

**WOLLT IHR DEN TOTALEN KRIEG?
POLITICAL, MORAL AND LEGAL ASPECTS
OF THE RESETTLEMENT OF GERMAN POPULATION
AFTER WORLD WAR II**

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Abstract: Germany had started the Second World War in an intentional and conscious manner, obviously being aware that every action can have unpredictable and unwanted consequences.

The Potsdam decisions were taken by the Great Powers after assuming supreme authority in Germany. They constituted a manifestation of the Allies' rights and responsibilities. The territorial changes of Germany and the transfer of population were part of the general regulation of the effects of the Second World War. These decisions were not a simple matter of revenge. They must be perceived in a wider political perspective of European policy.

The resettlement by Germany of ethnic Germans to the Reich or to the territories it occupied constituted an instrument of National Socialist policy. This German policy turned out in 1945 to be a tragic irony of fate.

The resettlement decided in Potsdam must be perceived in the context of German legal responsibility for the war's outbreak. The individual perception of the resettlement and individual guilt are different from

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the international responsibility of the state and from the political-historical responsibility of the nation.

In our discussion we made the distinction between the individual and the collective aspect as well as between the legal and historical/political aspect. We deal with the guilt of individuals (criminal, political, moral), the international legal responsibility of states, and the political and historical responsibility of nations (societies).

For the difficult process of understanding and reconciliation between Poles and Germans, the initiatives undertaken by some social circles, and especially the church, were of vital importance. The question of the resettlement became a theme of numerous publications in Poland after 1989. In the mid 1990s there was a vast debate in the media with the main question of: should we apologize for the resettlement?

Tracing a line from wrongdoing/harm to unlawfulness is not easy. In 1945 the forcible transfer of the German population was an act that was not prohibited by international law. What is significant is that this transfer was not a means of war conduct. It did not apply to the time of a belligerent occupation, in terms of humanitarian law, but to a temporary, specific, international post-conflict administration.

Maybe for some people Potsdam decisions will always be seen as an illegal action, for others as an expression of strict international legal responsibility, for some as a kind of imperfect justice, and still for others as an opening of a new opportunity for Europe.

Key words: World War II, Germany, international law, international humanitarian law

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Preface*

Despite the passage of time, there remains divergence between Polish and German legal and political opinions concerning the course and impact of the Second World War. While the historical experience of different generations is not hereditary, the interest in these questions persists, as does their effects. Societies cannot ignore the past, in which they were forged, because the past is prologue to their future fate.

Individual nations' perceptions of history are often at odds. If two sides cannot agree on the history or legal questions underlying an issue, each must come to an understanding of the point of view of the other side in the course of dialogue. Otherwise, the risk arises that controversies live on as tools for current political purposes, especially in the context of historical policies, which are the DNA of every state and society.

Germany started the Second World War in an intentional and conscious manner, obviously being aware that every action can have unpredictable and unwanted consequences. The imperial and racist foundations of Nazi Germany and its methods of war led to irreversible outcomes for Germany itself.

The resettlement of the German population after the Second World War by the victorious powers is an example of contested history that lives on with modern repercussions. How were resettlement decisions justified? Were they illegal in light of international law in force at that time?

Propaganda minister Joseph Goebbels called for total war, adding that the defeat of Germany might lead to its destruction. Would the German defeat be less total than their victory? On what could the German state and its people count in 1945?

The Potsdam decisions were taken by the Great Powers after assuming supreme authority in Germany. The territorial changes of Germany and

* In memory of my mother and grandparents, who in March 1940 were forced to abandon their family home in Poznań forever, with two hours' notice and two suitcases between them. Their forcible transfer was dictated to make room for *baltendeutsche Umsiedler*. After a few days in Lager Głowno (Posen-Ost), they were transported /Liste N°. 23 der *evakuierten Personen*, die in das Generalgouvernement abtransportiert worden sind/ to Mielec (city in South East Poland). They spent five difficult and hungry years in Mielec, under constant threat to their lives. Their return home became possible as a result of unexpected consequences of WWII, which turned out to be a tragic irony for Germany and for the Germans.

the transfer of population were part of the general regulating of the effects of the Second World War. These decisions were not a simple matter of revenge. They must be analysed in a wider political perspective of European policy.

The resettlement decided in Potsdam was part of German legal responsibility for the war's outbreak. The individual perception of the resettlement and individual guilt are different from the international responsibility of the state and from the political/historical responsibility of the nation. The international legal responsibility of states inevitably affects their population, which shares the fate of the state both in times of peace and in war.

In our discussion we made the distinction between the guilt of individuals (criminal, political, moral), the international legal responsibility of states and the political/historical responsibility of nations (societies).

For the difficult process of understanding and reconciliation between Poles and Germans, the initiatives undertaken by some social circles, and especially the church, were of vital importance. The question of the resettlement became a theme of numerous publications in Poland after 1989. In the mid 1990s there was a vast debate in the media with the main question of: should we apologize for the resettlement?

Tracing a line from wrongdoing/harm to unlawfulness is not easy. In 1945 the forcible transfer of the German population was an act that was not prohibited by international law. What is significant is that this transfer was not a means of war conduct. It did not apply to the time of a belligerent occupation, in terms of humanitarian law, but to a temporary, specific, international post-conflict administration.

The resettlement of the German population after the Second World War by the victorious powers is an example of contested history that lives on with modern repercussions. We attempt to provide a perspective on the problem: the first part (Chapters 1 and 2) deals with the border change as an essential precondition of resettlement; the second part (Chapters 3, 4 and 5) presents the political and moral aspects; and the third part (Chapter 6) appraises the resettlement in the light of international law.

Chapter 1: Introduction

*For they sow the wind, and they shall reap the whirlwind*¹

1.1. Legal controversies between Poland and Germany were inevitable following the Second World War.² The peace settlement with Germany, announced at the Potsdam Conference (11 July – 2 August, 1945), never went into effect. The collapse of the victorious coalition and the division of Europe (including Germany) into two opposing blocs (“the Iron Curtain”, “the Cold War”) ensured a contested future for Poland.

Several elements contributed to the situation which arose in 1945.

¹ Old Testament, Hosea 8:7.

