICJ) has summarized this in the colonial context in the following manner:

> [b]y becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. International law – and consequently the principle of *uti possidetis* – applies to the new State (as a State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State *as it is*, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title.[6]

This smooth transformation poses a challenge, as internal and external borders serve very different purposes under international law, and states do not normally regulate their internal borders as possible candidates for external ones.[7]

Nevertheless, *uti possidetis* has been systematically applied and endorsed by the ICJ and other legal institutions on several occasions.[8] While at first solely related to

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[3] S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90(4) American Journal of International Law 590 (1996), p. 593; and P. Hensel, M. Allison, A. Khanani, *Territorial Integrity Treaties, Uti Possidetis, and Armed Conflict Over Territory*, paper presented at the conference "Building Synergies: Institutions and Cooperation in World Politics" (2006), p. 8.

[4] Ghana Independence Act, 5 & 6 Eliz. 2 (1957) at 1.

[5] R. McCorquodale, R. Pangalangan, *Pushing Back the Limitations of Territorial Boundaries*, 12(5) European Journal of International Law 867 (2001), p. 874.

[6] *Frontier Dispute* (*Burkina Faso v. Mali*), Judgment, ICJ Rep 1986, p. 554, para. 30.

[7] M. Shaw, *Peoples, Territorialism and Boundaries*, 8(3) European Journal of International Law 478 (1997), pp. 489-490.

[8] For authoritative statements of *uti possidetis* as a general principle, *see e.g.* ICJ, *Frontier Dispute,* para.

decolonization, its target group has been expanded greatly in the last 30 years. Thus *uti possidetis* is solidifying its status as a general principle or doctrine of international law, and constitutes the go-to rule in the cases of state dissolution.

Every practical application of *uti possidetis* has called for its adjustment to the changing paradigms of international law. Here I have identified three main cycles that have updated the doctrine into the contemporary international law system: Decolonization of Latin America (1808-1836), Decolonization of Africa (1960s), and the Socialist Federal Dissolutions (1990s). However, the last cycle has partially disrupted the doctrine's evolutionary process, which created several territorial conflicts. My proposed formula aims to correct this mistake.

1.2. (*Uti Possidetis*) *Meritus*

The main idea of the *meritus* formula is that it was the evolution of *uti possidetis* that enabled it to produce predictable and legitimate results for the parties concerned. In this way it had a decent track record of pre-empting violent conflicts over territory. Unfortunately however this did not take place in the 1990s with the dissolutions of the USSR and the Socialist Federal Republic of Yugoslavia (SFRY), as the developments concerning the right to self-determination were not taken into account. Accordingly, *uti possidetis* produced disputed results that have created endemic territorial conflicts in the successor states.

The functioning logic of *uti possidetis* is simple enough. It turns the "picture" of former administrative borders into a blueprint of the new borders of an emerging state. However, the key question is *which* administrative borders. The concept that not understood by the outside powers in the 1990s was that due to socialist ideology, the USSR and the SFRY had a unique understanding of the right to self-determination. They had created an "ethnofederal" model of different levels of autonomy given to different peoples. This was quite alien to the Western understanding of the content of self-determination.

Ethnofederalism awarded full self-determination only to the most "progressive nations", i.e. those that could be categorized as historical nations with a national culture. A lower status meant that the nation was not advanced enough for more autonomy.[9]

20; *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar v. Bahrain*), Judgment, ICJ Rep 2001, p. 40 paras. 10, 148; *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening),* Judgement, ICJ Rep 1992, p. 351, para. 386; *The Indo-Pakistan Western Boundary (Rann of Kutch) between Indian and Pakistan,* Reports of International Arbitral Awards, Vol. XVII, 19 February 1968, 1-576 at 527; and Arbitration Committee on Yugoslavia, *Opinion No. 3,* 11 January 1992, para. 2.

[9] F. Hill, *"Russia's Tinderbox": Conflict in the North Caucasus and its Implications for the Future of the Russian Federation*, Harvard University Press, New Haven: 1995, p. 2.

In the USSR, there were four levels of autonomy: the Soviet Socialist Republics (SSRs'); the Autonomous Soviet Socialist Republics (ASSRs); the Autonomous Oblasts; and the Autonomous Okrugs. The highest two levels were classified as "nations", and the lower two as "nationalities".[10] In the early 1990s, the international community chose to recognize the 15 SSRs of the USSR as independent states. Simultaneously, they left altogether twenty second-tier ASSRs to the mercy of their new parent states, without any recognized rights, although some ASSRs had more inhabitants than some SSRs. This was a clear breach of the ASSRs' self-determination rights, as provided by the USSR Constitution and the consensus in the 1990s of the content of the right. In other words, there was a lot more variance in the right of self-determination than the simple either-or formula that was used.

The concept of *meritus* – and my proposal to solve the territorial conflicts in Ukraine – consists of two components: the internal and the external legal frameworks concerning territory, and the inhabitants of the disputed area. The two components are interlinked and need to be read in harmony with each other.

The internal component is the legal status that the last applicable constitutional order provided for the territory in question. *Uti possidetis* turns the administrative borders into international ones, so the target state's constitution needs to confirm *which* borders, as not all administrative borders are transformed; but only those ones that are seen to have acquired self-determination rights. The last constitutional order is the "photograph" that the successor states inherit. The Soviet Constitution remains relevant to Ukraine insofar as it determined Ukraine's borders and included the autonomous unit (ASSR) of Crimea within those borders. Nothing in this "photograph" gave Crimea a right to secession, or Russia a right to annex it. Additionally, no matter how alien the Soviet system of ranking the progressiveness of nations was to the international community, the application of *uti possidetis* cannot question the borders drawn without compromising its function. Therefore, according to *uti possidetis* the first two tiers of the ethnofederal system were seen as administrative areas belonging to "nations" with internal self-determination rights.[11]

The external component is the content of the right to self-determination under the public international law at the moment of independence. Indeed, as legal doctrines self-determination and *uti possidetis* have a complex relationship. The former might seem obsolete as most of the borders that came out of the dissolution of the USSR were delineated based on *uti possidetis*. However, when read in conjunction

[10] G. Ubiria, *Soviet Nation-Building in Central Asia: The Making of the Kazakh and Uzbek Nations*, Routledge, London: 2016, pp. 96-97.

[11] For more on problems with internal self-determination, *see* W. Czapliński, *Self-determination – Secession – Recognition*, in: W. Czapliński, S. Dębski, R. Tarnogórski, K. Wierczyńska (eds.), *The Case of Crimea's Annexation Under International Law*, Wydawnictwo Scholar, Warszawa: 2017, p. 28.

with the first component, the right to self-determination becomes important in the case of Crimea.

As the combination of the two components, *meritus* provides us with a model that can determine the different levels of self-determination rights applicable to the different levels of borders in Crimea and Donbas.

2. THE FEDERAL HISTORY OF UKRAINE AND CRIMEA

The seeds of all the post-Soviet conflicts over territory were planted during the Soviet era. Thus it is necessary to briefly examine the history of national relations in the USSR, and why it remains relevant today.

Nationalism was always a troublesome issue for Marxism, and in 1917 the USSR became the first state that had to try to accommodate the two concepts. The solution was to create a multi-tier federal state with ethnicities, ranked into categories based on a combination of classification factors under scientific Marxism and geopolitical factors. The focus was on the highest two categories, the SSRs and the ASSRs.

The SSRs, such as Russia and Ukraine, were the most privileged entities under the ethnofederal system. The constitutive moment of the USSR was said to be the voluntary signing of the Union Treaty (1922) by the SSRs, and the illusion of their independence was maintained all throughout the Soviet era. One of the oddities of the system was that promotion and demotion were possible, and even rather frequent. This gave the peoples of the USSR a sense of *merit* being associated with the status of their national unit, and constituted a unique dynamic in the final dissolution process of the USSR.

2.1. The Rights of Different National Units

As the highest-ranking national units, the SSRs retained sovereignty over their territory and possessed an exclusive – yet in practice highly theoretical – right to free secession.[12] The number of SSRs varied and reached its peak of 16 in the 1950s. As the status was reserved only for the most progressive nations, it was possible to gain or lose this privileged position.[13] Within their borders, each SSR had autonomous institutions and a national flag. They also had a right to conduct direct foreign relations.[14]

[12] In the West, this right was often referred to as a "constitutional fiction". *See* S. Lee, *Russia and the USSR, 1855-1991*, Routledge, London: 2006, p. 36; and E. Walker, *Dissolution: Sovereignty and the Breakup of the Soviet Union*, Rowman & Littlefield, Lanham: 2003, p. 6.

[13] The SSRs which were later downgraded included the Karelo-Finnish SSR (1940-1956), and the Abkhazian SSR (1921-1924). The SSRs of Ukraine and Byelorussia were admitted to the UN as independent nations in 1945, available at: https://www.un.org/en/about-us/growth-in-un-membership (accessed 30 June 2022).

[14] C. Zürcher, *The Post-Soviet Wars*, New York University Press, New York: 2007, p. 25.

The governmental structure of the SSRs was a copy of the USSR model, with versions of a Supreme Soviet (parliament), Council of Ministers, and Supreme Court.[15] The SSRs were subjected only to the federal centre and only in areas where they had granted it exclusive jurisdiction. While their territory could not be altered without their consent, they did not have the right to ratify constitutional amendments, so in the end their powers could be altered without their consent.[16]

The second-level ASSRs were subunits located within the host SSRs. This status was given to the "national states" that usually had less inhabitants than the "sovereign states" of SSRs.[17] Nevertheless, the ASSRs possessed attributes normally attached to sovereignty,[18] such as delineated borders, individual constitutions, and national symbols, but without the rights to independent foreign relations or secession. Their governmental structure was almost an exact parallel to the SSRs, with their own Supreme Soviet and Council of Ministers.[19] However, a significant difference between the ASSRs and the SSRs was that the ASSRs were constitutionally subjects of the host SSRs, and thus entered into the structure of the USSR only through their hosts.[20] Like the SSRs, the ASSR territory could not be altered without their explicit consent.[21] The ASSRs were often promoted or demoted within this system.[22]

To summarize, both the SSRs and the ASSRs were titled "states" in the USSR Constitution, and even though the consent of the SSRs was required for territorial changes, they had several state attributes. Yet at the same time there were a few key differences, with the right to secession and the term 'sovereign' only awarded to the SSRs. The representational quotas in the federal organs also favored the SSRs. Finally, the SSRs were constituent parts of the USSR as a whole, whereas the ASSRs were integral parts of both the USSR *and their host SSR*. This was the key difference between them in 1991.

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[15] Constitution of the Union of Soviet Socialist Republics, 5 December 1936, Arts. 57, 63, and 102.

[16] N. McCabe (ed.), *Comparative Federalism in the Devolution Era*, Lexington, Lenham: 2002, p. 150.

[17] Zürcher, *supra* note 14, at 26.

[18] S. Holovaty, *Territorial Autonomy in Ukraine – The Case of Crimea*, in: European Commission of Democracy through Law, *Local Self-Government, Territorial Integrity and Protection of Minorities*, Proceedings, Lausanne 25-27 April 1996, published in *Science and Technique of Democracy*, No. 16 (Council of Europe, 1996) 135-150 at 141-142. He calls the ASSR status a "specific form of statehood", with "each nation creating an autonomous republic in the Soviet federation had the right to self-determination on the basis of national sovereignty."

[19] The 1936 Constitution of the USSR, Arts. 89 and 93.

[20] *E.g.*, B. Balayer, *The Right to Self-Determination in the South Caucasus: Nagorno Karabakh in Context*, Lexington, Lenham: 2013, p. 116; and F. Feldbrugge, G. Van Den Berg, W. Simons (eds.), *Encyclopedia of Soviet Law*, Martinus Nijhoff, The Hague: 1985, p. 73.

[21] Constitution and Fundamental Law of the Union of Soviet Socialist Republics, 7 October 1977, Art. 84.

[22] Numerous examples are listed in B. Nahaylo, V. Swoboda, *Soviet Disunion: A History of the Nationalities Problem in the USSR*, Free Press, London: 1990, p. 361; and *Goskomstat SSSR (1989), Natsionalnyi sostav naseleniya SSSR: Po dannym vsesoyuznoi perepisi naseleniya 1989*, available at: http://demoscope.ru/weekly/ssp/sng_nac_89.php?reg=1 (accessed 30 June 2022).

The above distinctions mean that, in relation to *uti possidetis*, Ukraine and Crimea were in notably different legal positions.

2.2 The Dissolution of the USSR; State Recognition and the Right to Internal Self-Determination

When the dissolution of the USSR began to seem imminent, in December 1991 the European Community (EC) issued its "Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union."[23] The Guidelines laid down the EC's formative rules for recognition of the newly-emerging states. The recognition of the SSRs was conditioned on their fulfilment of the following criteria: re-affirmation of the principle of self-determination;[24] respect for the rule of law, democracy and human rights;[25] guarantees for the rights of ethnic and national groups and minorities in accordance with the framework of the Commission on Security and Cooperation in Europe (CSCE);[26] respect for the inviolability of the *uti possidetis* borders;[27] acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation;[28] and a commitment to settle by agreement or arbitration all questions concerning state succession and regional disputes.[29] Upon fulfilling these criteria, the SSRs were recognized within their *uti possidetis* – i.e., former administrative – borders. The ASSRs were denied any kind of status recognition.

However, this choice of an all rights/no rights dichotomy between the self-determination units inevitably jeopardized the promotion of *internal self-determination*, as provided in several international conventions and instruments.[30] Most importantly, the right to self-determination had been codified since 1966 in two international Covenants,[31] making self-determination a treaty-based, general entitlement right.[32] In addition, by recognizing this right outside decolonization, many scholars

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[23] European Community, *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991, 31 I.L.M. 1486.

[24] *Ibidem*, para. 1.

[25] *Ibidem*, para. 3.

[26] *Ibidem*, para. 4.

[27] *Ibidem*, para. 5.

[28] *Ibidem*, para. 6.

[29] *Ibidem*, para. 7.

[30] *See e.g.*, Conference on Security and Co-operation in Europe, Final Act, Helsinki, 1 August 1975, Chapter VIII; *Charter of Paris for a New Europe*, 22 November 1990); and the UN General Assembly (*Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, GA Res. 48/131, 20 December 1993, preamble).

[31] International Covenant on Civil and Political Rights, UNGA res. 2200A (XXI) and International Covenant on Economic, Social and Cultural Rights, UNGA res. 2200A (XXI), 16 December 1966.

[32] S. Oeter, *Self-Determination*, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, Vol. 1, Oxford University Press, Oxford: 2012, p. 322; and H. Hannum, *Rethinking Self-Determination*, 34(1) Virginia Journal of International Law 1 (1993), p. 19.

claimed that the Covenants provided a legal right to internal self-determination.[33] The USSR was bound by the Covenants and had guaranteed the SSRs' and the ASSRs' right to internal self-determination in its last federal Constitution of 1977. Therefore, the ethnofederal system territorialized self-determination, awarding it to the population of a specific territory[34] It is no wonder that ASSR status under this system was so desirable.

2.3 The Federal History of Crimea

The SSR of Ukraine declared independence from the USSR in August 1991 and was universally recognized as an independent state in December of the same year. At the moment of its independence, it had within its borders the ASSR of Crimea. It also had a significant Russian-speaking minority, located mainly in Eastern Ukraine.

As a national unit, Crimea was originally declared an SSR in April 1919.[35] On 18 October 1921, it was demoted to the "Crimean ASSR of the Russian Soviet Federative Socialist Republic" (RSFSR).[36] In 1945, it was again demoted to a mere administrative region.[37] Thus over the course of 26 years Crimea had moved from 'sovereign' SSR to a non-autonomous region. On 19 February 1954, Crimea was transferred from the RSFSR to the SSR of Ukraine. The justification given was the 'integral character of the economy, the territorial proximity and the close economic ties between the Crimea Province and the Ukraine Republic', as well as the favourable stances of both the RSFSR and Ukraine.[38] Ukraine promised to rebuild Crimea and to create infrastructure.[39] On 20 January 1991, a referendum was held

[33] *E.g.*, M. Barelli, *Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?*, 13(4) International Community Law Review 413 (2011), p. 414; A. Rosas, *Democracy and Human Rights*, in: A. Rosas, J. Helgesen (eds.), *Human Rights in a Changing East-West Perspective*, Pinter, London: 1990, pp. 30-34; S. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90(4) American Journal of International Law 590 (1996), p. 611. According to New York City Bar, "[t]he norm of self-determination is not a general right of secession. It [...] has evolved into the concepts of 'internal self-determination,' the protection of minority rights within a state, and 'external self-determination,' secession from a state." Special Committee on European Affairs of the New York City Bar, *Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 14 ILSA Journal of International and Comparative Law 379 (2008), pp. 383-384.

[34] *See* Czapliński, *supra* note 11 at 26.

[35] For more on the Russian claims of its "historical rights" over Crimea, *see* T. Lundstedt, *"Peaceful and "Remedial" Annexations of Crimea*, *Russian Perspectives on International Law Symposium*, Voelkerrechtsblog, 19 January 2018, available at: https://voelkerrechtsblog.org/peaceful-and-remedial-annexations-of-crimea (accessed 30 June 2022).

[36] The 1936 Constitution of the USSR, Art. 22.

[37] N. Belitser, *The Constitutional Process in the Autonomous Republic of Crimea in the Context of Interethnic Relations and Conflict Settlement*, International Committee for Crimea, 20 February 2000, available at: https://www.iccrimea.org/scholarly/nbelitser.html (accessed 30 June 2022).

[38] Quoted in K. Calamur, *Crimea: A Gift to Ukraine Becomes a Political Flash Point*, National Public Radio, Parallels, 27 February 2014, original in *Pravda*, 27 February 1954.

[39] A. Tatarenko, *The Legal Status and Modern History of Crimean Autonomy*, Verfassungsblog, 2 April 2014.

in Crimea about returning to its ASSR status. The motion was backed by 93.26% of the electorate, with over 80% participation.[40] Ukraine re-established Crimea's ASSR status a month later.

After the August 1991 coup attempt, the USSR was in a state of paralysis, with the RSFSR not participating in any federal organs. In September, the USSR governmental system was suspended.[41] On 1 December 1991, Ukrainians overwhelming voted for independence.[42] Subsequently, on 8 December 1991 the heads of state of the RSFSR, Ukraine, and Belarus signed the Agreement Establishing the Commonwealth of Independent States (CIS). It stated that "the USSR as a subject of international law and a geopolitical reality no longer exists."[43] On 21 December 1991, eight more SSRs joined the CIS, declaring that "the USSR had ceased to exist."[44]

With the federation thus abolished, the SSRs had to make decisions on their national borders. They decided to follow the earlier decolonization examples and to retain the Soviet administrative lines according to the *uti possidetis juris* rule. Thus, the newly independent Ukraine inherited the borders of the SSR of Ukraine, including the ASSR of Crimea and the Russian-speaking areas of Donbas. However, Crimea's unique history as a federal unit complicated its relationship with Ukraine throughout the 1990s and 2000s. The main problem was that Crimea had previously been a part of Russia and had a predominantly Russian population, making the Russian Federation a stakeholder in Crimea's quest for self-determination.

From the very outset, Crimea displayed tendencies toward an enhanced autonomy or even outright independence. In February 1992 the Crimean parliament renamed the ASSR as the "Republic of Crimea", and a month later the "Republican Movement of Crimea" collected over 200,000 signatures in support for a referendum on independence.[45] The Ukrainian parliament was under pressure to grant concessions to the Crimeans, as other former ethnofederal units had already started armed uprisings (in Azerbaijan, Georgia, and Moldova). In April 1992, a Ukrainian law reinstated generous autonomy for Crimea,[46] which however granted Crimea less self-governance than the province had hoped for. On 5 May 1992, the Crime-

[40] Chronology for Crimean Russians in Ukraine, *Minorities at Risk Project* (2004), available at: https://www.refworld.org/docid/469f38ec2.html (accessed 30 June 2022).

[41] Joint Declaration of the President of the USSR and of the Leading Officials of the Union Republics, Izvestiia, 2 September 1991.

[42] 92.3% voted yes. D. Nohlen, P. Stöver (eds.), *Elections in Europe: A Data Handbook*, Nomos, Baden-Baden: 2010, p. 1985.

[43] Agreement on the Establishment of the Commonwealth of Independent States, 8 December 1991, 31 ILM 138.

[44] Alma-Ata Declaration (21 December 1991), 31 ILM 148.

[45] D. Litvinenko, *The Legal Aspects of Crimea's Independence Referendum of 2014 with the Subsequent Annexation of the Peninsula by Russia*, Master's Thesis, Harvard Extension School 2016, at 17.

[46] Law On the Status of the Autonomous Republic of Crimea, 21 April 1992.

an parliament approved a new Constitution that declared Crimea independent, pending its approval by an independence referendum. The referendum was never held, as the next day the Crimean parliament backed off and passed a constitutional amendment that stated that Crimea was a "constituent part" of Ukraine.[47]

Nevertheless, the 1992 Constitution of Crimea gave it a substantial self-governing status. The local parliament and the council of ministers were declared to possess the highest legislative and governmental power; Russian was declared the state language; and the Republic retained the right to have state symbols.[48] Just like in the late Soviet era, the Constitution proclaimed that while a part of Ukraine, Crimea "defines its relation with it on the basis of a treaty and agreements."[49]

On 19 May 1992, Crimea completely withdrew its pending independence proclamation and in July a compromise was reached: Crimea remained under Ukrainian jurisdiction, but with significant autonomy. A new law on the status of the "Autonomous Republic of Crimea" was passed, giving Crimea the right to pass laws so long as they did not contradict Ukraine's laws; to adopt a budget and have an independent tax system; and to conduct local referendums on questions under the Autonomous Republic's jurisdiction.[50]

In 1993, the Crimean parliament created an office for the President of Crimea. The first presidential elections in January 1994 were won by Yuri Meshkov, who had campaigned for Crimean secession and a union with Russia. In May 1994, the Crimean parliament adopted a law that indicated a desire for more autonomy or even outright independence, thus violating the Ukrainian Constitution and the April 1992 law on the status of Crimea.[51] International involvement followed and on 24 November 1994 the OSCE established a "Mission to Ukraine", charged with the task of supporting the work of experts on constitutional and economic matters and reporting on the Crimean situation.[52]

In March 1995 the Ukrainian parliament repealed the 1992 Crimean Constitution, abrogated all Crimean laws contradicting Ukrainian legislation, and removed the post of President of Crimea.[53] Ukraine adopted a new Constitution in 1996. It proclaimed Ukraine a unitary state with sovereignty over all its territory and the

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[47] P. Kolstø, *Russians in the Former Soviet Republics*, Indiana University Press, Bloomington: 1995, p. 194.

[48] Tatarenko, *supra* note 39.

[49] Constitution of the Republic of Crimea, 5 May 1992, Art. 9.

[50] *Autonomous Republic of Crimea*, Global Security, available at: https://www.globalsecurity.org/military/world/ukraine/arc.htm (accessed 30 June 2022).

[51] A. Bloed (ed.), *The Conference on Security and Co-Operation in Europe: Basic Documents, 1993-1995*, Martinus Nijhoff, The Hague: 1997, p. 788.

[52] The Mission was closed in 1999, available at: https://www.osce.org/mission-ukraine-1999-closed (accessed 30 June 2022).

[53] On the Autonomous Republic of Crimea, Act No. 0095, 17 March 1995.

Autonomous Republic of Crimea as an integral part of Ukraine.[54] Nevertheless, Crimea was still awarded many characteristics of a state: its representative organs were entitled to adopt a Constitution, as well as to have a local government, emblem, hymn, flag, and state language (Russian).[55] Yet at the same time these rights were substantially limited – the Crimean Constitution had to be approved by the Ukrainian parliament, and all Crimean legislation had to be in conformity with the Ukrainian Constitution and legislation.[56] The Ukrainian Constitution explicitly prohibits Crimean secession.[57]

It is noteworthy that even with these state characteristics, Crimea was and remained an autonomous unit within the territory of Ukraine. When the right to self-determination and territorial integrity are in contradiction, the latter usually prevails. Hence in the absence of Ukrainian concessions the self-determination rights of Crimeans need to be accomplished within the territorial framework of Ukraine. Crimea exists within Ukraine, as an exception to Ukrainian sovereignty. As a "non-state actor", it can nevertheless acquire an international status or role.[58]

Finally, Crimea adopted a new Constitution on 21 October 1998, concurring with the 1996 Constitution of Ukraine. According to the Constitution, Crimea exercises normative regulation over numerous areas.[59] The Crimean parliament selects the head of the Crimean government, but this is subject to a veto by the Ukrainian President.[60]

With the Crimean population being predominantly Russian,[61] the dispute between Ukraine and Crimea always had a third stakeholder. The separatist elements found support from the Russian Duma, which in 1992 had declared the 1954 transfer of Crimea to have been illegal, and in 1993 that Crimea was a part of Russia. Nevertheless, President Yeltsin did not press the issue and the dispute was seemingly settled with the 1997 Treaty of Friendship, Cooperation and Partnership between Russia and Ukraine.[62] In that Treaty Russia unambiguously recognized Ukraine's borders and sovereignty over Crimea in exchange for rights to lease the

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[54] Constitution of Ukraine, adopted on 28 June 1996, Arts. 2 and 133.

[55] *Ibidem*, Title X, Art. 134-139.

[56] *Ibidem*, Art. 135.

[57] *Ibidem*, Arts. 92(13), 92(18), and 157.

[58] J. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford: 2007, at 254.

[59] For example, in agriculture and forestry; public works, city construction and housing management; tourism; and water supply. Constitution of the Autonomous Republic of Crimea, adopted on 21 October 1998, Art. 18(2).

[60] *Ibidem*, Art. 36(1).

[61] In 2001, Russians made up 58.3% of the population of Crimea, available at: https://web.archive.org/web/20111217151026/http://2001.ukrcensus.gov.ua/eng/results/general/nationality/ (accessed 30 June 2022).

[62] Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, 31 May 1997.

Sevastopol Naval Base until 2017.[63] After this Treaty separatist arguments were significantly curtailed in both Crimea and Russia.

The interaction between Ukraine and Crimea displays a complex ethnofederal bargaining process, and the final compromise – while containing a meaningful autonomy – was less than expected and thus contributed to separatist tendencies. Without having had its ASSR status, the Crimeans would have been simply a territorially concentrated ethnic minority. However, having held this status at the moment of the dissolution of the USSR, they expected the same rights as their counterparts in other successor states of the USSR. The power-sharing treaties that the Russian Federation had signed with its former ASSRs were a natural reference point.

The key legal point in the 1992 Crimean Constitution was that although a part of Ukraine, Crimea exercised sovereign rights over its territory, and that the bearers of this sovereignty were the people of Crimea.[64] This was a typical example of thinking along the lines of the Soviet ethnofederal framework. The ASSRs used to view their legal position as a territory entitled to "territorial sovereignty" – a substantial autonomy over their territory with strong constitutional guarantees, including a veto right over any changes. Thus, while a part of Ukraine, Crimea functioned under its own Constitution based on the sovereignty of its people, regulating its relations with Ukraine by treaties and agreements.[65]

This constitutional order was a copy of the Soviet era. It continued the asymmetric ethnofederal model and co-opted it with the new realities, such as the loss of the arbitrating federal centre, a multi-party democratic system, and a more rule of law state. However, this compromise was not to last.

The key changes made in the still valid 1998 Constitution[66] underlined Crimea's subordinate position. The Crimean Constitution had to be approved by the Ukrainian parliament;[67] the Ukrainian President had a veto right over the selection of Crimea's Prime Minister;[68] and finally and most importantly, the Constitution stated unambiguously that Crimea exercises "any and all powers as may be delegated to it by Ukrainian laws pursuant to the Constitution of Ukraine."[69] Thus, the asym-

[63] Partition Treaty on the Status and Conditions of the Black Sea Fleet, signed on 28 May 1997; Agreement between Ukraine and Russia on the Black Sea Fleet in Ukraine, signed on 21 April 2010, extended the Sevastopol lease until 2042.

[64] Constitution of Crimea (1992), Arts. 1, 2, and 7(1).

[65] *Ibidem*, Art. 9.

[66] Constitution of Crimea (1998). A new Constitution was passed in 2014, but under foreign occupation and it has not been recognized by the Ukrainian parliament. According to *ex injuria jus non oritur*, the 2014 Constitution is null and void as the international community does not recognize the Russian annexation of Crimea.

[67] *Ibidem*, Art. 135.

[68] *Ibidem*, Art. 36(1).

[69] *Ibidem*, Art. 1(1).

metric "co-sovereignty" with Ukraine was transformed into a more conventional territorial autonomy, with a delegated and limited set of powers. All that being said, Crimea continued to exercise regulation rights over many important policy areas, such as agriculture, public works, city construction, public transportation, tourism, and culture.70 Moreover, Crimea held a veto over any changes to its *uti possidetis* borders. Hence Crimea's autonomy, although curtailed, still remained not insignificant.

Donbas never had or demanded an autonomous status. The question over Crimea is a proper post-Soviet territorial dispute, whereas the Donbas separatist movement appears to be mainly orchestrated by Russia. The questions of Crimea and Donbas are thus handled separately in this article.

2.4. The Events of 2014

The roots of the 2014 first Russian invasion, as well as the ongoing full-scale war in Ukraine, go all the way back to the difficult relationship between Ukraine and Russia following the dissolution of the USSR. There have been significant problems, relating especially to the political and military alignment of Ukraine and the continuous negotiations over the Sevastopol Naval Base lease. In 2010, the lease was extended until 2042, seemingly solving the issue for a generation.

In the 2010s, a competition for the political affiliation of Ukraine developed between the EU and a Russian-led integration project called the Eurasian Economic Union (EEU). It was initially a mere customs union between Russia, Belarus, and Kazakhstan, coming into force on 1 January 2010.

However, from the very beginning Russia had more grandiose plans for the EEU. The ultimate goal was for a political union that would resemble the EU in many ways, uniting the members states' economies, legal systems, custom services, and militaries, with the intention of rivalling the other "blocks" of the EU, the USA, and China.[71] The unresolvable problem was that for the "in-between states" of Armenia, Azerbaijan, Georgia, Moldova, and Ukraine it was an either-or choice, as the EU membership or even an Association Agreement with the EU would render such a state incompatible with EEU membership.

The issue really came to fore in the late 2013. Ukraine was in the final stages of negotiating an Association Agreement with the EU, but suddenly at an EU-Ukraine summit at Vilnius Ukrainian President Yanukovych – having received an offer from Russia of economic assistance – refused to sign the agreement. A series

[70] *Ibidem*, Art. 18(2).

[71] J. Henley, *A brief primer on Vladimir Putin's Eurasian dream*, The Guardian, 18 February 2014, available at: https://www.theguardian.com/world/shortcuts/2014/feb/18/brief-primer-vladimir-putin-eurasian-union-trade (accessed 30 June 2022).

of anti-government protests followed all across Ukraine. In Kiev, the situation escalated quickly in late February 2014, culminating in President Yanukovych fleeing the country and his dismissal by the Ukrainian Parliament.

Following those events, the Russian Special Forces took over the Crimean Peninsula on 27-28 February 2014. A hastily organized and internationally condemned referendum was held on 16 March, and Crimea was incorporated two days later into the Russian Federation as a Republic. At first Russian scholars remained silent, whereas Russia's government officials were giving highly contentious international law justifications for the Russian actions.

In relation to the arguments supporting the right to self-determination of Crimea, Russia argued that Crimea was using the same general right to self-determination that Ukraine itself had used to become independent from the USSR in 1991; that the will of the Crimean people had been clearly expressed in the 16 March 2014 referendum; that there were grounds for remedial secession based on the Kosovo precedent as Russians in Crimea were under attack; and that the ICJ's Advisory Opinion on Kosovo Independence in 2010 had ruled that general international law does not prohibit a declaration of independence.

In April 2014, a series of pro-Russian protests in the Donbas area of Ukraine turned into armed conflicts between the Russia-backed rebel forces and Ukrainian authorities, producing yet another frozen conflict. Until 2022, Russia has continuously denied any direct involvement.[72]

2.5 The Right to Self-determination of Crimea and the Donbas

The Russian justifications for the annexation of Crimea are easy to refute. In what follows this article proceeds to examine what international law provides for the inhabitants of Crimean and Donbas.

First, Russia has already recognized Crimea as part of Ukraine in several international agreements. It is now trying to escape its responsibilities thereunder by claiming that due to an illegal constitutional coup Ukraine has become a new state with which Russia did not have any agreements.[73] However, international law does not give states the right to simply "un-recognize" other states in order to escape their legal obligations. Multilateral treaties involving Ukraine have remained in force all throughout the crises. These include the UN Charter; Art. 62 of the Vienna Agreement (especially banning the right to unilaterally resign from a border agreement);

[72] Protocol on the results of consultations of the Trilateral Contact Group, signed in Minsk 5 September 2014.

[73] *Address by President of the Russian Federation*, 18 March 2014, available at: http://en.kremlin.ru/events/president/news/20603 (accessed 30 June 2022).

the CSCE Final Act (1975); the CIS founding Agreement (1991); and the 1994 Budapest Memorandum. Thus, Russia's justification is not credible.

Second, Russia has claimed that the Russian population in Crimea was in danger and had to be protected with armed forces.[74] The same reasoning was used at the start of the 2022 war. Yet four independent international fact-finding missions from the OSCE, the UN, and the Council of Europe visited Crimea in the early spring of 2014 and found that there was absolutely no threat facing the Russian population in Crimea.[75] This justification was as easily refutable back then as it is in 2022.

The third justification was based on the official requests for help by President Yanukovych and the Parliament of Crimea, respectively. Under the Russian interpretation of the events of 2014, Yanukovych remained the legal President and could thus ask for help.[76] Crimea could ask for help as an independent state. Yanukovych had been removed without the constitutional threshold of 75% of parliamentarians due to the absence of many of them.[77] However, according to the Constitution only the Ukrainian parliament can ask for outside intervention, not the President. There is nothing in international law preventing a coup d'état from happening in a state – only a clear prohibition for an outside state to be involved in such a coup. Crimea remained a part of Ukraine and its autonomy did not include a right to become independent unilaterally, nor to ask for outside assistance.

The fourth justification was Russia's strongest one, i.e. that of the precedent of Kosovo independence (2008). In 1998-1999 the situation in Kosovo had developed into a threat to the civilian population, recognized by both the UN Secretary-General as well as in several Security Council resolutions. To resolve the situation, there was a highly contentious unilateral military operation to drive the Serb forces out from the province. After this had taken place, Security Council resolution 1244 established a United Nations Interim Administration Mission in Kosovo (UNMIK) to administer it until the negotiations between Kosovo and Serbia would settle the future status of the province. After eight years of failed negotiations, Kosovo declared independence unilaterally and quickly received a significant number of

[74] UN Doc SIPV. 7125, at 3-4.

[75] The Ad hoc Advisory Committee, *Report on the situation of national minorities in Ukraine,* adopted on 1 April 2014, Council of Europe Doc. para. 15; Office of the United Nations High Commissioner for Human Rights, *Report on the human rights situation in Ukraine*, 15 June 2014, available at: https://bit.ly/3axvg7W; Council of Europe Commissioner for Human Rights, *Human Rights Abuses in Crimea Need to Be Addressed*, 12 September 2014, available at: https://bit.ly/3IxwZXb; *Statement by the OSCE High Commissioner on National Minorities on her Recent Visit to Ukraine*, 4 April 2014, available at: http://www.osce.org/hcnm/117175; and Statement of 19 September 2014, http://www.osce.org/hcnm/123805 (all accessed 30 June 2022).

[76] A quote by the Russian Ambassador to the UN Vitaly Churkin on the request by President Yanukovych. Presented at the UN Security Council meeting on 3 March 2014, SIP V.7125.

[77] Constitution of Ukraine (1996), Art. 111.

international recognitions. In 2010, an ICJ Advisory Opinion held that Kosovo's declaration of independence did not violate international law.[78]

In comparison, all throughout the Ukrainian crisis Russia was heavily involved and openly used its armed forces to get the pro-Russian politicians into power.[79] These individuals then hastily organized a referendum without international observation. The President of Russia has admitted that he made the decision on the takeover of Crimea. There is no way around the fact that due to *ex injuria jus non oritur*, Russian actions make the independence of Crimea an illegal event. The same applies to the self-proclaimed "People's Republics" of Donbas.

Finally, Russia claimed that the 1954 transfer of Crimea from Russia to Ukraine had violated the Soviet Constitution.[80] However, inasmuch as Russia recognized Crimea belonging to Ukraine in several bilateral and multilateral international agreements, this argument is not legally credible.

In conclusion, while peoples have a right to self-determination, this right can usually only be realized within the confines of a state that has sovereignty over the area. An overwhelming majority of countries in the world recognize Crimea as being legally a part of Ukraine, so Ukraine is the only authority that can grant Crimea independence. If this were to take place, it would have to happen within the constitutional framework of Ukraine, which stipulates that such a move would need to be backed in referendums by the majority of voters in both Crimea as well as in Ukraine as a whole. Without such a concession, the recognition of independence and/or annexation of Crimea breaches the territorial integrity of Ukraine and is thus illegal interference into its internal affairs.

In relation to Donbas, while Ukraine did promise in the so-called Minsk II agreement in February 2015 to grant local self-governance to Donetsk and Luhansk provinces, it did so under a threat of use of force. As stated in Art. 52 of the 1969 Vienna Convention on the Law of Treaties, a treaty that is based on the threat or use of force in violation of the Charter of the UN is void. Moreover, the Minsk agreement never disputed Ukraine's territorial sovereignty over the provinces, and neither Ukraine nor Russia ever fulfilled the conditions stipulated in the agree-

[78] Unfortunately, the decision did not introduce any concrete instances or clarification on the factual content of the right to secession. N. Cwicinskaja, *The Legality and Certain Consequences of the "Accession" of Crimea to the Russian Federation*, XXXIV Polish Yearbook of International Law 61 (2014), p. 70. "The ICJ interpreted the question posed in a very narrow and formalistic way" (R. Värk, *The Advisory Opinion on Kosovo's Declaration of Independence: Hopes, Disappointments and Its Relevance to Crimea*, XXXIV Polish Yearbook of International Law 115 (2014), p. 115.

[79] Indirect aggression using the "little green men" is legally the same as using the state's official armed troops. Legal Advisory Committee, *The Opinion to the Minister of Foreign Affairs of the Republic of Poland on the Annexation of the Crimean Peninsula to the Russian Federation in Light of International Law*, XXXIV Polish Yearbook of International Law 275 (2014), p. 278.

[80] Putin's speech *(supra* note 73); and a resolution by the State Duma on 22 May 1992.

ment. After recognizing the independence of the Donetsk and Luhansk People's Republics in February 2022, President Putin stated that the Minsk agreement no longer existed.[81]

Thus, legally Crimea and Donbas continue to remain within Ukrainian territorial sovereignty. This does not mean that Crimeans and the inhabitants of Donbas are without any rights. In what follows I present a formula that demonstrates what Crimea – as a former ASSR – and the minority in Donbas would have been entitled to under international law at the time of the dissolution of USSR.

3. HOW INTERNATIONAL LAW CAN HELP TO MEDIATE THE POST-SOVIET CONFLICTS IN UKRAINE

As long as the tragic war is taking place, there can be no meaningful mediation. First there needs to be a ceasefire that holds. As I write these words the situation is ever-changing, and the future is hard to predict. At any rate, there is a need for peaceful solutions based on international law. I thus posit a proposal on how to mediate the post-Soviet conflicts in Ukraine – i.e., to settle the status of Crimea and the "People's Republics" in Donbas.

In Crimea, the question is not whether Russia or Ukraine that has full and exclusive sovereignty over Crimea. At its core, this is a Soviet dispute, so understanding the Soviet interpretation of sovereignty is key. In this framework Crimea's right to self-determination becomes an issue which needs to be taken into consideration. While this appears to complicate the matter further – bringing in a third party to compete over sovereignty – it actually clarifies the situation considerably. International law and the right to self-determination can find a solution to the Crimean question by going back to the original autonomous position of Crimea in Ukraine in early 1991, the subsequent dissolution of the USSR, and what these events meant for the autonomous status of Crimea.

A legally credible solution is to combine Crimea's autonomous status at the moment of the dissolution of the USSR with the *uti possidetis juris* rule and the rules of state succession. According to the two Vienna Conventions on the Succession of States, the term means "the replacement of one State by another in the responsibility for the international relations of territory", i.e., the transfer of rights and obligations between the former and the succeeding state.[82]

Ukraine inherited the territory of the former SSR of Ukraine and – with it – obligations towards the internal self-determination unit of the former ASSR of

[81] *Ukraine conflict: Biden sanctions Russia over 'beginning of invasion'*, BBC, 23 February 2022, available at: https://www.bbc.com/news/world-europe-60488037 (accessed 30 June 2022).

[82] Vienna Convention on Succession of States in Respect of Treaties (1978) and Vienna Convention on

Crimea. Ukraine's international recognition was conditioned on it accepting the *uti possidetis* borders, guaranteeing the rights of its national groups, and committing to settle any state succession questions by agreement or arbitration.[83]

From this equation, when adding the fact that the law of state succession is governed by the general principle of equity,[84] it follows that Crimea's right to internal self-determination was a precondition of Ukraine being recognized within its then-current legal borders that included Crimea. The following mediation proposal uses this right as a benchmark.

In Donbas, the first thing to acknowledge is that this is mostly a manufactured dispute without an ethnofederal background. The solution should begin with dismantling the illegal pseudo-state institutions set up by the separatists. The Russian-speaking areas should have enhanced local governance in those municipalities that are demographically distinct. This arrangement would provide a compromise that would be in accordance with *uti possidetis* and the previous status quo that the inhabitants of Donbas had accepted all throughout the Soviet era.

4. THE MODEL TO SOLVE THE CRIMEAN QUESTION

4.1. Territorial Autonomy

The ethnofederal model was based on and found legitimacy in providing "homelands" for the numerous peoples of the USSR.[85] Therefore, it is no coincidence that the post-Soviet conflicts revolve almost exclusively around territory and there is no credible alternative to the territorialization of autonomy.[86] Territorial autonomy is the most workable solution as it should be equally acceptable to both the conflicting parties and the international community – it is in accordance with the ethnofederal system that the parties found legitimate in their shared Soviet past, and with the territorial integrity of Ukraine that the international community places such a high value on and has insisted upon.

Succession of States in Respect of State Property, Archives and Debts (1983). Zimmerman argues that the quote constitutes the consensus on what the term 'state succession. encompasses. A. Zimmerman, *Secession and the Law of State Succession*, in: M. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, Cambridge: 2006, pp. 208-209.

[83] European Community, *supra* note 23.

[84] S. Maljean-Dubois, *Le Role de l'équité dans le droit de la succession d'Etats*, in: P. Eisemann, M. Koskenniemi (eds.), *State Succession – Codification Tested Against the Facts*, Martinus Nijhoff, The Hague: 2000, p. 137.

[85] Seven out of the eight ethnofederalized SSRs have had separatist conflicts.

[86] Other alternatives include personal and cultural autonomy (M. Weller, *Introduction*, in: M. Weller, K. Nobbs (eds.), *Asymmetric Autonomy and the Settlement of Ethnic Conflicts*, University of Pennsylvania Press, Philadelphia: 2010, p. 3.

Any model to resolve the Crimean question must begin with demarcating the borders of Crimea. Art. 133 of the Constitution of Ukraine establishes the Autonomous Republic of Crimea. The 1998 Constitution of Crimea delineates the borders of this unit within the Ukrainian territorial sovereignty. According to Art. 7(1), the territory of the Autonomous Republic of Crimea is within those borders that were in existence on 20 January 1991, when its autonomous status in its current form was established. According to Art. 7(2), this territory can only be changed on the basis of a local referendum and a subsequent resolution of the Crimean parliament pursuant to the Constitution of Ukraine.[87] Hence there is no dispute over its borders.

The next step is to determine the rights involved within those borders. Crimea was a lower level ethnofederal unit with some state-like attributes, and held a veto right over any changes to its autonomy. While the rights of Crimea fall short of independence, Ukraine was only recognized independent by the international community after having pledged to respect the rights of its minorities in accordance with the commitments subscribed to in the framework of the CSCE, as well as the inviolability of all frontiers.[88]

The combination of these factors gives the Crimean territorial unit a set of rights, which I posit to be a suitable compromise by which to resolve the Crimean question. By entitling Crimea to a comprehensive yet limited territorial autonomy, the proposal does not compromise Ukrainian sovereignty over Crimea. Inasmuch as Crimea has not been internationally recognized as having become part of Russian sovereignty, there is still plenty of room to find compromises through negotiations.

Given the current impasse on the Crimean question, there is a need for a new perspective. By utilizing the *meritus* formula, my proposal establishes a framework for transforming the Soviet-era status of Crimea into the contemporary international law setting in the following four domains: *power-sharing, consociation, external guarantees*, and *special provisions*.

4.2. A Power-sharing Agreement

Power-sharing is essential for the success of any model of autonomy, but also a potential flashpoint in negotiations. Since there is no longer a federal centre to mediate the dispute, the lower-level units will aim to maximize their power within the organs of the parent state. Conversely, the parent state will aim to minimize the subunits' potential for interference so that they cannot compromise the functioning of the state. These are both equally legitimate concerns that need to be carefully balanced in any settlement.

[87] Constitution of the Autonomous Republic of Crimea (1998).

[88] European Community, *supra* note 23.

An appropriate continuation of Crimea's former autonomy does not entail a right to independent statehood, nor does it mean the confederalization or federalization of Ukraine. Since Crimea did not have a right to have independent foreign relations or a right to secession, it is within the parameters of *meritus* that it remains a part of Ukraine, with a territorial autonomy that has only a very limited external dimension.

Power-sharing needs to be accomplished by *devolution*, not decentralization. In the latter case, a unitary state gives a territorial unit a chance to exercise public power on its behalf, in a clear subordinate position. This would not work in the post-Soviet context. Instead, there should be a clear devolution of public authority, giving the autonomous region a right to exercise direct public power in its own domain.[89] This should be accommodated with the minority's own police force.[90]

Finally, a genuine autonomy arrangement should include power-sharing in the field of the judiciary. Crimea's regional courts – while being part of the unified judicial system of Ukraine – need to serve as the highest-instance court for those matters falling within the self-governance framework.[91]

So my proposal is for a power-sharing agreement between Ukraine and Crimea, which will require some re-formulation of the 1998 Constitution of the Autonomous Republic of Crimea. It is based on *uti possidetis meritus*, transforming the Soviet era autonomous agreement and its 1992 updates to accord with the present day situation:

The Crimean ASSR in Ukraine had originally been created on 12 February 1991,[92] but its status was only clarified with a new law on 30 June 1992.[93] That law gave Crimea a meaningful autonomy and the title of "Republic of Crimea." It was a functioning compromise between Ukraine's sovereignty and territorial integrity, and Crimean's right to a substantial internal self-determination in the form of strong territorial autonomy. As the codified clarification of Crimea's inherited ASSR status, it should be the basis for resolving the current Crimean question.

The main points of law involved are as follows: The Republic of Crimea is an autonomous part of Ukraine and independently resolves issues referred to its juris-

[89] Weller, *supra* note 86, p. 4.

[90] For example, in Kosovo's civil service at least 10% of the central level positions are reserved for Serbs (Law No.03/L-149 on the Civil Service, 14 June 2010, Art. 11.3).

[91] S. Wolff, *A Resolvable Frozen Conflict? Designing a Settlement for Transnistria*, ECMI Brief 26 (November 2011) p. 7. In Kosovo, 15% of Supreme Court judges must be members of minority communities.

[92] The law recognized the Crimean regional Council of People's Deputies as the highest body until the adoption of a new constitution.

[93] A law of 29 April 1992 had reproduced the ASSR model, where possible, in an independent Ukraine. However, it limited Crimean autonomy considerably and produced a backlash from the Crimean authorities. A new law was introduced in June, corresponding more with the internal right to self-determination that the Soviet ASSRs had enjoyed.

diction. Crimea can formulate its own laws and Constitution, so long as they do not contradict those of Ukraine.[94] Its territory cannot be changed or transferred to another state without the approval of both the Crimean and Ukrainian parliaments.[95] Crimea has full jurisdiction of its own affairs and it can participate "in the formation and implementation of domestic and foreign policy activities of Ukraine" on issues related to its interests.[96] According to Art. 3, Crimea's own affairs include things such as forming the electoral and judicial systems of the Republic; free ownership over the peninsula's natural resources; coordinating the economic policy of Crimea; environmental protection; the definition and implementation of policy in the field of education, culture, health care, sports, social security; as well as the protection and use of historical and cultural monuments. Crimea can develop and implement demographic policy, programs of urban planning and housing, and it has a relatively free language policy. More importantly, Crimea has an independent budgetary policy, meaning its own budget and finances. The maintenance of law and order is supervised by Crimea's own police force,[97] and it would be advisable to add symmetrical representation in the civil service, as was done in Kosovo. In foreign policy, Crimea can "independently enter into relations with other states and international organizations in the fields of economy, environmental protection, and socio-cultural sphere."[98]

Crimea has a veto over Ukrainian military affairs concerning the peninsula. Ukraine cannot – without the consent of the Crimean Parliament – station troops or military bases or conduct military exercises in Crimea.[99] Any Ukrainian military units stationed in Crimea must consist mainly of citizens residing in Crimea. The Crimean parliament needs to approve the Military Commander, the Commander of the Security Services, and the Prosecutor and Deputy Prosecutors of Crimea.[100]

The Crimean Parliament may apply to the Constitutional Court of Ukraine to declare Ukraine's laws invalid in the event they violate the powers of the Republic of Crimea.[101] Ukraine is declared to act as a guarantor of the legal status of the Republic of Crimea.[102] Finally, Art. 15 establishes that the content of the autonomy listed in the law for the Republic of Crimea may not be changed without the consent of the highest legislative body of Crimea.

[94] About the delimitation of Powers Between Public Authorities of Ukraine and the Republic of Crimea, 30 June 1992, Art. 1. The Ukrainian Parliament may also suspend normative acts of the Crimean Parliament in case of their inconsistency with the Constitution and laws of Ukraine (Art. 10).

[95] *Ibidem*, Art. 2.

[96] *Ibid*em, Art. 3.

[97] *Ibidem*.

[98] *Ibidem*, Art. 4.

[99] *Ibidem*, Arts. 5-6.

[100] *Ibidem*, Arts. 7-9.

[101] *Ibidem*, Art. 13.

[102] *Ibidem*, Art. 14.

This extensive autonomous status of Crimea was not a gift from Ukraine but a legal right of Crimeans, based on the combination of the *uti possidetis* rule and the internal form of the right to self-determination.

Any compromise solution for the Crimean question will obviously require some major concessions on the part of every stakeholder (Crimea, Ukraine, and Russia). I posit that the formula I am proposing can be the most neutral starting ground for a negotiated solution, as it is legally consistent. Ukraine maintains its territorial integrity; Crimea keeps its internal self-determination in the form of meaningful territorial autonomy; and Russia gains several perks indirectly – the rights of the Russian speakers in Crimea will be guaranteed and no matter what the Ukraine's defence policy framework in the future is, the peninsula will have a veto over any military deployments there – probably making it a demilitarised zone (apart from the Sevastopol Naval Base).

The changes that curtailed Crimean autonomy since 1995 were – in retrospect – a mistake, as they probably bred the discontent that contributed in large part to the population supporting the Russian illegal annexation in 2014. We need to find a working compromise that suits all stakeholders. I posit that the best compromise is for Ukraine, Crimea, and Russia alike to go back to the original arrangement, in the form in which it was clarified and codified in 1992, but with a few key changes.

Here I list the rest of the compromise solution, namely a consociation agreement between Crimea and Ukraine; international guarantees and dispute resolution mechanisms to be included into the compromise; and special provisions needed to get Russia to buy into the deal.

4.3. A Consociation Agreement

A functioning autonomy arrangement often requires an agreement on consociation. Not coincidentally, similar agreements are also found as a condition for meaningful minority protection in many of the EU's Accession Agreements.[103] However, when trying to find a balanced solution for the territorial conflicts involving former ASSRs, it is crucial to recognize that Ukraine was a federal component of the USSR but not a federation in itself. Consequently, *meritus* advocates for the continuation of the ethnofederal system – asymmetrical territorial autonomy – and not the federalization of Ukraine.

This is an important distinction that needs to be made. Previous mediation attempts, for example in 2003 in Moldova, have failed because they insisted on federalizing the host state. Even back in the Soviet times, the ASSRs did not have a right to independent foreign relations or veto over the host SSRs' relations. They do not need such a right now either.

[103] M. Rossi, *Ending the Impasse in Kosovo: Partition, Decentralization, or Consociationalism*, 42(5) Nationalist Papers 867 (2014), p. 872.

Thus, any mediation attempt based on *uti possidetis* should start from the premise that the former ethnofederal unit is unlikely to accept a weaker position than the internal self-governing position that corresponds with that established in the Soviet era. This should not include the right to disrupt the activities of the host state outside its territorial autonomy, but in some cases should contain a right to participate in the running of the state. This could be accomplished by establishing qualified majorities in the host state's parliament in some specific policy areas that are of importance for the subunit. The qualified majorities could be predetermined or triggered by a procedure. The aim is to limit the subunit's veto to areas that could be seen as essential to the autonomy arrangement.[104]

For example, under the current constitutional arrangement in Kosovo, a permanent Committee on the Rights and Interest of Communities guarantees the "vital interests" of communities in the legislative process within the Kosovo Assembly. Kosovo's ethnic groups are able to take part in the running of the state[105] via enhanced political representation and the entrenchment of parliamentary double-majorities in some legislative areas.[106]

Au autonomy arrangement requires determination of the appropriate level of representation for the minorities, which in turn is based on numerous factors. According to *meritus*, the guideline should be the previous level of consociation.[107] A quota to be followed is the subunit's former representation in the host state's parliament. In addition, in the more heterogeneous minority units there should be consociation agreements for the subunit's parliament as well.[108]

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[104] One example is the 2007 Kosovo Status Settlement Proposal. It envisioned a double-majority requirement for changing the Constitution and adopting laws of "vital minority interest."

[105] The UNMIK Regulation 2001/9 followed the "group-differentiated rights" model of minority protection. More in W. Benedek, *Final Status of Kosovo: The Role of Human Rights and Minority Rights*, 80(1) Chicago-Kent Law Review 215 (2005), p. 221.

[106] The representatives and all the minority representatives need to vote in favor. M. Warren, A. Zeqiri, *Decentralization or Destabilization? Striking an Ethnic Balance in the Balkans*, IPI Global Observatory, 8 July 2016. However, according to Adem Beha, while Kosovo's Constitution and subsequent legislation includes most key international legal standards on minority rights, many of them remain unimplemented in practice. A. Beha, *Minority Rights: An Opportunity for Adjustment of Ethnic Relations in Kosovo?*, 13(4) Journal on Ethnopolitics and Minority Issues in Europe 85 (2014), p. 86.

[107] The SSRs had 32 representatives in the Soviet legislative body, and the ASSRs had 11. The Constitution of the USSR (1936), Art. 35, and the Constitution of the USSR (1997), Art. 110.

[108] This is especially important in Crimea. In Kosovo, the Constitution reserves 20 of the 120 parliamentary seats to minorities and guarantees that at least one minister must be a Serb and another belongs to another minority. Moreover, the Constitution created the "Consultative Council for Communities", which serves as a channel of inter-ethnic coordination and consultation (Constitution of the Republic of Kosovo, signed on 7 April 2008, Arts. 60, 81, and 96). The Council is composed primarily of representatives of all non-Albanian communities. The OSCE monitors the Council's work (OSCE Mission in Kosovo, *Performance and Impact of the Consultative Council for Communities: 2015-2016*, 14 December 2017, pp. 4-5).

The autonomy settlement must be constitutionally entrenched and might have to be included in international agreements.[109] The key is to find a balance between stability and flexibility: the arrangement should be hard to change (to ensure stability), but flexible and dynamic rather than static. In other words, there must be clear rules on how to jointly change the rules if need be.

Consociation should be extended to judicial power-sharing, as an agreement cannot function without an impartial dispute resolution system. The representation of minorities in the judiciary will build up trust for the common cause. Therefore, the highest courts of the state should have a mandatory representation of minorities.

Thus under *meritus* Crimea should be given the same number of representatives in the Ukrainian parliament as it had under the Soviet system of consociation.

The Autonomous Republic of Crimea had the same number of confirmed seats in the Ukrainian Parliament as it did as an ASSR in the SSR Ukraine Parliament (Supreme Soviet), 12 out of 450 total (approximately 2.7%).[110] A realistic compromise should maintain this level. In the other cases of ethnofederal relations – for instance in Tajikistan – it has been proven that retaining the exact representational quota for the former autonomous unit can produce more harmonious national relations. Crimeans will likely view the continuation of the former representation quota as legitimate, increasing support for the autonomy arrangement.

4.4. International Guarantees and Mechanisms for Dispute Resolution

In addition to securing consociation in parliament – likely through a veto right in some limited policy areas – and in the judicial system, the undeniable fact is that the prolonged conflict over Crimea has built up much distrust. Thus, any credible agreement is going to need international guarantees.

These guarantees can play a decisive role, especially considering the power imbalance between Ukraine and Crimea, as well as the Soviet-era practice of using Moscow as a mediator in the case of a dispute. Building on this shared legacy is an obvious way to enhance trust between the parties, which is needed to reach and maintain a self-governance arrangement. International guarantees are also effective in committing external parties to the maintenance of the settlement. The international community can use this conflict as a means to decrease other threats to international peace and security, which all territorial conflicts contain even in their 'frozen' state.

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[109] Weller, *supra* note 86, p. 4.

[110] *Parliamentary elections not to be held at nine constituencies in Donetsk region and six constituencies in Luhansk region – CEC*, Interfax-Ukraine, 25 October 2014, available at: https://en.interfax.com.ua/news/general/230595.html (accessed 30 June 2022). For example, the quota was 3,33% for Nagorno-Karabakh in Azerbaijan's parliament and 4% for Gorno-Badakhshan in Tajikistan's parliament.

Finally, the "elephant in the room" needs to be addressed. Russia needs to be given a stakeholder position in guaranteeing Crimea's future autonomy. While this must not amount to Russia be given any veto rights over Ukraine's foreign policy, due to the pro-Russia feelings of Crimeans as well as the Soviet history of Moscow's mediation this guarantor role is an absolute necessity for the success of the settlement. This is not about rewarding Russia for its illegal aggression, but a recognition of the right to internal self-determination of Crimeans and their understandable need to have – from their point of view – a trustworthy guarantor state for the autonomy agreement. Moreover, the inclusion of Russia enables a role for the UN Security Council in the settlement (as is further discussed below).

No matter how distasteful it may be for Ukraine, Russia needs to be the guarantor of the rights of Russian speakers in Crimea, as no neutral state could credibly fulfil this guarantor's role. At the same time however, this role must be strictly limited to such issues as language rights. Russia can take an active role in protecting the agreed upon rights, for example by having a right to initiate the settlement's dispute resolution mechanism. However, it cannot be given any right to interfere with Ukraine's internal affairs or otherwise exploit this position.

There are several ways to internationally guarantee an agreement. First, a settlement can be achieved via an international peace treaty with multiple signatories, such as the one in Bosnia-Herzegovina.[111] Russia and Ukraine are not officially at war, but there needs to be an agreement to end all hostilities. Second, the settlement can be confirmed by a UN Security Council resolution, as was done in the Cambodian settlement.[112] This gives the agreement added weight and has the potential to involve the Security Council in any violations. If Russia is on board with the settlement, there will no longer be a paralyzing veto blocking this route to peace and it should be attempted. Finally, a temporary international administration of the conflict area – such as UNMIK in Kosovo – might be necessary. This administration must ensure the protection of human and minority rights, i.e., the fulfillment of the OSCE's and Council of Europe's minority protection standards. In Crimea, there needs to be a transition period, pending the details of the settlement, which includes establishment of the number of Russian troops allowed in the peninsula.

There is also a need to ensure that the autonomy agreement continues to function even when there are disputes. This should be secured primarily through consociation in the parliament and the Constitutional Court. Crimeans will probably need a guaranteed veto right over changes to its constitutional position.

In addition, a need for outside mediation in dispute resolution would be imperative. This could be accomplished by a panel of mediators, with representa-

[111] Dayton Peace Agreement Documents, initialled in Dayton on 21 November 1995.
[112] United Nations Security Council, S/RES/718, adopted on 31 October 1991.

tional quotas from both the disputing parties as well as from external countries.[113] A potential model would be the Council for Interethnic Relations introduced by Macedonia in 1991.[114] It consists of the President of the Macedonian Assembly and two members from each of the nationalities, with its main function being to consider issues of inter-ethnic relations and making proposals for their solution. The Macedonian Assembly is obliged to take into consideration the proposals of the Council and to make decisions regarding them.[115]

4.5. Special Provisions

In addition to all the above-listed requirements, a settlement based on *meritus* can include exclusion clauses, demilitarization options, international core issues, and/or referendums.

The exclusion clauses could address some potentially problematic areas between the host state and its subunits. For instance, in the case of Kosovo it was decided that in order to reassure the remaining Serb minority, the possibility of Kosovo joining Albania was banned by the UN Security Council resolution 1244. Likewise, the settlement with Gagauzia[116] and the proposals for Transnistria have contained clauses that would allow the subunit to exercise external self-determination in the event of unification of Moldova with Romania. In Crimea, such clauses could prevent Crimea from ever joining an outside state or could make some reservations if Ukraine joins the NATO or the EU.

Special provisions could also address international concerns, such as demilitarization or a non-aligned policy imposed upon the host state, as took place in Cambodia. For Crimea, this should include such external concerns as language rights. In addition, it should address the question of the Sevastopol Naval Base and the Russian Black Sea Fleet. The only realistic alternative would be to continue the Base's lease period according to the latest agreement between Russia and Ukraine, i.e., until 2042.

Finally, the settlement would need to include returning the currently occupied territories to Ukrainian control, and the free return of all internally displaced persons and refugees to their former places of residence in Crimea, under the supervision of an international peacekeeping mission.

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[113] Many international peace agreements include such provisions. *See e.g.*, Verification/Monitoring Mechanism: General Peace Agreement for Mozambique, signed 4 October 1992.

[114] Arbitration Committee on Yugoslavia, *Opinion No. 6*, 11 January 1992.

[115] Art. 78 of the Constitution of the Republic of Macedonia, quoted in: V. Neofotistos, *The Risk of War: Everyday Sociality in the Republic of Macedonia*, University of Pennsylvania Press, Philadelphia: 2012, p. 140.

[116] In 1994, the OSCE mediated a settlement between Gagauzia and Moldova.

4.6. The Model to Solve the Status of Donbas

As a baseline solution for the conflicts involving former autonomous entities, *meritus* advances an *asymmetric territorialization* that recognizes the former territorial subject as a self-governing unit. Crimea is proof that an essentially territorial conflicts can only be remedied with territorial solutions. However, for essentially non-territorial conflicts, *meritus* offers only a limited non-autonomous solution, such as the Ohrid settlement in Macedonia.[117] The level of local self-governance is based on the CSCE/OSCE framework for minority protection and the EC Guidelines.[118]

New legislation increasing the powers of elected local officials needs to be adopted, in conformity with the Ukrainian Constitution and the European Charter on Local Self-government. Enhanced competencies should relate principally to less politically sensitive areas, such as public services, urban planning, environmental protection, local economic development, culture, education, welfare, and health care. The local institutions need adequate financing to fulfil all their responsibilities.

Donbas should not get any special consociation levels in the Ukrainian parliament.

CONCLUSIONS

Admittedly it is a tall order to get Ukraine and Russia to agree on the proposals laid out in this article. It would have been difficult in 2021 and seems outright impossible today in 2022, given the horrendous, unprovoked war. Nevertheless, there needs to be concrete proposals on how to move forward. In these pages I have presented one model that would return Crimea and Donbas to Ukraine, but with concessions to Crimea and Russia. In sum, the main points are as follows:

In 1991 Ukraine inherited, through the application of *uti possidetis*, the borders of the SSR of Ukraine – including the autonomous unit of Crimea. It promised to the inhabitants of Crimea the continuation of this autonomy, and to the international community that it would respect the rights of national groups and would settle any questions concerning state succession and regional disputes by agreement or arbitration. Indeed, the recognition of Ukraine was conditioned on these criteria.

Based on Crimea's right to internal self-determination, the proposal presented in this article brings back the 1992 autonomy solution, but with a few key additions concerning dispute resolution, due to the loss of the mediating federal centre that made the arrangement work during Soviet times. In addition, unlike the 1992 solution, the solution in 2022 needs to contain a consociation agreement, to be

[117] Weller, *supra* note 86, p. 6.

[118] The 4 November 1991 Draft Convention of The Hague Peace Conference on Yugoslavia contains useful examples of minority protection.

internationally guaranteed, and to have special provisions concerning language rights and the Sevastopol Naval Base.

In exchange for its consent to the arrangement and its help in solidifying it by a UN Security Council Resolution, Russia would gain a guarantor status and the continuation of the Naval Base lease, neither of which compromise Ukrainian sovereignty. In the future, Russia could take an active role in protecting the agreed-upon rights of the Crimeans, for example by having a right to initiate the dispute resolution mechanism. However, it cannot be given any right to determine Ukraine's foreign policy or in any other way to exploit this position. To achieve this, the UN Security Council should be directly invested in maintaining the settlement.

The inhabitants of Donbas could gain a limited, local self-governance based on the CSCE/OSCE framework for minority protection and the EC Guidelines.

This proposal is non-biased, as it is based on international law. In addition, it gains further credibility from the fact that it is backed by history. Indeed, most of the things I have suggested here have worked in the past and have been found legitimate by all the parties concerned.

When the guns fall silent and the senseless war finally ends, there will be an even greater need for mediation proposals. To begin this crucial process, here I have offered one to get things started.

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PUSHBACKS IN POLAND: GROUNDING THE PRACTICE IN DOMESTIC LAW IN 2021[1,2]

Abstract: *In the summer of 2021 deliberate actions by the Belarusian state authorities led to a huge increase of people irregularly crossing the border from Belarus to Poland. Instead of addressing this humanitarian crisis, the Polish government responded with actions that were in violation of its international obligations and domestic law. Among these measures was carrying out "pushbacks" and grounding them in Polish domestic law. "Pushbacks" are the practice of returning people to the border without assessing their individual situation. The formalization of those practices in 2021 was done within two legal frameworks; one interim and one permanent. They continue to function in parallel while containing different provisions. This article assesses the two frameworks' compatibility with domestic and international law and concludes that they both violate domestic and international rules. In the context of EU law, the article demonstrates the incompatibility of the two frameworks with the so-called Asylum Procedures Directive and Return Directive. The article further argues that the pushbacks violate the European Convention of Human Rights and would not fall within the exceptions to the prohibition of collective expulsions.*

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[2] Parts of this article are based on texts I have published before on Verfassungsblog (G. Baranowska, *The Deadly Woods. Legalizing pushbacks at the Polish-Belarusian border*, Verfassungsblog, 29 October 2021, available at: https://bit.ly/3FvdlJS; G. Baranowska, *A Tale of Two Borders. Poland's continued illegal actions at its border with Belarus*, Verfassungsblog, 10 March 2022, available at: https://bit.ly/3LZ7bEw (both accessed 30 June 2022)), as well as in two chapters, *see* G. Baranowska. *Can a state limit the processing of asylum applications (evaluation of the provisions of so called the Pushback Act)* and *The legality and permissibility of push-back policies (forcing people back over a border) and assessment of the attempts to legalise it in Poland*, both in: W Klaus. (ed.) *Beyond the Law. Legal assessment of Polish state's activities in response to humanitarian crisis on the Polish-Belarusian Border*, Wydawnictwo INP PAN, Warsaw: 2022.

Keywords: pushbacks, border violence, asylum, international protection, prohibition of collective expulsions

INTRODUCTION

In the second half of 2021 thousands of persons were forced to repeatedly wander in minus temperatures though thick woods in the borderlands of Poland and Belarus. The situation was created by the actions of Belarusian authorities, which had issued touristic visas to people from crisis regions and facilitated their arrival to the Polish, Latvian and Lithuanian borders. After they crossed the border irregularly, Polish authorities forced them back to Belarus, and Belarusian authorities back to Poland, leading to serious injuries and deaths. These practices were also applied to pregnant women, children and person with disabilities.

The Polish authorities decided to ground their practices in domestic law. This was done within two frameworks: an interim one based on an executive regulation (August 2021); and a permanent measure based on an act of Parliament (October 2021). In March 2022, a Polish regional court in Hajnówek issued a ruling with regard to a pushback carried out on the basis of the executive regulation and declared it to be illegal, unjustified, unlawful and irregular.[3] As of the time of this writing, i.e. July 2022, both frameworks, each of which contains different regulations, remain in force in parallel.

This article provides an overview of the Polish laws grounding pushbacks in domestic law and examines them in the context of international and EU law. It starts by introducing the term "pushback" and giving examples how it has been grounded in domestic law by several EU countries (Section 1). Next it presents the legal steps taken by Polish authorities to respond to the increase of people crossing the Polish-Belarusian border irregularly beginning in the summer of 2021 (Section 2). This is done in order to place the events in the broader context in which the pushbacks were taking place. Section 3 discusses the two frameworks that were adopted in Poland and which grounded pushbacks in domestic law: the executive regulation (3.1) and the parliamentary act (3.2). The next section (4) presents a domestic judgment from March 2022, in which the legality of the pushbacks carried out on the basis of the executive regulation was assessed. This serves as a bridge to Section 5, in which the two frameworks are assessed with regard to their compatibility with domestic and international law. This section finds that they violate domestic (5.1), refugee

[3] Wyrok Sądu Rejonowego w Bielsku Podlaskim VII Zamiejscowy Wydział Karny w Hajnówce [Judgment of the Regional Court in Bielsko Podlaskie VII Penal Branch Division in Hajnówka], 28 March 2022, VII Kp 203/21.

(5.2), and European Union (EU) law (5.3), as well as the European Convention of Human Rights (ECHR) (5.4).[4]

1. PUSHBACKS

1.1. The term and practice of pushbacks

At various EU borders people who are trying to cross a border, or have crossed it, are forced back over the border, without their individual situation being assessed.[5] Such practices have been called "pushbacks". The practice is a violation of international law, as states are obliged under international law to review claims of international protection, and collective expulsions without an assessment of individual circumstances are prohibited.[6] Furthermore, as has been widely reported pushbacks often involve physical violence, ill-treatment, seizure of cell phones as soon as the persons are apprehended, and the destruction of their belongings.[7] Consequently, when performed using force and violence – which is often the case – they also breach other human rights, such as the prohibition of torture and inhuman treatment.

The UN Special Rapporteur on the human rights of migrants has defined the term "pushback" in his 2021 report as:

> various measures taken by States, sometimes involving third countries or non-State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.[8]

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[4] While the article does not deal with the UN treaty bodies' assessment of pushbacks, it is worth pointing out that in the light of those decisions, the pushbacks taking place at the Polish-Belarusian border are very likely to be deemed to constitute a human rights violation. See for example UN Committee on the Rights of the Child, *D.D. v. Spain* (CRC/C/80/D/4/2016), 1 February 2019 – while the decision concerned unaccompanied minors, the general principles in it are relevant also for other contexts; *see* V. Wriedt, *Push-backs rejected: D.D. v. Spain and the rights of minors at EU borders*, EU Migration Law Blog, 29 April 2019, available at: https://bit.ly/3l6SD9X (accessed 30 June 2022).

[5] This means that neither their asylum claims nor any other claims, such as for example being an unaccompanied minor, are assessed.

[6] I. Goldner Lang, B. Nagy, *External Border Control Techniques in the EU as a Challenge to the Principle of Non-Refoulement*, 3(17) European Constitutional Law Review 442 (2021), pp. 451-459; H. Hakiki, *The ECtHR's Jurisprudence on the Prohibition of Collective Expulsions in Cases of Pushbacks at European Borders: A Critical Perspective*, in: S. Schiedermair, A. Schwarz, D. Steiger (eds.), *Theory and Practice of the European Convention on Human Rights*, Nomos: Baden-Baden: 2022.

[7] *The Black Book of Pushbacks*, Border Violence Monitoring Network, 2020, available at: https://bit.ly/3FrVunb (accessed 30 June 2022).

[8] Special Rapporteur on the Human Rights of Migrants, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea*, A/HRC/47/30, 12 May 2021.