² See J. Kranz, *Polsko-niemieckie kontrowersje prawne – próba syntezy*, [in:] W.M. Góralski (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego Traktatu o dobrym sąsiedztwie i przyjaznej współpracy – 1991-2011*, Warszawa 2011, pp. 477-520 (English version: *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’, Warsaw 2011, pp. 419-460); W. Czapliński, B. Łukańska (eds), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku* [Legal issues in Polish-German relations on the brink of XXI century], Warszawa 2009; W.M. Góralski (ed.), *Polska-Niemcy 1945-2007. Od konfrontacji do współpracy i partnerstwa w Europie. Studia i dokumenty* [Poland-Germany. From confrontation to cooperation and partnership in Europe. Studies and materials], Warszawa 2007; W.M. Góralski (ed.), *Transfer. Obywatelstwo. Majątek. Trudne problemy stosunków polsko-niemieckich. Studia i dokumenty* [Transfer. Citizenship. Property. Difficult issues in Polish-German relations. Studies and materials], Warszawa 2005; W.M. Góralski (ed.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004* [Issues of reparation, damages and consideration in Polish-German relations between 1944-2004], vol. I: *Studia*, vol. II: *Dokumenty*, Warszawa 2004; L. Janicki, *RFN wobec terytorialno-politycznych następstw klęski i upadku Rzeszy* [FRG’s attitude towards territorial and political consequences of the defeat and collapse of the Reich], Poznań 1986; K. Skubiszewski, *Poland’s Western Frontier and the 1970 Treaties*, ‘American Journal of International Law’ 1973, vol. 67, pp. 23-43; *id.*, *The Western Frontier of Poland and the Treaties with Federal Germany*, ‘Polish Yearbook of International Law’ 1970, vol. 3, pp. 53-68; *id.*, *Zachodnia granica Polski w świetle traktatów* [The Western border of Poland in light of international treaties], Poznań 1975; *id.*, *Zachodnia granica Polski* [The Western border of Poland], Gdańsk 1969; M. Lachs, *La frontière polono-allemande. Droit, vie et logique historique*, Warszawa 1964; A. Klafkowski, *Umowa poczdamska z dnia 2 VIII 1945 r.* [The Potsdam agreement of 2 August 1945], Warszawa 1960 (French version : *L’Accord de Potsdam du 2 août 1945*, Varsovie 1964); B. Wiewióra, *Granica polsko-niemiecka w świetle prawa międzynarodowego* [The Polish-German border in light of international law], Poznań 1957.

First, the victorious powers (the USA, the USSR, United Kingdom and France) assumed supreme authority over Germany and reserved for themselves the power to determine its future, including its borders (the Berlin Declaration of 5 June 1945).³ This took place in the context not only of the unconditional surrender of Germany's armed forces and the lack of any central German government, but also of the Allies' conviction that German political forces could not realize the Allies' aims.

Second, the German international legal responsibility was not limited to the acts of aggression, but also included war crimes and crimes against

³ Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, 5.6.1945:

There is no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country and compliance with the requirements of the victorious Powers. (...) 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, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany. 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, will hereafter 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. (preamble) (...) Article 13. (a) In the exercise of the supreme authority with respect to Germany (...) the four Allied Governments will take such steps, including the complete disarmament and demilitarization of Germany, as they deem requisite for future peace and security. (b) The Allied Representatives will impose on Germany additional political, administrative, economic, financial, military and other requirements arising from the complete defeat of Germany. The Allied Representatives, or persons or agencies duly designated to act on their authority, will issue proclamations, orders, ordinances and instructions for the purpose of laying down such additional requirements, and of giving effect to the other provisions of this Declaration. All German authorities and the German people shall carry out unconditionally the requirements of the Allied Representatives, and shall fully comply with all such proclamations, orders, ordinances and instructions.

Protocol of the Yalta Conference, February, 1945: "III. Dismemberment of Germany. It was agreed that Article 12 (a) of the Surrender terms for Germany should be amended to read as follows: "The United Kingdom, the United States of America and the Union of Soviet Socialist Republics shall possess supreme authority with respect to Germany. In the exercise of such authority they will take such steps, including the complete dismemberment of Germany, as they deem requisite for future peace and security". See also Agreement on Control Machinery in Germany, 14.11.1944.

humanity, whose range and scale had been up to this time unknown. A specific feature of German policy was the massive and planned extermination of the civilian population and the systematic plunder and spoliation of private and public property.

Third, the Potsdam Conference was a hurried affair, called to make necessary decisions regarding Germany's responsibility for the war.⁴ The Allied powers were aware that, in the first phase, those decisions were not subject to negotiation with Germany, although they foresaw that a future peace settlement would be negotiated. As a result of the Potsdam Conference, many fundamental questions related to the Second World War were addressed, even though the announced peace settlement did not take effect. The final post-war phase was the Treaty on the Final Settlement with Respect to Germany (12 September 1990—"2+4" Treaty), which finally closed the chapter of the war on a multilateral level.

Regardless of whether the result of the Potsdam Conference is treated as one treaty or as a series of treaties, and also regardless of how the Allies were legally bound by them, there is no doubt that the settlement

⁴ Potsdam Agreement, 1945. Communiqué:

It is not the intention of the allies to destroy or enslave the German people. It is the intention of the allies that the German people be given the opportunity to prepare for the eventual reconstruction of their life on a democratic and peaceful basis. If their own efforts are steadily directed to this end it will be possible for them in due course to take their place among the free and peaceful peoples of the world. (...) The Political and Economic Principles to govern the Treatment of Germany in the Initial Control Period. (...) 3. The purposes of the occupation of Germany by which the Control Council shall be guided are: (i) The complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could be used for military production. (ii) To convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves, since their own ruthless warfare and the fanatical Nazi resistance have destroyed German economy and made chaos and suffering inevitable. (iii) To destroy the National Socialist Party and its affiliated and supervised organizations; to dissolve all Nazi institutions; to ensure that they are not revived in any form; and to prevent all Nazi and militarist activity or propaganda. (iv) To prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful co-operation in international life by Germany. (...) German Reparations. In accordance with the Crimea decision that Germany be compelled to compensate to the greatest possible extent for the loss and suffering that she has caused to the United Nations, and for which the German people cannot escape responsibility.

of the conference had a contractual character.⁵ Using the term “Potsdam decisions” does not undermine its character.

1.2. A fundamental West German political problem in the post-war period was the unification of Germany, as well as the question of German borders. The Federal Republic of Germany (FRG) constructed a specific political legal doctrine about the effects of the Second World War. These legal positions included the following elements:

1. Keeping open the so-called German question (the question of unification) to the moment of the peace settlement with Germany as a whole, including the thesis about the legal existence of Germany within the borders of 1937 (as long as the Brandenburg Gate is closed, the problem of Germany is open).
2. Questioning the legally binding character of the Potsdam agreement for Germany, because it was not a party (*res inter alios acta*; violation of the right to self-determination);
3. Questioning the international legality of the Potsdam decisions concerning the transfer of the German population and the confiscation of its private property (the so-called open property questions);
4. The thesis that Poland has only temporary administrative power and not sovereign authority over the new western parts of its territory (the distinction between *Gebietshoheit* and *Hoheitsgebiet*);
5. The view that the western border of Poland is provisional to the moment the peace settlement with Germany as a whole has been concluded (in the Treaty of 1970 the FRG recognized the western frontier of Poland exclusively in its own name);
6. Deferring the question of reparations until the moment of a peace settlement with Germany as a whole.

FRG’s interpretation of contested legal issues shed light on the political and legal pressure Poland faced for decades.

The main assumption of the German legal doctrine rested on the conviction that the decisions of the victorious powers violated international law to a lesser or greater degree. Characteristically, Germany understood the war and its consequences mainly in legal terms (*Verrechtlichung*).

⁵ J.Abr. Frowein, *Potsdam Conference (1945)*, ‘Encyclopedia of Public International Law’ 2009.

It tends to be forgotten that it is politicians who determine the main goals of the peace settlement when a war ends. So settlements are political and legal—the law is not the only instrument for administering justice. We should add that international law in 1945 did not prohibit the change of borders, the resettlement of populations, or the trial of war criminals before an international court. Also, the form and magnitude of war reparations was not and still is not determined in advance.

The West-German legal positions were not universally accepted. And over time they evolved as the rights and responsibilities of the Four Powers were reduced and as detailed international legal regulations came into force.

1.3. The imperial and racist foundations of Nazi Germany produced horrific methods of war which led to irreversible outcomes for Germany itself. Striking at the fundamentals of law and morality, the Third Reich took aim at the basic tenets of Western civilization.⁶ It is difficult to assume that the German people were unaware of how far it strayed from European norms.

Propaganda minister Joseph Goebbels publicly called for total war, adding that the defeat of Germany might lead to its destruction (*Wollt ihr den totalen Krieg?*).⁷ SS leader Heinrich Himmler asserted that

⁶ See R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, Washington, D.C. 1944; J. Karski, *Courier from Poland: The Story of a Secret State*, Boston 1944; T. Snyder, *Bloodlands: Europe Between Hitler and Stalin*, 2010; G. Aly, *Hitlers Volksstaat. Raub, Rassenkrieg und nationaler Sozialismus*, Frankfurt am Main 2011; Ph. Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*, 2016.

⁷ Joseph Goebbels, speech of 18.2.1943 (Berliner Sportpalast):
Jedermann weiß, dass dieser Krieg, wenn wir ihn verlören, uns alle vernichten würde. Und darum ist das Volk mit seiner Führung entschlossen, nunmehr zur radikalsten Selbsthilfe zu greifen. Die breiten arbeitenden Massen unseres Volkes machen der Regierung nicht zum Vorwurf, dass sie zu rücksichtslos, sondern höchstens, dass sie zu rücksichtsvoll vorgeht. (...) Ich frage euch: Wollt ihr den totalen Krieg? Wollt ihr ihn, wenn nötig, totaler und radikaler, als wir ihn uns heute überhaupt noch vorstellen können? /Everyone knows that if we lost him, that war would destroy us all. And that's why the people, with their leadership, are determined to resort to the most radical self-help. The broad working masses of our people do not blame the government for being too reckless, but at the most, for being too considerate. (...) I ask you: Do you want the total war? Do you want him, if necessary, more total and radical than we can even imagine him today?

See: https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0200_goe&object=translation&l=de (accessed on 22.7.2019).

the destruction of the Jewish nation and enslavement of other nations constituted “a page of glory in our history.”⁸ He said the people of the East had a right to only the first four years of schooling and must obey the divine commandments of the Germans (*Herrenvolk*).⁹ For the category of “sub-human” (*Untermenschen*) there was envisioned a special plan for colonization of the East (*Generalplan Ost*).¹⁰

⁸ Speeches by Reichsfuehrer-SS Himmler before senior SS officers in Poznań (Posen), 4.10.1943 and 6.10.1943. *Trials of War Criminals before the Nuernberg Military Tribunals*, Washington, U.S Govt. Print. Off., 1949-1953, Vol. XIII, p. 323, and Himmler, Reichsfuehrer-SS - P. Padfield, Henry Holt and Co, New York 1990, p. 469:

Most of you know what it means when 100 corpses are lying side by side, or 500, or 1,000. To have stuck it out and at the same time – apart from exceptions caused by human weakness – to have remained decent fellows, that is what has made us hard. This is a page of glory in our history which has never been written and is never to be written. I ask of you that what I say in this circle you really only hear and never speak of. We come to the question: how is it with the women and the children? I have resolved even here on a completely clear solution. That is to say I do not consider myself justified in eradicating the men – so to speak killing or ordering them killed – and allowing the avengers in the shape of the children to grow up for our sons and grandsons. The difficult decision has to be taken, to cause this Volk [people] to disappear from the earth.

See: <https://fcit.usf.edu/holocaust/resource/document/DocJewQn.htm>
German version – http://www.1000dokumente.de/index.html?c=dokument_de&dokument=0008_pos&object=translation&st=&l=de/ (accessed on 22.7.2019).

⁹ Reichsfuehrer SS Heinrich Himmler on the treatment of foreigners in the East (15.5.1940):

Für die nichtdeutsche Bevölkerung des Ostens darf es keine höhere Schule geben als die vierklassige Volksschule. Das Ziel dieser Volksschule hat lediglich zu sein: Einfaches Rechnen bis höchstens 500, Schreiben des Namens, eine Lehre, dass es ein göttliches Gebot ist, den Deutschen gehorsam zu sein und ehrlich, fleißig und brav zu sein. Lesen halte ich nicht für erforderlich. Außer dieser Schule darf es im Osten überhaupt keine Schulen geben. /For the non-German population of the East, there should be no higher school than the four-grade elementary school. The goal of this elementary school is: simple calculation to a maximum of 500, writing the name, a credo that it is a divine command to be obedient to the Germans and to be honest, hardworking and good. I do not think reading is necessary. Apart from this school there should not be any schools in the East at all/.

See: <http://www.ns-archiv.de/krieg/untermenschen/himmler-fremdvolk.php> (accessed on: 22.7.2019).