While this is not a legal definition, it does give a good overview of the practice and its different forms. It consists of forcing refugees, asylum seekers and migrants back to the country from which they crossed the border, without observing the necessary human rights safeguards. Within this practice the individual situation of each person is not assessed; thus it denies access to asylum procedures and is at odds with the principle of non-refoulement. The border guards engaged in pushback operations usually claim that the persons in question did not mention the wish to apply for international protection.[9] This practice is widespread in Europe and has been noted at all the main migration routes to Europe.[10]

1.2. Grounding pushbacks in domestic law

Some states conduct pushbacks informally without any records, and subsequently deny that they have taken place. Others issue semi-formalized paperwork in fast-track procedures. Still other states, among them recently Poland, formalize those practices in domestic law. In this article I do not use the term "legalised" pushbacks, as the point of the practice is to misapply the law. Instead, I use the phrase "grounding the practice in domestic law", which in my opinion better reflects the rationale of the act.[11]

Poland is not the first country to ground pushbacks in domestic law. In Spain, for example, a law was adopted in 2015 which introduced a special legal regime for returning persons detected at the territorial border line of Ceuta and Melilla who have tried to cross irregularly.[12] Similarly, a Hungarian law has allowed for such returns to Serbia. The application of this law led to judgments by the European Court of Human Rights (ECtHR)[13] and Court of Justice of the European Union,[14] both of which ruled that the so-called 'expedited returns' have to meet the conditions established in the ECtHR case law and EU law.[15]

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[9] W. Klaus, *The Porous Border Woven with Prejudices and Economic Interests. Polish Border Admission Practices in the Time of COVID-19*, 10 Social Sciences 435 (2021).

[10] Council of Europe, Commissioner for Human Rights, *Pushed beyond the limits. Four areas for urgent action to end human rights violations at Europe's borders*, 2022, available at: https://bit.ly/3wnlPPj (accessed 30 June 2022).

[11] I would like to thank Hanaa Hakiki for introducing me to this phrase, as well as for inspiring discussions on border violence and migration.

[12] Ley Orgánica 4/2015, 30 March 2015, de prección de la seguridad ciudadana. *See also* Wriedt, *supra* note 4.

[13] ECtHR (GC), *Ilias and Ahmed v. Hungary* (App. No. 47287/15), 21 November 2019; ECtHR, *R.R. and Others v Hungary* (App. No. 36037/17), 2 March 2021.

[14] Case C-564/18 *LH v. Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2020:218; Joint Cases C924/19 PPU and C925/19 PPU *FMS and others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367.

[15] J. De Coninck, *(Il-)Legal Gymnastics by Poland and Hungary in EU Border Procedures*, Verfassungsblog, 11 November 2021, available at: https://bit.ly/3l9i4b6 (accessed 30 June 2022).

In response to the events on the EU eastern border in summer 2021, Latvia also has grounded pushbacks in domestic law. An executive regulation was introduced which allowed the Latvian State Border Guard, National Armed Forces and State Police to return people who have irregularly crossed the Latvian border from Belarus without formal procedures and irrespective of their wish to claim asylum. Furthermore, they are allowed to use physical force and special means to ensure compliance.[16]

2. POLISH RESPONSES TO EVENTS ON THE POLISH-BELARUSIAN BORDER SINCE THE SUMMER OF 2021

The situation on the eastern EU-borders in 2021 was caused by a policy of the Belarusian regime, which issued tourist visas to persons from crisis regions so that they could fly to Minsk, and then provided them with transport to Belarusian borders with neighbouring countries. Due to this practice, thousands of persons were trying – many successfully – to irregularly cross borders into Poland, Lithuania and Latvia.[17] Being in Belarus, they had no possibility to enter the EU regularly.[18] At the border they were forced by Belarusian state agents to cross into Poland. The conducted pushbacks exposed the individuals to a risk of torture and inhuman treatment at the hands of Belarusian state agents.[19]

In response to this situation, the Polish authorities employed a number of measures. One of them – pushbacks – is examined more closely in this article. The legal frameworks put in place in September and October 2021 are analyzed, but it is worth pointing out that the Commission for Human Rights of the Council of Europe found that the practice of pushbacks had been occurring systematically even before the Polish legislation was adopted.[20]

Along with the widespread pushbacks, a state of emergency was announced, which prohibited persons from entering the area close to the border. This worsened the humanitarian crisis, as it made providing support significantly more difficult. Additionally, it made it impossible for journalists to report from the ground on the situation at the border. The state of emergency was initially implemented in

[16] A. Jolkina, *Trapped in a Lawless Zone. Forgotten Refugees at the Latvia-Belarus Border*, Verfassungsblog, 2 May 2022, available at: https://bit.ly/3w74fjz (accessed 30 June 2022).

[17] Grupa Granica, *Humanitarian crisis at the Polish-Belarusian border. Report*, 2021, available at: https://bit.ly/39YWnbo (accessed 30 June 2022).

[18] The situation further deteriorated after the Russian invasion of Ukraine in February 2022, as it made it extremely difficult to leave Belarus due to international responses to Belarusian involvement in the war.

[19] Council of Europe, Commissioner for Human Rights, *supra* note 10.

[20] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights *R.A. and others v. Poland* (App. No. 42120/21), available at: https://bit.ly/3MdMXXv (accessed 30 June 2022), para. 17.

the region in September 2021.[21] As according to the Polish constitution a state of emergency could be ongoing for a maximum of 150 days,[22] the situation should have changed on 1 December 2021, making the area available for humanitarian organizations and journalists. However, in November 2021 an amendment to the law on the protection of the state border and certain other acts was adopted, allowing for a de facto extension of the state of emergency.[23] The law gives the minister in charge of interior affairs the competence to introduce a temporary prohibition against entering selected border regions,[24] and indeed such a temporary prohibition at the border with Belarus was introduced starting in December 2021,[25] and subsequently prolonged in March 2022 (several days after Russia's full-scale invasion of Ukraine) until June 2022.[26]

These legislative efforts have been accompanied by attempts to intimidate human rights defenders. They have been threatened with criminal sanctions[27] and harassed, which even led to a statement by several UN experts in February 2022, who called upon Poland to "investigate all allegations of harassment of human rights defenders, including media workers and interpreters at the border with Belarus, and grant

[21] Rozporządzenie Prezydenta Rzeczypospolitej Polskiej w sprawie wprowadzenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego [Regulation of the President of the Republic of Poland on the introduction of a state of emergency in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship], Journal of Laws 2021, item 1612.

[22] Initially 90 days and then with one extension for a period no longer than 60 days (Art. 228.1). The state of emergency was indeed prolonged after 90 days for another 60 days, *see* Rozporządzenie Prezydenta Rzeczypospolitej Polskiej w sprawie przedłużenia stanu wyjątkowego na obszarze części województwa podlaskiego oraz części województwa lubelskiego [Regulation of the President of the Republic of Poland on the extension of the state of emergency in part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship], Journal of Laws 2021, item 1788.

[23] Ustawa o zmianie ustawy o ochronie granicy państwowej oraz niektórych innych ustaw [An act amending the act on the protection of the state border and some other acts], Journal of Laws 2021, item 2191.

[24] The law, and consequently the executive regulations introduced on the basis of the law, are violating the Constitution procedurally and materially (M. Górski, *Lawfulness of the introduction of a state of emergency and the limitations on civil rights under it, including restriction on movement,* in: W. Klaus (ed.), *supra* note 2.

[25] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie wprowdzenia czasowego zakazu przebywania na określonym obszarze w strefie przygranicznej przyległej do granicy państwowej z Republiką Białorusi [Regulation of the Minister of the Interior and Administration on the introduction of a temporary ban on staying in a specific area in the border zone adjacent to the state border with the Republic of Belarus], Journal of Laws 2021, item 2193.

[26] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie wprowadzenia czasowego zakazu przebywania na określonym obszarze w strefie przygranicznej przyległej do granicy państwowej z Republiką Białorusi [Regulation of the Minister of the Interior and Administration on the introduction of a temporary ban on staying in a specific area in the border zone adjacent to the state border with the Republic of Belarus], Journal of Laws 2022, item 488.

[27] *See also* W. Klaus, who shows that humanitarian help at the border does not meet the criteria of crimes provided for by Polish law. W. Klaus, *Criminalisation of solidarity. Whether activists who help forced migrants in the borderland can be penalised for their actions?* in: W. Klaus (ed.), *supra* note 2.

access to journalists and humanitarian workers to the border area ensuring that they can work freely and safely."[28]

3. GROUNDING PUSHBACKS IN POLISH LAW IN 2021

3.1. Executive regulation

The executive regulation, adopted on 21 August 2021, was the first attempt to ground pushbacks in domestic law in Poland. It is an amendment to an executive regulation from 13 March 2020, adopted within the response to the COVID-19 pandemic, and as such is supposed to be an interim measure. In this section, the original executive regulation will first be shortly described (3.1.1), as it drastically restricted the possibility to claim international protection, which is relevant also for the assessment of the pushback practices. Next the 2021 amendment specifically introducing pushbacks will be analyzed (3.1.2).

3.1.1. COVID-19 Executive Regulation (2020)

The original executive regulation from 2020 suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine.[29] It included two annexes: one listing those border crossings where the crossing was suspended, and the other where the crossing was restricted. On those border crossings where the executive regulation restricted border traffic, the act only allowed selected categories of persons to cross. Initially this included Polish citizens, their spouses and children, foreigners holding a "Polish Card" (pol. *Karta Polaka*), members of diplomatic and consular missions and their families, foreigners with the right of permanent or temporary residence in Poland, as well as foreigners with the right to work in Poland.[30]

This list was subsequently extended to include additional categories of persons,[31] but asylum seekers were never included, meaning that they are not allowed to enter Poland through those border crossings. As the other border crossings from Russia, Belarus and Ukraine are suspended, this practically meant that the executive regulation made it nearly impossible for asylum seekers to enter Poland from those countries. Under the executive regulation the commanding officer of the Border Guards can allow asylum seekers to enter. However, according to Poland's domestic

[28] OHCHR, *Poland: Human rights defenders face threats and intimidation at Belarus border – UN experts*, 15 February 2022, available at: https://bit.ly/3PpeVBY (accessed 30 June 2022).

[29] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych [Regulation of the Minister of the Interior and Administration on the temporary suspension or restriction of border traffic at specific border crossing points], Journal of Laws 2020, item 435.

[30] *Ibidem*, para. 3.2

[31] Including, among others, drivers, students, researchers, citizens of Belarus and Ukraine.

law and international obligations, asylum seekers do not have to seek additional permits to ask for international protection. Consequently, these regulations are in violation of Poland's domestic law as well as its international obligations.

3.1.2. 2021 Amendment

In August 2021, in response to the increase of persons who irregularly crossed the border from Belarus, the Minister of Interior and Administration adopted an amendment to the 2020 executive regulation suspending and restricting border traffic. According to the amendment, persons not included in one of the categories (i.e. allowed to cross a border crossing on which traffic was restricted), and who have crossed the border are to be returned to the Polish border.[32] Importantly, the amendment not only concerns people at the suspended and restricted border crossing points, but also "beyond the territorial range of the border crossing."[33] Consequently, every person identified on the territory of Poland who does not fall into one of the categories and has crossed the border from Russia, Belarus or Ukraine after 20 August 2021 can be returned to the border on the basis of the amendment.

The amendment does not provide for any procedure by which the return to the border should take place: it only specifies that the person should be returned to the border. It requires no formal documentation concerning this return. The amendment does not even include information about where the return should take place, thus implicitly confirming the practice of returning persons outside of border crossings.

3.2. Parliamentary act

On 23 August 2021, just two days after the above-described amendment was adopted, the government submitted a draft of a parliamentary act which aimed at the same goal: to ground in domestic law the practice of returning persons who have crossed the border irregularly. The law entered into force on 25 October 2021.[34] In contrast to the one-sentence on the return contained in the executive regulation, the parliamentary act includes more details about the procedure.

According to the parliamentary act, when persons are apprehended immediately after crossing an external border in violation of the law, the commanding officer

[32] Rozporządzenie Ministra Spraw Wewnętrznych i Administracji zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych [Regulation of the Minister of Interior and Administration amending the ordinance on the temporary suspension or limitation of border traffic at certain border crossing points], Journal of Laws 2021, item 1536.

[33] *Ibidem*, para. 1: "In the case of discovery of the persons referred to in paragraph 1. 2a, at the border crossing point where the border traffic has been suspended or limited and beyond the territorial range of the border crossing point, such persons shall be returned to the state border line."

[34] Ustawa o zmianie ustawy o cudzoziemach oraz niektórych innych ustaw [Law amending the Law on foreigners and other laws], Journal of Laws 2021, item 1918.

of the Border Guard issues an order according to which the persons have to leave Poland. The order contains a prohibition to re-enter Poland and other Schengen area countries during a specified period (between 6 months and 3 years). It may be appealed to the Commander-in-Chief of the Border Guard, but this does not suspend its execution.

The parliamentary act is narrower than the executive regulation, which does not require apprehension "immediately after crossing" the border. At the same time however, it is much more general than the executive regulation, which was an amendment to the COVID-19 rules and as such is supposed to be an interim measure.

The parliamentary act also deals explicitly with asylum seekers, by allowing the border guards to disregard applications for international protection from people apprehended immediately after crossing an external border in breach of the law. That clearly violates Poland's international obligations.[35] The one exception with regard to asylum seekers in the parliamentary act concerns persons coming directly from the territory of a country where their life or freedom is threatened with persecution or the risk of serious harm. Additionally, they need to present credible reasons for their "illegal" entry to Poland and submit their asylum claims immediately after crossing the border. It is highly unlikely that asylum seekers would be able to meet these conditions.

3.3. The two frameworks in parallel

Consequently, two frameworks grounding pushbacks in domestic law exist in parallel. The interim one based on the COVID-19 regulation allows the return of anyone not fitting into any of the categories of persons authorized to enter into Poland who has crossed the border from Russia, Belarus or Ukraine after 20 August 2021. The second, based on the parliamentary act, allows the return of persons apprehended immediately after crossing the border irregularly. The pushbacks within the second framework are performed on the basis of an order and result in a prohibition to re-enter the Schengen area – while pushbacks within the first one do not.

Such a state of affairs gives the border guards flexibility as to which framework to use with regard to particular pushbacks. As the interim framework does not require the officers to issue an order, it could be their preferred framework. While it cannot be stated with certainty which of these two regulations is applied more often, it was the interim framework that led to the first domestic judgment discussed in the following section.

[35] *See more* in section 5. See also critique of the act by the Polish Ombudsman [Rzecznik Praw Obywatelskich], 3.10.2021, available at: https://bit.ly/3LRijDj; several Polish NGOs: Fundacja Ocalenie, 28 September 2021, available at: https://bit.ly/39MByzP; Helsińska Fundacja Praw Człowieka, 6 September 2021, available at: https://bit.ly/3kS8KYV, as well as the UNHCR, 16 September 2021, available at: https://bit.ly/3wdaQIe (all accessed 30 June 2022).

4. DOMESTIC JUDGMENT

In March 2022, a Polish regional court in Hajnówek issued a ruling in a case concerning a pushback carried out on the basis of the executive regulation.[36] The case concerned three Afghan nationals, who irregularly crossed the border from Belarus to Poland on 29 August 2021, i.e. eight days after the executive regulation was adopted. According to the facts reiterated in the judgment, after crossing the border they met with a person with whom they signed a power of attorney to represent them in proceedings for international protection. Subsequently, the Border Guards were called and informed about their wish to apply for international protection – this was recorded on a phone. The three Afghan nationals were then brought to a border guard post, which their representative was not allowed to enter. After a couple of hours spent in the facility, they were driven into the forest to the border with Belarus. No official documentation from the incident was drawn up.

A complaint was brought against the Border Guard concerning the deprivation of liberty. The commanding officer of the local Border Guard responded that the incident was not a deprivation of liberty, but a "temporary restriction of freedom of movement" in the course of a return procedure as foreseen in the executive regulation. It was argued that the Afghan nationals were transferred and held at the facility to rest and be fed. According to the response, there was no information on their claim for international protection.

The court found that the facts in the case constituted a deprivation of liberty, which was not conducted correctly inasmuch as it was not documented. It further stated that driving people in the middle in the night deep into a restricted nature reserve without appropriate equipment was deeply inhumane and in violation of the law. With respect to the law assessed in this article, importantly the court also issued explicit comments on the executive regulation. While the court acknowledged that the regulation does not specify how the procedure for return to the state border should take place, it stated that this is irrelevant, as the executive regulation was adopted in excess of the executive's statutory authorization. The court reiterated that the Minister of Interior and Administration was by law authorized only to suspend or restrict the crossing at border crossings – not at other places. Furthermore, the executive regulation cannot restrict the right to stay in Poland while claims for international protection are being processed. In consequence, the court found the pushbacks to be unreasonable, illegal, and incorrect in light of the applicable law.

[36] Wyrok Sądu Rejonowego w Bielsku Podlaskim VII Zamiejscowy Wydział Karny w Hajnówce [Judgment of the Regional Court in Bielsko Podlaskie VII Penal Branch Division in Hajnówka], 28 March 2022, VII Kp 203/21.

5. COMPATIBILITY OF THE FRAMEWORKS GROUNDING PUSHBACKS IN POLISH LAW WITH DOMESTIC LAW AND INTERNATIONAL LAW

5.1. Domestic law

The above judgment does not leave any doubts that the executive regulation – and consequently pushbacks conducted on its basis – are in violation of Polish law. While it dealt specifically with a situation in which there was a deprivation of liberty, the court's findings also hold true for pushbacks when no deprivation of liberty takes place.[37] Firstly, the court found that the executive regulation was adopted in excess of the executive's statutory authorization. Secondly, it found that the executive regulation cannot limit the stay in Poland for persons submitting claims for international protection. The second finding is also relevant with respect to pushbacks conducted on the basis of the parliamentary act.

As mentioned above, the parliamentary act explicitly allows for disregarding an application for international protection from people apprehended immediately after crossing an external border in breach of the law. Just as was the case with the executive regulation, so too the parliamentary act cannot restrict the stay in Poland while claims for international protection are being processed.

The right to asylum is enshrined in the Polish Constitution, which specifies that foreigners may be granted refugee status in accordance with international agreements to which Poland is a party.[38] The Law on Foreigners states that the application for international protection is submitted through commanding officers of the Border Guards.[39] Consequently, every person that submits an application for international protection to a Border Guards should be allowed to enter Poland and remain on its territory until the application is processed.[40]

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[37] For example if a person would be "pushed back" to Belarus while physically at the border.

[38] Konstytucja Rzeczpospolitej Polskiej [Constitution of the Republic of Poland], Journal of Laws 1997, No. 78, item 483, Art. 56.

[39] Ustawa o cudzoziemach [Law on foreigners], Journal of Laws 2003, No. 128, item 1176, Art. 24. *See also* J. Chlebny (ed.), *Prawo o cudzoziemcach. Komentarz* [Law on foreigners. Commentary], CH Beck, Warszawa: 2020.

[40] M Półtorak, *Can an application for international protection be refused and when is it considered to be submitted?*, in: W. Klaus (ed.), *supra* note 2. *See also* P. Dąbrowski, *Niedopuszczalność odmowy wjazdu cudzoziemca na terytorium RP bez wyjaśnienia, czy cudzoziemiec deklaruje wolę ubiegania się o ochronę międzynarodową. Glosa do wyroku Naczelnego Sądu Administracyjnego z dnia 20 września 2018 r., II OSK 1025/18* [Inadmissibility of refusing entry of a foreigner to the territory of the Republic of Poland without clarifying whether the foreigner declares the will to apply for international protection. Gloss to the judgment of the Supreme Administrative Court of September 20, 2018, II OSK 1025/18], 3 Orzecznictwo Sądów Polskich 150 (2019).

While the Hajnówek judgment[41] did not deal with the consequences of irregular crossings of borders as foreseen in the Polish Penal Code and the Petty Offences Code, it is worth mentioning them in this context. Crossing the Polish border irregularly constitutes a violation of Art. 49a of the Petty Offences Code[42] and may also constitute a violation of Art. 264 of the Penal Code[43] (crossing borders in violation of law, using violence, threats, deception or in cooperation with other persons). Persons seeking international protection are exempted from those rules, as Poland is party to the Convention Relating to the Status of Refugees[44] (Art. 31.1). Thus, according to Polish law when an irregular crossing is discovered, state authorities are under an obligation to initiate proceedings under the Petty Offences Code (and possibly the Polish Penal Code), unless the persons are claiming asylum. Consequently, by returning persons who have crossed irregularly without initiating either criminal or asylum procedures, both the executive regulation and the parliamentary act are inconsistent with Polish law.

5.2. International refugee law

Poland has been a party to the 1951 Convention Relating to the Status of Refugees (Refugee Convention) since 1991. According to the Refugee Convention, all state-parties are obliged to review applications for international protection. The Convention does not provide for the possibility of its suspension. Provisional measures can be applied only in time of war or other grave and extraordinary circumstances with respect to a particular person before declaring that person a refugee (Art. 9). Consequently, these measures have to be decided on a case-by-case basis. A general ban on submitting applications for international protection with regard to a group of persons – as is foreseen in the parliamentary act – is thus in violation of the Refugee Convention.

The Refugee Convention also addresses the specific situation of people who have entered states irregularly. Art. 31 recognizes that asylum seekers are not required to enter states in a regular manner, as long as they can show "good cause" for entering without the necessary documentation.[45] It foresees that states should

[41] *See* section 4.

[42] Kodeks wykroczeń [Petty Offences Code], Journal of Laws 1971, No. 12, item 114.

[43] Kodeks karny [Penal Code], Journal of Laws 1997, No. 88, item 553.

[44] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. On how current migration control practices have limited the possibility to seek asylum in the globalized world, *see* T. Gammeltoft-Hansen, *Access to Asylum. International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge: 2013.

[45] G.S. Goodwin-Gill, J. McAdam, *The Refugee in International Law, Third Edition,* Oxford University Press, Oxford: 2007, pp 384-385. Importantly however, Goodwin-Gill and McAdam also recognize that this has been differently approached by states in their domestic legislation, citing in particular Australian law. For more on Art. 31 *see also* G.S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, in: E. Feller, V. Türk, F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge: 2003, p. 187.

not impose penalties upon persons who come directly from a territory where their life or freedom was threatened, as long as they present themselves without delay to the authorities and show good cause for the irregular entry. As highlighted by Goodwin-Gill and McAdam, imposing penalties without an individual assessment of the claims of an asylum seeker is not only a breach of Art. 31, but is also likely to violate the obligations to ensure and protect the human rights of everyone within its jurisdiction.[46] The benefits of the non-penalization is restricted to refuges "coming directly" from the said territory.[47] However, as explained in Zimmermans's commentary to Art. 31, the only category of refugees whose behaviour could be rationally targeted and penalized are those that have already been accorded refugee status and residence in a transit state to which they can safely return.[48]

The wording of Art. 31 is similar to the one employed in the parliamentary act with regard to persons seeking international protection. However, the rationale for using this in both legal acts is substantially different. Art. 31 of the Refugee Convention does not concern the filing of asylum applications – it concerns the non-penalization of irregular entry. The analysed parliamentary act in turn deals with returning persons to the border without assessing their claims of international protection. Not accepting an asylum application and/or not allowing one to be processed is much more than the penalization of the irregular entry.

If however we were to consider the application of Art. 31 in the given context, it would require scrutinizing the circumstances of the persons who have crossed from Belarus, while an asylum application concerns a threat to their life and freedom in other countries (for example Syria or Afghanistan). In such a case the current situation in Belarus and how it impacts their life and freedom would also need to be considered. The ECtHR did not consider Belarus to be a safe third country before August 2021.[49] This assessment has further deteriorated due to the conduct of Belarussian authorities since then, as they have been widely reported to have used physical violence to force people to cross back into Poland. The Council of Europe Commissioner for Human Rights stated in January 2022 that expelling migrants and asylum seekers to Belarus is likely to put them at risk of torture or inhuman or degrading treatment at the hands of Belarussian state agents. She added that

[46] Goodwin-Gill, McAdam, *supra* note 43, p. 267.

[47] *Ibidem*, pp. 149-150.

[48] G. Noll, *Part Six Administrative Measures, Article 31*, in: A. Zimmermann, F. Machts, J. Dörschner (eds.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Cambridge University Press, Cambridge: 2011, pp. 1256-1257. *See also* Hathaway, who argues that "all refugees whose illegal entry or presence is due to the risk of being persecuted in a country of asylum are today entitled to exemption from immigration penalties" (J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge: 2004, p. 401).

[49] ECtHR, *M.K. and Others v. Poland* (App. Nos. 40503/17, 42902/17 and 43643/17), 23 July 2020, paras. 177-185; *D.A. and Others v. Poland* (App. No. 51246/17), 8 July 2021, para. 64.

inasmuch as this situation is well-documented, it is, or should be, known to the Polish authorities.[50]

Furthermore, the Refugee Convention contains a prohibition of expulsion or return to the frontiers of territories where the migrants' life or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion (Art. 33). As pushback procedures do not assess the personal circumstances of asylum seekers, the procedure itself contravenes the principle of non-refoulement. Consequently the pushbacks carried out on the basis of the parliamentary act and the executive regulation are both in violation of the principle of non-refoulement and of the Refugee Convention.

As the refugee regime in Europe is largely driven by the legal regimes established within the EU and the Council of Europe,[51] it is important to scrutinize the parliamentary act and the executive regulation in the light of these two legal regimes as well.

5.3. EU law

The asylum procedures within the EU were harmonized in 2013 through the so-called Asylum Procedures Directive.[52] According to the Directive, persons applying for international protection have a right to remain in the member states for the entire procedure.[53] Member states can accelerate the examination procedure of claims,[54] but they cannot simply disregard asylum claims. In light of the Asylum Procedures Directive, when a foreigner submits an application for international protection, the application must be processed and the person is allowed to stay in the EU throughout the entire procedure. Pushbacks conducted on the basis of the

[50] Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights *R.A. and Others v. Poland* (App. No. 42120/21), available at: https://bit.ly/3MdMXXv (accessed 30 June 2022), para. 17. *See also* M. Górski, *Is deportation to Belarus legal, or can Belarus be considered a safe third country?* in: W. Klaus (ed.), *supra* note 2.

[51] E. Tsourdi, *Regional Refugee Regimes*, in: C. Costello, M. Foster, J. McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford University Press, Oxford: 2021. See in particular the aspects in which EU law diverges from the Refugee Convention (pp. 357-358). On the interplay between the EU and ECtHR law with regard to asylum seekers, *see also* J. De Coninck, *The Impact of ECtHR and CJEU Judgments on the Rights of Asylum Seekers in the European Union: Adversaries or Allies in Asylum*, European Yearbook on Human Rights 343 (2018).

[52] Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180/60. For more on the Asylum Procedures Directive in this context *see* G. Cornelisse, *Territory, Procedures and Rights: Border Procedures in European Asylum Law*, 35(1) Refugee Survey Quarterly 74 (2016), in particular section 2 on: "EU Legal Framework: Can Member States Deny Asylum Seekers Entry". *See also* Resolution 2299(2019) of the Parliamentary Assembly of the Council of Europe on pushbacks, which calls on EU member states to refrain from pushbacks and states that in line with obligations under the Asylum Procedures Directive all persons arriving at the border have to be informed about international protection and ensured access to legal assistance and representation.

[53] Art. 9 of Directive 2013/32/EU.

[54] *Ibidem*, Art. 31(8).

Polish parliamentary act and the executive regulation with regard to persons who expressed the intention of submitting[55] a claim for international protection were thus in violation of the Asylum Procedures Directive.[56]

However, it is not only the Asylum Procedures Directive which is violated through pushbacks carried out on the basis of the parliamentary act and the executive regulation. The so-called Return Directive[57] regulates the procedures that are initiated with regard to persons who have already entered the territory of an EU Member State, including when they have crossed irregularly. While Member States have the possibility not to apply the Return Directive to "refusal of entry decisions",[58] refusals of entry concern those who have not yet crossed into EU Member States territory.[59] As the pushbacks initiated on the basis of the parliamentary act or the executive regulation applied to persons who are clearly already in Poland, these do not constitute a "refusal of entry" under EU law. Even if they would, the Return Directive specifies that a refusal of entry is without prejudice to special provisions concerning the right to asylum.[60]

According to the Return Directive, in order to return a person who stays illegally on an EU Member States territory, the Member State shall issue a return decision.[61] Inasmuch as the Polish executive regulation does not provide for such a documentation, this has to be considered as a violation of the Return Directive.[62] In particular, the Return Directive foresees procedural safeguards for a return decision, including the form in which it should be issued and remedies.[63] Furthermore, the Return Directive explicitly states that it shall be without prejudice to the asylum regulations.[64] This is in contrast to the Polish parliamentary act, which explicitly allows for disregarding claims for international protection.

Last but not least, neither one of the two acts specify where the return of the foreigner should take place. In practice, the pushbacks in Poland consisted of forc-

[55] Expressing the intention to apply for international protection is the first step of submitting one, which should unconditionally trigger subsequent steps of the procedure. *See ibidem*, Art. 6.

[56] While this has not been adopted yet, a law on "expedited proceedings" has been debated in Poland. On the various drafts, *see* W. Klaus, *Between closing borders to refugees and welcoming Ukrainian workers. Polish migration law at the crossroads*, in: E.M. Goździak, I. Main, B. Suter (eds.), *Europe and the Refugee Response. A Crisis of Value?,* Routledge, London: 2020, pp. 82-84.

[57] Directive 2008/115/CE of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98.

[58] *Ibidem*, Art. 2.2.

[59] Regulation 2016/399 of 9 March 2016, on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, Art. 14.

[60] *Ibidem*, Art. 14.1.

[61] Directive 2008/115/CE, Art. 6.

[62] Similarly, refusals of entry decisions are also given on a standard form which is handed to the third-country national (Schengen Borders Code, Art. 14).

[63] Directive 2008/115/CE, Arts. 12-14.

[64] *Ibidem*, Art. 4.2

ing foreigners to cross the border in an unauthorised place. This in itself can be considered a violation of the Return Directive and the Schengen Borders Code.

5.4. The Council of Europe system

As mentioned above, the Council of Europe system is the second system that drives the refugee regime in Europe. Within this system the ECtHR plays a particularly important role in establishing standards.[65] While the ECHR and its additional protocols do not contain any explicit obligation to receive and examine applications for international protection, they do contain the prohibition of collective expulsions of aliens (Art. 4 of the Protocol 4), which has been applied in pushback cases.[66] The practice has also been examined by the ECtHR in the context of the violation of Art. 3.[67] In connection with the failure to process applications for international protection submitted at the Polish border with Belarus, the ECtHR has repeatedly found a violation of both Art. 3 ECHR and Art. 4 of the Protocol 4.[68]

In cases in which applicants have presented themselves at the border seeking international protection, but were removed in a summary manner to a third country (without an assessment of the risk of torture or inhuman or degrading treatment upon return), the ECtHR applies Art. 3 ECHR.[69] The ECtHR has ruled that states cannot deny access to their territory to persons who come to a border checkpoint and allege that they may be subjected to ill-treatment if they remain on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk. Importantly, "taking into account the absolute nature of the right guaranteed under Article 3, the scope of that obligation was not dependent on whether the applicants had been carrying documents authorising them to cross the (...) border or whether they had been legally admitted to (...) territory on other grounds."[70] This should equally apply to the post-August-2021 pushbacks.[71]

In the 2020 judgment *N.D. and N.T. v. Spain* the ECtHR's Grand Chamber introduced an exception to the application of the prohibition of mass expulsions (Art. 4 of the Protocol 4). It applies to situations wherein people "cross a land border in an unauthorized manner, deliberately take advantage of their large numbers

[65] For a broader critique on the ECtHR approach to migration and refugee protection, see M.D. Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press, Oxford: 2015; C. Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, Oxford: 2016.

[66] Art. 4 of Protocol No. 4 to the European Convention on Human Rights. Hakiki, *supra* note 6.

[67] *Ilias and Ahmed v. Hungary*.

[68] *M.K. and Others v. Poland*; *D.A. and Others v. Poland*.

[69] *Ilias and Ahmed v. Hungary*.

[70] *M.K. and Others v. Poland*, paras. 178-179.

[71] This concerns the procedural limb of Art. 3, which is very often raised in pushback cases. However, in some cases the substantive limb of Art. 3 has also been raised, for example because of the treatment of people being pushed back by border guards. This could also be the case in applications concerning Poland's post-August-2021 pushbacks.

and use force."[72] When assessing such situation, the Court analyzes whether the state provided genuine and effective access to means of legal entry, in particular border procedures. If the state provided such means, the Court considers whether the applicant had cogent reasons not to make use of them and whether they were based on objective facts for which the state was responsible.[73] In *N.D. and N.T. v. Spain* the ECtHR found that the applicants had access to means of legal entry and did not have cogent reasons for not making use of them.[74]

In assessing this exception in subsequent applications, the ECtHR clearly distinguished those cases from *N.D. and N.T. v. Spain* by highlighting that the applicants' situation "cannot be attributed to their own conduct."[75] In other cases, the ECtHR pointed to the fact that the applicants were not storming the border *en masse* using force.[76] Similarly, the pushbacks in Poland did not concern such situations. Firstly, the crossings did not take place with the use of force, as people crossed the border in unmarked places.[77] Secondly, this was not done in "large numbers". While it is not entirely clear what reaches the threshold of "large numbers", the Polish-Belarusian border has been predominantly crossed by groups consisting of a dozen or so and up to several dozen persons,[78] which is very unlikely to be found be a "large number" (in *N.D. and N.T. v. Spain* the group consisted of 600 persons[79]). Consequently, this aspect should not be relevant for the pushback cases in Poland.

If the ECtHR were however to still examine whether the people who have crossed the border irregularly circumvented effective procedures for legal entry,[80] it would have to consider whether such procedures were available. As mentioned

[72] ECtHR, *N.D. and N.T. v. Spain* (App. Nos. 8675/15 and 8697/15), 13 February 2020, para. 201.

[73] *Ibidem*, paras. 206-232.

[74] *Ibidem*, para. 201. For a critique of the judgment, see for example Hakiki, *supra* note 6; M. Paz, *The Legal Reconstruction of Walls: N.D. & N.T. v. Spain 2017, 2020*, 22 Legislation and Public Policy 693 (2020); A. Sardo, *Border Walls, Pushbacks, and the Prohibition of Collective Expulsions: The Case of N.D. and N.T. v. Spain*, 23(3) European Journal of Migration and Law 308 (2021).

[75] ECtHR, *A.I. and Others v. Poland* (App. No. 39028/17), 30 June 2022, para. 55; *A.B. and Others v. Poland* (App. No. 42907/17), 30 June 2022, para. 52. Those two judgments are particularly interesting, as they apply the principles established in *N.D. and N.T.* for the first time to a case brought against Poland. However, it concerns applications from peoples whose asylum applications were refused by border guards at official crossings, so the factual circumstances are different to what the ECtHR will have to decide in post-August-2021 pushback cases.

[76] ECtHR, *Shahzad v. Hungary* (App. No. 12625/17), 8 July 2021, para. 61.

[77] In a recent case the ECtHR had no doubt about applying the *N.D. and N.T. v. Spain* exception to a situation in which there was clearly no force applied to cross the border. Differently than the pushbacks in Poland, the situation however concerned a crossing of a land border en masse, *see* ECtHR, *A.A. and Others v. North Macedonia* (App. No. 55798/16), 5 April 2022, para. 114. Indeed, the ECtHR highlighted that the applicants were "taking advantage of their large numbers" (para. 115).

[78] Grupa Granica, *supra* note 17.

[79] *N.D. and N.T. v. Spain*, para. 24.

[80] As it did in other cases; see for example *Shahzad v. Hungary*, paras. 61-65 and ECtHR, *M.H. and Others v. Croatia* (App. Nos. 15670/18 and 43115/18), 18 November 2021, paras. 295-301.

in the sections above, the COVID-19 regulations suspended and restricted border traffic at selected border crossing points to Russia, Belarus and Ukraine. This made it virtually impossible for people wishing to submit claims for international protection to cross these border crossings. While both under the parliamentary act and executive regulation the Border Guards are allowed to make an exception and not return a person that wishes to lodge a claim for international protection, such extraordinary measures can hardly be considered to constitute an effective procedure.

The *N.D. and N.T. v. Spain* exception was subsequently widened in *A.A. and Others v. North Macedonia*. Leaving aside the critique of that judgment, which has excessively broadened the exception to the prohibition of collective expulsions[81], it is worthwhile to distinguish the situation in *A.A. and Others v. North Macedonia* and the post-August-2021 pushbacks in Poland. In *A.A. and Others v. North Macedonia* the ECtHR pointed out that states may refuse to grant access to their territory to those who have failed to seek asylum at other crossings at a different location, especially "by taking advantage of their large numbers."[82] As explained above with regard to the situation in Poland there were no effective ways to apply for international protection at other places. Also, the persons were clearly not taking advantage of their large numbers. Consequently, *A.A. and Others v. North Macedonia* should not influence the assessment of the pushbacks in Poland.