¹⁰ *Generalplan Ost. Rechtliche, wirtschaftliche und räumliche Grundlagen des Ostaufbaues, vorgelegt von SS-Oberführer Professor Dr. Konrad Meyer*, Berlin-Dahlem, Juni 1942; K. Lange, *Der Terminus „Lebensraum“ in Hitlers „Mein Kampf“*, ‘Vierteljahrshefte für Zeitgeschichte’ 1965, vol. 13, no 4, pp. 426-437; M. Wildt, *„Eine neue Ordnung der ethnographischen Verhältnisse“*. *Hitlers Reichstagsrede vom 6. Oktober 1939*, ‘Zeithistorische Forschungen/Studies in Contemporary History’ 2006 , no 1.

In the light of such claims one can wonder why the German defeat would be less total than their victory. After the end of the war was it permissible to use extraordinary methods? Were the methods applied in 1945 unlawful? Was the Versailles treaty a *diktat* and the Potsdam treaty a *superdiktat*? On what could the German state and its people count in 1945?¹¹ The assessment of the Allied decisions, including the decisions about the resettlement of the German population, depends on the answers to these questions.

If, according to German legal positions, the decisions of the victorious powers offended international law, we can consider what alternatives would be legally and politically possible in 1945. Should the Allies have begun peace negotiations with politicians and military leaders who were accused in the Nuremberg International Trials? Or should they have imposed the conditions of peace on the Germans? Should the rights of self-determination, poorly defined in 1945, have counted more than all the other factors?

And, instead of taking the supreme authority, redrawing borders, and resettling Germans, were there other possibilities that could have effectively insured European political stability and security? Should the trial of German war criminals have been left to the German courts?

In 1945 Germany was not completely deprived of legal protection, however this protection was limited. The fundamental principles of law and justice dictate that an aggressor state cannot determine the limits of its responsibility and the legality of the measures taken against it.

The aim of the victorious powers was not only the defeat of Germany, but also the creation of a new foundation for peace in Europe. Although the decisions of the Allies did not constitute a universal model, it needs to be taken into account that, governed by important principles and the general interests of international security, the winning coalition prepared the way for some new legal developments. For instance, the Nuremberg trials, which were criticized in Germany on legal grounds, advanced international criminal law; collective sanctions against Germany preceded

¹¹ On signing the Act of Military Surrender General Jodl noticed:

Durch diese Unterzeichnung ist das deutsche Volk und die deutsche Wehrmacht den Siegern auf Gnade und Ungnade ausgeliefert. In diesem Krieg, der über fünf Jahre gedauert hat, hat unser Volk mehr vollbracht und mehr erduldet als vielleicht alle übrigen Völker der Erde. Ich kann jetzt nur der Hoffnung Ausdruck verleihen, daß die Sieger es mit Großmut behandeln werden. See: „Welt am Sonntag“, 8.5.2005.

the construction foreseen in Chapter VII of the UN Charter; and assuming supreme authority in Germany presaged the international administration of territory acknowledged and practiced today.

Chapter 2: The Western Polish Border and the German Unification

*“Wars begin when you will,
but they do not end when you please”*

Niccolò Machiavelli,
Florentine Histories

2.1. Germany was not threatened in 1939 by any state. On 23.5.1939 Adolf Hitler announced to the German generals that it was not a matter of Danzig/Gdansk, but of expanding the German living space (*Lebensraum*) in the East, and to achieve this it would be necessary to invade Poland, regardless of all legal considerations.¹²

¹² *Es darf nicht der Grundsatz gelten, sich durch Anpassung an die Umstände einer Lösung der Probleme zu entziehen. Es heißt vielmehr die Umstände den Forderungen anpassen. Ohne Einbruch in fremde Staaten oder Angreifen fremden Eigentums ist dies nicht möglich. (...) Weitere Erfolge können ohne Blutvergießen nicht mehr errungen werden. (...) Danzig ist nicht das Objekt, um das es geht. Es handelt sich für uns um die Erweiterung des Lebensraumes im Osten und Sicherstellung der Ernährung. (...) Es entfällt also die Frage, Polen zu schonen, und bleibt der Entschluss, bei erster passender Gelegenheit Polen anzugreifen. (...) Hierbei spielen Recht oder Unrecht oder Verträge keine Rolle, Bericht über eine Besprechung (Schmundt-Mitschrift), 23.5.1939 /There must be no principle of avoiding a solution to the problems by adapting to the circumstances. It is rather the circumstances to adjust the demands. Without breaking into foreign countries or attacking foreign property, this is not possible. (...) Further success can not be achieved without bloodshed. (...) Gdansk is not the object of concern. We are concerned with the extension of the living space in the East and ensuring the nutrition. (...) There is no need to spare Poland, and the decision remains to attack Poland at the first appropriate opportunity. (...) In this connection are law or treaties irrelevant/.*

See:<http://www.ns-archiv.de/krieg/1939/schmundt/23-05-1939-schmundt.php>
(accessed on: 23.7.2019).

The Second World War began on 1.9.1939 as a result of Hitler's provocation (*es wird zurückgeschossen*)¹³ and of the German aggression against Poland.¹⁴ The war did not start with a clash of military units, but with a war crime committed against civilians. On 1.9.1939, at 4.40 a.m., German Luftwaffe attacked an undefended small Polish town – Wieluń – deep in its sleep, and in which there were no military units, no military installations.¹⁵ German bombers destroyed 75 percent of the city, including a hospital, and 1,200 people died.

Germany, in cooperation with the Soviet Union (which invaded Poland on 17.9.1939¹⁶), changed by force the borders of Poland and carried out the forcible resettlement of population.

In the secret protocol to the German-Soviet Nonaggression Pact of 23.8.1939, the preliminary division of spheres of influence was achieved and both parties decided that the maintenance of an independent Polish

¹³ „Polen hat heute Nacht zum ersten Mal auf unserem eigenen Territorium auch mit bereits regulären Soldaten geschossen. Seit 5.45 Uhr wird jetzt zurückgeschossen!“ (Poland shot tonight for the first time on our own territory with already regular soldiers. Since 5.45 clock is now shot back!) – Adolf Hitler. speech in Reichstag on 1.9.1939. See also Gleiwitz incident – W. Röhr, *Vom Annaberg nach Gleiwitz. Zur Vorgeschichte des deutschen Überfalls auf Polen am 1. September 1939*, Berlin 2009; A. Spieß, H. Lichtenstein, *Unternehmen Tannenberg. Der Anlaß zum Zweiten Weltkrieg*, Frankfurt am Main 1989.

¹⁴ „Polen hat heute Nacht zum ersten Mal auf unserem eigenen Territorium auch mit bereits regulären Soldaten geschossen. Seit 5.45 Uhr wird jetzt zurückgeschossen!“ – Adolf Hitler. Speech at Reichstag on 1.9.1939. See also J. Trenkner, *Wieluń, 1. September 1939: Mit der Zerstörung des polnischen Städtchens durch die deutsche Luftwaffe begann der totale Bombenterror des Zweiten Weltkriegs*, 'Die Zeit' 2003, no 7.

¹⁵ The order was issued by Generalmajor Wolfram Freiherr von Richthofen already known as commander of the infamous Legion Condor (Bombardment of Guernica 1937) in the Spanish Civil War; he wanted to try the new version of the dive bomber JU-87. See J. Trenkner, *Wieluń, 1. September 1939: Mit der Zerstörung des polnischen Städtchens durch die deutsche Luftwaffe begann der totale Bombenterror des Zweiten Weltkriegs*, 'Die Zeit', 2003, Nr. 7; Th. Urban, *An einem Morgen im September*, „Süddeutsche Zeitung“, 31.8.2004; H. Bertram, *Feuertaufe. Der Film vom Einsatz der deutschen Luftwaffe in Polen (1940)*; see also fn 144.

¹⁶ The German Ambassador in the Soviet Union (Friedrich-Werner Graf von der Schulenburg) to the German Foreign Office. Telegram No. 371 of 16.9.1939:

The Soviet Government intended to motivate its procedure as follows: the Polish State had collapsed and no longer existed; therefore all agreements concluded with Poland were void; third powers might try to profit by the chaos which had arisen; the Soviet Union considered itself obligated to intervene to protect its Ukrainian and White Russian brothers and make it possible for these unfortunate people to work in peace. See: <http://www.yale.edu/lawweb/avalon/nazsov/ns073.htm> (accessed on 22.7.2019).

State could be determined in the course of further political developments.¹⁷ These decisions were finalized in the Soviet-German Boundary and Friendship Treaty of 28.9.1939.¹⁸ Several days later the Soviet Ministry of Foreign Affairs, Vyacheslav Molotov, called Poland a “Versailles Treaty bastard.”¹⁹ In the post-Versailles German propaganda, Poland was defined as a seasonal State (*Saisonstaat*). Similarly, as in the time of the 18th century

¹⁷ Secret Additional Protocol to the German-Soviet Non-Aggression Treaty of 23.8.1939:

2. *Für den Fall einer territorial-politischen Umgestaltung der zum polnischen Staat gehörenden Gebiete werden die Interessensphären Deutschlands und der UdSSR ungefähr durch die Linie der Flüsse Narew, Weichsel und San abgegrenzt. Die Frage, ob die beiderseitigen Interessen die Erhaltung eines unabhängigen polnischen Staates erwünscht erscheinen lassen und wie dieser Staat abzugrenzen wäre, kann endgültig erst im Laufe der weiteren politischen Entwicklung geklärt werden.* /Article 2. In the event of a territorial and political rearrangement of the areas belonging to the Polish State, the spheres of influence of Germany and the U.S.S.R. shall be bounded approximately by the line of the rivers Narew, Vistula and San. The question of whether the interests of both parties make desirable the maintenance of an independent Polish State and how such a state should be bounded can only be definitely determined in the course of further political developments./

¹⁸ German-Soviet Border and Friendship Treaty, Moscow, 28.9.1939:

Die Deutsche Reichsregierung und die Regierung der UdSSR betrachten es nach dem Auseinanderfallen des bisherigen polnischen Staates ausschließlich als ihre Aufgabe, in diesen Gebieten die Ruhe und Ordnung wiederherzustellen und den dort lebenden Völkerschaften ein ihrer völkischen Eigenart entsprechendes friedliches Dasein zu sichern. Zu diesem Zwecke haben sie sich über folgendes geeinigt: Artikel I. Die Deutsche Reichsregierung und die Regierung der UdSSR legen als Grenze der beiderseitigen Reichsinteressen im Gebiete des bisherigen polnischen Staates die Linie fest, die in der anliegenden Karte eingezeichnet ist und in einem ergänzenden Protokoll näher beschrieben werden soll. /German-Soviet Boundary and Friendship Treaty, Moscow, 28.9.1939: The Government of the German Reich and the Government of the U.S.S.R. consider it as exclusively their task, after the collapse of the former Polish state, to re-establish peace and order in these territories and to assure to the peoples living there a peaceful life in keeping with their national character. To this end, they have agreed upon the following: Article I. The Government of the German Reich and the Government of the U.S.S.R. determine as the boundary of their respective national interests in the territory of the former Polish state the line marked on the attached map, which shall be described in more detail in a supplementary protocol./ See also confidential protocols to this agreement.

¹⁹ Speech of the Foreign Minister of the Soviet Union, Vyatcheslaw Molotov, of 31.10.1939, text in: A.L. Szcześniak (ed.), *Zmowa. IV rozbiór Polski* [Collusion. IVth partition of Poland], Warszawa 1990, pp. 181-197.

partitions of Poland, Germany and the Soviet Union decided to restore “order” in the territory of Poland.²⁰

When World War II ended, the British and the Americans—taking into account the military situation—accepted the *status quo* as an accomplished fact (*fait accompli*), agreeing to the changes in the eastern border of Poland. Stalin did not intend to give up the gains that he achieved in 1939 during his alliance with Hitler. As far as the new western Polish border was concerned, the Soviet Union appeared as a guarantor, and at the same time perpetuated Polish-German antagonism, which served Soviet interests.

The Polish borders, however, did not constitute the only and the principal goal of the Allied powers, which were more concerned with creating a new Europe and preventing future German aggression. From this perspective, the issue of the German borders and the resettlement of the German population became part of the larger scheme (the “four D’s” policy: *demilitarization, denazification, decentralization, democratization*) and went beyond the framework of bilateral Polish-German relations.