CONCLUSIONS

The Polish authorities responded with force to the humanitarian crisis caused by the Belarusian authorities, who facilitated the arrival of many persons crossing the border irregularly. It introduced a number of legal and factual solutions, many of which violated domestic and international law.[83] One of the measures undertaken consisted of pushbacks. i.e. the practice of returning people to the border without assessing their individual situations. Those actions have been grounded in Polish domestic law, first through an executive regulation and then through a parliamentary act. While containing different provisions, they are in force in parallel, thus offering border guards flexibility as to which framework to use with regard to a given pushback.

This article has assessed these two legal frameworks and demonstrated that they are in violation of law. Starting with a domestic judgment from March 2022, the

[81] D. Schmalz, *Enlarging the Hole in the Fence of Migrants' Rights. A.A. and others v. North Macedonia*, Verfassungsblog, 6 April 2022, available at: https://bit.ly/3wdsQ6o; V. Wriedt, *Expanding exceptions? AA and Others v North Macedonia, Systemic Pushbacks and the Fiction of Legal Pathways*, EU Migration Law Blog, 7 June 2022, available at: https://bit.ly/3nEPqQl (both accessed 30 June 2022).

[82] *A.A. and Others v. North Macedonia*, para. 115.

[83] *See* W. Klaus (ed.), *supra* note 2.

article shows that the executive regulation – and consequently pushbacks conducted on its basis – are in violation of Polish law. Firstly, the executive regulation was adopted in excess of the executive's statutory authorization. Secondly, the stay in Poland for persons submitting claims for international protection cannot be limited. This explicitly concerns the parliamentary act, which allows for disregarding applications for international protection from people apprehended immediately after crossing an external border in breach of the law. Consequently, under Polish law every person that submits an application for international protection to a Border Guard should be allowed to enter Poland and remain on its territory until the application is processed; which is not the case under the executive regulation.

The article has further argued that the two frameworks grounding pushbacks in domestic law are in violation of international refugee law, specifically the Refugee Convention, to which Poland has been a party since 1991. Importantly, the Convention also protects the rights of persons who have crossed irregularly and issue their wish to submit a claim for international protection.

Furthermore, the two frameworks violate both the EU asylum Procedures Directive and the Return Directive. According to the Procedures Directive , persons applying for international protection have a right to remain in the Member States for the entire procedure. The Return Directive provides clear safeguards with regard to all persons who are returned from the EU – not only those submitting claims for international protection. The procedures for return under both of the Polish framework regulations do not meet the safeguards provided for in the Return Directive, including the documentation of the process.

Lastly, the article has examined the ECtHR case law to show that the pushbacks under the two Polish framework regulations were in violation of the ECHR. It assessed the Polish practices in the light of two recent judgments – *N.D. and N.T. v. Spain* (2020) and *A.A. and Others v. North Macedonia* (2022) – both of which have introduced broad exceptions to the prohibition of mass expulsion. It distinguished the cases and thus argues that the exceptions would not apply to the pushbacks conducted under the two frameworks in Poland, both because of the laws – which made it impossible to apply for international protection at the border – and the situation on the ground, as the people were not crossing the borders en masse and with force.

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THE MISSING POST-HOLOCAUST TRACES IN RECENT CASE LAW OF THE EUROPEAN COURTS

For in the end, it is all about memory, its sources and its magnitude, and, of course, its consequences.

Elie Wiesel[1]

Abstract*: The Holocaust constitutes one of the most powerful symbols in the history of humankind. Its memory, and in particular its irrefutable relationship with anti-Semitism, should trigger strict scrutiny every time anti-Semitic attitudes re-emerge, even if disguised as seemingly harmless words or actions. This applies also to legal measures, neutral on their face but which, in their consequences, may have an adverse effect on Jews, and thus raise the suspicion of anti-Semitic implications. Such implications are visible in the recent phenomena that serve as the two case studies for the present article: boycotts of Israel and bans on ritual slaughter (Shechita). While in the case of anti-Israeli boycotts, the core arguments relate to international anti-discrimination law and policies, in relations to the Shechita bans claims about violation of the religious freedom of observant Jews prevail. At the same time, in both cases strong references to the Holocaust and the memory of its victims are being invoked, allowing one to raise objections as to the status of the relevant legal developments. Here again history and memory enter into the public and legal discussions, legislative processes, and courtrooms.*

Keywords: Holocaust, boycotts, ritual slaughter bans, anti-discrimination law, religious freedom

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[1] E. Wiesel, *Night*, Macmillan, New York: 2006, p. 110.

INTRODUCTION

As noted by Saul Friedländer, the Holocaust raises problems that have so far not been resolved and constitute "the unease of the historian."[2] Even though in a different context, the same can be claimed in the case of lawyers and legal scholars, as the Holocaust to a great extent influenced the post-World War II legal universe that eventually led to the creation of international systems of human rights protection and international human rights law. Among other motivations, human rights law was implemented in order to prevent future genocides; to guarantee the rights and freedoms of minorities; and to tackle manifestations of discrimination, hatred and prejudice. While imperfect and too often ineffective, these guarantees should still be seen as the aftermath and the proof of the victory of the Holocaust memory, which can be encapsulated in the simple but powerful call: "Never again!"[3]

At the same time, and as a result of the sometimes turbulent changes in the social, political and economic spheres, this heritage has become somewhat problematic. Thus the question arises as to whether the arguments about the *Shoah* and anti-Semitism – the latter phenomenon closely related to this genocide, could counterbalance the claims and rights of those supporting the *Boycott, Divestment, Sanctions* movement (BDS), demanding the right to boycott Israel politically as a state (including also Israel's goods, services or academia[4]), and those seeking to introduce statutory prohibitions of ritual slaughter. At first glance, these two issues may seem to be completely different from each other: one is about an individual decision not to transact with some other people or institutions; and the other seems to be about a clash between religious freedom and humanitarian concern for animal welfare. But a closer reflection illustrates a common thread. The commonality is discernible in the underlying criteria of identifying groups and individuals in the society and the legal and moral principles about mutual respect between groups and in the society, and how they relate to each other. Their mutual relations often (in fact, more often than not) involve and engage with something about the past, and this "something" may be troubling or dramatic. The path dependence triggers dilemmas. The dilemma is, seemingly, much easier to realize in case of the boycotts.

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[2] As referred to by Yehuda Bauer in Y. Bauer, *Rethinking the Holocaust,* Yale University Press, New Haven: 2000, p. 12.

[3] "Never again" is a phrase commonly associated with the Holocaust and other genocides. It is said to be used by liberated prisoners at the Buchenwald concentration camp to express their anti-fascist sentiment. Philogos, *What Is the Source of the Phrase "Never Again"?*, Mosaic, 21 June 2017, available at: https://bit.ly/3Pewt3t (accessed 30 June 2022).

[4] On the academic dimension of the BDS movement, *see*: M.D. Garasic, S. Keinan, *Boycotting Israeli Academia: Is Its Implementation Anti-Semitic?*, 15(3) International Journal of Discrimination and the Law 189 (2015).

As powerfully stated by Anthony Julius (famous attorney for Deborah Lipstadt in the court trial initiated against her by one of the most notorious Holocaust deniers, David Irwing):

> What happens when people are boycotted? The ordinary courtesies of life are no longer extended to them. They are not acknowledged in the street; their goods are not bought; their services are not employed; invitations they hitherto could rely upon dry up; they find themselves isolated in company. The boycott is an act of violence, although of a paradoxical kind – one of recoil and exclusion rather than assault. The boycotted person is pushed away by the 'general horror and common hate'.[5]

Leaving aside all the legal technicalities involved in assessing the discriminatory character of a given action or words, the above statement on the very nature of boycotting provokes reflections which are at the same time ethical, political, and legal. But also so does the most recent EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030), whereby the European Commission explicitly undertakes to enhance support for various forms of strengthening Jewish presence in the EU Member States.[6] However, can this be done when the highest judicial body in the EU approves the ban on ritual slaughter,[7] which constitutes *a sine qua non* condition for the very existence of the Jewish religious community?

The underlying assumption of this article is simple: when a particular legal ban or authorization of a conduct raises even a slight suspicion that it may have been motivated by anti-Semitic views; or when the suspicion is that, even in the absence of such motivations, it may foster anti-Semitism, the rule should be subjected to a very strict legal scrutiny. This means that only a very strong proof of a pressing social need (to use the language of the European Court of Human Rights (ECtHR, or the Court), or a compelling purpose (to use the language of the Supreme Court of the United States) may redeem such a rule as legitimate, and this under a rigorous requirement of "necessity", i.e. upon a showing that such a rule is necessary to attain such a purpose or meet such a social need. This is a very demanding requirement when both criteria are taken together. Still, many regulations which

[5] A. Julius, *Trials of the Diaspora: A History of Anti-Semitism in England*, Oxford University Press, New York: 2010, pp. 482-483, quoted after: J.S. Fishman, *The BDS message of anti-Zionism, anti-Semitism, and incitement to discrimination*, 18(3) Israel Affairs 412 (2012), p. 413.

[6] European Commission, *Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030)*, Strasbourg, 5 October 2021, COM(2021) 615 final, available at: https://bit.ly/3Lic3DH (accessed 30 June 2022).

[7] *See generally* J.A. Rovinsky, *The Cutting Edge: The Debate over Regulation of Ritual Slaughter in the Western World*, 45(1) California Western International Law Journal 79 (2014) and W. Sadurski, A. Gliszczyńska-Grabias, *The Law of Ritual Slaughter and the Principle of Religious Equality*, 4 Journal of Law, Religion and State 233 (2016).

may be suspected of wrongful motives or reasons will pass the test: a strict scrutiny does not mean an unconditional invalidation. But also many regulations will have to be abandoned. Two such types of regulations to be subjected to this degree of scrutiny will be discussed in this article, and their common denominator is that both raise a strong suspicion of impropriety. The suspicion in both cases is moored in the tragic legacy of the Holocaust. In this way, the past radiates in the legal present.

The remainder of this article is organized as follows. Section 2 lists the most important examples of the memory of the Holocaust impacting international human rights law. Next, Section 3 discusses the legal implications of the anti-Israeli boycotts, including the wavering attitude of the ECtHR *vis-à-vis* this phenomenon. Section 4 offers an analysis of the recent legal controversies over *Shechita* bans, including the 2020 dictum of the Court of Justice of the European Union (CJEU), in light of the guarantees of religious freedom. The final section offers conclusions.

1. THE HOLOCAUST AND THE EMERGENCE OF THE INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

The establishment of the universal system of protection of human rights within the UN was inextricably linked with the history of the Second World War and with the Holocaust. It is important to note that the leading Jewish organisations based in the United States, and in particular the American Jewish Conference, played an active role in focusing the UN on human rights issues, including the issue of countering racial discrimination.[8] This involvement was partly motivated by a conviction that the best protection of the rights of Jewish people is assured by making it part and parcel of a larger project of universal protection of human rights. As the then-President of the American Jewish Committee, Judge J.M. Proskauer noted, after the years of Nazi rule the whole world realized that violations of the rights of Jews are inevitably an attack of rights of all humankind.[9] Much later, in 2004, during the first ever conference of the United Nations devoted to the problem of anti-Semitism, Secretary General Kofi Annan recalled that the United Nations was named precisely in order to characterize a unity of the world's nations struggling against a murderous system, and that the UN was born after the world found out about the terror in the death camps. He added that the UN was raised "from the

[8] *See* American Jewish Committee, *The Jewish Position at the United Nations Conference on International Organization. A Report to the Delegates of the American Jewish Conference*, American Jewish Congress, New York: 1945; American Jewish Committee, *A World Charter for Human Rights. The Story of the Consultants to the American Delegation to the United Nations Conference on International Organization and their Historic Achievement – The Inclusion of Human Rights Provisions in the Charter of the New World Organization*, New York: 1948.

[9] J.M. Proskauer, *A Segment of My Times*, Farrar, New York: 1950, p. 216.

ashes of the Holocaust" and that no human rights system which overlooks anti-Semitism is faithful to the history of rights-related concerns.[10]

The same point can be made about the philosophical and political sources of the European human rights system. The orgins of the Council of Europe for the Council of Europe (CoE) are related to the reaction against Nazism, fascism and Stalinism, i.e. the totalitarian regimes which wrought unspeakable horrors, including genocide and mass repressions. In contrast, the CoE was based on the principles of the rule of law, respect for human rights, and democratic mechanisms of governance in modern European states. The CoE may be seen as providing a supranational guarantee for these ideals.

It is thus not surprising that the aftermath of the Holocaust was translated into the whole system of human rights and freedoms, including those enshrined in the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Elimination of All Forms of Racial Discrimination, and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or the Convention). The protection of racial, ethnic and religious minorities; the prohibition of incitement to genocide and hatred; and general bans on discriminatory treatment can be seen as the response to the call of "Never again". All the legal instruments of international human rights law that are being used to counteract public manifestations of anti-Semitism should also be seen as an important part of this special legacy of concern.[11]

Obviously, there is also a certain risk embedded in this perspective: invoking the Holocaust and the need to fight anti-Semitism cannot be abused in order to restrict the rights and freedoms of others. The fight against anti-Semitism should never serve as an argument for enforcing interpretations of international human rights law which would breach the principle of balancing rights and freedoms and proper consideration of the facts of a given case. However it is argued herein that since the systems of human rights protection contain a number of tools which can and should be used also in the struggle against anti-Semitism, they thus can and should be used in all cases where boycotts against Israel can be characterized as actions motivated by anti-Semitism. Moreover, these tools can be also used even when the manifestly anti-Semitic character of the utterances accompanying boycotts is absent, but when its consequences adversely affect individual and group rights and freedoms protected in the human rights systems. In turn, when it comes to the *Shechita* bans, even though the anti-Semitic traces are much less visible than in the case of the anti-Israeli boycotts, the fact that such bans were traditionally

[10] The text of the speech is available at: http://www.un.org/press/en/2004/sgsm9375.doc.htm (accessed 30 June 2022).

[11] A. Gliszczyńska-Grabias, *Przeciwdziałanie antysemityzmowi. Instrumenty prawa międzynarodowego* [Combating antisemitism. International law instruments], Wolters Kluwer, Warszawa: 2014.

used against the Jews,[12] as well as that their introduction may lead to the whole or partial elimination of the presence of Jews in particular states and societies, should be given due attention and argumentation based on the legal guarantees aimed at protecting religious freedom should be invoked.

2. ANTI-ISRAELI BOYCOTTS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Boycotting Jews and Israel is not a phenomenon that has emerged recently. On the contrary: when it comes to the boycott of Jews both as a nation and as Jewish individuals, the history of such exclusion reaches back to the very beginning of the history of the Jewish people and their exclusion in Europe is as old as 'Europe' itself.[13] As a result, boycotting Jews in the political, social, and economic life of many pre-war European states was an element of the "prelude" to the genocide of the European Jewry. While some of the boycotts had an economic dimension, it is beyond dispute that they were mainly motivated by anti-Semitic sentiments, and resulted in deeply anti-Semitic actions with equally profound effects. This was most visible in Nazi-ruled Germany, where Jews were prevented from participating in various public activities. From the early 1930s militants of the SA (*Sturmabteilung*) formation barred customers from entry to Jewish-owned stores, the shops were plundered, and shop owners beaten up. Jews were denied access to employment in German firms, and in particular in big companies such as banks or insurance firms. However, other states used similar methods of exclusion and intimidation. Between the two world wars the Polish legislator adopted many legal provisions which, while ostensibly based on economic grounds, in fact were propelled by strong anti-Semitic convictions.[14] For instance, as a result of such convictions laws came into force which permitted punishing those students who would not comply with university rules about the segregation of Jews and non-Jews in classrooms, and also rules which made it virtually impossible for Jews to practice law.[15]

[12] *See e.g.* R. Fraser, *Anti-Shechita Prosecutions in the Anglo-American World, 1855-1913*, Academic Studies Press, Boston: 2018.

[13] As noted by Marc A. Greendorfer: "Before there was a BDS Movement, or even an Arab League or a State of Israel, there were boycotts against Jews, especially those advocating for the establishment of a modern state of Israel. (...) During the Ottoman rule of the land of Israel, which was commonly referred to as Palestine at that time, there were numerous calls for Arab boycotts of Jews. (...) Once the British succeeded the Ottoman Empire in the early 20th century and began to recognize the rights of Jews to their historic homeland, the Arab boycott of Jews in Palestine intensified (...) and quickly became a pan-Arab movement that threatened to expand into a boycott of British goods generally (...)". *See* M.A. Greendorfer, *The BDS Movement: That Which We Call a Foreign Boycott, By Any Other Name, Is Still Illegal*, 22(1) Roger Williams University Law Review 1 (2017), p. 5.

[14] For a detailed analysis, *see*: S. Rudnicki, *Anti-Jewish Legislation in Interwar Poland*, in: R.E. Blobaum (ed.), *Antisemitism and its Opponents in Modern Poland*, Cornell University Press, Ithaca and London: 2005.

[15] *Ibidem*, pp. 162-166.

Inevitably, the association of the present BDS movement with the concept of "boycott" in the context of anti-Jewish attitudes from the Nazi era renders BDS morally problematic, to say the least. And even though the pre-Second World War slogans "Don't buy from Jews!" do not automatically translate into today's "Don't buy from the Israelis!", the highly negative impact – in some cases violations of human rights – on the Jewish people (whether referred to as "Israelis", "Zionists" or "Jews") caused by the boycotts serves as a common denominator.[16]

2.1. Anti-Israeli boycotts and the international human rights protection standards

For centuries Jews have been targeted by anti-Semitic hatred and discrimination, both as individuals and as a group. While such attacks often target particular persons, it is due to their membership in Jewish communities and of an ethnic, national, cultural or religious nature. Additionally, worldwide Jews are seen as a group which is associated with the state of Israel, irrespective of their own convictions and views. The protection of individuals against this "community-oriented" character of hatred and discrimination (clearly manifested in many boycott actions) remains a challenge for the international systems of human rights protection.

On one hand, the position according to which every criticism of Zionism or policy of Israeli authorities is a manifestation of anti-Semitism should be rejected as unfounded, and all guarantees of freedom of expression embodied in international law have to be respected. At the same time however, quite often such criticism is clearly, if not unambiguously, motivated by anti-Semitism. The extremely violent protests against Israel's military operation in Gaza staged by particular Scandinavian movements in January 2009 in Oslo – which turned into riots of an intensity unheard of in Norway for decades – are an example of this phenomenon.[17] It is thus not possible to make an *a priori* assumption that anti-Zionism or criticism of Israel have never been and cannot be interpreted as manifestations of anti-Semitism, especially when in the context of the Middle East conflict Jews are called "Zionist Nazis", "filthy germ", "blood-thirsty barbarians" and "the source of rottenness", while Israel is the "cancer of the world" or a "stinking corpse".[18] This is how this problem was approached in a "Le Monde" editorial of 6 November 2003:

[16] For a comprehensive report addressing the issue of how the BDS movement is engaged in an ongoing campaign of delegitimization against Israel; one which includes the use of antisemitic rhetoric and images, *see* Ministry of Strategic Affairs and Public Diplomacy of Israel, *Behind the Mask. The Antisemitic Nature of BDS Exposed*, 2019, available at: https://4il.org.il/wp-content/uploads/2019/09/MSA-report-Behind-the-Mask.pdf (accessed 30 June 2022).

[17] E. Eiglad, *The Anti-Jewish Riots in Oslo*, Communalism Press, Porsgrunn: 2010.

[18] Examples quoted by Alvin Rosenfeld and Irwin Cotler in: A. Rosenfeld, *The Holocaust and Beginning of a New Antisemitism*, in: A. Rosenfeld (ed.), *Resurgent Atisemitism. Global Perspectives*, Indiana University Press,

> Those who practice a discourse of systematic and one-sided denunciation consisting in demonizing Israel, as is customary in some European circles, do so beyond the area of criticism of government policy. With this rhetoric we are led to believe that a state of such a criminal character should be excluded from the family of nations. This is an almost unnoticeable transition from the criticism of government to the refusal of its right to exist. (...) It is a fact that anti-Israeli anger is excellent food for new anti-Semitism.[19]

It is for such reasons that coordinated, organized actions of boycotts of Israel and Israeli products, academics, or institutions – which are often represented as protests against drastic violations of human rights by Israel – can lead to multiple breaches of the human rights of persons who are not directly associated with the state of Israel, but rather identified through their Jewish background, which in turn is viewed in its national, ethnic or religious dimensions. As a result of the boycotts, these individuals of Jewish heritage – and entire groups – may experience discrimination, persecution, exclusion and intimidation. Their rights to personal dignity, safety, and often to freedom of expression, assembly and association may be violated. Frequently, prohibitions on hate speech contained in international human rights law are breached, and often boycott actions have the character of incitement to hatred based on ethnic or national origins – which is forbidden under various international treaties, including the International Convention against All Forms of Racial Discrimination.[20]

When considering various boycott actions against Israel which in fact target the Jews regardless of their connections with the state of Israel, one can draw an analogy with the theory of "harm in hate speech", as developed by Jeremy Waldron.[21] Waldron attaches special significance to various signs and symbols present in the public sphere, such as posters, graffiti, leaflets etc., which may constitute a constant and hostile element of the environment. Such elements are clear ingredients of boycotts, even (or especially) if they take the form of an official position of a particular institution or authority. Waldron concludes his book with strong statements which should be applied to the general debate about the limits of freedom of speech. He claims that we are often too lenient towards hate speech, putting it merely in the category of an "offense", thus forgetting or ignoring the real harms that it produces, which range from exclusion and insult to pogroms and purges. All these consequences violate human dignity and the right of vulnerable minorities to equal treatment.

Bloomington: 2013, pp. 525-529; I. Cotler, *Combating State-Sanctioned Incitement to Genocide: A Legal and Moral Imperative*, in: R. Provost, P. Akhavan (eds.), *Confronting Genocide*, Springer, New York: 2011, p. 141.

[19] Quoted after A. Glucksmann, *Rozprawa o nienawiści,* Czytelnik, Warszawa: 2008, p. 82. Translation by the author.

[20] Ministry of Strategic Affairs and Public Diplomacy of Israel, *supra* note 15.

[21] J. Waldron, *The Harm in Hate Speech*, Harvard University Press, Cambridge, MA: 2012.

The same conclusions can be drawn regarding the effects of boycott-related actions: they stigmatize the Jewish people as a whole, regardless of their real connections with the state of Israel. As such, it is an instance of unacceptable group responsibility imposed upon individuals who are completely innocent of any wrongdoing. It should be stressed that international human rights law, both in its universal and regional dimensions, does not allow such discriminatory treatment of individuals and groups identified on the basis of their ethnic, national or religious background.[22] Anti-discrimination law is very clear in finding the effects of a particular act or statement – when these effects may lead to discriminatory treatment – as determinative of a discriminatory intent (in a direct, indirect, or "discrimination by association" sense). As rightly pointed out by Walter Laqueur, in the case of the BDS movement a thorny issue concerns drawing the borderline between a legitimate criticism of the Israeli state, authorities and society (or even Zionism), and a concealed manifestation of anti-Semitism.[23] Therefore, in addition to advocating considerable caution before statements or actions hostile to Israel or Zionism are classified as anti-Semitic, it is also necessary to boldly take notice of and legally condemn those discriminatory human rights violations which are consequences of anti-Israeli boycotts.

2.2. Anti-Israeli boycotts in the view of the European Court of Human Rights

One of the most characteristic features of the CoE's system in the area of anti-discrimination and anti-hatred attitudes is its stance against anti-Semitism, racism, and xenophobia, deeply embedded in the entire European human rights protection system.[24] The strong connection between the commitments of the CoE and the Holocaust memory in Europe is visibly reflected in the jurisprudence of the ECtHR, to the extent that it allows letting the Holocaust memory and past influence the reasoning of the Strasbourg judges and their position towards historical disputes and interpretations.[25] So far, none of the complaints by Holocaust deniers

[22] *See generally* E. Heinze, *The Logic of Equality: A Formal Analysis of Non-Discrimination Law*, Routledge, London: 2018.

[23] W. Laquere, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day*, Oxford University Press, New York: 2008.

[24] The CoE strongly signalled its commitment to counteracting all forms of prejudice, including anti-Semitism, at the First Summit of Heads of State and Government of the member states of the CoE, held in October 1993 in Vienna. The then-adopted declaration and action plan "Combating racism, xenophobia, antisemitism and intolerance" allowed the CoE and each of its member states to set priorities in the fight against racism. Both documents are available here: https://bit.ly/3KZlYgZ (accessed 30 June 2022).

[25] For a detailed analysis of this phenomenon, *see* A. Gliszczyńska-Grabias, *Never Again as a cornerstone of the Strasbourg system: the traces of the Holocaust in the jurisprudence of the European Court of Human Rights*, in: H. Aust, E. Demir-Gürsel (eds.), *The European Court of Human Rights: Current Challenges in Historical Perspective*, Edward Elgar Publishing, Cheltenham: 2021.

or individuals publicly manifesting anti-Semitic statements or actions have been accepted by the ECtHR as legitimate, while the Court consistently refers to the Holocaust heritage and stresses the obligation to counteract all forms of anti-Semitism.[26] However, the attitude of the ECtHR towards the anti-Israeli boycotts cannot be perceived as belonging to the same category of the Court's case-law, but rather as concentrating on other aspects, including the freedom to participate in an open debate on important social issues. At the same time, the two judgments on the boycotts issued so far differ widely, and it seems that the Court's finding in the first case, *Willem v. France*[27] of a violation of the rights and freedoms guaranteed in the Convention, while not finding such in the second case, *Baldassi v. France*,[28] was based not only on the different circumstances in these cases, but also on the evolving position of the ECtHR.

The ECtHR's *Willem* judgment has for many years now been seen as the main proof of the thesis that various calls for the boycotting of Israeli products or citizens may be seen as acts which breach international human rights law. In 2002 the mayor of the French municipality of Seclin, Jean-Claude Willem, declared during a meeting of the Municipal Council, observed by the press, that he intended to boycott Israeli products in Seclin. He presented his decision as a protest against what was, in his opinion, the anti-Palestinian policy of Israel. Members of the local Jewish community lodged a complaint to the public prosecutor, who subsequently charged the later applicant to the ECtHR (i.e. Willem) with incitement to discrimination on national, racial, and religious grounds, as prohibited by the Press Act of 1881. Willem was acquitted by the Criminal Court in Lille, but later found guilty on appeal on 11 September 2003, and fined EUR 1,000. Subsequently he unsuccessfully appealed this conviction. In the complaint filed to the ECtHR Willem defended his action of calling for the boycott of Israeli products by his intention to participate in a public debate on the Palestinian-Israeli conflict, which was an issue of public interest. He claimed that his conviction in France was a violation of his right to freedom of expression as protected under Art. 10 of the European Convention.

However, the ECtHR found no violation by France of Willem's right to freedom of expression. While in general the Court always adopts special scrutiny whenever the restriction in a given case applies to political speech, and such state regulations have little chance of being approved by the Court in Strasbourg, nevertheless the Court determined that Willem was not punished for the substance of his political

[26] For examples of this attitude, *see* A. Gliszczyńska-Grabias, *Memory Laws or Memory Loss? Europe in Search of its Historical Identity through the National and International Law*, 34 Polish Yearbook of International Law 161 (2014).

[27] ECtHR, *Willem v. France* (App. No. 10883/05), 10 December 2009.

[28] ECtHR, *Baldassi and Others v. France* (App. No. 15271/16), 11 July 2020.

expression, but rather for an act of incitement to discrimination.[29] The Court observed that the target of mayor's criticism was not confined to Ariel Sharon's government, but involved an express call for a boycott of food coming from Israel. The Court also observed that the discriminatory character of Willem's conduct was further confirmed by the fact of posting a similar notice on the municipality's website, in addition to making such a call at the council meeting. The Court established that as a town mayor Willem was under an obligation to be in many ways neutral.[30] This was all the more so since he was administering a public budget, and so as far as public funds are concerned he should not have "advocate[d] spending them along the lines of a discriminatory logic."[31] The Court also rejected the claim that by his action Willem encouraged the free discussion of an issue of general interest. Inasmuch as he only presented his statement at a Municipal Council meeting, and with no debate or vote on the matter, Willem could not claim to have been encouraging the free discussion on a subject of general interest.[32]

The ECtHR's *Willem* decision also included an important dissenting opinion written by Judge Jungwiert. In it he strongly emphasized that freedom of speech in the context of public debate is of the highest importance and can only be limited for "compelling reasons" (*des raisons impérieuses*) which, according to the dissenting Judge, the Court failed to find. Judge Jungwiert produced some hypothetical examples: e.g. those of town majors calling for boycotting US products as protests against the US military intervention in Iraq; or Russian products as reactions to the conflict in Chechnya; or Chinese goods in order to protest the Chinese policies in Tibet. Judge Jungwiert emphasized that he was a firm believer in the principle that a democratic society must accept that such a debate must be carried out. This view, however, was not shared by the majority of the Court and remained an isolated one.

However, 2020 marked a significant change with the Court's judgment in *Baldassi*. The applicants were members of a local collective supporting BDS. They were prosecuted for calling on customers in a hypermarket not to purchase products from Israel, under the same provisions used in the case of *Willem,* i.e. the subsection of the Law on Freedom of the Press prohibiting incitement to discrimination against a group of persons on account of, *inter alia*, their origin or belonging to a specific nation. The applicants were acquitted in the first instance, but on appeal a suspended fine of 1.000 EUR was imposed, and they were ordered to pay damages to the Jewish associations appearing as civil parties. This time, more than 10 years after the judgment in *Willem*, the ECtHR found a violation of Art. 10 of the Convention.

[29] *Willem v. France*, para. 35.
[30] *Ibidem*, para. 37.
[31] *Ibidem.*
[32] *Ibidem*, para. 38.

It observed in particular that a boycott is primarily a means of expressing protest, and that a call for a boycott, as performed by the applicants, is thus covered by the protection set out in the guarantees of free expression. At the same time, as the Court stressed, incitement to discrimination is a form of incitement to intolerance which, together with incitement to violence and hatred, is not covered by the protection of free speech considered in the light of the standard of the Convention as developed by the Court.[33] Nevertheless the Court concluded that incitement to differential treatment is not necessarily the same as incitement to discrimination. Another point strongly marked by the Court was that the applicants had not been punished for making anti-Semitic remarks or for inciting to hatred or violence, and also that the store had not claimed any damages in the domestic courts.[34] What's more – and highly important in the context of the Court's assessments in cases concerning free speech – the actions and remarks imputed to the applicants had concerned a subject of public interest: Israel's respect for international law and the human rights conditions in the occupied territories.[35] Thus the Court found that the actions and remarks in question fell within the ambit of political expression, strongly protected under the Convention.

The core decisive aspects of the cases that allowed for the different conclusions reached by the ECtHR can be summarized as follows: in *Willem* the applicant had been acting in his capacity as mayor and using mayoral powers regardless of his obligations of neutrality and discretion. He had made the announcement of a boycott without a prior debate or vote in the Municipal Council, which meant that he could not claim to have encouraged free discussion on a subject of public interest. In contrast, in *Baldassi* the applicants were ordinary citizens who were not restricted by any duties and responsibilities arising from a public mandate and whose influence over consumers was not comparable to that of a mayor over his municipal services. The reason why the applicants had issued the calls for a boycott had been to trigger or stimulate debate among supermarket customers. At the same time however, no clear answer can be given to the question of why the Court confirmed, in its *Baldassi* dictum, that the issue of Israeli policies towards Palestinians and anti-Israeli boycotts falls within the purview of public interest debated by the French society, while such was not the case in *Willem*.

In particular, while the Court in *Baldassi* did address the question of a possible correlation between the boycott action of the applicants and its anti-Semitic undertone, it seems to have wrongly concluded that no such correlation had been detected in the *Baldassi* case. However, the most important missing element in both

[33] *Baldassi and Others v. France*, para. 46.
[34] *Ibidem*, para. 71.
[35] *Ibidem*, para. 78.

judgments issued by the ECtHR on anti-Israeli boycotts is the implementation of its well-established case law wherein it has repeatedly confirmed that contributing to an atmosphere of intimidation and exclusion of a particular national or ethnic group constitutes a blatant violation of the rights and freedom of members of such a group.[36] While this collective dimension of the harm caused by anti-Semitic discourse being freely circulated in public has recently been strongly emphasized in the Court's judgment in *Behar and Gutman v. Bulgaria*,[37] the Court nevertheless seems to overlook this aspect of the boycotts in its current reasoning. At the same time, it is yet to be seen how it would address the same phenomenon if a boycott was directed against a particular, individual Jewish person.

3. *SHECHITA* BANS AND THEIR IMPLICATIONS FOR THE GUARANTEES OF HUMAN RIGHTS AND FREEDOMS.

Despite decades-long efforts to counteract anti-Jewish attitudes throughout Europe and elsewhere in the world, Jews are still facing constraints on their religious freedom and other forms of discrimination and hatred. According to a survey conducted by the EU Fundamental Rights Agency between 2013 and 2018 in 12 EU Member States, more than one third of Jewish people living there said they were considering emigration because they no longer felt safe as Jews.[38] At the same time, half of respondents (49%) stated that they at least sometimes wear, carry, or display religious items that could identify them as Jewish. However, of those respondents who at least sometimes carried or displayed such items, over two thirds (71%) occasionally specifically avoided doing so in particular circumstances. As shockingly stated by one of the respondents, a woman aged 40-44 years old from Sweden: "I never wear any Jewish symbols publicly and I always look over my shoulder when I attend a Jewish event. (...) I only want to be left in peace and be able to practice my religion."[39]

There is no doubt that Jews wishing to observe their customs and traditions encounter various barriers and obstacles. Even if it is not the case that such obstacles are always motivated by anti-Semitic sentiments (despite clear historical analogies with obvious anti-Semitism[40]), they evoke various practices of restrict-

[36] *See* in particular: ECtHR, *Garaudy v. France* (App. No. 65831/01, decision on inadmissibility), 23 June 2003; *M'Bala M'Bala v. France* (App. No. 25239/13), 20 October 2015.

[37] ECtHR, *Behar and Gutman v. Bulgaria* (App. No. 29335/13), 16 February 2021.

[38] *Experiences and perceptions of antisemitism. Second survey on discrimination and hate crime against Jews in the EU*, EU Fundamental Rights Agency Report 2018, available at: https://bit.ly/3kX0wil (accessed 30 June 2022).

[39] *Ibidem*, p. 8.

[40] In Nazi Germany *Shechita* was banned, and Jews were persecuted for practicing it. Anti-Semitic motives were central in its vilification. *See* generally T. Kushner, *Stunning Intolerance: A Century of Opposition to Religious Slaughter,* 36 The Jewish Quarterly 216 (1989).

ing the religious freedom of Jews in Europe. For example, there has recently been a good deal of public outrage regarding circumcision, which many critics have found inhumane and called for its ban for persons under 18 years old.[41] A similar phenomenon arose regarding kosher animal slaughter, which has become one of the main battle cries of animal rights groups, but is very frequently based on firm political or ideological sentiments. In recent years ritual slaughter has been legally (sometimes partly) banned in the Netherlands, Belgium, Denmark, and outside Europe in New Zealand. Active campaigns addressed at banning either or both of these religious practices are currently taking place also in Germany, Switzerland, Luxemburg, Sweden, Norway, Finland, Poland, Australia, Canada, and even the United States.[42] At the same time, and more significantly, the question of kosher slaughter received an authoritative interpretation by the highest EU court, which declared that some bans are consistent with the EU law. This may be seen as a real challenge to the collective life of Jewish communities in Europe.

There are many animal slaughter procedures that religions and cultures practice around the world.[43] The two that are most commonly used and known are the *halal* and *kosher* methods practiced by Muslims and Jews, respectively. Both religious practices have been conducted by Jews and Muslims for centuries, and perceived as fundamental elements of the religious identities of the followers of these religions. In Judaism, *Shechita* is defined as the slaughtering of certain mammals and birds for food according to *kashrut* edicts. The origins of the obligation to respect the rules of *kashrut* and to observe *kosher* stem from the general principles of keeping kosher in the Torah. It includes commandments – called *mitzvahs* – to be followed as ways to obey God. Keeping kosher is one of them. Thus, for an observant Jew wishing to practice his/her religion in this particular aspect, it is of crucial and fundamental importance to have free access to food produced according to his or her religious demands. Denying such free access or imposing limitations that *de facto* lead to a lack of such free access translates into a direct violation of the rights and freedoms of individuals and groups. While eating meat has no spiritual or religious value in itself, the only meat religious and observant Jews can eat must be kosher meat. A vegetarian Jew does not violate *halakhah* in any way, but preventing access to kosher meat not only deprives religious Jews of the possibility of making

[41] In 2018 Iceland commenced a legislative process to introduce a male circumcision ban (other than for medical reasons), making it an offence with a penalty of up to six years imprisonment. Z. Caldwell, *Bill to criminalize male circumcision is still alive in Iceland*, Aleteia, 29 May 2018, available at: https://bit.ly/3FDTLvb (accessed 30 June 2022).

[42] For more details *see Legal Restrictions on Religious Slaughter in Europe*, The Law Library of Congress, Global Legal Research Center 2018.

[43] *See generally* Z.A. Aghwan, J. M. Regenstein, *Slaughter practices of different faiths in different countries*, 61(3) Journal of Animal Science and Technology 111 (2019).

a choice, but also imposes dietary restrictions on them which others are free of, and thus it introduces inequality before the law. Given that religiously observant Jews are obliged to kosher eating, preventing them from fulfilling their religious duties would limit such religious Jews' opportunity for religious fulfillment, in the sense of being forced to act against their religion.

3.1. *Shechita* bans and human rights protection

Religious freedom, of which the right to obey religious orders is one of the essential elements, belongs to the cornerstone of the entire history of establishing both a universal and European system of the human rights protection. In particular, in the context of the establishment of the CoE and the adoption of the ECHR, it should be noted again that they were aimed, *inter alia*, at introducing such protection of the fundamental rights and freedoms of vulnerable groups, which would thus make it impossible to repeat the crimes that took place during Second World War and the Holocaust (which were also motivated by religious considerations). The ECHR therefore contains explicit guarantees regarding the freedom of religion and conscience[44] and relating to non-discrimination,[45] as well as abuse of rights under the Convention and limitations on the use of restrictions,[46] for example by invoking freedom of expression to promote religious hatred. Also the EU Charter of Fundamental Rights (the Charter),[47] i.e. the document enforced by the CJEU in its judgment on *Shechita* bans, contains direct references to guarantees of religious freedom,[48] as well as to the rights of religious minorities[49] and the prohibition of discrimination.[50]

A whole series of arguments speak in favor of recognizing that *Shechita* bans most probably violate the Convention's rights on both religious freedom and discrimination on the basis of religion and belief;[51] despite the fact that in the only case of religious slaughter considered so far by the ECtHR (in 2000) it did not find a violation of the Convention as a result of the introduction of certain restrictions.[52] In that case the applicant association complained that the refusal of its application for approval infringed upon its freedom to manifest its religion through obser-

[44] Art. 9 of the Convention.

[45] Art. 14 of the Convention.

[46] Art. 17 of the Convention.

[47] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.

[48] Art. 10 of the Charter.

[49] Art. 22 of the Charter.

[50] Art. 21 of the Charter.

[51] *See e.g.* ECtHR, *Dimitras and Others v. Greece* (App. Nos. 42837/06, 3269/07, 35793/07 and 6099/08); 3 June 2010; *Jehovah's Witnesses of Moscow v. Russia* (App. No. 302/02), 3 June 2010; *Perry v. Latvia* (App. No. 30273/03), 8 November 2007.

[52] ECtHR, *Cha'are Shalom Ve Tsedek v. France* (App. No. 27417/95), 27 June 2000.

vance, as guaranteed by Art. 9 of the Convention. The applicants further asserted that they were victims of discrimination under Art. 14 of the Convention because the approval to obtain access to slaughterhouses that they sought was granted only to the Paris Central Consistory, the organization representing the majority of French Jews in France, and whose ritual slaughterers, the complaint argued, failed to examine the meat properly in order to certify it as kosher. In its decision finding a non-violation of the rights and freedom of the applicant, the ECtHR stated that there would have been a restriction upon the applicant's freedom of religion only if the bans on ritual slaughter in question would have prevented ultra-orthodox Jews from consuming properly kosher meat, which was not the case in *Cha'are Shalom Ve Tsedek,* as at that time it was still possible to import kosher meat from Belgium. The ECtHR's reasoning presented in the judgment was met with justifiable criticism. As observed by G. van der Schyff, "This type of reasoning makes for bad law and should consequently be rejected." [53] According to him, an undue burden was placed on the claimant of a right under Art. 9(1) ECHR, while such a claimant should enjoy maximum protection under said Art. 9(1), with any restrictions upon that right requiring a justification under the categories of derogation listed in Art. 9(2). According to van der Schyff, the Court's argument "neutralises the protection of religious freedom with little difficulty."

Despite the *Cha'are Shalom Ve Tsedek* decision, on the basis of the aforementioned international human rights law regulations it can be claimed that the rights and freedoms of the followers of Judaism who obey religious orders to eat meat only from kosher slaughter have a very strong basis in the European human rights law. Applicable restrictions on these rights and freedoms may not violate the foundation of religious freedom, which is the case when access to religious practices is effectively blocked by legal provisions and/or the application of a law in force. The problem of violations of the rights of individuals and groups affected by bans similar to those imposed in Belgium should be thus considered in several fundamental dimensions: violation of religious freedom; violation of the right to privacy; violation of the prohibition of discrimination; violation of the proportionality requirement; and the necessity to limit rights and freedoms in democratic societies. It also indicates the context of the protection of the rights of religious minorities, guaranteed under the relevant provisions of EU law and the national laws of individual EU Member States.

As has been indicated, freedom of religion and belief is admittedly not absolute and unlimited. The possibility of limiting it is specified both in international and national law, as well as in the relevant jurisprudence. When determining the premises

[53] G. van der Schyff, *Reviewing the recent Ban on Ritual Slaughter in Flanders*, Verfassungsblog, 16 August 2017, available at: https://verfassungsblog.de/reviewing-the-recent-ban-on-ritual-slaughter-in-flanders/ (accessed 30 June 2022).

for the introduction of restrictions, the most frequently indicated prerequisites are the obligation to expressly proscribe such restrictions in the applicable law, and to apply them only when they are necessary in a democratic society and state for its safety or public order, for the protection of the environment, public health and morals, or for protection of the freedoms and rights of others. Most importantly however, no restrictions may be imposed that violate the very essence of a given freedom or right. Notably, in the case of *Shechita* bans this very core element of religious freedom seems to be taken away from the observant members of the Jewish minorities. An additional and very important element at the centre of the issue at stake is the evolution of the legal and social perception of animal rights, which has been evolving for several decades now. One of the expressions of this approach was, *inter alia*, the adoption of the European Convention for the Protection of Animals for Slaughter.[54] Against this background, the question of how a society should balance competing values when a minority's religious rights conflict with animal protection is of utmost relevance. Through a mixture of legal and scientific arguments, such a balancing results in the conclusion that *Shechita* bans can violate rights and freedoms of observant Jews in a disproportionate way that is in contradiction with the standards of European human rights law.

3.2. CJEU Grand Chamber judgment in Case C-336/19

The judgment of the Grand Chamber of the CJEU issued in December 2020 in case C-336/19[55] came in response to a request for a preliminary ruling under Art. 267 of the Treaty on the Functioning of the European Union from the Constitutional Court of Belgium (*Grondwettelijk Hof*). The initial complaint was filed by the Coordinating Committee of Jewish Organizations in Belgium (CCOJB) against laws in Flanders and Wallonia mandating stunning before slaughtering, which is forbidden under Jewish religious law. It was alleged that the law, which was imposed in both the Flemish and the Walloon Regions and prohibits slaughtering without pre-stunning, amounts to a *de jure* and *de facto* ban on religious slaughtering. The CJEU decision results not only in the fact that these two major Belgian regions can in effect implement a ban on kosher slaughter, but that similar bans affecting Jewish minorities may be imposed throughout the EU.[56] Surprisingly, the decision issued was in contradiction to the arguments presented in the case by Advocate General

[54] The European Convention for the Protection of Animals for Slaughter, 10 May 1979, ETS No. 102.

[55] C-336/19 *Centraal Israëlitisch Consistorie van België e.a. and Others v. Vlaamse Regering* [2020], EU:C:2020:1031.

[56] For a broader context of religious freedom protection under EU law *see* N. Doe, *Law and Religion in Europe. A Comparative Introduction*, Oxford University Press, Oxford: 2011.

Hoogan,[57] who had recommended the CJEU to adopt a different conclusion (as further described below).

The case, as already indicated, raised the question of whether the laws introduced by the Flemish and Walloon Regions in Belgium which prohibit slaughter without pre-stunning – even in the context of slaughter conducted as a religious practice (including the Jewish *Shechita*) – is compatible with EU law. Jewish organisations advocated against what was alleged as the imposition of an outright ban on Jewish (and Muslim) religious slaughter, while acknowledging the need for less restrictive measures to ameliorate and minimize animals' suffering. They stressed that to forbid a community of faith to prepare their food in accordance with their religious obligations is *prima facie* a violation of the freedom of religion, and that the requirement of pre-stunning is discriminatory in nature, since it does not affect the majority of the citizens of the European Union but rather only specific minority communities.[58] Advocate General Hoogan, in his Opinion, recommended that the relevant legal rules to be considered by the Court of Justice should be understood as demanding that the states must not enact provisions which prohibit the slaughter of non-stunned animals when the slaughter is done as part a religious practice and, on the other hand, "for an alternative stunning procedure for the slaughter carried out in the context of a religious rite, based on reversible stunning and on the condition that the stunning should not result in the death of the animal."[59]

These arguments however were not shared by the Grand Chamber of the CJEU.[60] It found, in essence, that based on the concerns for animal welfare in the circumstances of ritual slaughter, Member States of the EU may require a reversible stunning procedure and this will not infringe upon the rights declared in the EU Charter of Fundamental Rights. On this basis the CJEU found that Regulation 1099/2009,[61] interpreted in the light of Art. 13 TFEU and Art. 10(1) of the Charter, does not ban national legislation which requires a reversible stunning procedure which cannot result in the animal's death in the circumstances of ritual slaughter. The argument of the Court relied on the determination that Regulation 1099/2009

[57] Advocate General's Opinion in Case C-336/19 *Centraal Israëlitisch Consistorie van België e.a. and Others*, 10 September 2020, ECLI:EU:C:2020:695.

[58] *See* the Statement by the World Jewish Congress, 17 December 2020, available at: https://bit.ly/3La97sl (accessed 30 June 2022).

[59] Advocate General's Opinion in Case C-336/19, para. 77.

[60] For an overview of argumentation against the bans, which was not shared by the CJEU, as well as a critical assessment of the judgment, *see* J.A. Rovinsky, *Don't have cow, Flanders: Guidance for the European Court of Justice as it considers the Flemish parliament's ban on ritual slaughter*, 97(2) University of Detroit Mercy Law Review 353 (2020) and L. Hehemann, *Religious Slaughtering, a Stunning Matter: Centraal Israëlitisch Consistorie van België and Others*, 6(1) European Papers 111 (2021).

[61] Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing OJ L 303, 18.11.2009, p. 1.

does not prohibit Member States from imposing a duty to stun animals prior to their slaughter which is also valid in the circumstances of ritual slaughter; under the condition however that in enacting such laws the States comply with the Charter's fundamental rights.

The CJEU acknowledged that by requiring, in the context of ritual slaughter, reversible stunning contrary to the religious precepts of Jewish and Muslim believers, the Belgian bans entail a limitation on the exercise of the right of those believers to freely manifest their religion. However, when assessing whether such a limitation under the Belgian laws is permissible, the CJEU found that the restriction upon the freedom of religion resulting from the law is indeed provided for by law and that it complies with the essence of Art. 10 of the Charter because it is confined to one aspect of the slaughter only, and that an act of ritual slaughter is not *per se* prohibited.[62] The CJEU then noted that the interference at stake meets an objective of general interest recognized by the European Union, namely the promotion of animal welfare. At the same time, in referring to the question of proportionality of the limitation the CJEU concluded that the measures included in the Belgian law strike a proper balance between the value of animal welfare and the importance of religious freedom for Jewish and Muslim believers.[63]

Serious legal consequences of the CJEU's position can already be noted. On 30 September 2021 the Constitutional Court of Belgium, after receiving and analyzing the response of the CJEU issued in case C-336/19 referred to above, decided to uphold two decrees adopted in the regions of Flanders and Wallonia banning religious slaughter.[64] The judgment is now final and the only further option for legal steps challenging these bans is to file an individual complaint to the ECtHR or to the UN Human Rights Committee, with a claim of multiple violations of human rights arising from the judgment of the Belgian Constitutional Court, including the violation of religious freedom, the principle of non-discrimination, and the right to privacy. Additionally, on 27 October 2021, Greece's supreme administrative court nixed the slaughter permit then currently binding in Greece, which had been issued by a ministerial decision that exempted ritual slaughter from the general requirement to stun animals prior to killing them.[65] It seems clear that such a conclusion by the

[62] C-336/19 *Centraal Israëlitisch Consistorie van België and Others v. Vlaamse Regering,* para. 61.

[63] *Ibidem*, para. 65.

[64] H. Lyons, *Belgium's Jews lament ban on ritual slaughter*, Politico, 10 October 2021, available at: https://www.politico.eu/article/belgium-jewish-community-ritual-slaughter-ban-antwerp/ (accessed 30 June 2022).

[65] T. Joffre, *Greek court annuls permit for kosher, halal slaughter*, The Jerusalem Post, 27 October 2021, available at: https://www.jpost.com/diaspora/greek-court-annuls-permit-for-kosher-halal-slaughter-683274 (accessed 30 June 2022).

Greek court was reached under the new legal circumstances created by the CJEU's December 2020 judgment.

CONCLUSIONS

Undoubtedly the Holocaust, as the main symbol of the horrific genocidal past, still marks its presence today in numerous fields of social, cultural, economic and political life of the post-World War II world. Perhaps the most obvious evidence that the powerful call of "Never again" has been heard by the international community was the implementation of the international human rights law and creation of the international systems of human rights protection. These close relationships between the Holocaust past and contemporary legal developments have been emphasized in, *inter alia*, the jurisprudence of the ECtHR, in particular in the area of Holocaust denial and public manifestations of anti-Semitism. It seems, however, that the same connections were ignored when considering other issues related to the history of the Holocaust and the rights of people of Jewish origin, which are increasingly becoming the subject not only of public debates, but also of legal interference: i.e. with respect to anti-Israeli boycotts and *Shechita* bans.

In particular with regard to boycotts – which very often take the form of anti-Semitic demonstrations, the effects of which clearly violate the rights and freedoms of the Jews regardless of their real ties with the state of Israel – it is surprising and worrisome that the ECtHR has so far not addressed this aspect of boycotts when examining cases concerning this very issue. In turn, in the case of *Shechita* bans the arguments pointing to the legacy of the Holocaust as a commitment to support the rights of minorities, in particular in the context of their religious freedom, have not been taken into account, despite the fact that the common denominator of these issues seems to be the prohibition of discrimination, which is particularly firmly embedded in international human rights law. Thus one of the most important conclusions of the present article is that even if the Holocaust memory is omitted as an important aspect in considering the issues at stake, nevertheless the very standards of international human rights law suffice to argue that the anti-Israeli boycotts target Jews, both as individuals and as a group; as well as that *Shechita* bans violate the religious freedom of the observant Jews.

Simultaneously, other elements of the human rights protection framework developed within the EU and the CoE seem to take note of the continuing need of referring to the Holocaust, in particular while counteracting anti-Semitism. The EU's Fundamental Rights Agency continues to conduct valuable research and publish its reports on anti-Semitism in the EU Member States, including on its perception by the Jewish minorities. One of such reports, quoted above,

revealed that for 69% of Jewish respondents in 12 EU Member States a prohibition of traditional slaughter would be a problem and concern.[66] The same report states that among Jewish respondents who consider certain opinions or actions by non-Jews to be anti-Semitic (in terms of opinion and/or action), 82% indicated that they believe support for boycotts of Israel or Israelis are manifestations of anti-Semitism.[67] Also, the above-mentioned recent EU Strategy on Combating Antisemitism and Fostering Jewish Life (2021-2030) acknowledges not only the importance of Holocaust remembrance within the dimension of European human rights protection, but refers directly to the CJEU *Shechita* judgment and promises to facilitate "the exchange of practices between public authorities and Jewish and Muslim communities regarding slaughter based on religious traditions, drawing on the experience of international organisations such as the UN, OSCE-ODIHR and the Council of Europe."[68] It further addresses numerous instances of Israel-related antisemitism in the EU. Also the 2021 revised version of the CoE's European Commission against Racism and Intolerance (ECRI) General Policy Recommendation No. 9 on preventing and combating anti-Semitism highlights the historical and moral heritage of the European commitment to fight anti-Semitism, In fact, it goes much further than the EU strategy by tackling the issue of anti-Zionism and anti-Israeli boycotts in a direct way.[69] The ECRI underscores, among other things, that the line between anti-Zionism and anti-Semitism is most often not clear-cut and that these two phenomena overlap. At the same time, it states that while anti-Zionists are not always anti-Semitic, the vast majority of anti-Semites are also anti-Zionists. Moreover, in its recommendations directed at CoE's governments, the ECRI calls for condemnation of "activities that promote boycotts of the State of Israel, its nationals or Israeli companies and institutions if such activities incite violence, hatred or intolerance,"[70] referring also directly to the ECtHR's *Baldassi* and *Willem* judgments.[71] However, one needs to stress that the above-mentioned positive developments lack the legal significance and authority of court judgments. Nonetheless the very fact that the complex character of issues such as the *Shechita* bans or the anti-Semitic dimension of some anti-Israeli boycotts is openly discussed is of great importance, as it keeps the discussion of these challenges going within the human rights protection discourse.

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[66] EU Fundamental Rights Agency, *supra* note 38, p. 71.

[67] *Ibidem*, p. 29.

[68] European Commission, *supra* note 6, p. 15.

[69] ECRI General Policy Recommendation no. 9 (revised) on preventing and combating antisemitism, CRI(2021)28, para. 10, p. 8, available at: https://edoc.coe.int/en/racism/10309-ecri-general-policy-recommendation-no-9-revised-on-preventing-and-combating-antisemitism.html (accessed 30 June 2022).

[70] *Ibidem*, Recommendation no. 34, p. 14.

[71] *Ibidem*.

It is difficult to expect the law to meet all social needs or comprehensively address the issues of memory and historical heritage. In particular, one cannot demand that the law will always succeed in identifying and addressing deep connections between present practices and their underlying rationales which may or may not be questionable morally and politically. It seems however that in the examples discussed in this article these relationships are inseparable and the legal analysis should take into account a number of underlying rationales and assumptions which go beyond purely legal deliberations. However, this should be done with full respect for the legitimate rights and freedoms of those "on the other side" of the conflicting interests, worldviews and priorities; including both individuals and organizations calling for anti-Israeli boycotts as well as those defending animal welfare.

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SPECIAL JURISDICTION IN INFRINGEMENTS OF PERSONALITY RIGHTS

Abstract*: This article focuses on the problems of jurisdiction in cross-border civil proceedings concerning an alleged violation of personality rights. There are no specific rules on jurisdiction for such torts in European Union law. In the current case law of the Court of Justice of the European Union (CJEU), Art. 7(2) of the Brussels I bis Regulation is applicable to such disputes. Nevertheless, the authors argue that the CJEU has misinterpreted this article when the claim is based on violation of personality rights, and has thus created a legal chaos in such disputes. The authors analyse the peculiarities of Internet infringements and the locus delicti connecting factor in the case law of the CJEU in this area. The Court has adopted the criterion of 'centre of interests' as the major connecting factor to establish international jurisdiction. The authors criticize this approach and argue that it has led to a structural misunderstanding of the infringement of personality rights. Finally, the authors propose a new rule on jurisdiction in cases concerning violation of personality rights, which should be established in the Brussels I bis Regulation to ensure legal certainty and proper international dispute settlement.*

Keywords: special jurisdiction, personality rights, Brussel I bis, torts, Internet

INTRODUCTION

In this article, we propose to introduce a separate basis of special jurisdiction for infringements of personality rights in cross-border civil proceedings. The proposal is inspired by the judgment of 21 June 2021 in case C-800/19 (the *Mittelbayerischer*

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judgment),[1] in which the Court of Justice of the European Union (CJEU or the Court) once again referred to the 'centre of interests' as a connecting factor formulated by it in the *eDate* judgment.[2] We criticize the CJEU's approach regarding the jurisdiction of Internet torts. We believe that the time has come for introduction of a separate jurisdictional provision relating to alleged infringements of personality rights; one which should be foreseeable for the defendant and protect the interests of the victim.

Currently, the EU courts establish special jurisdiction in matters of tort obligations under Art. 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (Brussels I bis Regulation). The scope of application of Art. 7(2) of the Brussels I bis Regulation also covers cases concerning liability for infringement of personality rights, which has led to a number of debatable judgments of the CJEU.[4] It lacks predictability of such jurisdiction. This problem is confirmed in the doctrine.[5] Moreover, the Grand Chamber of the CJEU has recently rendered another ruling concerning the application of the said provision in a case of dissemination of derogatory comments on the Internet in the *Gtflix Tv* case.[6] In this case, the Court separated the jurisdiction for the claim of rectification of the information and the removal of the content placed online and the claim for compensation for the damage suffered for such infringement. There are other examples of problems of infringement of personal rights and protection of the rights to a fair trial (and right of access to a court). For instance, in the case *Arlewin v. Sweden*,[7] the European Court of Human Rights (ECtHR) found a violation of Art. 6(1) of the European Convention on Human Rights (ECHR) since the Swedish courts refused to hear the case in which the claimant sought damages for the infringement of personal rights by the information announced in a television programme.

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[1] C-800/19 *Mittelbayerischer Verlag KG v. SM* [2021] ECLI:EU:C:2021:489.

[2] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH and Others v. X and Olivier Martinez, Robert Martinez v. MGN Limited* [2011] ECLI:EU:C:2011:685.

[3] O.J. 2012, L 351, p. 1.

[4] J. Gołaczyński, M. Zalisko, *Jurysdykcja krajowa szczególna w sprawach dotyczących czynu niedozwolonego lub czynu podobnego do czynu niedozwolonego w rozporządzeniu nr 1215/2012* [Special national jurisdiction in matters relating to tort, delict or quasi-delict in Regulation no. 1215/2012], 4 Europejski Przegląd Sądowy 23 (2019).

[5] T.C. Hartley, *Jurisdiction in tort claims for non-physical harm under Brussels 2012, Article 7(2)*, 67(4) International and Comparative Law Quarterly 987 (2018); J. Kramberger Škerl, *Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance*, 9(2) Lexonomica 87 (2017).

[6] C-251/20 *Gtflix Tv v. DR* [2021] ECLI:EU:C:2021:1036.

[7] ECtHR, *Arlewin v. Sweden* (App. No. 22302/10), Judgment, 1 March 2016.

We propose to introduce a new jurisdictional provision in the Brussels I bis Regulation. The wording should be as follows: "[f]or non-contractual obligations arising out of violations of personality rights, the courts of the country in which the habitual residence of the person sustaining damage is situated at the time when the tort or delict occurred shall have jurisdiction." This rule would be applicable to the infringement of personality rights of both natural and legal persons (in the latter case the rule should be based on the place of registration of the entity and the objective link).

The need for a new jurisdictional rule is confirmed by the *Mittelbayerischer* judgment, in which the CJEU misinterpreted both the scope of Art. 7(2) itself as well as its *locus delicti* (place of infringement) connecting factor. The Court once again introduced new requirements for the jurisdictional provision to be applied by the courts and thus triggered conceptual chaos. The solution to this problem would be the adoption of an unambiguous and stable personal connecting factor that will not be subject to the Court's divergent interpretations, which depend on the categorization of the case. We contend that Art. 7(2) of the Brussels I bis Regulation is outdated and inadequate to the current needs, particularly when it comes to Internet infringements. In cases involving infringements of personal rights, this has led the CJEU to put forward the connecting factor of a "centre of interests" of the victim alongside the so-called "mosaic approach". Neither of these solutions properly meet the objectives of proper jurisdiction for national courts, which should include the predictability of their jurisdiction; the proper administration of justice; and the efficient organisation of proceedings. Failure to change the EU's jurisdiction rules in this field will result in a growing state of uncertainty regarding the jurisdiction of the courts. Subsequent judgments of the CJEU may further surprise us, as the court seems to be overly creative with regard to Internet infringements.[8] The choices made in the recent case law have actually diminished jurisdictional predictability and spurred the fragmentation of litigation, which is deemed contrary to the objective of sound administration of justice.[9]

We believe that the grounds of special jurisdiction for torts in the Brussels I bis Regulation should be expanded to differentiate between various types of torts, not only infringements of personal rights. These rules should be harmonized with the conflict of law rules arising from the Rome II Regulation. This also means that the Rome II Regulation should be supplemented by a corresponding conflict of

[8] As pointed out in the doctrine, the EU PIL is still rooted on a technology-neutral lawmaking, which is mitigated by the creative, case-by-case based interpretations of the CJEU. O. Feraci, *Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements*, in: E. Carpanelli, N. Lazzerini (eds.), *Use and Misuse of New Technologies*, Springer Nature Switzerland, Cham: 2019, p. 280.

[9] H. Schack, *Internationale Zuständigkeit bei Verletzung von Urhebervermögensrechten über Internet*, 50 Neue Juristische Wochenschrift 3630 (2013).

law rule for infringements of personality rights.[10] It should be noted however that the question of the applicable law is beyond the scope of this article and we focus only on matters of jurisdiction. Another argument for the introduction of new jurisdictional grounds in the Brussels I bis Regulation is the fact that General Data Protection Regulation (GDPR) provides special rules for jurisdiction in cases of personal data breaches (Arts. 79 et seq.).[11] These rules are based on the habitual residence of the victim (the data subject) connecting factor. The jurisdictional rules in the field of personal rights infringements could therefore be consolidated; i.e. the introduction of a new jurisdictional rule in the Brussels I bis Regulation may lead to the deletion of the separate jurisdictional ground of Art. 79 GDPR.

The structure of this article is as follows: In Section 1 we refer to the *locus delicti* (place of infringement), which is still being applied as the connecting factor in Art. 7 (2) of the Brussel I bis Regulation. The CJEU jurisprudence on Internet defamation cases is the subject of analysis in this respect. In Section 2 the concept of the 'centre of interests' as a connecting factor is criticised, with particular reference to the *Mittelbayerischer* judgment. In this section we present, as an alternative, the personal connecting factor based on the habitual residence of the victim. Separately, we also analyse the hypothetical scope of the proposed new jurisdictional rule, especially taking into consideration the *Mittelbayerischer* case. A summary and conclusions are presented in the final part (Section 3) of this text.

1. INTERNET INFRINGEMENTS AND THE *LOCUS DELICTI* CONNECTING FACTOR

Art. 7 of the Brussels I bis Regulation provides the main grounds of special jurisdiction. It supplements the general jurisdiction based on the connecting factor of domicile of the infringer (Art. 4).[12] According to the case law of the CJEU, the

[10] Art. 1(2)(g) of the Rome II Regulation excludes from its scope obligations arising out of violations of privacy and other personal rights, including defamation. This issue was originally covered by the draft regulation, which was subsequently modified several times and generated much controversy (see *Comments on the European Commission's draft proposal for a Council regulation on the law applicable to non-contractual obligations*, available at: https://bit.ly/3MKicZT, accessed 30 June 2022). As a result of disputes and the impossibility to reach a compromise, it was finally decided to exclude torts arising from violations of personal rights by introducing the so-called 'review clause' contained in Art. 30(2) of the Rome II Regulation.

[11] Disputes arising from international data breaches can be complex. Despite the introduction of GDPR, the EU failed to amend the Rome II Regulation on the applicable law to non-contractual liability and to extend its scope to include infringements of privacy. GDPR only contains provisions on international civil procedure. However, there are no supplementing conflict-of-law rules. In order to determine the applicable law national courts have to apply divergent and dispersed national codifications of private international law. *See* M. Brkan, *Data Protection and Conflict-of-Laws: A Challenging Relationship*, 2(3) European Data Protection Law Review 324 (2016).

[12] C-228/11 *Melzer v. MF Global UK Ltd* [2013], ECLI:EU:C:2013:305.

concepts and criteria used in Art. 7(2) are subject to autonomous interpretation, with reference to the system introduced in the Brussels I bis Regulation and its objectives.[13] What matters is the predictability of the jurisdiction, proper administration of justice, and the efficient organization of proceedings.[14] However, the case law of the CJEU relating to Internet infringements does not in fact meet these objectives. The juridical interpretative activism of the CJEU has only to some degree addressed the shortcomings of Art. 7(2), while at the same time it also has triggered new uncertainties.

The CJEU case-law confirms that the connecting factor based on "place where the harmful event occurred or may occur", as used in Art. 7(2), refers to both the place where the damage materialised and the place where the harmful event occurred, so that the defendant may be sued, at the plaintiff's choice, also in the courts of the place where the damage occurred or may occur.[15] This distinction, however, is not sufficient in the case of infringements of personality rights, particularly those committed on the Internet, so the need for clarification arose. The Internet continues to present new challenges for jurisdictional principles,[16] leading to a dramatic increase in difficult jurisdictional problems.[17]

In the classic 1995 *Shevill* case,[18] the CJEU ruled that the courts of the place where the defamatory publications were delivered and where the victim suffered damage to his reputation are territorially best placed to determine the nature of the defamation and to determine the extent of the damage suffered. The judgment thus gave rise to the so-called "mosaic theory."[19] This solution is particularly problem-

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[13] For more on this matter, *see* U. Magnus et al., *Brussels I-bis Regulation*, Sellier European Law Publishers, Münich: 2016.

[14] P. Mankowski, *Article 7*, in: U. Magnus et al. (eds.), *Brussels I-bis Regulation*, Sellier European Law Publishers, Münich: 2016, p. 271.

[15] In the famous case of *GMines de Potasse D'Alsace S.A.*, the phrase "harmful event" was interpreted to mean alternatively either the place where the wrongful acts took place or the place where the harm was felt. C-21/76 *Handelskwekerij G. J. Bier BV v. Mines de Potasse D'Alsace SA* [1976], ECLI:EU:C:1976:166.

[16] J. Hörnle, *The Jurisdictional Challenge of the Internet*, in: L. Edwards, C. Waelde (eds.), *Law and the Internet*, Oxford University Press, Oxford: 2008; J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge University Press, Cambridge: 2009; U. Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity*, Cambridge University Press, Cambridge: 2007; U. Kohl, *Jurisdiction in Cyberspace*, in: N Tsagourias, R. Buchan (eds.), *Research Handbook on International Law and Cyberspace*, Edward Elgar, Cheltenham: 2017, pp. 30-54.

[17] As already observed almost 20 years ago by P. Borchers, *Tort and Contract Jurisdiction via the Internet: The 'Minimum Contacts' Test and The Brussels Regulation Compared*, 50(3) Netherlands International Law Review 401 (2003).

[18] C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA* [1995], ECLI:EU:C:1995:61.

[19] O. Feraci, *La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria*, 4 Rivista di diritto internazionale 1020 (2009).

atic in cases involving electronic communications.[20] A characteristic feature of the Internet is the so-called dispersion of the factual state of the tort, which consists in linking the tort itself, or the damage caused by this tort, to the territories of many countries.[21] As we shall see, the increasingly ubiquitous nature of the Internet has transformed the tort of infringements of personality rights to that of a common tort. It is also pointed out that the mere availability of a website including defamatory material in a given Member State should not be used as a ground for establishing national jurisdiction of the courts of such Member States.[22] There is no doubt, therefore, that the "mosaic theory", which is still being applied by the EU courts since the *Shevill* ruling, should be abandoned.

In the 2011 *eDate* case the Court ruled that in the case of infringement of personal rights, a person who considers him/herself harmed by content published on the Internet may bring an action for liability – with respect to all of the damage suffered – before the courts of the Member State in which the centre of his/her interests is situated. The CJEU clarified that the place where a person has the centre of his/her interests coincides, in general, with habitual residence. However, the centre of interests may also be elsewhere, insofar as other factors may establish the existence of a particularly close link with a given State, for instance the pursuit of a professional activity.[23] In the Court's view, the connecting factor of the victim's centre of interests is compatible with the objective of foreseeability of jurisdiction, since it enables the plaintiff to easily determine the court before he or she may bring his/her action, and at the same time the defendant to reasonably foresee before which court (s)he/it may be sued. Therefore, in the above judgment the concept of "centre of interests" was created, but without replacing the "mosaic approach".

The *eDate* ruling had been widely criticized.[24] It is pointed out that, in essence, the CJEU maintains a mosaic approach to the Internet, without considering the

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[20] K. Weitz, *Jurysdykcyjne aspekty umownych i deliktowych zobowiązań elektronicznych w świetle rozporządzenia Rady (WE) nr 44/2001 – zagadnienia węzłowe* [Jurisdictional aspects of electronic contractual and tort obligations under Council Regulation (EC) No 44/2001 – nodal issues], in: J. Gołaczyński (ed.), *Kolizyjne aspekty zobowiązań elektronicznych*, Wolters Kluwer, Warszawa: 2007, p. 291; A. Tomaszek, *Dochodzenie roszczeń z tytułu czynów niedozwolonych w Internecie* [Pursuing claims for tort on the Internet], 11 Monitor Prawniczy 685 (2000); K. Cornils, *Der Begehungsort von aeusserungsdelikten im Internet*, 8 JuristenZeitung 394 (1999).

[21] H. Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, in: C. Kessedjian, K. Boele-Woelki, Michel Pelichet (eds.), *Internet – Which Court Decides? Which Law Applies?, Proceedings of the international colloquium*, Kluwer Law International, The Hague: 1998, p. 71.

[22] Gołaczyński, Zalisko, *supra* note 4, p. 30.

[23] C-509/09, C-161/10 *eDate Advertising GmbH*, paras. 48-49.

[24] *Cf.* M. Reymond, *The ECJ eDate Decision: A Case Comment*, 13 Yearbook of Private International Law" 493 (2011); M. Bogdan, *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case*, 13 Yearbook of Private International Law 483 (2011); S. Bollée, B. Haftel, *Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt eDate Advertising et Martinez*, Recueil Dalloz 1285 (2012).

practical problems involved. The CJEU's approach weakens the main principle of *actor sequitur forum rei* in favour of *forum actoris*.[25] Moreover, as rightly pointed out in the doctrine, in the vast majority of cases the centre of interest will be equal to the place of habitual residence of the victim. The same is true for legal entities, whose centre of interests will likely correspond to the place of registration (place of the seat). Still, as proved by the following judgments the proposed approach includes a high level of ambiguity. A person does not necessarily have only one centre of interests. In addition, the Court's ruling is controversial because in the Internet cases jurisdiction should not depend only on the dissemination of information in a certain territory, but rather on the fact that the defendant has failed to restrict the availability of information to residents of a given country.[26] Furthermore, the place of centre of interests may change over time when the person moves his/her interests to another country.

In 2017, the CJEU further tried to develop its interpretation of Art. 7(2) of the Brussel I bis Regulation in the *Bolagsupplysningen* case.[27] In this case, the legal entity sought first and foremost rectification and/or retraction and removal of the information made available online, and only secondarily compensation for the alleged infringement of its reputation. In its judgment, the CJEU confirmed the application of the "mosaic approach", despite AG Bobek's proposed different opinion. The *Bolagsupplysningen* judgment confirms that the centre of interests concept is based on the presumption that the victim's centre of interests is at his or her habitual residence, or in the case of a legal entity at its registered office (with the provison that this latter presumption can be rebutted by showing that it carries out the main part of its economic activities in another Member State).[28] The CJEU's statement in *Bolagsupplysningen* that economic activity must be carried out mainly in a certain Member State in order to invoke the centre of interests as the basis for

[25] S. Francq, *Responsabilité du fournisseur d'information sur Internet: affaires eDate Advertising et Martinez*, 1-2 La Semaine Juridique - édition Générale 35 (2012); K. Weitz, *Forum delicti commissi w sprawach o naruszenie dóbr osobistych w Internecie w świetle art. 5 pkt 3 rozporządzenia nr 44/2001* [Forum delicti commissi in cases of infringement of personal rights on the Internet in the light of Art. 5 point 3 of Regulation No 44/2001], 3 Polski Proces Cywilny 316 (2013), p. 330.