The Polish sociologist, Stanislaw Ossowski, wrote in 1946:

We can assess the territorial change [1945] of the Polish state to the west not only from the point of view of the future security of Poland, but also of other issues that are important in our national

²⁰ Treaty between His Majesty the King of Prussia, on the one hand, and His Majesty the King and the Serene Republic of Poland on the other, concluded and signed at Grodno on 25.9.1793:

Le bouleversement qui est survenu dans la constitution et dans le régime intérieur de la république de Pologne par la révolution illégale du 3 May 1791, les désordres qui n'ont cessé de la déchirer depuis cette malheureuse époque, et les progrès que l'esprit d'innovations pernicieuses commençait à y faire, ayant obligé S.M. le Roi de Prusse et S.M. l'Impératrice de toutes les Russies, à s'entendre et à se concerter avec les puissances voisines sur les moyens de garantir leurs propres états du danger imminent dont ils étaient menacés; sa dite Majesté Prussienne et S.M. l'Impératrice de toutes les Russies, unies par un concert mutuel de principes et de vues n'ont cru pouvoir remédier efficacement au mal, qu'en incorporant à leurs empires respectifs les provinces qui y confinaient.

Manifesto of the King of Prussia of 24.2.1793:

Dieselben Gründe, welche S. Majestät den König von Preussen verbunden haben, ein Corps seiner Truppen in einem District von Grosspolen einrücken zu lassen, setzen höchst dieselben auch in die Nothwendigkeit, sich der Stadt Danzig und ihres Gebiets zu versichern. Ohne von den gar nicht freundschaftlichen Gesinnungen zu reden, die diese Stadt seit einer langen Reihe von Jahren gegen Preussen hegt, ist sie jetzt einer der Sitze dieser frevelhaften Secte geworden, die von Verbrechen zu Verbrechen schreitet und sich durch den unreinen Dienst ihres Anhangs und ihrer Genossen fortzupflanzen sucht.

perspective. This movement can play a vital role in the shaping of social life in central Europe—it can bring about a reversal in the great historical processes on its territories. The loss of the eastern provinces of the Reich, on which the power of Prussia was built, may perhaps end the era of Prussian domination in German life—and facilitate an internal transformation of that country. In Poland though, as it is believed, the territorial changes connected with the loss of the former centers of Polish culture in the east—closing a great chapter in the history of Poland in the tradition of its nobility—will make possible a deep social transformation and open new possibilities of coexisting with the neighbors.²¹

Had Ossowski put this program forward during the pre-war period, it would have been seen as an impossible dream. It became a reality only because Germany began the Second World War in 1939. The German presence in the East in 1945 became an historical burden and radically changed as a result of the war. The eastern territories were not so much taken away from Germany as they were lost as a result of its policies.²²

2.2. The German legal situation in 1945, together with the policies of the victorious powers, became defined in two main documents. The first was the Berlin Declaration of 5 June 1945, in which the powers stated that, without any annexation, they assume supreme authority with respect to Germany.²³ The second more concrete stage was the Potsdam agreement and other decisions, in which the Allied powers further defined their main goals, including the shape of the political and economic system in Germany,

²¹ S. Ossowski, *Na tle wydarzeń kieleckich*, 'Kuźnica' 1946, no 38 (56) (reprint in: „Gazeta Wyborcza”, 4.7.1996, pp. 11-13).

²² „Wir Deutschen sind uns bewusst, daß der heute unterzeichnete Vertrag nichts aufgibt, was nicht längst vorher verloren war, als Folge eines verbrecherischen Krieges und eines verbrecherischen Systems“ – Speech of the Federal Minister of Foreign Affairs of the Federal Republic of Germany, Hans-Dietrich Genscher, at the signing of the German-Polish border treaty in Warsaw on 14.11.1990.

²³ Declaration (fn. 3); The Berlin (Potsdam) Conference, 17.7-2.8.1945. *Protocol of the Proceedings*, 1.8.1945:

II. The Principles to Govern the Treatment of Germany in the Initial Control Period. 1. In accordance with the Agreement on Control Machinery in Germany, supreme authority in Germany is exercised, on instructions from their respective Governments, by the Commanders-in-Chief of the armed forces of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council.

the rights and responsibilities relating to Berlin and to Germany as a whole, and the legal consequences for other regions and states.

The Allied powers did not intend to negotiate the terms of peace with Germany, as in the case of the previous unconditional surrender. In the Potsdam agreement, it was clearly foreseen that the peace settlement would be presented to the future German government only for them to accept.²⁴

The absence of Germany at the Potsdam Conference resulted from extraordinary circumstances, namely the military defeat, the unconditional surrender of the armed forces, and the absence of any central political authority. In this situation the Allied powers established an international administration in Germany, which was not the same as a belligerent occupation.²⁵ The construction of the rights and responsibilities of the Four Powers relating to Germany as a whole constituted the expression of this administration. The powers acted in their own name, in the name of Germany, and in the general interest of international peace and security.

According to the government of the FRG and German doctrine, a treaty cannot create either obligations or rights for a third State without its consent (the principle of *pacta tertiis nec nocent nec prosunt*),²⁶ and thus the Potsdam Agreement did not produce legal effects for Germany.

Regardless of whether the Potsdam Agreement is recognized as the source of legal obligations for Germany, or as the obligation of the powers for the future shape of the German state, there is no doubt that the agreement concerned the future fate of Germany and brought

²⁴ The Berlin (Potsdam) Conference, 17.7-2.8.1945. Protocol of the Proceedings, 1.8.1945:

A. The Conference reached the following agreement for the establishment of a Council of Foreign Ministers to do the necessary preparatory work for the peace settlements: (...) (3)(i) As its immediate important task, the Council shall be authorized to draw up, with a view to their submission to the United Nations, treaties of peace with Italy, Rumania, Bulgaria, Hungary and Finland, and to propose settlements of territorial questions outstanding on the termination of the war in Europe. The Council shall be utilized for the preparation of a peace settlement for Germany to be accepted by the Government of Germany when a government adequate for the purpose is established.

²⁵ See fn. 67.

²⁶ See C. Chinkin, *Third Parties in International Law*, Oxford 1993; Ph. Cahier, *Le problème des effets des traités à l'égard des Etats tiers*, 'Recueil des Cours (Académie de Droit International)' 1974-III, vol. 143, pp. 595-732; H. Srebro (ed.), *International Boundary Making*, The International Federation of Surveyors (FIG), December 2013.

about concrete legal consequences. The main decisions of the victorious powers had an irreversible character.

In assessing whether the Potsdam Agreement was to any degree in accordance with customary law, as reflected in Articles 34 and 35 of the Vienna Convention on the Law of Treaties dealing with the principle of *pacta tertiis*²⁷, we need to take into consideration the extraordinary circumstances of signing this agreement. The Federal Republic of Germany emphasized the customary character of the provisions (already in force in 1945) included later in Articles 34 and 35 of the Vienna Convention, noting at the same time the fact that Article 75²⁸ (not having such a character) refers only to future events²⁹ and is not an exception to the above-mentioned principle.³⁰

We can note, however, that—in recognition of Germany’s international responsibility for the war—the supreme authority assumed by the Allied powers resulted first of all, not from the treaty, but from the Berlin Declaration, which did not have a treaty character.³¹

²⁷ Vienna Convention on the Law of Treaties (1969):

Article 34. A treaty does not create either obligations or rights for a third State without its consent. Article 35. An obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing. Article 36.1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.