[26] M. Pilich, *Prawo właściwe dla dóbr osobistych i ich ochrony* [The law applicable to personal rights and their protection], 3 Kwartalnik Prawa Prywatnego 599 (2012), p. 635; M. Pilich, M. Orecki, *Jurysdykcja i prawo właściwe w sprawach o ochronę dóbr osobistych przed naruszeniem w Internecie. Glosa do wyroku TSUE (wielka izba) z 25 października 2011 r. w sprawach połaczonych C-509/09 i C-161/10 eDate Advertising v. X oraz Oliver Martinez, Robert Martinez v. MGN Limited* [Jurisdiction and applicable law in cases concerning the protection of personal rights against infringement on the Internet. Glossary to the judgment of the CJEU (Grand Chamber) of 25 October 2011 in joined cases C-509/09 and C-161/*10 eDate Advertising v. X and Oliver Martinez, Robert Martinez v. MGN Limited*], 1 Polski Proces Cywilny 109 (2015).

[27] C-194/16 *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB (BOÜ/Ilsjan)* [2017], ECLI:EU:C:2017:766.

[28] T. Lutzi, *Shevill is dead, long live Shevill!*, 134 The Law Quarterly Review 210 (2018).

jurisdiction is likely to raise difficult questions with respect to how to draw the line. This ruling has also been much criticized.[29]

The CJEU has set a high bar for invoking the centre of interests basis of jurisdiction, in that a legal entity's centre of interests must be clearly identifiable at the stage when the court assesses its jurisdiction.[30] In particular, the CJEU's approach leads to the conclusion that the localisation of the victim's centre of interests is dependent upon the circumstances of the actual dispute.[31] This practice of the CJEU shows that a claimant has to prove to the national court – at the initial stage of civil proceedings – that its/her/his centre of interests is mainly in this member state, instead of the fact that the actual damage took place there. Nevertheless, there is no indication in Art. 7(2) of the Brussel I bis Regulation that such a requirement for the special jurisdiction rule has to be established. Also, the CJEU itself has not provided any guidance how the centre of main interests should be established, and this leads to more legal uncertainties.

2. CRITIQUE OF THE CENTRE OF INTERESTS CONNECTING FACTOR IN THE LIGHT OF *MITTELBAYERISCHER* JUDGMENT

The centre of interests as a connecting factor for cross-border jurisdiction in civil cases was once again applied in the *Mittelbayerischer* case, in which the CJEU continued the previous case law in this area (*eDate*; *Bolagsupplysningen*). The claimant, a Polish national, brought a civil claim against a German newspaper before the Polish courts for having used the expression "Polish extermination camp." The expression was mentioned in an online article to refer to a Nazi extermination camp built on the territory of (then-occupied) Poland. The claimant sought protection of his personality rights, in particular his national identity and dignity, which he claimed had been infringed as a result of the use of that expression.

Nevertheless, the factual and legal situation in the *Mittelbayerischer* case differs from the previous case law. Though it also concerns infringement of personal rights online, the peculiarity in this case is that the victim who brought the claim to the court in Poland was not mentioned in the Internet publication. The CJEU put great emphasis on this aspect of the case and primarily focused on the foreseeability of

[29] L. Lundstedt, *Putting Right Holders in the Centre: Bolagsupplysningen and Ilsjan (C-194/16): What Does It Mean for International Jurisdiction over Transborder Intellectual Property Infringement Disputes?*, 49 International Review of Intellectual Property and Competition Law 1022 (2018); T. Kyselovská, *Critical Analysis of the "Mosaic Principle" under Art. 7 Para 2 Brussels Ibis Regulation for Disputes Arising out of Non-Contractual Obligations on the Internet*, 1 Prawo Mediów Elektronicznych 36 (2019).

[30] Lundstedt, *supra* note 29, p. 1027.

[31] T. Lutzi, *Internet cases in private international law: developing a coherent approach*, 66(3) International and Comparative Law Quarterly 687 (2017).

cross-border jurisdiction, without further analysis of where the actual place of harm is. Also, the subject matter of the claim was not the defamation of a person, but an alleged violation of his national identity and dignity. The claimant asked the court to prohibit the defendant from disseminating in any way the terms which according to the claimant violated his national dignity; order the defendant to apologise, and pay the amount of 50,000 Polish zlotys.[32]

The outcome of the *Mittelbayerischer* judgment demonstrates that in cases of infringement of personal rights online not only is Art. 7(2) of the Brussels I bis Regulation difficult to apply, but also that another additional requirement for this special rule of jurisdiction was established; which is the identification of a victim in the Internet publication. We argue that this case not only reveals the need for special rules on jurisdiction for infringement of personal rights online in the Brussels I bis regulation, but also the lack of protection of the interests of a victim in such cases which exists in the current regulation of cross-border civil cases. Also, it shows that the CJEU failed to analyse the peculiarities of infringement of personal rights online and did not provide a solution to the current problem in such cross-border cases.

First, the CJEU found that the factual circumstances in the *Mittelbayerischer* case differed from the previous cases concerning violation of personality rights online. In this case the alleged victim of the violation of personal rights who brought a claim against the defendant was not explicitly mentioned in the Internet publication. Relying heavily on the foreseeability of jurisdiction in cross-border civil proceedings, the court found that in order to achieve the objectives of predictability of the rules of jurisdiction laid down by the Brussels I bis Regulation and of legal certainty pursued by that regulation, the connection must – in cases where a person claims that his or her personality rights have been infringed by content placed online – be based not on exclusively subjective factors relating solely to the individual sensitivity of that person, but on objective and verifiable elements which make it possible to identify, directly or indirectly, that person as someone who was specifically harmed.[33] Thus, a victim of infringement by online publication has the right to bring a claim only if he or she can be identified. This means that in the event an infringer publishes information which according to the national law could be regarded as a basis for violation of personal rights, but no victim can be identified *individually*, the jurisdiction rule of Art. 7(2) of the Brussels I bis Regulation is not applicable. This approach of the CJEU focuses ultimately on the protection of interests of an infringer, and weakens protection of the interests of a victim. In order words, the CJEU did not base the application of Art. 7(2)

[32] Opinion of Advocate General Bobek delivered on 23 February 2021, Case C-800/19 *Mittelbayerischer Verlag KG v SM*, ECLI:EU:C:2021:124, para. 16.

[33] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH*, para. 42.

of the Brussels I bis Regulation on the violation of personal rights, but instead it focused on the predictability of jurisdiction vis-à-vis the infringer. However, this generalized requirement for an individual identification of the victim establishes a requirement for the application of Art. 7(2) of the Brussels I bis Regulation which is not mentioned in the text of the regulation and requires a claimant to prove to the court, at the initial stage of the instigation of civil proceedings, an additional fact (i.e. that he or she was mentioned in the publication). Another issue arising from this requirement is that it establishes this personal identification criterion without leaving room for the assessment of an individual's situation. Violation of personal rights online is a *sui generis* tort which often cannot be objectively established, since harm in some cases is the violation of non-pecuniary rights, such as dignity and reputation. The peculiarity of this tort suggests that it should also be assessed on an individual basis, and a victim should be allowed to prove that his or her individual rights have been infringed. It is worthy of note that this position was supported by the Advocate General Bobek, who argued that pursuant to Art. 7(2) of the Brussels I bis Regulation the establishment of jurisdiction based on the centre of interests does not require that the allegedly harmful online content names a particular person, and consequently posited that jurisdiction over the violation of personal rights online should be assessed on *ad hoc* basis.[34]

Secondly, the problem with the CJEU's rationale in this case is the vagueness of the requirement for *individual identification* of a victim. The CJEU did not provide how such identification should be established and which criteria should be assessed. It only mentioned that objective and verifiable elements shall be used to search for an answer. According to the simple logical rule of syllogism, if a victim *cannot* show directly or indirectly that she or he is mentioned in the Internet publication as an individual, he or she *cannot* enjoy jurisdiction under Art. 7(2) of the Brussels I bis Regulation. However, such an interpretation is far from the essence of the said rule, which bases jurisdiction on *locus delicti*. Instead of looking to the place where the damage was carried out or is suffered, the court only relied on the principles of foreseeability and legal certainty. Also, the CJEU dismissed the argument that a subjective criterion could be sufficient in this case, wherein the claimant claimed an infringement of his national dignity and identity.

Thirdly, it seems that the CJEU placed great importance on the economy of civil proceedings. The CJEU seemingly identified the victim as belonging to a vast identifiable group (the Polish people), and it found that the principles of foreseeability and legal certainty cannot be established in such a case since the centres of interests of the members of such a group may potentially be located in any Member

[34] Opinion of Advocate General Bobek in C-800/19, para. 88.

State of the European Union.[35] This creates another riddle. Though a victim can be identified, Art. 7(2) of the Brussels I bis Regulation is still not applicable because of the potential myriad of places of centres of interests of the persons belonging to such group. Such an approach leads to more obscurity in cases where information online violates the personal rights of a group of persons. Does it mean that in such case all persons of such group must have their centres of interests only in one EU Member State? Does it mean that in case an infringer violates personal rights belonging to a group of people who have similar legal interests, Art. 7(2) of the Brussels I bis Regulation is not applicable because the publication mentions only *a group of people*, but not a separate individual? Also, even though the jurisdictional rules in the Brussels I bis Regulation are based on individual litigation, violation of individual rights belonging to a group of people suggests that a collective action can be brought and/or procedural joinder is possible. For instance, according to Art. 43 (1)(2) of the Code of Civil Procedure of the Republic of Lithuania, a claim may be brought by several co-plaintiffs together or against several defendants if the subject of a claim concerns requests or liabilities of the same nature, based on the same matter and the same factual and legal issues, when each separate demand could be the subject of an independent claim (optional joinder). Given that some information spread online could violate the personal rights of a large group of people, individual litigation may not always be the most effective procedure and the joining and/or coordination of actions would seem like a proper solution. However, this would not mean that the said rule on jurisdiction is not applicable. Furthermore, since the CJEU identified the claimant as a member of the group whose interests were allegedly infringed, the question arises: What else needs to be established to find jurisdiction under Art. 7(2) of the Brussels I bis Regulation? Even following the argument that the centre of main interests should be established (which in this case seems to be clearly in Poland), the requirements for jurisdiction set out in *eDate* and *Bolagsupplysningen* are likely to be met. It should also be noted that the claimant did not claim damages for violation of the rights of other members of the group in this case, since he argued namely that *his personal* rights were violated. Thus the scope of the claimant's claims leads to the questions why the CJEU focused on the interests of all members of this group, since only one member of the group argued infringement of his personal rights, and not the infringement of others' rights?

Finally, even following the CJEU's approach regarding the foreseeability and legal certainty of cross-border civil jurisdiction, it seems that these broad but essential criteria can be established in this case. In essence, the principle of foreseeability means that an applicant should be able to easily identify the court in which he may

[35] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH*, para. 43.

sue, and the defendant reasonably foresee before which court it may be sued.[36] In such cases the courts should look for a strong connection between the case and the jurisdiction it belongs to.[37] It seems that great importance should be attached to the content of the publication and the language in which it was published (to mention the elements which could be attributed to the specific individual or a group); whether the publication targets a specific audience; and of course the place where the harm was manifested. It is noteworthy that such criteria were considered by the ECtHR in the case *Arlewin v. Sweden*, in which the court established that these aspects showed very strong connections with Sweden, when the information which infringed personal reputation was transmitted by satellite TV.[38]

The facts presented to the CJEU also indicate that the requirement of foreseeability was also met. To put it in the words of the Advocate General Bobek:

> [I]t is indeed difficult to suggest that it would have been wholly unforeseeable to a publisher in Germany, posting online the phrase 'the Polish extermination camp of Treblinka', that somebody in Poland could take issue with such a statement. It was thus perhaps not inconceivable that 'the place where the damage occurred' as a result of that statement could be located within that territory, especially in view of the fact that that statement was published in a language that is widely understood beyond its national territory.[39]

It seems that the Advocate General was suggesting that since the Internet publication specifically mentioned the location in Poland and the language of the publication is widely known in the state of residence of the claimant, the publisher could have reasonably foreseen that such publication would be read by Polish readers. Consequently, it could also be argued that the published information could infringe the interests of a particular group (Polish people), and thus the harm occurred in Poland. Moreover, one can also argue that mentioning of a specific place and event in history which took place in a particular territory also seems to create a link to the specific territory which could be the *locus delicti*. However, the CJEU did not consider these factual circumstances.

To sum up, the CJEU's *Mittelbayerischer* case paid great attention to the principles of predictability and legal certainty, without an examination of the peculiarities of the specific tort of violation of personal rights. Moreover, although the court managed

[36] C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhors* [2009], ECLI:EU:C:2009:257, para. 22

[37] Council of Europe, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states*, DGI (2019)04.

[38] *Arlewin v. Sweden*, para. 72.

[39] Opinion of Advocate General Bobek C-800/19, para. 74.

to identify the possible victim (a member of a group of people), this was deemed not relevant since no specific indication or identification of the claimant was made in the Internet publication. Such an additional requirement for personal identification of the victim in the initial stage of civil proceedings creates legal uncertainty and does not resolve the problem. Also, it seems that the facts of the case may have revealed that the publisher of the Internet publication could have reasonably foreseen the harm in Poland and the violation of personal rights in this Member state.

3. THE SCOPE OF THE JURISDICTIONAL RULE FOR INFRINGEMENTS OF PERSONALITY RIGHTS

The analysis of the *Mittelbayerischer* judgment leads to the conclusion that the CJEU understands 'personality rights' in a narrow sense, having in mind primarily defamation. This led to the incorrect ruling in the case because the Court directly applied the 'centre of interests' connecting factor that was originally developed for the purpose of Internet defamation, requiring unequivocal identification of the plaintiff in the publication at issue. The *Mittelbayerischer* case however involves not defamation, but infringement of other personal rights. The applicable law does not require identification of the victim in the publication. In fact, such a requirement should not exist at all, as Art. 7 (2) of the Brussels I bis Regulation is based on the *locus delicti* (place of infringement) connecting factor, which the court did not consider at all in this particular case.

The legal basis for the plaintiff's claims under the applicable law were Arts. 23 and 24 of the Polish Civil Code, which protect personality rights in a broad sense. Although these provisions do not explicitly mention national identity and national dignity, or the right to respect for the truth about the history of the Polish nation, numerous examples from the case law confirm that these three values are covered by the scope of personal rights protected under Art. 23 of the Polish Civil Code. According to the case law, personality rights include the protection of national identity and national dignity and the right to respect for the truth about the history of the Polish nation. Therefore, Mittelbayerischer's untrue claims about the Nazi death camps allegedly violated the personality rights of those who survived them. These individuals have standing to bring an action under the applicable law. These rights can be violated not only by statements directed against a person individually, but also by statements that affect a larger group of people, including an entire nation.

The CJEU should interpret legal concepts in EU regulations and directives autonomously, but with a view to their uniform application throughout the EU.[40]

[40] D. Chalmers, *European Union Law*, Cambridge University Press, Cambridge: 2014, pp. 179-183.

The interpretation of legal concepts such as personal rights should take into consideration the definitions of concepts and localisation of damage under the applicable national substantive law. A starting point for a definition of personality rights under EU law is chapter 1 of the Charter of Fundamental Rights of the European Union (EU Charter), which protects the dignity and integrity of the person: Arts. 7 and 8 of the EU Charter on respect for private and family life and the protection of personal data; and Art. 8 of the ECHR on respect for private and family life. Inspiration should be drawn from the various laws of the Member States on personality rights, even though the EU definition must be formally independent from the national laws.[41]

It should be mentioned that indeed the rules of jurisdiction should be predictable (Recital 15 of the Brussels I bis Regulation). This is also true in cases of jurisdiction over infringements of personality rights. However, the specific type of tort (infringement of personality rights) allows one to argue that even in a case like *Mittelbayerischer*, which included a number of specific references to a concrete member state (Poland), the wrongdoer (defendant) may reasonably expect that a violation of the personality rights would be alleged in such member state since the plaintiff has place of residence there. Moreover, it is debatable whether the notion of centre of main interest ensures predictability. In such case the wrongdoer may not be able to identify where the plaintiff's centre of interests is located.

With the *Mittelbayerischer* judgment in mind, we propose that the scope of the new jurisdictional provision should include violation of all personality rights (as understood by the national regulations), and not just defamation. Of course this concept should be subject to autonomous interpretation, but it is required that the position of the national laws be taken into account. This also means that it could cover breaches of personal data leading to non-contractual obligations on the part of the data controller or the processor, which may make the separate grounds for jurisdiction in Art. 79 of the GDPR redundant. On the other hand, it is not required to distinguish Internet infringements in the proposed jurisdictional rule.

CONCLUSIONS

The EU rules of special jurisdiction which are currently applied to infringements of personality rights are backward when viewed in light of the rules of private international law for non-contractual obligations. The improvement made in this respect in the Rome II Regulation with regard to the law applicable to non-contractual obligations serves as a model for amendment of the EU jurisdictional rules.[42]

[41] Lundstedt, *supra* note 29, p. 1035.

[42] *Cf.* J. von Hein, *Protecting victims of cross-border torts under Article 7(2) Brussels Ibis: towards a more differentiated and balanced approach*, 16 Yearbook of Private International Law 241 (2015).

The criticism of the Rome II Regulation stems from their conservativeness rather than the change itself.[43] This mainly concerns the exclusion of infringements of personality rights from its scope and the overly rigid regulation of infringements of intellectual property.[44] This can be corrected in parallel with the jurisdictional rules. Even though the conflict of law rules of the individual Member States with respect to infringements of personality rights are now widely divergent, a common denominator is that they often lead to the application of a single law as opposed to an application of the laws where the content was distributed or accessible.[45] Consistency may be seen as an imperative to take into account the options given by the Rome II Regulation when interpreting the Brussels I bis Regulation. The law applicable to a given dispute can also have an influence on the expediency of the proceedings and sound administration of justice in general.[46]

Due to the technological progress that has taken place since 2001 (in fact since 1968, when the Brussel Convention was adopted[47]), the improvement, or even overhaul, of jurisdictional rules is highly needed. The jurisdiction rules indeed require a fundamental change, and in particular separate types of torts should be distinguished and separate grounds of special jurisdiction need to be established.

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[43] A. Dickinson, *The Rome II Regulation*, Oxford University Press, Oxford: 2009; R. Plender, M. Wilderspin, *European Private International Law of Obligation*, Sweet & Maxwell, London: 2009; J. Ahern, W. Binehy, *Rome II Regulation on Law Applicable to Non-Contractual Obligations* Martinus Nijhoff, The Hague: 2009; J. Fawcett, M. Carruthets, G.P. North, *Private International Law* (14th ed.), Oxford University Press, Oxford: 2008; G. Calliess (ed.), *Rome Regulations: Commentary on the European Rules of the Conflict of Law* (Part Two), Wolters Kluwer, Cham: 2011, pp. 358-654; P. Huber (ed.), *Rome II Regulation*, Munich 2011; A. Rushworth, A. Scott, *Rome II: Choice of law for non-contractual obligations*, Lloyd's Maritime and Commercial Law Quarterly 274 (2008); S. Leible, M. Lehmann, *Die neue EG-Verordnung über aufervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)*, 53 Recht der Internationalen Wirtschaft (2007); T. Graziano, *Das auf aufservertragliche Schuldverhältnisse anzuwendende Recht nacht Inkraftreten der Rom II – Verordnung*, 73 RabelsZ 1 (2009); T. Dornis, *When in Rome, do as the Romans do? - A defense of the lex domicilii communis in the Rome II Regulation*, 4 European Legal Forum 152 (2007); S. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 American Journal of Comparative Law 173 (2008); P. Kozyris, *Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' Missed Opportunity*, 56 American Journal of Comparative Law 471 (2008); M. Carruthers, E. Crawford, *Variations on a theme of Rome II. Reflections on proposed choice of law rules for non-contractual obligations: Part I*, 9 Edinbourgh Law Review 65 (2005); *Part II*, 9 Edinburgh Law Review 238 (2005).

[44] The exception in Art. 1(2)(g) of the Rome II for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, should arguably be given a restrictive interpretation that does not go beyond the reason for the exception, which dealt with conflicts between the freedom of expression and the right to privacy (Lundstedt, *supra* note 29, p. 1035).

[45] European Commission, *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality*, 2009, JLS/2007/C4/028. Final Report, pp. 79-112.

[46] E. Fronczak, *Cuius legislatio, eius iurisdictio? The emerging synchronisation of European private international law on tort*, 17 ERA Forum 173 (2019).

[47] Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, OJ 1990 C 189, at. 2 (consolidated).

National courts should be offered an unambiguous basis for special jurisdiction that flows directly from the provisions of the Brussels I bis Regulation, and not from the CJEU's misplaced concepts. The solutions proposed by the CJEU are neither creative nor do they serve to make jurisdiction more predictable in cases of Internet infringements. This deepens the state of confusion for the national courts and triggers unpredictability of the outcome of litigation. As rightly pointed out in the doctrine,[48] the Internet is not just an incredibly powerful means of communication – it now represents the pulsing heart for the vast majority of social relationships and commercial transactions, as well as being the main instrument of storage and management of digital content of any kind.[49] It is increasingly affecting the rights of individuals and the activities of businesses worldwide.[50]

The current 'mosaic system' created by the CJEU in an attempt to adapt the *forum commissi delicti* of Art. 7(2) of Brussels I bis to the peculiarities of online infringements deviates from the general purposes of legal certainty and foreseeability, as pursued by the Regulation. Moreover, it collides with the specific objective of Art. 7(2), namely the proximity between the dispute and the forum, as well as the sound administration of justice.[51] The CJEU also did not provide parameters through which the place of the centre of interests of the victim should be determined, creating the need for an overall factual assessment of the concrete circumstances of the case. The CJEU's approach is likely to lead not only to jurisdiction being exercised on unsubstantiated connections, but also to a high incidence of parallel and related proceedings.

The proposed solution is to adopt the unambiguous and stable connecting factor based on the victim's place of habitual residence. This approach responds to the need for rules establishing jurisdiction in favour of one single court which is significantly connected to the situation at stake and which is therefore in the best position to assess the impact of the Internet content on the affected individual's rights.[52] The proposed rule, in establishing a genuine close connection between the

[48] In the context of private international law, see in particular the fundamental monographs of P. De Miguel Asensio (*Conflict of Laws and the Internet*, Edward Elgar, Cheltenham: 2020) and T. Lutzi (*Private International Law Online*, Oxford University Press, Oxford: 2020).

[49] O. Feraci, *Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements*, in: E. Carpanelli, N. Lazzerini (eds.), *Use and Misuse of New Technologies* (eds.), Springer Nature Switzerland, Cham: 2019, p. 277.

[50] C. Nagy, *The Word Is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities*, 2 Journal of Private International Law 251 (2012); S. Marino, *Nuovi sviluppi in materia di illecito extracontrattuale on line*, 4 Rivista di diritto internazionale privato e processuale 879 (2012).

[51] Feraci, *supra* note 49, p. 301.

[52] A similar approach, with respect to conflict-of-laws, has been adopted by the recent Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (adopted at the 17th session of the Standing Committee of the 11th National People's Congress on 28 October 2010), which entered into

infringement at stake and the territory of a certain state, could identify the court best placed to assess and compensate victims for the entirety of their damages. This approach would satisfy the needs for procedural proximity and efficiency. It ensures that litigation takes place where the gathering of evidence is easiest and where proceedings are most likely to be efficiently managed.

The proposed new jurisdictional rule would preserve predictability for both parties party to the dispute. It would also be consistent with the reasonable expectations of both parties and based on a strong connecting factor. The arguments of potential infringers (in a majority of cases media companies operating on the Internet) to limit the scope of jurisdiction do not merit consideration. The previous solutions are disadvantageous to the victims because they allow infringers (i.e. mostly media companies) to organize their activities in such a way as to subject their potential liability for their actions to the law offering the lowest standard of protection. The connecting factor of the habitual residence of the victim, or in the case of legal entities their registered office, makes the connection simple and clear. It also safeguards predictability for infringers by enabling publishers to foresee the courts before which they could face liability. Additionally, new digital technologies allow for a mitigation of the borderless nature of the Internet by the media companies. In particular, the so-called 'geolocation technologies' nowadays make it possible to ascertain the geographical location of Internet users with a high degree of accuracy.[53]

To conclude, the rules on jurisdiction in the Brussels I bis Regulation applicable to Internet cases should be based on considerations related to the sound administration of justice and the efficacious conduct of proceedings, whereby the applicable substantive law is based on political, economic, and moral considerations concerning the balancing of conflicting interests. The preference towards the *forum actoris* would balance the competing interests of the parties involved, thus creating predictability in Internet disputes.

force on 1 April 2011. The law in fact provides for a technology-specific provision on Internet defamation, stating that: "Where such personal rights as the right of name, portrait, reputation and privacy are infringed upon via network or by other means, the laws at the habitual residence of the infringed shall apply" (Art. 46).

[53] D. Svantesson, *Geo-location Technologies and Other Means of Placing Borders on the "Borderless" Internet*, 23 John Marshall Journal of Computer and Information Law 101 (2008); D. Svantesson, B. Jerker, *Time for the Law to Take Internet Geolocation Technologies Seriously*, 3 Journal of Private International Law 473 (2012).

POLISH PRACTICE

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STATEMENT OF POLISH INTERNATIONAL LAWYERS CONCERNING THE AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE

The axiology of the modern international legal order is founded upon the maintenance of international peace and security, ensuring of justice and respect for fundamental human rights. The armed attack and consecutive military activities of the Russian Federation, undertaken since 24 February 2022 against Ukraine on its territory, severely compromise these values. These activities constitute violations of fundamental principles of international law embodied in the Charter of the United Nations (the UN Charter), which are simultaneously binding as customary international law. They undermine the core of the legal order that regulates relations within the contemporary international community. The norms prohibiting the threat and use of force are of special character, therefore the Russian Federation violated its legal obligations, not only towards Ukraine, but also towards the international community as a whole.

The actions of the Russian Federation preceding the use of force against Ukraine and the subsequently undertaken military activities constitute, assessed together and separately, a violation of the prohibition of the threat and use of force, as stated in Article 2(4) of the UN Charter, and binding as customary norm. At the same time, those actions violate the principle of peaceful settlement of international disputes, as embodied in Article 2(3) of the UN Charter, and in the corresponding customary norm.

The military activities of the Russian Federation violate the prohibition of the use of force. They do not fall within the scope of any of the permissible exceptions since they are neither conducted upon the prior authorization of the UN Security Council under Chapter VII, nor are they undertaken in self-defence on the basis of Article 51 of the UN Charter and the corresponding customary norm. They do not constitute a response to an armed attack by Ukraine which actually never occurred. Moreover, there was no possibility of invoking even the contested concept of pre-emptive self-defence, as there was no risk of any imminent armed attack by Ukraine.

The 'invitation' issued by the authorities of the so-called Donetsk People's Republic (DPR) and so-called Luhansk People's Republic (LPR), whose statehood had been recognized by the Russian Federation (on the basis of their alleged right to self-determination), cannot justify the military activities of the Russian Federation against Ukraine. Those actions have no legal effect, because they are not justified by facts nor by modern international law, and as such they constitute a violation of Ukraine's territorial integrity. Only legitimate, effective and internationally recognized authorities of a State may invite other States to a military intervention in the territory of the State concerned (intervention by invitation/military assistance on request). Because of the same reasons, so-called DPR and so-called LPR are not empowered to effectively request the Russian Federation to undertake military action against Ukraine on the basis of the right to collective self-defence. Notwithstanding that, self-defence – individual as well as collective – is always subject to strict limitations set out by the principles of necessity and proportionality of the actions to repel an armed attack.

Therefore, military activities of the Russian Federation against Ukraine constitute an act of aggression, in the meaning of the United Nations General Assembly Resolution 3314 (XXIX) of 1974, reflecting the binding customary law. It defines an act of aggression as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations' (Article 1 of the Annex to the Resolution). The prohibition of aggression is considered a peremptory norm (*jus cogens*), having an *erga omnes* character (effective towards international community as a whole). Thus, all States are obliged to undertake actions in order to stop a breach of such norm, and are also obliged not to recognize as lawful a situation created by it. Sanctions against the Russian Federation are lawful as a result of the committed act of aggression, which gives rise to international responsibility. Aggression as an act of a State must be distinguished from the crime of aggression, understood as an act of an individual who is subject to international criminal responsibility (more on this issue below).

Simultaneously, the military activities of the Russian Federation qualify as an armed attack, in the meaning of Article 51 of the UN Charter, and under customary law. Accordingly, the military response of Ukraine constitutes internationally lawful self-defence. Circumstances show that military actions undertaken by Ukraine meet the requirements of necessity and proportionality.

Article 51 of the UN Charter provides not only an individual right to self-defence, but also a right to collective self-defence. Therefore, any possible military assistance provided for the State victim of an armed attack, at its request, is fully lawful and fits in the scope of collective self-defence.

According to the Resolution 3314 (XXIX) consent of a State to place its territory at a disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State constitutes itself an act of aggression. Accordingly, the Republic of Belarus, from whose territory an attack of a part of the Russian armed forces against Ukraine was performed, is responsible for aggression, and as a result, adequate countermeasures might and should be undertaken also against it.

The military action between the Russian Federation and Ukraine, from a legal point of view, is an international armed conflict, to which norms of the four Geneva Conventions of 1949 on the protection of the victims of war, of the 1977 First Protocol thereto and of customary international humanitarian law apply.

Among the norms applicable to international armed conflict, the following ones should be recalled: it is prohibited to target civilian population and civilian objects; attacks must be limited only to military objectives; it is forbidden to conduct attacks, in which the attacking party does not distinguish between military objectives and civilian population and objects; the wounded and the sick should be collected and cared for; hospitals, all kinds of units of Medical Service, and medical personnel, are to be protected; combatants who fell into the hands of the enemy should be granted the status of prisoners of war; prisoners of war are protected, also against public curiosity; it is forbidden to use such methods and means of warfare that cause unnecessary suffering; it is also prohibited to use methods and means which cause or could cause widespread, long-term and severe damage to the natural environment.

Even if the Russian Federation is not a party to the conventions prohibiting the use of anti-personnel mines or cluster munition, those kinds of weapons are considered inhumane, because they can cause unnecessary suffering. Moreover, incendiary weapons, including thermobaric projectiles, the use of which in the ongoing armed conflict is attributed to the Russian Federation, cannot be used in the vicinity of civilians. As regards the public threats of the president of the Russian Federation concerning the use of nuclear weapons, it must be recalled that the International Court of Justice (the ICJ) recognized the use of nuclear weapons as contrary to fundamental humanitarian rules. The ICJ stated that the use of such weapons should only be acceptable *ultima ratio* if the very survival of a State is at stake, which is not the present case.

In an armed conflict norms guaranteeing fundamental human rights, including the right to life and prohibition of torture apply simultaneously to international humanitarian law. During an armed conflict arbitrary actions violating fundamental human rights may occur. Those violations may become a subject of individual or interstate complaints before the European Court of Human Rights or before other competent international human rights bodies (e.g. the Human Rights Committee).

The Russian Federation has committed an act of aggression, and the president and other State and military officials have perpetrated the crime of aggression. Neither the Russian Federation nor Ukraine are parties to the Statute of the International Criminal Court (ICC), let alone they did not ratify the amendments concerning the definition of the crime of aggression, and the conditions for the exercise of jurisdiction in respect of this crime. However, the ICC can exercise jurisdiction in regard to the ongoing armed conflict in Ukraine on the basis of the Ukrainian declaration of 8 September 2015 over the perpetrators of war crimes, crimes against humanity and genocide. This declaration recognizes the competence of the Court regarding the events which have occurred in Ukraine after 20 February 2014. The jurisdiction of the ICC includes not only individuals who commit those crimes, but also persons who order, solicit, or induce, or in any other way contribute to the commission of those crimes. The responsibility also applies to the president, the minister of foreign affairs and the prime minister, because their immunities do not bar the Court from exercising its jurisdiction.

The Prosecutor of the ICC expressed his willingness to investigate the situation in Ukraine. Moreover, the individual States are not barred from initiating their own investigations on the basis of universal jurisdiction or from documenting crimes committed in the territory of Ukraine. Such investigations would not only support the procedure before the ICC by providing evidence, but also may pave the way to prosecuting low-rank perpetrators before domestic courts and result in effective convictions for the crimes committed in Ukraine. We emphasize that judging the committed crimes will not be effective without large-scale assistance of national jurisdictions, both in terms of own documentation of committed crimes and conducted criminal proceedings over the perpetrators, as well as possible cooperation with the ICC. Since the Court cannot prosecute the crime of aggression, there is a special role for the courts of those States which have appropriate domestic rules allowing convicting for the crime of aggression.

Past violations of international law by other States, including the unlawful use of force, do not justify such violations either now or in the future. They result in the international responsibility of the State concerned. Thus, the Russian Federation should be held responsible for having committed an armed attack against Ukraine. We are of the opinion that the lack of adequately strong condemnation by the academic community of violations of international law in the past, should not hamper this community from reacting to the current violations. Gross violations of international law should be always condemned irrespective of who is committing them.

We hereby stand in solidarity with Ukrainian international lawyers and declare our full support and assistance in undertaking legal actions in order to hold the Russian State accountable for internationally wrongful acts, and to prosecute

individuals responsible for the violations of international legal norms. Simultaneously, we express our deep respect for those Russian international lawyers who, despite the consequences they might face, had the courage to protest against violations of international law committed by the State of which they are nationals.

4 March 2022

STANOWISKO POLSKICH PRAWNIKÓW MIĘDZYNARODOWYCH DOTYCZĄCE AGRESJI FEDERACJI ROSYJSKIEJ PRZECIWKO UKRAINIE

Fundamentem aksjologicznym współczesnego porządku międzynarodowoprawnego jest zachowanie międzynarodowego pokoju i bezpieczeństwa, zapewnienie sprawiedliwości i poszanowania podstawowych praw człowieka. Kolejne działania zbrojne Federacji Rosyjskiej, podejmowane od 24 lutego 2022 roku przeciwko Ukrainie na jej terytorium, rażąco godzą w te wartości. Stanowią naruszenia podstawowych zasad prawa międzynarodowego zawartych w Karcie Narodów Zjednoczonych (KNZ) i wiążących również na podstawie międzynarodowego prawa zwyczajowego. Podważają samą istotę porządku prawnego regulującego stosunki we współczesnej społeczności międzynarodowej. Ze względu na szczególny charakter normy zakazującej groźby lub użycia siły zbrojnej naruszonej przez Federację Rosyjską, państwo to pogwałciło swoje zobowiązania prawne nie tylko w stosunku do Ukrainy, ale także wobec całej społeczności międzynarodowej.

Działania Federacji Rosyjskiej poprzedzające użycie siły zbrojnej przeciwko Ukrainie, a następnie podjęte działania zbrojne stanowią, łącznie i z osobna, naruszenie zakazu groźby i użycia siły zbrojnej przewidzianego w art. 2 ust. 4 KNZ, oraz obowiązującej równolegle normy zwyczajowej. Równocześnie, działania te stanowią naruszenie zasady pokojowego rozwiązywania sporów międzynarodowych przewidzianej w art. 2 ust. 3 KNZ oraz odpowiadającej jej normy zwyczajowej.

Działania zbrojne Federacji Rosyjskiej stanowią naruszenie zakazu użycia siły zbrojnej, gdyż nie wchodzą w zakres żadnego z przewidzianych wyjątków od tej zasady, tj. nie były prowadzone z upoważnienia Rady Bezpieczeństwa ONZ na podstawie rozdziału VII KNZ, ani w samoobronie na podstawie art. 51 KNZ oraz równolegle obowiązującej normy zwyczajowej. Nie stanowiły bowiem odpowiedzi na napaść zbrojną ze strony Ukrainy – taka sytuacja nie miała miejsca w rzeczywistości. Nie istniało również ryzyko nieuchronnej napaści zbrojnej ze strony Ukrainy,

co wyklucza powołanie się nawet na sporną we współczesnym prawie międzynarodowym koncepcję samoobrony uprzedzającej (wyprzedzającej).