²⁸ Article 75. The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression. See M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden 2009, pp. 914-918 (commentary to Article 75).

²⁹ Vienna Convention on the Law of Treaties (1969) – Reservations: Germany (upon ratification):

3. The Federal Republic of Germany interprets ‘measures taken in conformity with the Charter of the United Nations’, as referred to in Article 75, to mean future decisions by the Security Council of the United Nations in conformity with Chapter VII of the Charter for the maintenance of international peace and security.

³⁰ O. Corten, P. Klein (eds), *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruxelles 2006 – Chr. Tomuschat, commentary to art. 75, vol. III, pp. 2657-2675.

³¹ Th. Schweisfurth, *International Treaties and Third States*, ‘Zeitschrift für ausländisches öffentliches Recht und Völkerrecht’ 1985, vol. 45, p. 670:

The successive treaties, declarations, and decisions were instruments of the international responsibility of Germany.³² We should think that the decisions of the victorious powers in 1945 are not subject to review in light of the law of treaties.³³ According to the International Law Commission, the legal consequences of treaties imposing certain obligations upon an aggressor state fail outside the principle laid down in Article 35

To sum up: the Potsdam Agreement is not a fruitful example to demonstrate the effect of Article 75 of the Vienna Convention on Article 34 et seq. of the Vienna Convention, simply because it is not a treaty providing for obligations for the aggressor State Germany. But even if it were such a treaty the following simple reasoning could demonstrate that it is not the treaty which represents the basis for the obligations of the aggressor State: imagine that Germany had been defeated and completely occupied only by one of the victorious powers, for example the Soviet Union, and that the Soviet Union had issued a declaration with the material content of the Potsdam Agreement. This declaration would not be a treaty. The basis of its legal effect on the defeated aggressor could not be the aggressor State exception of treaty law, but only other norms provided for by international law for this case: State responsibility and the rights of belligerent occupation. These rules represent the measure for the obligations incumbent upon the defeated aggressor State, whether they are formulated in a unilateral act or in a multilateral instrument of the victorious powers.

See also fn. 70.

³² *The Government of the State of Eritrea v. the Government of the Republic of Yemen* (Phase one: Territorial sovereignty and scope of the dispute), Arbitration Tribunal, Award of 9.10.1998:

153. (...) If State A has title to territory and passes it to State B, then it is legally without purpose for State C to invoke the principle of *res inter alios acta*, unless its title is better than that of A (rather than of B). In the absence of such better title, a claim of *res inter alios acta* is without legal import.

See also BVerfG. decision of 28.1.1998 (2 BvR 1981/97), Rz. 1 and Rz. 7.

³³ C. Laly-Chevalier, F. Rezek, commentary to art. 35, in : *Les Conventions* (fn. 28), vol. II, pp. 1433-1434:

Les mécanismes juridiques concernant l'Etat agresseur (...) reposent sur des règles générales extérieures au droit des traités. (...) [L]es obligations imposées à l'Etat agresseur [n'ont] leur source ni dans le droit des traités, ni dans le traité lui-même, mais bien dans le droit de la responsabilité des Etats et dans celui de la Charte des Nations Unies. On ne pouvait donc y voir une exception à la règle posée.

O. Dörr, K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Berlin-Heidelberg 2012, p. 623: "obligations imposed upon aggressor State were to be considered as sanctions, the basis of the obligations concerned therefore being the concept of State responsibility."

of the Vienna Convention.³⁴ Article 75 of the Convention can be treated as a kind of counterbalance for the legal position of the FRG.³⁵

In this context we should also remember the terms of Article 107 of the UN Charter:

Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

The FRG does not consider itself legally bound by the Potsdam Agreement, part of which is officially regarded in Germany as unlawful.³⁶ Following such logic it would also be necessary to consider illegal the taking over of supreme authority as a consequence of the Berlin Declaration. In spite of that, Germany accepted and respected the consequences of the postwar decisions of the victorious powers.³⁷

Poland supported the decision of the Allied powers because its existence as a sovereign state had been threatened by Germany and Russia for 200 years. Poland accepted the decisions of the Potsdam Agreement without being one of its parties. On the basis of this agreement, Poland, as a third country (*pactum in favorem tertii*), gained new territory on its western border and the right to reparations.³⁸

³⁴ Yearbook of the International Law Commission, 1966, Vol. II. *Draft Articles on the Law of Treaties with Commentaries* (1966) – commentary to Article 31 (equivalent of Article 35 of the Vienna Convention on the Law of Treaties):

Some Governments in their comments referred to treaty provisions imposed upon an aggressor State and raised the question of the application of the present article to such provisions. The Commission recognized that such cases would fail outside the principle laid down in this article, provided that the action taken was in conformity with the Charter.

³⁵ M.E. Villiger (fn. 26): “The principle which could be said to underline Article 75 is that an aggressor State should not be able to gain any profit (in this case in the form of the provisions of the Convention) from the aggression it has committed” (p. 918).

³⁶ See fn. 149, 150, 152.

³⁷ J.Abr. Frowein (fn. 5): “14. (...) The Federal Republic of Germany never recognized the binding force of the Potsdam Agreements as such. She has, however, from the beginning respected legal consequences flowing from the Agreements.”

³⁸ Vienna Convention on the Law of Treaties (1969):

Article 37.2. When a right has arisen for a third State in conformity with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.

2.3. As far as the delimitation of the western frontier of Poland and the resettlement of the German population is concerned, the wording of the Potsdam Agreement seems unambiguous. The terms used, “the former German territories” or “the transfer to Germany of German populations, or elements thereof, remaining in Poland”, were quite explicit.