Podstawy działań zbrojnych Federacji Rosyjskiej przeciwko Ukrainie nie stanowi także „zaproszenie" wystosowane przez władze tzw. Donieckiej Republiki Ludowej (DRL) i tzw. Ługańskiej Republiki Ludowej (ŁRL), których państwowość Federacja Rosyjska uznała z powołaniem się na prawo do samostanowienia narodów. Czynności te pozostają prawnie bezskuteczne, gdyż nie znajdują żadnego uzasadnienia w faktach oraz we współczesnym prawie międzynarodowym i tym samym naruszają integralność terytorialną Ukrainy. Z wnioskiem o interwencję zbrojną na swoim terytorium i do tego terytorium ograniczoną, zwracać się mogą tylko prawowite i efektywne władze danego państwa korzystające z uznania międzynarodowego (interwencja na zaproszenie). Z tych samych względów tzw. DRL i tzw. ŁRL nie były władne skutecznie zwrócić się do Federacji Rosyjskiej o podjęcie działań zbrojnych przeciwko Ukrainie na podstawie prawa do samoobrony zbiorowej. Niezależnie od powyższego, należy zauważyć, że samoobrona – zarówno indywidualna, jak i zbiorowa – podlega zawsze daleko idącym ograniczeniom wytyczanym przez zasady konieczności i proporcjonalności podjętych działań w stosunku do odpieranej napaści zbrojnej.

W związku z powyższym, działania zbrojne Federacji Rosyjskiej przeciwko Ukrainie stanowią agresję w rozumieniu, odzwierciedlającej wiążące prawo zwyczajowe, Rezolucji Zgromadzenia Ogólnego ONZ nr 3314 (XXIX) z 1974 roku. Definiuje ona agresję jako „użycie siły zbrojnej przez państwo przeciwko suwerenności, integralności terytorialnej lub niepodległości politycznej innego państwa, albo w inny sposób niezgodny z KNZ" (art. 1 Aneksu do Rezolucji). Zakaz agresji stanowi normę bezwzględnie wiążącą (*ius cogens*) i mającą charakter *erga omnes* (skuteczną wobec społeczności międzynarodowej jako całości). W konsekwencji wszystkie państwa są zobowiązane do podjęcia działań nakierowanych na powstrzymanie naruszania tej normy, jak również są zobowiązane do nieuznawania skutków tegoż naruszenia. Sankcje zastosowane wobec Federacji Rosyjskiej są legalne ze względu na dokonany akt agresji, który pociąga za sobą międzynarodową odpowiedzialność państwa. Od agresji jako aktu państwa trzeba odróżnić zbrodnię agresji, rozumianą jako czyn jednostki, który podlega odpowiedzialności międzynarodowokarnej (szerzej patrz niżej).

Równocześnie, działania zbrojne Federacji Rosyjskiej kwalifikują się jako napaść zbrojna w rozumieniu art. 51 KNZ i na podstawie równolegle obowiązującej normy zwyczajowej. W związku z powyższym, zbrojna odpowiedź Ukrainy stanowi zgodną z prawem międzynarodowym samoobronę. Okoliczności wskazują, że działania zbrojne podejmowane dotychczas przez Ukrainę spełniają wymogi zasad konieczności i proporcjonalności.

W art. 51 KNZ mowa jest nie tylko o indywidualnym prawie do samoobrony, ale także prawie do samoobrony zbiorowej. Dlatego też ewentualna pomoc zbrojna udzielana państwu, które padło ofiarą napaści zbrojnej, okazana na jego prośbę, jest w pełni legalna i wpisuje się w ramy samoobrony zbiorowej.

Przywoływana wyżej Rezolucja Zgromadzenia Ogólnego nr 3314 (XXIX) jako akt agresji wymienia również udostępnianie własnego terytorium do dokonania agresji przez państwo trzecie. Tym samym Białoruś, z której terytorium nastąpił atak części sił zbrojnych Federacji Rosyjskiej na Ukrainę, jest odpowiedzialna za agresję i w związku z tym także wobec Białorusi mogą i powinny być podjęte odpowiednie przeciwśrodki.

Działania zbrojne między Federacją Rosyjską a Ukrainą są z prawnego punktu widzenia międzynarodowym konfliktem zbrojnym, do którego znajdują zastosowanie przepisy czterech konwencji genewskich o ochronie ofiar wojny z 1949 r. oraz pierwszy protokół dodatkowy z 1977 r. do tych konwencji, a także normy zwyczajowego międzynarodowego prawa humanitarnego.

W międzynarodowym konflikcie zbrojnym obowiązuje szereg reguł, spośród których przywołujemy następujące: zakazane jest atakowanie ludności cywilnej i obiektów cywilnych; ataki muszą być ograniczone wyłącznie do celów wojskowych; zakazane jest przeprowadzanie ataków, w których atakujący nie czyni rozróżnienia między celami wojskowymi a obiektami i osobami cywilnymi; ranni i chorzy powinni być zbierani i leczeni; szpitale, wszelkiego rodzaju placówki pomocy medycznej, tak jak i personel medyczny, podlegają ochronie; kombatanci, którzy znaleźli się w rękach nieprzyjaciela mają prawo do statusu jeńca wojennego; jeńcy wojenni są chronieni, także przed ciekawością publiczną; zakazane jest używanie wszelkich metod i środków prowadzenia walki, które mogą powodować zbędne cierpienie; zabronione jest również stosowanie takich metod i środków, które wywołują rozległe, długotrwałe, i poważne szkody w środowisku naturalnym lub po których można oczekiwać, że takie szkody wywołają.

Nawet jeśli Federacja Rosyjska nie jest stroną konwencji zakazujących użycia min przeciwpiechotnych lub broni kasetowej, to taka broń jest uznawana za niehumanitarną, ponieważ może powodować zbędne cierpienia. Ponadto, broni zapalającej, w tym pocisków termobarycznych, których użycie przypisuje się Federacji Rosyjskiej w trwającym konflikcie zbrojnym, nie wolno używać w pobliżu osób cywilnych. Wobec publicznych gróźb prezydenta Federacji Rosyjskiej o użyciu broni nuklearnej należy podkreślić, że Międzynarodowy Trybunał Sprawiedliwości uznał użycie broni nuklearnej za sprzeczne z podstawowymi zasadami humanitarnymi. Trybunał ten stwierdził, że użycie takiej broni byłoby dopuszczalne tylko w sytuacji, gdy zagrożona byłaby egzystencja państwa, a takie zagrożenie nie istnieje w przypadku Federacji Rosyjskiej.

W konfliktach zbrojnych oprócz międzynarodowego prawa humanitarnego obowiązują równolegle normy gwarantujące podstawowe prawa człowieka, w tym prawo do życia oraz zakaz tortur. W trakcie konfliktu zbrojnego może dochodzić do arbitralnych działań naruszających podstawowe prawa człowieka. Naruszenia te mogą stać się przedmiotem postępowań wszczynanych skargą indywidualną lub międzypaństwową przed Europejskim Trybunałem Praw Człowieka lub przed innymi międzynarodowymi organami ochrony praw człowieka (na przykład Komitetem Praw Człowieka).

Federacja Rosyjska dokonała aktu agresji, zaś członkowie jej władz na czele z prezydentem dopuścili się zbrodni agresji. Choć zbrodnia agresji została zdefiniowana w Rzymskim Statucie Międzynarodowego Trybunału Karnego (MTK), to ani Federacja Rosyjska, ani Ukraina nie są stronami Statutu Trybunału, ani tym bardziej nie ratyfikowały poprawek do Statutu dotyczących definicji zbrodni agresji i warunków wykonywania jurysdykcji w stosunku do tej zbrodni. Międzynarodowy Trybunał Karny może wykonywać jurysdykcję odnośnie do toczącego się konfliktu zbrojnego wobec sprawców zbrodni wojennych, zbrodni przeciwko ludzkości i ludobójstwa popełnionych w Ukrainie, na podstawie deklaracji tego państwa z 8 września 2015 r. uznającej kompetencję Trybunału w stosunku do wydarzeń mających miejsce w Ukrainie po dniu 20 lutego 2014 r. Jurysdykcja MTK obejmuje nie tylko osoby, które te zbrodnie popełniają, ale także osoby, które zlecają ich popełnienie, namawiają do nich, czy przyczyniają się do ich popełnienia w jakikolwiek inny sposób. Odpowiedzialność dotyczy także prezydenta, ministra spraw zagranicznych i premiera, gdyż ich immunitety nie stanowią przeszkody w postępowaniu przed Trybunałem.

Prokurator MTK wyraził gotowość prowadzenia śledztwa dotyczącego sytuacji w Ukrainie. Nic też nie stoi na przeszkodzie, aby państwa wszczynały własne dochodzenia na podstawie jurysdykcji uniwersalnej, dokumentując zbrodnie międzynarodowe popełniane na terytorium Ukrainy. Takie postępowanie nie tylko może wspomóc MTK przez dostarczanie dowodów, ale także doprowadzić do prowadzenia alternatywnych, krajowych postępowań sądowych wobec niższych rangą sprawców, a w rezultacie do efektywnego osądzenia sprawców zbrodni w Ukrainie. Podkreślamy, że osądzanie popełnionych zbrodni nie będzie skuteczne bez szerokiego wsparcia jurysdykcji krajowych zarówno w zakresie własnej dokumentacji popełnianych zbrodni i prowadzonych postępowań karnych w odniesieniu do sprawców zbrodni, jak i ewentualnej współpracy z MTK. Zwracamy także uwagę na to, że skoro Trybunał nie może osądzić zbrodni agresji, to szczególną rolę mogą odegrać w tym zakresie sądy krajowe tych państw, które mają odpowiednie przepisy wewnętrzne pozwalające na ściganie winnych agresji.

Dokonane w przeszłości przez inne państwa naruszenia prawa międzynarodowego, w tym zakazu użycia siły zbrojnej, nie uzasadniają jego naruszeń obecnie

i w przyszłości. Skutkują natomiast odpowiedzialnością międzynarodowoprawną państwa dokonującego naruszenia obowiązującej normy. Odpowiedzialność taką winna ponieść Federacja Rosyjska za dokonanie napaści zbrojnej na Ukrainę. Wyrażamy przy tym przekonanie, że brak odpowiednio stanowczego potępienia przez społeczność naukową naruszeń prawa międzynarodowego w przeszłości, nie powinien powstrzymywać jej od reagowania na naruszenia, które mają miejsce obecnie. Rażące naruszenia prawa międzynarodowego powinny być piętnowane zawsze i niezależnie od tego, przez kogo są dokonywane.

Niniejszym solidaryzujemy się z ukraińskimi prawnikami międzynarodowymi i deklarujemy wszelkie wsparcie i pomoc w podejmowaniu działań prawnych mających na celu pociągnięcie do odpowiedzialności międzynarodowej zarówno państwa rosyjskiego, jak i jednostek odpowiedzialnych za naruszenia norm prawa międzynarodowego. Równocześnie wyrażamy głęboki szacunek dla tych rosyjskich prawników międzynarodowych, którzy nie bacząc na grożące im konsekwencje, mieli odwagę, aby zaprotestować przeciwko naruszeniom prawa międzynarodowego dokonywanym przez państwo, którego są obywatelami.

4 marca 2022 r.

ЗАЯВА ПОЛЬСЬКИХ ЮРИСТІВ-МІЖНАРОДНИКІВ ЩОДО АГРЕСІЇ РОСІЙСЬКОЇ ФЕДЕРАЦІЇ ПРОТИ УКРАЇНИ

Аксіологія сучасного міжнародного правопорядку ґрунтується на підтримці міжнародного миру та безпеки, забезпеченні справедливості та поваги до основних прав людини. Збройний напад і наступні воєнні дії Російської Федерації, які ведуться проти України на її території з 24 лютого 2022 року, грубо порушують ці цінності. Ці дії є порушенням основоположних принципів міжнародного права, закріплених у Статуті Організації Об'єднаних Націй (Статут ООН), які водночас є юридично обов'язковими нормами міжнародного звичаєвого права. Ці дії підривають основу правового порядку, який регулює відносини в сучасному міжнародному співтоваристві. Норми, які забороняють застосування сили або погрози силою, мають особливий статус, тому Російська Федерація порушила свої юридичні зобов'язання не лише перед Україною, а й перед міжнародною спільнотою в цілому.

Дії Російської Федерації, які передували застосуванню сили проти України, та подальші воєнні дії є, у сукупності та окремо, порушенням заборони

погрози силою та її застосування, як передбачено статтею 2(4) Статуту ООН, що є імперативною нормою звичаєвого права. Водночас ці дії порушують принцип мирного вирішення міжнародних спорів, закріплений у статті 2(3) Статуту ООН, та відповідної норми звичаєвого права.

Воєнні дії Російської Федерації порушують заборону застосування сили. Вони не підпадають під дію жодного з допустимих винятків, тому що вони не проводяться ані з попереднього дозволу Ради Безпеки ООН у відповідності до розділу VII, ані з метою самооборони на підставі статті 51 Статуту ООН, що також є нормою звичаєвого права. Вони не є відповіддю на збройний напад України, якого насправді ніколи не було. Більше того, неможливим є посилання на спірну концепцію превентивної самооборони, оскільки не існувало ризику неминучого збройного нападу з боку України.

'Запрошення', надане владою так званої Донецької народної республіки (ДНР) та так званої Луганської народної республіки (ЛНР), державність яких була визнана Російською Федерацією (на основі заявленого ними права на самовизначення), не може бути підставою для воєнних дій Російської Федерації проти України. Ці дії не мають юридичної сили, тому що вони не ґрунтуються ні на фактах, ні на нормах сучасного міжнародного права, і є порушенням територіальної цілісності України. Лише законні, ефективні та міжнародно визнані органи держави можуть просити інші держави про введення військ на територію відповідної держави (інтервенція за запрошенням/військова допомога за запитом). Зважаючи на ці причини, так звані ДНР та ЛНР не мають права просити Російську Федерацію про ведення воєнних дій проти України на основі права на колективну самооборону. Незважаючи на це, самооборона - як індивідуальна, так і колективна, завжди підлягає суворим обмеженням, що встановлюються принципами необхідності та пропорційності дій для відбиття збройного нападу.

Відтак, воєнні дії Російської Федерації проти України є актом агресії у відповідності з Резолюцією 3314 (XXIX) 1974 року, що містить у собі імперативні звичаєві норми. Вона визначає акт агресії як 'застосування державою збройної сили проти суверенітету, територіальної недоторканості або політичної незалежності іншої держави, або яким-небудь іншим чином, несумісним із Статутом Організації Об'єднаних Націй (стаття 1 додатку до Резолюції). Заборона агресії вважається імперативною нормою (*jus cogens*) та є нормою erga omnes (діє по відношенню до міжнародної спільноти в цілому). Таким чином, усі держави зобов'язані вжити заходів для припинення порушення такої норми, а також зобов'язані не визнавати як правомірну ситуацію, яка склалась з порушенням цієї норми. Санкції проти Російської Федерації є правомірними, адже були застосовані внаслідок вчиненого акту агресії, який тягне за собою

міжнародну відповідальність. Агресію як дію держави потрібно відрізняти від злочину агресії, що розуміється як акт фізичної особи, яка підлягає міжнародній кримінальній відповідальності (докладніше про це нижче). Водночас воєнні дії Російської Федерації класифікуються як збройний напад у розумінні статті 51 Статуту ООН та у відповідності до норм звичаєвого права. Відповідно, військова відповідь України є правомірним застосуванням права на самооборону. Обставини свідчать про те, що воєнні дії України відповідають вимогам необхідності та пропорційності.

Стаття 51 Статуту ООН передбачає право не лише на індивідуальну самооборону, а й право на колективну самооборону. Отже, будь-яка можлива військова допомога, яка надається державі, яка є жертвою збройного нападу, на її прохання є повністю правомірною та підпадає під дію принципу колективної самооборони.

Відповідно до Резолюції 3314 (XXIX) згода держави передати свою територію у розпорядження іншої держави, що буде використана цією іншою державою для здійснення акту агресії проти третьої держави, становить акт агресії. Відповідно, Республіка Білорусь, з території якої частина російських збройних сил здійснила напад на Україну, несе відповідальність за агресію, і, як наслідок, проти неї можуть і повинні бути вжиті відповідні контрзаходи.

Воєнні дії між Російською Федерацією та Україною, з правової точки зору, є міжнародним збройним конфліктом, до якого застосовуються норми чотирьох Женевських конвенцій 1949 року про захист жертв війни, додаткового протоколу 1977 року до них, а також норми міжнародного звичаєвого гуманітарного права.

Серед норм, що застосовуються до міжнародних збройних конфліктів, варто згадати наступні: заборона нападу на цивільних осіб та цивільні об'єкти; лише військові цілі є законними об'єктами для нападу; заборона проведення нападів невибіркового характеру, за яких нападник не розрізняє цивільні та військові об'єкти; надання медичної допомоги всім пораненим та хворим; лікарні та всі медичні формування, а також медичний персонал, знаходяться під захистом; комбатанти, що потрапили у полон, здобувають статус військовополонених; військовополонені користуються захистом, в тому числі, від цікавості публіки; заборона використання таких методів та засобів ведення війни, що можуть призвести до надмірних страждань; заборона застосування методів або засобів ведення військових дій, що мають на меті завдати або, як можна очікувати, завдадуть широкої, довгочасної та серйозної шкоди природному середовищу.

Хоча Російська Федерація не є стороною конвенцій про заборону застосування протипіхотних мін та касетних боєприпасів, такі види озброєння вважаються не гуманними, так як завдають надмірних страждань. Крім того,

забороняється використання запалювальної зброї, включно з термобаричними боєприпасами, використання яких в поточному збройному конфлікті приписується Російській Федерації, поблизу цивільного населення. Що стосується публічних погроз президента Російської Федерації щодо застосування ядерної зброї, варто згадати, що Міжнародний Суд ООН (МС ООН) визнав застосування ядерної зброї таким, що суперечить нормам та принципам міжнародного гуманітарного права. У консультативному висновку МС ООН було зазначено, що використання такої зброї може бути прийнятним лише ultima ratio (в якості останнього засобу), якщо під загрозою знаходиться саме існування держави, що не відповідає поточній ситуації.

У випадку збройного конфлікту норми, що гарантують основоположні права людини, включно з правом на життя та забороною тортур, застосовуються сумісно з нормами міжнародного гуманітарного права. Під час збройного конфлікту можуть вчинятися свавільні дії, що порушують основоположні права людини. Такі порушення можуть розглядатися в рамках індивідуальних або міждержавних позовів до Європейського суду з прав людини або інших уповноважених органів із захисту прав людини (наприклад, Комітет з прав людини ООН).

Російська Федерація здійснила акт агресії, а президент та інші політичні та військові діячі здійснили злочин агресії. Російська Федерація та Україна не є сторонами Римського статуту Міжнародного кримінального суду (МКС), обидві держави також не ратифікували додатки до Статуту, що стосуються визначення злочину агресії та умов здійснення юрисдикції щодо цього злочину. Однак, МКС може здійснювати юрисдикцію щодо поточного збройного конфлікту на території України, відповідно до декларації України від 8 вересня 2015 року про прийняття юрисдикції Суду для цілей виявлення, переслідування та засудження порушників та співучасників за воєнні злочини, злочини проти людяності та злочин геноциду. Ця декларація визнає юрисдикцію Суду щодо подій, які відбулися на території України після 20 лютого 2014 року. Юрисдикція МКС поширюється не тільки на індивідів, що здійснюють ці злочини, а й на тих, хто наказує, підбурює чи спонукає вчинити такі злочини, або будь-яким іншим чином сприяє їх вчиненню. Юрисдикція також поширюється на президента, міністра закордонних справ та прем'єр-міністра, адже їх імунітет не захищає від здійснення Судом цієї юрисдикції.

Прокурор МКС висловив свою готовністю розслідувати ситуацію в Україні. Крім того, окремі держави можуть ініціювати власне розслідування на основі універсальної юрисдикції або документувати злочини, вчинені на території України. Такі розслідування підтримають розслідування в рамках МКС шляхом надання доказів, а також можуть запустити процес притягнення до

відповідальності злочинців, що займають нижчі посади, в державних судах та їх засудження за злочини, вчинені на території України. Ми наголошуємо, що судові провадження щодо вчинених злочинів будуть більш ефективні, якщо проводитимуться спільно з масштабною допомогою від національних судових систем, і в контексті документування вчинених злочинів, і в контексті кримінальних проваджень над злочинцями, а також в контексті можливої співпраці з МКС. Враховуючи, що Суд не має юрисдикції щодо злочину агресії в даному випадку, особливу роль відіграють суди тих держав, які мають належне національне законодавство, що передбачає покарання за злочин агресії.

Порушення міжнародного права в минулому іншими державами, включно з протиправним застосуванням сили, не є підставою для вчинення такого порушення зараз чи у майбутньому. З таких порушень витікає міжнародна відповідальність відповідної держави. Відповідно, Російська Федерація повинна понести відповідальність за вчинення збройного нападу на Україну. Ми також вважаємо, що відсутність відповідного різкого засудження порушень міжнародного права у минулому академічною спільнотою не повинно бути перешкодою для відповідної реакції на поточні порушення. Грубі порушення міжнародного права повинні засуджуватися завжди, незалежно від того, хто їх вчиняє.

Цим засвідчуємо свою солідарність зі спільнотою українських юристів-міжнародників, а також готовність надати підтримку та допомогу у підготовці позовів з метою притягнути до відповідальності за міжнародні правопорушення державу Росія та індивідів, відповідальних за порушення міжнародно-правових норм. Ми також хочемо висловити свою глибоку повагу тим російським юристам-міжнародникам, які, не зважаючи на потенційні наслідки, мужньо висловили протест проти порушень міжнародного права, вчинених державою, громадянами якої вони є.

4 березня 2022

ЗАЯВА ПОЛЬСКИХ ЮРИСТОВ-МЕЖДУНАРОДНИКОВ ПО ПОВОДУ АГРЕССИИ РОССИЙСКОЙ ФЕДЕРАЦИИ ПРОТИВ УКРАИНЫ

Аксиология современного международного правопорядка основывается на поддержании международного мира и безопасности, обеспечения справедливости и уважения основных прав человека. Вооруженное нападение и последующие военные действия Российской Федерации, которые ведутся с 24 февраля 2022 года против Украины на территории этого государства, грубо подрывают эти ценности. Эти действия являются нарушением основных принципов международного права, закрепленных в Уставе Организации Объединенных Наций (Устав ООН), которые также являются юридически обязательными нормами обычного международного права. Они подрывают основу правопорядка, который регулирует отношения современного международного сообщества. Нормы, запрещающие применения силы и угрозы силой, обладают особенным характером, соответственно, Российская Федерация нарушила свои правовые обязательства не только по отношению к Украине, но и по отношению ко всему международному сообществу в целом.

Действия Российской Федерации, предшествующие применению силы против Украины и последующих военных действий, являются, вместе и по отдельности, нарушением запрещения применения силы или угрозы силой по определению статьи 2(4) Устава ООН, а также юридически обязательной нормы обычного права. В то же время, эти действия нарушают принцип мирного разрешения международных споров, который изложен в статье 2(3) Устава ООН, и соответствующую норму обычного права.

Военные действия Российской Федерации нарушают запрет на применение силы. Они не подпадают под действие ни одного из допустимых исключений, так как они не проводятся ни с предварительного разрешения Совета Безопасности ООН в соответствии с разделом VII, ни в целях самообороны на основании статьи 51 Устава ООН, что также является нормой обычного права. Они не являются ответом на вооруженное нападение Украины, которого на самом деле никогда не было. Кроме того, невозможным также есть применение оспариваемой концепции превентивной самообороны, так как не было риска неминуемого вооруженного нападения со стороны Украины.

“Приглашение”, предоставленное властями так называемой Донецкой народной республики (ДНР) и так называемой Луганской народной республики

(ЛНР), государственность которых была признана Российской Федерацией (на основе заявленного ими права на самоопределение), не может оправдать военные действия Российской Федерации против Украины. Эти действия не имеют юридической силы, потому что они не основываются ни на фактах, ни на нормах современного международного права, и являются нарушением территориальной целостности Украины. Только законные, эффективные и международно признанные органы могут просить другие государства ввести войска на территорию соответствующего государства (интервенция по приглашению/военная помощь по запросу). По тем же причинам так называемая ДНР и так называемая ЛНР не имеют права просить Российскую Федерацию о ведении военных действий против Украины, ссылаясь на коллективную самооборону. Несмотря на это, самооборона, как индивидуальная, так и коллективная, всегда подлежит жестким ограничениям, установленным принципами необходимости и соразмерности действий по отражению вооруженного нападения.

Соответственно, военные действия Российской Федерации против Украины квалифицируются как акт агрессии в его определении согласно Резолюции Генеральной Ассамблеи Организации Объединенных Наций 3314 (XXIX) от 1974 года, в которой изложена юридически обязательная норма обычного права. Резолюция определяет акт агрессии следующим образом: "применение вооруженной силы государством против суверенитета, территориальной неприкосновенности или политической независимости другого государства, или каким-либо другим образом, несовместимым с Уставом Организации Объединенных Наций" (статья 1 Приложения к Резолюции). Запрещение агрессии считается императивной нормой (*jus cogens*), обладающей характером *erga omnes* (обязательство перед всем мировым сообществом в целом). Таким образом, все государства обязаны принять меры для прекращения нарушения такой нормы, а также обязаны не признавать ситуацию, созданную таким нарушением, как правомерную. Санкции против Российской Федерации правомерны, так как являются мерой в ответ на совершенный акт агрессии, который влечёт за собой международную ответственность. Агрессию как акт государства нужно отличать от преступления агрессии, под которым имеется в виду акт индивида, который подпадает под международную уголовную ответственность (подробнее об этом дальше).

В то же время, военные действия Российской Федерации квалифицируются как вооруженное нападение в значении статьи 51 Устава ООН, а также соответственно обычному праву. Соответственно, военный ответ Украины, согласно международному праву, квалифицируется как правомерная самооборона. Анализ ситуации показывает, что военные действия, совершенные Украиной, соответствуют критериям необходимости и соразмерности.

Статья 51 Устава ООН предусматривает не только индивидуальное право на самооборону, но также и право на коллективную самооборону. Соответственно, любая возможная военная помощь государству, подвергшемуся вооруженному нападению, по просьбе этого государства, является полностью правомерной и подпадает под понятие самообороны.

Согласно Резолюции 3314 (XXIX), действие государства, позволяющего, чтобы его территория, которую оно предоставило в распоряжение другого государства, использовалась этим другим государством для совершения акта агрессии против третьего государства, квалифицируется как акт агрессии. Соответственно, Республика Беларусь, с территории которой совершались нападения части вооруженных сил России против Украины, также совершила акт агрессии, и соответствующие контрмеры могут и должны применяться по отношению к ней.

Военные действия между Российской Федерацией и Украиной, с юридической точки зрения, являются международным вооруженным конфликтом, к которому применяются нормы четырех Женевских конвенций 1949 года о защите жертв войны, Первого протокола Женевских конвенций 1977 года, а также нормы обычного международного гуманитарного права.

Среди норм, которые применяются в случае международных вооруженных конфликтов, стоит вспомнить следующие: запрещаются нападения на гражданское население и объекты; нападения должны совершаться только на военные объекты; запрещается совершать нападения, при которых невозможно провести различия между военными объектами и гражданскими лицами и объектами; обязательство оказывать медицинскую помощь всем больным и раненым; больницы и другие медицинские учреждения, а также медицинский персонал пользуются защитой; комбатанты, которые попали в плен, обретают статус военнопленных; военнопленные пользуются защитой, в том числе и от любопытства толпы; запрещается использование таких средств и методов ведения войны, которые причиняют излишние страдания; также запрещается использование средств и методов, которые способны причинить долговременный и серьезный ущерб природной среде.

Хотя Российская Федерация не является стороной конвенций о запрещении применения противопехотных мин и кассетных боеприпасов, такое вооружение считается негуманным, так как может причинять излишние страдания. Кроме того, зажигательное оружие, включая термобарические снаряды, использование которых в текущем вооруженном конфликте приписывается Российской Федерации, не могут использоваться в близости от гражданских лиц. Что касается публичных угроз президента Российской Федерации о применении ядерного оружия, стоит вспомнить, что Международный Суд ООН

(МС ООН) признал использование ядерного оружия таким, что по своей сути противоречит принципам и нормам международного гуманитарного права. МС ООН сделал вывод, что использование такого оружия возможно лишь *ultima ratio* (в качестве последнего средства) в том случае, когда под угрозу поставлено само дальнейшее существование государства, что неприменимо в данном случае.

В случае вооруженного конфликта нормы, которые гарантируют основные права человека, включая право на жизнь и запрет пыток, применяются совместно с международным гуманитарным правом. Во время вооруженного конфликта могут совершаться произвольные действия, которые нарушают основные права человека. Такие нарушения могут рассматриваться в качестве индивидуальных или межгосударственных исков в Европейском суде по правам человека или других уполномоченных органах по правам человека (например, в Комитете по правам человека ООН).

Российская Федерация совершила акт агрессии, а президент и другие политические и военные деятели совершили преступление агрессии. Российская Федерация и Украина не являются сторонами Устава Международного криминального суда (МУС), а также оба государства не ратифицировали поправки, касающиеся преступления агрессии, и условия применения юрисдикции в отношении этого преступления. Однако, МУС может применять юрисдикцию по отношению к текущему вооруженному конфликту на территории Украины на основе декларации Украины от 8 сентября 2015 года о признании юрисдикции Суда в целях определения, преследования и осуждения нарушителей и соучастников военных преступлений, преступлений против человечества и преступления геноцида. Эта декларация признаёт юрисдикцию Суда по отношению к событиям, произошедшим на территории Украины после 20 февраля 2014 года. Юрисдикция МУС распространяется не только на лиц, совершающих эти преступления, но и на тех, кто приказывает, подстрекает или побуждает совершить такое преступление или каким-либо иным образом содействует его совершению. Ответственность также возлагается на президента, министра иностранных дел и премьер-министра, так как их иммунитеты не защищают от применения Судом юрисдикции по этому вопросу.

Прокурор МУС заявил о своей готовности расследовать ситуацию в Украине. Кроме того, отдельные государства также могут инициировать собственные расследования на основе универсальной юрисдикции или документировать преступления, совершенные на территории Украины. Такие расследования помогут ведению процесса в МУС путём предоставления доказательств, а также обеспечат возможность судебного преследования преступников, которые занимают низшие должности, в государственных судах, и их осуждения за

преступления, совершенные на территории Украины. Мы подчеркиваем, что судебные преследования за совершенные преступления будут более эффективными при масштабной помощи национальных судов, как в плане документации совершенных преступлений, так и уголовного преследования преступников, и возможного сотрудничества с МУС. Так как Суд не имеет юрисдикции в отношении преступления агрессии, отдельная роль отведена тем государствам, которые имеют соответствующее национальное законодательство, которое предусматривает наказание за преступление агрессии.

Нарушения международного права другими государствами в прошлом, включая противоправное применение силы, не могут быть основанием такого нарушения сейчас или в будущем. Результатом такого нарушения является наступление международной ответственности для нарушившего норму государства. Таким образом, Российская Федерация должна понести ответственность за совершение вооруженного нападения на Украину. Мы считаем, что отсутствие жесткого осуждения нарушений международного права в прошлом академическим сообществом не должно препятствовать этому сообществу должным образом отреагировать на текущие нарушения. Грубые нарушения международного права всегда должны осуждаться, независимо от того, кто их совершает.

Этим мы подтверждаем свою солидарность с сообществом украинских юристов-международников и выражаем свою полную поддержку и готовность помочь в подготовке исков, направленных на то, чтобы привлечь государство Россия к ответственности за международные правонарушения, а также индивидов, ответственных за нарушения международных норм. Мы также выражаем глубокое уважение тем российским юристам-международникам, которые, несмотря на возможные последствия, мужественно выступили против нарушений международного права, совершенных государством, гражданами которого они являются.

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BOOK REVIEWS

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*Hanna Kuczyńska**

Valérie V. Suhr, *Rainbow Jurisdiction at the International Criminal Court. Protection of Sexual and Gender Minorities Under the Rome Statute*, T.M.C. Asser Press, Springer: 2022, pp. 405

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Under the eye-catching title of "Rainbow Jurisdiction", the author of the monograph presents a comprehensive study on the issue of penalizing the persecution of sexual and gender minorities (SGM) as crimes against humanity under Art. 7(1)(h) of the Rome Statute (RS). This provision penalizes, as acts that can amount to a crime against humanity, "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court." Additionally, in paragraph 2(g) "Persecution" is defined as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity", and in paragraph 3 the term "gender" is defined as referring "to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above". These provisions are not easy to interpret and create a complicated legal norm. Thus the author takes up the task of defining the real scope of these provisions as regards anti-SGM crimes. The author analyses this issue on two levels: both legal and sociological; basing this research on two foundations: personal (who is protected as "an identifiable group or collectivity on gender grounds") and material (the scope of the terms "persecution on grounds that are universally recognized as impermissible under international law" and "in connection with any act referred to in this paragraph or any crime within

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the jurisdiction of the Court"). These issues are no longer purely academic, as a communication reached the ICC-OTP in November 2017 asking the International Criminal Court (ICC or Court) to open a preliminary examination with regard to the gender-based crimes committed by the Islamic State of Iraq and Syria (ISIS) in Iraq. This shows that the ICC may be poised to answer the question whether SGM are protected as a specified group. The reader of the book, however, should not mistake "Jurisdiction" with "Jurisprudence" of the ICC – as the text relates to the possible scope of the ICC's material jurisdiction, proposing covering within its scope the persecution of a specific group – and not its case law, as the Court has so far not dealt with this question.

The author begins with a historical overview – invoking the Nazi persecution of SGM (the Nazis were never held accountable for the crimes they committed against homosexuals, or their homophobic laws and policies; the only time the Nuremberg Trials referred to homosexuals at all was with reference to medical experiments) – and also to more recent crimes as well (observing that when the UN *ad hoc* Tribunals dealt with sexualized violence the ICTY made clear that sexualized violence against men is punishable under international criminal law; however it did not categorize it as rape or other sexualized crimes but instead prosecuted under the more general norms of "torture", "inhuman and degrading treatment"); observing that these examples illustrate how anti-SGM crimes form part of the violence over which the ICC should have jurisdiction, as it is primarily the ICC that will ultimately decide whether international criminal law protects this group.

In the Introduction the author explains that the rights of sexual and gender minorities are human rights, but the book deals with that topic from another angle: from the point of view of goods (qualities) protected by international criminal law. Therefore, the author adopts the criminal law perspective, successfully driving the analysis in the light of human rights and international criminal law. According to this basic assumption, the crime under Art. 7(1)(h) RS covers persecution on the basis of sexual orientation and gender identity, even though these grounds are not explicitly listed. The book establishes that crimes against gender minorities may constitute crimes against humanity in two ways: by treating the SGM as a targeted protected group (qualifying them as gender-based persecution, being targeted merely because of a real or perceived group affiliation); or as victims of crimes against humanity, such as e.g. murder and torture based on "other grounds that are universally recognized as impermissible under international law." The author presents the thesis that in this latter case the term "crime against humanity" should focus on the identity of the victim group, as this identity is the reason why the harm has been inflicted. According to the author it is important not to merely prosecute, e.g. rape under "torture" (rather than explicitly prosecuting it as rape), since it fails to adequately address its sexualized

aspects and particular harm. One has to agree with the author that the principle of fair labelling is relevant not only for the perpetrator's individual prosecution and punishment, but also for general deterrence.

The book is composed of ten chapters, divided into three parts. Chapter One of Part I, entitled "Factual and legal background", precisely describes the two foundations of the researched problem: the facts and law applicable to the chosen topic. The topic is then examined in two following chapters: Chapter 2 "Reality" explains the meaning of the terms "SGM" and "anti-SGM persecution", describing various forms of the persecutory acts, adding that the main reason for all human rights violations directed against SGM can be traced back to the same roots, namely to "assumptions about 'appropriate' gender roles for women and men." The factual background shows that much discrimination against SGM is still prescribed by law, even criminal law. Chapter 3, entitled "Interpretation of the Rome Statute" prepares the groundwork for the method of application of the provisions of the Rome Statute, and demonstrates according to what rules a legal norm in Art. 7(1) RS is created from a legal provision. The theoretical part of the analysis relates to the issue: In what way and scope does international human rights law shape the content of international criminal law. In this Chapter the author presents the tension between a human rights' interpretation and the *nullum crimen* principle, arguing that it is crucial for the research question to determine how to reconcile the evolutive, dynamic, teleological human rights interpretation with international criminal law's need for a strict construction. This is – from the dogmatic point of view – the most interesting part of the legal analysis. The chapter demonstrates what the consequences are of the thesis that Art. 21(3) RS requires the ICC to interpret and apply its law consistent with internationally recognized human rights and the principle of non-discrimination. Human rights can both help to interpret the relevant persecutory grounds ("gender" and "other grounds that are universally recognized as impermissible under international law") and identify the persecutory acts. In fact, since international criminal law aims to protect human rights through criminalization and prosecution, it is often considered a tool of human rights protection. However as the author observes, the convergence between international criminal law and international human rights law is not absolute. Not every human rights violation also constitutes a crime "against humanity" "under international law." Unlike international criminal law, international human rights law usually does not depend on the *mens rea* of an individual perpetrator. Accordingly, international human rights law allows for broader definitions of human rights violations than international criminal law's definitions of crimes. As an example, the author mentions the ICTY case *Prosecutor v Zoran Kupreskic,*[1] where it was observed that it "would be contrary

[1] ICTY (TC), *Prosecutor v Zoran Kupreskic et al.*, Judgment, 14 January 2000, IT-95-16-T, para. 589.

to the principle of legality to convict someone of persecution based on a definition found in international ... human rights law." According to the author, the tension between these two principles cannot be resolved on the basis of a hierarchy between them, by describing the human rights interpretation as a "superlegality" which might also prevail over *nullum crimen* principle. The next argument in the line of analysis is to explore the universal and the regional human rights systems in order to determine whether persecution on grounds of sexual orientation and gender identity are grounds that are "universally recognized as impermissible under international law" within the meaning of Art. 7(1)(h) RS. The author misses nothing in her chain of legal reasoning: she explores the distinction between "international human rights", "internationally *recognized* human rights", and "internationally *protected* human rights"; and answers the question: When are the rights "international" enough? – by stating that the recognition of an "internationally recognized human right" does not need to be universal, but "merely" widespread.

In Part II – "Persecution of Sexual and Gender Minorities as a Crime Against Humanity" – beginning with Chapter 4 the author firstly presents the contextual element of crimes against humanity, that is the *chapeau* of Art. 7 RS. In this chapter she explores every element of crimes against humanity, analysing whether it may be fulfilled by attacks against the SGM population – or any other crime executed on the basis of a state policy. The author proves that attacks and policies against SGM can be both widespread and systematic. "Widespread" is a quantitative element characterized by a massive large-scale nature, including a multiplicity of victims, and the thesis of the author is that: "It is usually estimated that SGM constitute ten percent of a population. This leads to a potentially high number of individuals fearing persecution because of their sexual orientation or gender identity." According to the author, an attack may also be systematic, when there are domestic laws which punish sexual relations between persons of the same sex with imprisonment, corporal punishment, or the death penalty. This element may be linked to state conduct, or the conduct of highly organized terrorist organizations (as in the communication directed to the ICC-OTP concerning the gender-based crimes committed by ISIS). The author also describes the connection between the individual act and mental elements, explaining that if the individual act was committed merely accidently within the context of a general attack, without the perpetrators' knowledge of such a connection, they did not commit a crime against humanity. The author even presents here a far-reaching thesis – that even the inaction of a State towards crimes committed extra-legally or by non-state actors against sexual and gender minorities can, in exceptional circumstances, fulfil the contextual element.

Taking into consideration the elements of a crime in Art. 7(1)(h) RS, in Chapter 5, entitled "The Crime Against Humanity of Persecution", the author ac-

knowledges that since neither sexual orientation nor gender identity are explicitly listed as persecutory grounds, the material scope of the punishable act depends on the interpretation of the notion "persecution". The author explains that since persecution is the only crime against humanity that focuses on the real or perceived identity of the victim group, it most adequately deals with the specific harm of being targeted merely because of one's actual or perceived membership in or belonging to a specific group. This chapter analyses for the most part the most common persecutory acts which lead to severe deprivation of fundamental rights contrary to international law. The author carefully constructs her legal hypotheses; she does not put every element of discrimination into one group and therefore she concludes that only some of the persecutory acts can constitute a crime under Art. 7(1)(h) RS. Certainly, forcing SGM to live and work in concentration camps qualifies as a persecutory act under the RS; one that is committed in connection with another crime. However, even when contrary to international human rights law a failure to recognize couples and families does not alone amount to an individual act listed in Art. 7(1) RS. Moreover, a refusal to allow same-sex marriages alone is unlikely to be seen as a "*severe* deprivation of fundamental rights contrary to international law" comparable to other crimes against humanity and thus a persecutory act.

Chapter 6 – "Gender-Based Persecution of Sexual and Gender Minorities" – is more of a sociological than legal character, showing that persecution based on sexual orientation and gender identity may be persecution based on "other grounds that are universally recognized as impermissible under international law", which requires analysis of the substantial development of SGM rights under international human rights law. The Rome Statute is the first international treaty ever which defines the term "gender". However, as Art. 7(1) stipulates, in addition to the general requirements of the crime against humanity, a persecutory ground must be fulfilled. The legally interesting problem is the analysis of the interpretation of the *nullum crimen* principle in the light of possible differences between the notions "gender" and "sex" – analyzing the meaning of the binary part of the definition ("the two sexes") and showing how the definition also includes socially-constructed aspects of being male and female, thus arguing that the persecution of SGM could even be seen as sex-based persecution, as the Rome Statute's gender definition in Art. 7(3) does not refer only to the two "traditional" sexes.

The above-analysed issues lead to several questions of practical importance to these findings, and these questions are answered in the last chapters of the monograph. In Chapter 7 – "Persecution on 'Other Grounds that Are Universally Recognized as Impermissible Under International Law'" – the author explains that persecution based on sexual orientation and gender identity is universally recognized as impermissible under international law. Finally, the argumentation arrives

at the question that appeared to be of importance from the beginning: that issues of sexual orientation and gender identity are often seen as particularly culturally sensitive, and perceived as a "Western" conception. For example, several Asian governments, while reaffirming the general universality of human rights, regularly claim that these are currently too much influenced by the "West" and ask for respect for diversity; and several Islamic States have made specific reservations to human rights provisions (or treaties), in particular the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to ensure its consistency with *shari'a law*. In section 7.2 of this Chapter "Universalism Versus Cultural Relativism, Colonialism, and Anti-SGM Laws", the author argues that persecution on grounds of sexual orientation and gender identity is "universally recognized as impermissible under international law", because the UN's position is most relevant as it is the only universal organization concerned with human rights. While matters of SGM are often seen as culturally sensitive, the analysis demonstrates that the common conception of SGM rights as "Western" is not justified; universal recognition does not mean absolute universality, and clear recognition at the international level only, particularly in international human rights law, suffices.

Part III begins with Chapter 10 "Anti-SGM Legislating as a Crime Against Humanity". This chapter analyses the question of whether legislators can be held individually criminally responsible for a crime against humanity under the Rome Statute for passing laws which persecute sexual and gender minorities. The author assumes that the members of parliament also intend the commission of the crime if a law provides for the death penalty, corporal punishment, or imprisonment of SGM, and thus can be held criminally responsible as, e.g., (joint) indirect perpetrators. As the author recalls, one of the main challenges is establishing causation between the passing of the law by each member of a parliament who voted in its favor and the attacks themselves. In this Chapter the author analyzes existing cases dealing with legislative injustice to show that the idea of holding legislators criminally responsible is not new (the Nuremberg Military Tribunal famously concluded that the "dagger of the assassin was concealed beneath the robe of the jurist"; another famous case was the US case *Sexual Minorities Uganda v Scott Lively*[2]).

Chapter 11 – "Summary, Factual Consequences, and Recommendations" – discusses the most likely factual consequences of a decision by the International Criminal Court on this topic. The author observes that "while a judgment on this issue will be heavily criticized either way, the more harmful choice is excluding sexual and gender minorities from the Rome Statute's protection". This will be seen as

[2] US District Court for the District of Massachusetts, Memorandum and Order Regarding Defendant's Motions to Dismiss, 14 August 2013, available at: https://ccrjustice.org/files/SMUG_OrderDenyingDefMTD_08_13.pdf (accessed 30 Junes 2002).

a decision that will have political consequences. In conclusion there are two possible legal qualifications: persecution of SGM as a crime against humanity based on sexual orientation and gender identity as persecution based on "*other grounds* that are universally recognized as impermissible under international law". SGM would be recognized as a distinct minority worthy of protection under international criminal law. However, prosecuting these crimes as *gender*-based persecution, together with a variety of other gender-based forms of persecution, would adequately reflect that SGM are subject to the same patterns of persecutions based on social or legal gender norms as other members of society. Consequently, when prosecuting the persecution of SGM, both grounds should be considered. Also in this Chapter – as the final conclusion – recommendations are presented to amend the Rome Statute in a way that makes it clearer that all sexual and gender minorities are included within the scope of protected groups, as well as an assessment on how likely it is that such amendments will be implemented. Even other authors, who have come to the conclusion that the ICC currently cannot prosecute persecution against SGM, also criticize this (apparent) lack of protection.

This is a very interesting and valuable monograph for a person who wants to get to know the subject, which is so widely discussed in the English-language literature. The monograph gathers both factual and legal argumentation and reasonably and convincingly proves the main thesis of the book: that persecution of sexual and gender minorities (SGM) should be penalized as a crime against humanity under Art. 7(1)(h) RS. Even for a reader who is not an expert in this area the book still can be read with real interest, as it contains solid argumentation and is consistent and convincing. It is also a reliable work from the point of view of criminal law. By properly interpreting elements of crimes and criminal law principles, the author undoubtedly demonstrates her great erudition in the chosen research area. *Prima facie* it is visible that the author has made a great effort to gather together the vast literature on the topic of sexual minorities under international law and the meaning of this notion for the prosecution of crimes by the ICC.[3] The book is very care-

[3] The author invokes numerous publications on that topic in both English and German by, *inter alia*, just showing some of the literature that has been published so far on that topic: R. Axelson, *State-Sponsored Hatred and Persecution on the Grounds of Sexual Orientation: The Role of International Criminal Law*, in: J. Schweppe, M.A. Walters (eds.), *The Globalisation of Hate*, Oxford University Press, Oxford: 2016, pp. 277-293; B. Bedont, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in: F. Lattanzi, W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, il Sirente, Ripa Fagnano Alto: 1999, pp. 183-210; F. Bensouda, *Gender and Sexual Violence under the Rome Statute*, in: E. Decaux (ed.), *From Human Rights to International Criminal Law: Studies in Honour of an African Jurist, the Late Judge Laïty Kama*, Brill, Leiden: 2007, pp. 401-417; M. Bohlander, *Criminalising LGBT Persons Under National Criminal Law and Article 7(1)(h) and (3) of the ICC Statute*, 5 Global Policy 401 (2014); P.F. Byrne, *Sexual Minorities under International Law and the Rome Statute's Gender Provisions: A Step Forward for Recognition, or a Rubber Stamp for Outlaw Status?* University of Toronto. Toronto: 2006;

fully researched – the references reflect the wide reading of the author, relating to numerous fields: social, cultural, philosophic, and criminal law and international law as well as human rights law – and combines the conclusions resulting from the research into one comprehensive analysis. It constitutes a thorough academic workshop, even if it is a bit too long in places and some parts could have been omitted, as sometimes the arguments are repeated and the line of argumentation goes into "loops".

The book also raises several questions about the possibility for the ICC to accept jurisdiction in such a case: one has to keep in mind that the ICC can prosecute only the most serious crimes of international interest and must have jurisdiction in a specific case, based on territoriality, personality, or a referral from the Security Council. By finding that the worst crimes committed against SGM simply because they are sexual and gender minorities can amount to crimes against humanity, the ICC would recognize that these crimes belong to the "most serious crimes of concern to the international community as a whole", which would have both a symbolic and deterrent effect. Is this plausible or is this discussion purely academic? In the "Policy Paper on Sexual and Gender-Based Crimes" (June 2014[4]), published by the OTP, the Prosecutor Fatou Bensouda stated that: "The Office recognises that sexual and gender-based crimes are amongst the gravest under the Statute" and promised that "In appropriate cases, the Office will charge acts of sexual and gender-based crimes as different categories of crimes within the Court's jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, their nature, manner of commission, intent, impact, and context. The Office will also seek to highlight the gender-related aspects of other crimes within its jurisdiction".[5] The author of the reviewed book assumes that it is primarily the ICC that will ultimately decide whether international criminal law protects SGM, but to commence such a case it would have to choose from the multitude of other "most serious crimes", such as genocide, war crimes, and the crime of aggression. This task however should not be placed only on the Court.

R.C. Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 Security Dialogue 83 (2006); N. Duric, S.R. Vidlicka, G. Bogush, *Legal Protection of Sexual Minorities in International Criminal Law*, 6 Russian Law Journal 28 (2018); A.T. Feindel, *Reconciling Sexual Orientation: Creating a Definition of Genocide that Includes Sexual Orientation*, 13 Michigan State Journal of International Law 197 (2005); H. Heger, *The Men with the Pink Triangle: The True, Life-and-death Story of Homosexuals in the Nazi Death Camps*, Alyson Books, Los Angeles: 1994; E. Heinze, *Sexual Orientation: A Human Right: An Essay on International Human Rights Law*, Nijhoff, Dordrecht et al.: 1994.

[4] Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf (accessed 30 June 2022), para. 3.

[5] *Ibidem*, para. 8.

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Darryl Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*, Cambridge University Press, Cambridge: 2020, pp. 326

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INTRODUCTION

Darryl Robinson is one of the most well-known experts on international criminal law (ICL) and a distinguished academic among scholars, as seen by the breadth of the literature he analyses in *Justice in Extreme Cases*. It is a rewarding intellectual journey to review his excellent new book, which contributes to the nascent literature on ICL theory.

This book review is divided into two sections. Section 1 comprises the description of the book's content and Robinson's arguments regarding various theories. According to Robinson, criminal law requires not only traditional *source-based reasoning* (what legal authorities permit or require) and *teleological reasoning* (examining the purpose and consequences), but also an additional type of reasoning – *deontic reasoning.*[1] A reasoning that "focuses not on what the texts and precedents allow or how to maximize beneficial impact, but on the principled constraints arising from respect of the personhood or agency of accused persons as moral agents."[2] Deontic reasoning, as per Robinson, should follow a "coherentist" approach or theory of justification.[3] He claims that the best way to identify and define deontic principles is coherentism.[4]

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[1] D. Robinson, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*, Cambridge University Press, Cambridge: 2020, p. 52.

[2] *Ibidem*, p. 1.

[3] *Ibidem*, pp. 3, 14, 57, 85, 108.

[4] *Ibidem*, 230.

Coherentism is a concept that generates a method for justifying beliefs.[5] It refers to the method adopted in the book, arguing that it is impractical and unwise to specify fundamental or bedrock concepts as the foundation for ICL.[6] This means that coherentism does not recognize the existence of any "foundations."[7] It also acknowledges that the best we can do as humans is make use all of the available clues.[8] Robinson contends that it is more useful and effective to look for mid-level principles, such as the culpability and legality principles, which lie in the area between foundational moral theories and particular domains of practice.[9]

His proposed "coherentist" method, on the other hand, in my opinion has drawbacks. In section 2 I argue that the approach is far too hypothetical. Furthermore, I contend that his proposed approach poses legitimacy concerns in the context of ICL. This book review concludes however by asserting that although Robinson's recommended "coherentist" approach has some shortcomings, his book is packed with depth and careful legal interpretations. The genuine innovation of this book lies in the fact that every component of ICL can be enhanced by applying Robinson's method of legal theory.[10] Therefore I believe it will stimulate critical reflections by practitioners and academics working on ICL theories.

1. DESCRIPTION AND ARGUMENTS

Robinson's book is divided into three parts: the problem; the solution; and the method to be used. Part I in particular highlights the issue – namely, the need for more cautious deontic reasoning, i.e., a reasoning – perhaps ground-breaking in the ICL context – from which ICL would benefit.[11] By "deontic," he means "constraints rooted in respect for the individual – constraints such as the legality principle and the culpability principle, which allow the system to be described as a system of 'justice'."[12]

In part II, he suggests a solution: a coherentist method for deontic analysis. Coherentism is practical reasoning that attempts to address concrete human problems and questions as best we can, rather than uncover ultimate moral truths.[13] In part

[5] M.R. DePaul, *Two Conceptions of Coherence Methods in Ethics*, 96(384) Mind 463 (1987).

[6] J. Rikhof, *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law. By Darryl Robinson, Cambridge: Cambridge University Press (2020), 305 xix page*s, Canadian Yearbook of International Law/Annuaire canadien de droit international (2022), doi:10.1017/cyl.2022.6, p. 3.

[7] Robinson, *supra* note 1, p. 102.

[8] *Ibidem*, p. 3.

[9] *Ibidem*, pp. 96-99.

[10] Rikhof, *supra* note 6, p. 8.

[11] Robinson, *supra* note 1, p. 10.

[12] *Ibidem*, p. 57.

[13] *Ibidem*, p. 103.

III, he applies the method to several cases to clarify its use.[14] More precisely, he cautiously dissects various debates of command responsibility to clarify his proposed approach, as well as its questions, themes, and applicability.[15]

Part I consists of two chapters in which Robinson catalogues the range of ICL theories and their deficiencies.[16] According to him, ICL jurisprudence has always been focused on *source-based* reasoning – more precisely, the parsing of legal instruments and precedents; and *teleological* reasoning – the ramifications of any given decision or argument.[17] A "s*ource-based*" analysis applies basic interpretive techniques to detect what the laws, precedents, and authorities permit.[18] *Teleological* reasoning is often victim-focused, which has two features. First, even where its application may reflect a wider variety of objectives, it assumes a single aim – maximum victim protection. Second, it permits one assumed goal to override all other interpretive considerations, along with the text.[19]

Robinson raises several issues with the application of these two theoretical approaches, including unwarranted transplants from international humanitarian law and international human rights to ICL.[20] This is due to the fact part of the issue stems from habits of reasoning and techniques transplanted from the fields of human rights and humanitarian law without a proper understanding that the new context, criminal law, requires a different way of thinking.[21] Thus it appears that without adequately understanding the context of criminal law, ICL initially incorporated some inconsistent suppositions and methods of reasoning when it combined criminal law with human rights and humanitarian law.

To avoid these inconsistent suppositions, Robinson offers a third type of reasoning: deontic reasoning.[22] According to Robinson, the personal culpability concept, the legality principle, and the fair labelling principle are the deontic constraints in criminal justice.[23] The first is the principle of personal *culpability*, which asserts that each person is responsible for his or her own conduct.

The principle of *legality* (*nullum crimen sine lege*, "no crime without a law") requires, on the other hand, that definitions of laws not be applied retroactively.

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[14] *Ibidem*, p. 10.
[15] *Ibidem*, p. 14.
[16] *Ibidem*, pp. 3-54.
[17] *Ibidem*, p. 11.
[18] *Ibidem*, p. 60.
[19] *Ibidem*, p. 242.
[20] *Ibidem*, p. 20.
[21] *Ibidem*, p. 22.
[22] From Robinson's vantage point, "deontic reasoning focuses not on what the texts and precedents allow or how to maximize beneficial impact, but on the principled constraints arising from respect for the personhood or agency of accused persons as moral agents" (*see ibidem*, p. 20).
[23] *Ibidem*, p. 9.

Furthermore, this principle necessitates giving individual actors fair warning and restricting the use of coercive authority in arbitrary ways. The principle of *fair labelling* states that the label of the offence should accurately describe and communicate the accused's wrongdoing, so that the stigma of conviction corresponds to the act's wrongfulness.[24]

For example, in the *Kvočka* case the Trial Chamber failed to appropriately specify the role played by Kvočka when delivering its judgment and sentence. Mr. Miroslav Kvočka was the commander of the camp, and he was accused of the acts of his subordinates in the wilful killing, murder, torture, and rape of the Omarska prisoners. However, the Trial Chamber failed to specify whether Kvočka was a co-perpetrator or whether he aided or abetted.[25]

In this regard, the Appeal Chamber stated that "the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise."[26] The degree of individual criminal responsibility indicates the defendant's contribution to a crime, which is needed to establish *culpability*.[27]

Robinson points out that deontic reasoning "requires us to consider the limits of personal fault and punishability", and it is a "normative reasoning that focuses on our duties and obligations to others."[28] These deontic principles are moral principles, not "artifacts of legal positivism."[29] Thus, neither legal texts nor prior practices can determine what they are made of.[30] He outlines and discusses the grounds for deontic reasoning's necessity. Other approaches, he claims, are frequently ineffectively transplanted into ICL.[31] In addition, he uncovers three "modes" by which distortion occurs in reasoning: *interpretive approaches, substantive and structural conflation,* and *ideological assumptions*.[32]

The influence of *interpretive approaches* from human rights and humanitarian law, such as victim-focused teleological reasoning, is the first mode. Such reasoning weakens strict construction and encourages broad interpretations that could jeop-

[24] *Ibidem*.

[25] ICTY (TC), *Prosecutor v Kvočk*a, Judgment, IT -98- 30/1 T, 2 November 2001, paras. 26, 35, 39.

[26] ICTY (AC), *Prosecutor v Kvočka*, Judgment, IT-98-30/1-A, 28 February 2005, para. 92.

[27] Robinson, *supra* note 1, pp. 177-178.

[28] *Ibidem*, p. 11.

[29] *Ibidem*, p. 52.

[30] *Ibidem*.

[31] In ICL, the distortions often result from habits of reasoning that are progressive and appropriate in human rights law and humanitarian law, but which become problematic when transplanted without adequate reflection to a criminal law system (*see ibidem*, p. 20).

[32] *Ibidem*, pp. 27-51.

ardize culpability and fair labelling.[33] The second mode is *substantive and structural conflation*, which assumes that criminal norms must be consistent with human rights or humanitarian law norms.

Such assumptions disregard the differences in structure and implications of these domains of law; as a result, they overlook the additional deontic considerations that limit the punishment of individuals.[34] *Ideological assumptions*, such as "progress" and "sovereignty," are the third mode. These assumptions can lead to the hasty acceptance of far-reaching doctrines and the rejection of narrower but more principled ones. When applied regardless of the context shift in criminal law, any of these assumptions can skew the analysis away from Robinson's fundamental principles.[35]

Robinson claims that decision-makers in ICL have used defective reasoning processes that have undermined the regime's ability to follow its own commitments to liberal principles rooted in "*compassion, empathy,* and regard for *humanity*."[36] For instance, Drumbl contends that mass crimes, which entail organic group characteristics, are not appropriate for the paradigm of individual culpability developed for deviant isolated crimes.[37] Many academics correctly point out that whereas domestic crime includes "deviance" from society norms, ICL often encounters circumstances of "inverted morality," where there is significant social pressure to commit crimes.[38]

Abstention from crime is sometimes considered "deviant" in ICL contexts. The extension of "western doctrines onto the transnational plane without considering the implications for societies not sharing similar assumptions" is, according to many scholars, also discouraged.[39] Arguments are made that the culpability principle may need to be altered, changed, or even abandoned for these and other grounds.[40] Scholars like Drumbl and Osiel urge the detailed scrutiny of liberal principles to consider principles such as culpability, fair labelling, and legality.[41] According to Robinson, ICL necessitates a method that respects liberal values. Robinson provides

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[33] *Ibidem*, p. 23.

[34] *Ibidem*.

[35] *Ibidem*.

[36] *Ibidem*, p. 59.

[37] M.A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge: 2007, p. 24.

[38] W.M. Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 Law & Contemporary Problems 75 (1996) 77; Drumbl, *supra* note 37, pp. 24-35.

[39] M. Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, Cambridge: 2009, p. 8.

[40] M.A. Drumbl, *Pluralizing International Criminal Justice*, 103 Michigan Law Review 1295 (2005), p. 1309.

[41] M. Osiel, *The Banality of Good: Aligning Incentives against Mass Atrocity*, 105(6) Columbia Law Review 1765 (2005); M.A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99(2) Northwestern University Law Review 567 (2005).

a liberal, humanistic, coherentist, and cosmopolitan framework for investigating deontic restraints in the contexts fostered by ICL.[42]

Coherentism is a justification theory. It implies that a belief can be justified if it belongs to a coherent system of beliefs.[43] From Robinson's vantage point, "... we work with all available clues, including patterns of practice and normative arguments, to build the most coherent and convincing picture that we can."[44] This means that principles of justice are a human conversation about human ideas, not a matter of "certainty."[45] Coherentists use critical reasoning tools to examine past understandings for bias and inapt assumptions.[46] This is a non-foundational approach, which implies it embraces the fact that "foundations" do not exist.[47]

Long-running debates about the foundations of moral reasoning in criminal law show that an anti-foundationalist, coherentist view may indeed be the most appropriate choice. Coherentists believe they do not need the illusory comfort of choosing which foundational beliefs are prioritized. Instead, they can only do their best to decipher and deal with the entire web of clues available to them.[48] They also use comparative analysis to look at patterns of practice for clues about insights underlying justice (looking at other jurisdictions, other areas of law, or possibly even other social practices).[49] As per Robinson, the deontic analysis should be guided by a coherentist method or justification theory.

Robinson applies his proposed method to some ICL contexts in part III. More specifically, he addresses the concept of command responsibility using the liberal, deontic, and coherentist approaches. In ICL, three prerequisites must be met in order to hold commanders accountable for the crimes of their subordinates: a superior-subordinate relationship; a criminal act had to be imminent, in progress, or already have been committed before the superior knew or had reason to know about it; and the required and reasonable actions to stop or punish the behaviour in question have been disregarded.[50]

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[42] Robinson, *supra* note 1, pp 59-137.

[43] DePaul, *supra* note 5, p. 463.

[44] Robinson, *supra* note 1, p. 57.

[45] *Ibidem*, pp. 58 and 137.

[46] *Ibidem*, p. 13.

[47] A perspective of the structure of justification or knowledge is known as foundationalism. According to foundationalism, any justified belief must either be foundational or ultimately rely on foundational beliefs for its justification. The foundationalists' central claim is that non-inferential knowledge and justified belief serve as the basis upon which all other knowledge and justified beliefs are ultimately constructed; *see*: Foundationalist Theories of Epistemic Justification, *Stanford Encyclopaedia of Philosophy*, 21 February 2000; available at: https://plato.stanford.edu/entries/justep-foundational/ (accessed 30 June 2022).

[48] Robinson, *supra* note 1, p. 102.

[49] *Ibidem*, p. 106.

[50] *Ibidem*, p. 147.

Robinson addresses three components of this type of responsibility that have generated a lot of controversies. The first is whether a commander is responsible for punishing the unpunished subordinates for crimes committed under the command of a predecessor.[51] The second is how much of a contribution a commander must make to the crimes that his subordinates commit. Contribution is a crucial concept that establishes the culpability of a defendant.[52] The third concern is the *mens rea* for command responsibility, which has been divided into two separate doctrines: the "should have known" test and the "had reason to know" test, as outlined in the Rome Statute and the Statutes for the ad hoc tribunals. According to Robinson, these confusions would have been much clearer if his proposed method had been utilized.

Robinson suggests that command responsibility be recognized as a type of accessory liability, similar to how it was in World War II jurisprudence, ad hoc tribunals, and the Rome Statute.[53] Nonetheless, imposing responsibility on a commander who has no causal link to his subordinates' action and had no contribution to the crimes' commission – in any way – would be contrary to the culpability principle.[54] While ICL recognises that contribution to a crime in some way equates to culpability, Robinson identifies and demonstrates that the jurisprudence of the *ad hoc* tribunals – in its early reasoning – engaged ineffectively with the deontic aspect.[55] For example, the tribunals' jurisprudence violated the culpability principle by rejecting the fundamental requirement of causal contribution.[56]

Robinson claims that this ineffective engagement produces an internal paradox. According to him, criminal law demands causal contribution to avoid the internal paradox. This is because, under criminal law, a contribution is essential in determining culpability.[57] In ICL, it has been established that an accessory's contribution must have had a considerable or significant effect on the principal's ability to conduct a crime.[58]

Insofar as concerns the concept of command responsibility, criminality usually involves numerous individuals, each contributing to the crime in different ways and to varying degrees. The commitment to punish suspects only for their own wrongdoing implies that the accused must have contributed to the crime to be held accountable for it. Of course, an individual may share liability for acts physi-

[51] *Ibidem*, p. 156.
[52] *Ibidem*, pp. 177-178.
[53] *Ibidem*, p. 15.
[54] *Ibidem*, p. 178.
[55] *Ibidem*, pp. 143-173.
[56] *Ibidem*, p. 146.
[57] *Ibidem*, pp. 177-178.
[58] *Ibidem*, pp. 181-182.

cally performed by others if the individual participated in the acts and did so with a mental state adequate for accessory liability.[59]

2. CRITICAL ANALYSIS

Robinson's work investigates two types of causations for principal and accessory liability: Principal liability appears to necessitate a "but for" form of causation; while accessory liability requires only a "contribution," which is more indirect: it is sufficient to advocate or facilitate the crime.[60] In doing so, Robinson spent a lot of time investigating fundamental principles of general criminal law and how they apply to ICL. In the end, Robinson concludes that ICL, as currently structured, lacks such a theoretical framework, and this lack may obstruct justice. The solution is not simply to borrow and apply principles from domestic legal systems; source-based and teleological reasonings are insufficient, and what is required is deontic reasoning and a "coherentist" method.

I am persuaded by Robinson's deontic analytical approach. In particular his argument on international criminal law decision-makers' use of flawed reasoning methods – which have eroded liberal principles rooted in "compassion, empathy, and regard for humanity" – provides us with a means to rethink ICL theory.[61]

While I applaud Robinson's coherentist orientation, in my opinion his proposed method has several flaws. *First*, the approach is far too speculative. As argued by Professor Elies van Sliedregt, reliance on coherentism in ICL may cause a democratic legitimacy problem.[62] Robinson puts a lot of obligations on ICL's adjudicators and judges. This suggests that coherentism offers them too much discretion.[63] While teleological reasoning has a degree of democratic legitimacy and is textually anchored

[59] *Ibidem*, p. 149.

[60] The causal relationship between the defendant's conduct and the committed crime is known as causation. Principal liability appears to require a *sine qua non*, "but for," type of causation. Accessory liability merely requires "contribution," which is more indirect: it suffices to encourage or facilitate the crime (*ibidem*, p. 178).

[61] *Ibidem*, p. 59.

[62] E. van Sliedregt, *Justice in Extreme Cases Symposium: A Response to Darryl Robinson*, Opinio Juris, 30 March 2021, available at: http://opiniojuris.org/2021/03/30/justice-in-extreme-cases-symposium-a-response-to-darryl-robinson/ (accessed 30 June 2022).

[63] According to Adil, "when the law is vague, ambiguous, or otherwise indeterminate, it is at least arguable that no such conflict arises. In these cases, the law does not say one thing while morality says another. It is not clear what the law says. Judges therefore remain legally free to base their legal decisions on their moral reasons. For example, judges may acquit a non-culpable defendant for moral reasons, any time the crime definition or mode of liability leaves it indeterminate whether or not the defendant is legally responsible for a crime. The exclusive legal positivist would simply insist that judges in such cases necessarily switch from legal reasoning to moral reasoning when legal reasoning reaches a dead end"; *see*: A. Ahmad Haque, *Jurisprudence in Extreme Cases*, 35 Temple International and Comparative Law Journal 11 (2021) 22.

in precedents or *travaux preparatoires*,[64] coherentism has no interpretive process rooted in decision-making by accountable public representatives. As a result, it may compromise democratic legitimacy.

Similarly, as per Neha Jain:

> The coherentist approach is vaguely reminiscent of the 'crucible' approach to treaty interpretation endorsed in the Vienna Convention on the Law of Treaties (and adopted in ICL) where '[a]ll various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.'[65]

It seems Robinson leaves everything up to the decision-makers, both in terms of weighing and balancing, which is problematic. Even in the context of a reasonably cohesive epistemic community of scholars, lawyers, activists, and judges who share a common set of beliefs and practices, this coherentist approach would be challenging, Neha adds.[66]

The web theory is the *second* concern of the coherentist method. In terms of weight, Robinson's account of the coherentist method does not provide a clear or explicit method to rank various options such as moral theories, positive law, and considered judgments. His approach is not particularly beneficial for sorting out complex cases because the alleged web comprises various knots, none of which are greater than the others. Or to put it another way, it would almost certainly result in entirely different outcomes depending on who ranks the options or gives weight to the various knots (moralists, institutionalists, etc.).[67] This is due to the fact that web clues are flexible, ambiguous, and even unpredictable, and these clues might hence produce unpredictable results depending on a judge's legal tradition, experiences, and preferences.

Furthermore, the coherentist technique is neither consistent nor certain.[68] Thus, it appears that the accused could not expect clarity or consistency while facing international judges. But when tried by international judges, should not the accused be entitled to clarity and uniformity?[69] What happens if there is no standard or

[64] van Sliedregt, *supra* note 62.

[65] N. Jain, *A Tale of Two Cities: Reflections on Robinson's Twinning of International Criminal Law and Criminal Law Theory*, 35 Temple International and Comparative Law Journal 25 (2021), p. 30.

[66] *Ibidem*.

[67] A. Chehtman, *An "Ongoing Conversation": Method and Substance in Robinson's Justice in Extreme Cases*, 35 Temple International and Comparative Law Journal 37 (2021), p. 40.

[68] Robinson, *supra* note 1, p. 57.

[69] M.G. Karnavas, *Book Review: Justice In Extreme Cases – Criminal Law Theory Meets International Criminal Law*, International Criminal Law Blog, 1 June 2021, available at: http://michaelgkarnavas.net/blog/2021/06/01/book-review-justice-in-extreme-cases/ (accessed 30 June 2022).

ranking by which to compare different options? The problem with such a web, according to Alejandro, is that the knots lack a consistent metric or scale by which we can assess them, making our judgments appear arbitrary in the end.[70]

Furthermore, Robinson's coherentism proposes that command responsibility should be recognized as a mode of *accessory* liability.[71] As per his proposition, if for example a commander's subordinates murder five civilians, the commander would be held accountable – if he fails to punish his subordinates – as an accessory for five murders. Robinson's proposal strikes me as problematic in this regard.

Professor David Ohlin highlights this issue and argues that a failure to punish should not result in accessorial responsibility because, while it is a type of behaviour that often encourages subordinates to commit crimes in the future, it cannot make a causal contribution to crimes committed in the past.[72] ICL jurisprudence, on the other hand, recognizes that accessory liability requires some involvement in the underlying crime for personal accountability.[73] As Ohlin stated, why should the commander be held responsible for murders committed by his or her subordinates if he or she has had no causal connection to the crimes?

Nonetheless, we cannot deny that a commander's failure to punish subordinates is a breach of duty. To solve this puzzle, Professor Jens David Ohlin and other jurists have offered a solution based on the deontic approach. They suggest conceptualizing failure to punish as a separate crime.[74] The concept of a separate crime derives from German domestic law, where command responsibility may have either of two components: accessorial liability and a separate offense.[75]

Under this approach, the commander would be held accountable for the separate crime of "command responsibility," but not for her subordinates' domestic crimes [i.e. 5 murders]. In my opinion this is a preferable solution based on source-based reasoning, because the commander should not be held liable for the underlying crimes committed by his or her subordinates but should be held accountable for failing to act against the subordinates.[76] Thus in this case the "source-based" analysis

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[70] Chehtman, *supra* note 67, p. 40.

[71] *Ibidem*, pp. 15, 148.

[72] J.D. Ohlin, *Complicity Negligence, And Command Responsibility*, 35 Temple International and Comparative Law Journal 109 (2021), p. 112.

[73] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1T, 21 May 1999, para 199.

[74] Ohlin, *supra* note 72.

[75] Volkerstrafgesetzbuch [VStGB] [Code of Crimes Against International Law], art. 1, § 13- 14 (Ger.), available at: https://casebook.icrc.org/case-study/gennany-international-criminal-code (accessed 30 June 2022);

[76] C. Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?*, 5(3) Journal of International Criminal Justice 619 (2007), p. 620; A.J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 The Michigan Journal of International Law 251 (2009) p. 255.

employs fundamental interpretive methods to discover what the statutes, precedents, and authorities permit.[77]

CONCLUSION

Darryl Robinson's *"Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law"* is an intriguing blend of theoretical insights and doctrinal descriptions. His book, for example, makes a significant contribution by discussing "deontic" constraints to the legal doctrine. He correctly emphasizes that the substance of ICL theory should respect these deontic norms. Furthermore, his book outlines a serious vulnerability to the regime's effectiveness and legitimacy: its failure to build a clear decision-making strategy.[78] To meet the challenge, he develops a method for the decision-making process: the coherentist method.

To summarize, Professor Robinson has made an essential contribution to the growing literature on international criminal law theory. Robinson provides a roadmap for more reasonable and predictable judicial decisions as well as practical suggestions for reforming the law. His roadmap undoubtedly serves as a model for anyone interested in international criminal law and criminal law theory. It will, I hope, be of great importance to practitioners and scholars focusing on command responsibility.

[77] Robinson, *supra* note 1, p. 60.
[78] *Ibidem*, p. 67.

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