In conformity with the agreement on Poland reached at the Crimea Conference the three Heads of Government (...) reaffirm their opinion that the *final delimitation* of the western frontier of Poland should await the peace settlement. The three Heads of Government agree that, pending the *final determination* of Poland’s western frontier, *the former German territories* east of a line running from the Baltic Sea immediately west of Swinemünde, and thence along the Oder River to the confluence of the western Neisse River and along the Western Neisse to the Czechoslovak frontier, including that portion of East Prussia not placed under the *administration* of the Union of Soviet Socialist Republics in accordance with the understanding reached at this conference and including the area of the former free city of Danzig, shall be *under the administration* of the Polish State and *for such purposes* should not be considered as part of the Soviet zone of occupation in Germany.³⁹

It should be noted, however, that other terms required some interpretation, for example the notion of administration used in relation to territories granted to Poland. Its Anglo-Saxon meaning was not limited to administration in the narrow, continental sense, but embraced legislative, executive, and judicial powers. Moreover, the territory granted to Poland was not part of the Soviet zone of occupation, nor was it subject to the authority of the Allied Control Council. “Poland exercised her administration in the former German territories *à titre de souverain*.”⁴⁰

³⁹ The Berlin (Potsdam) Conference, 17.7-2.8.1945. Protocol of the Proceedings, 1.8.1945; United States Department of State, *Foreign Relations of the United States. Diplomatic Papers: The Conference of Berlin (The Potsdam Conference) – Conference Proceedings, July 31, 1945*, vol. II, p. 534): “Stalin: Stettin is in the Polish territory. Bevin: Yes. We should inform the French. Stalin: Yes. Truman: Next question”; see also K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (fn. 2), pp. 64-87, 153-192.

⁴⁰ K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, ‘Archiv des Völkerrechts’ 1985, vol. 23. (1/2), p. 39:

The general law did not protect the German title to this territory, for the victors had the right to detach it from Germany. Only an express provision could save German sovereignty” (p. 38); “When a clause protecting the unchanged status of sovereignty is absent, the purpose of the administration helps to elucidate the status of the territory.

Krzysztof Skubiszewski rightly noted the untypical way in which Poland acquired authority over part of German territory, which “to some extent can be related to the so-called *adjudicatio* of territory by the Allied powers. Although the powers assumed the supreme authority in Germany at that time and had the authority to decide about her borders, this was not a clear example of *adjudicatio*, because of the future role of the peace settlement.”⁴¹

The Zgorzelec/Görlitz Treaty of 1950 between Poland and the GDR⁴² confirmed the border on the Odra and Nysa Łużycka (Oder, Lausitzer Neiße) rivers as “the state border between Poland and Germany” (not the GDR) and led to its demarcation.

The agreement of normalization between Poland and the FRG of 7.12.1970⁴³ stated in Article I that “the existing boundary line, the course

The aim of the Great Powers was to revise the eastern frontier of Germany in favour of Poland. The Potsdam Agreement constituted the basic decision which gave expression to that aim. In view of the purpose which the Great Powers intended to achieve there was practically no chance to establish, let alone maintain, the duality between the exercise of sovereignty by Poland and the nominal sovereignty supposedly retained by Germany. Poland exercised her administration in the former German territories *à titre de souverain*.

⁴¹ K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (fn. 2), p. 329; id., *The Great Powers and the Settlement in Central Europe*, ‘Jahrbuch für öffentliches Recht’ 1975, vol. 18, pp. 92–126; id., *Gdańsk and the Dissolution of the Free City*, [in:] ‘Recht im Dienst des Friedens. Festschrift für Eberhard Menzel zum 65. Geburtstag’, Berlin 1975, pp. 469–485; id., *Poland’s Western Frontier and the 1970 Treaties*, ‘American Journal of International Law’ 1973, vol. 67, , pp. 23–43. For the historical perspective see D.-E. Khan, *Die deutschen Staatsgrenzen. Rechtshistorische Grundlagen und offene Rechtsfragen*, Tübingen 2004, and G. Labuda, *Polska granica zachodnia* [The Western border of Poland], Poznań 1971.

⁴² The Agreement between the German Democratic Republic and People’s Republic of Poland Concerning the Demarcation of the Established and the Existing Polish-German State Frontier, signed at Görlitz, 6.7.1950:

Artikel 1. Die Hohen Vertragsschließenden Parteien stellen übereinstimmend fest, dass die festgelegte und bestehende Grenze, die von der Ostsee entlang der Linie westlich von der Ortschaft Swinoujście und von dort entlang dem Fluss Oder bis zur Einmündung der Lausitzer Neiße und die Lausitzer Neiße entlang bis zur tschechoslowakischen Grenze verläuft, die Staatsgrenze zwischen Deutschland und Polen bildet.

⁴³ Treaty Between the Federal Republic of Germany and Poland Concerning the Basis for Normalizing Their Mutual Relations, signed at Warsaw, 7.12.1970:

Artikel I.(1) Die Bundesrepublik Deutschland und die Volksrepublik Polen stellen übereinstimmend fest, daß die bestehende Grenzlinie, deren Verlauf im Kapitel IX der Beschlüsse der Potsdamer Konferenz vom 2. August 1945 von der Ostsee unmittelbar westlich von Swinemünde und von dort die Oder entlang bis zur Einmündung der Lausitzer Neiße und

of which is laid down in Chapter IX of the decisions of the Potsdam Conference of 2 August 1945 (...) shall constitute the western State frontier of the People's Republic of Poland." There is not a word about the German border, with both parties only defining what was the legal status of the Polish western frontier. The term "state frontier" in relation to Poland signifies without any doubt, that the Polish state is east of the Odra and Nysa Łużycka. Article IV reminds us, however, that "The present Treaty shall not affect any bilateral or multilateral international arrangements previously concluded by either Contracting Party or concerning them," so that there still exist rights and responsibilities of the Four Powers relating to Germany as a whole (especially in the context of possible unification).⁴⁴

The evolution of the German position (*Ostpolitik*) took place in large measure because the FRG began to be affected by the negative outcomes of its former policy, and at the same time she perceived that the agreements of 1970 (with Moscow and Warsaw) were related to the readiness of the Soviet Union to liberalize the situation of West Berlin. It was generally understood that there was no way of escaping the legal confirmation of the western frontier of Poland by the Federal Republic, which finally happened by the Treaty of 7 December 1970.⁴⁵

The Moscow⁴⁶ and Warsaw treaties of 1970 made it possible for the FRG to emerge into the wider European political arena, and play

die Lausitzer Neiße entlang bis zur Grenze mit der Tschechoslowakei festgelegt worden ist, die westliche Staatsgrenze der Volksrepublik Polen bildet.

⁴⁴ Note from the Government of the Federal Republic of Germany to the three Western Powers (19.11.1970):

The Government of the Federal Republic of Germany has the honour to inform of a Treaty between the Federal Republic of Germany and the People's Republic of Poland. "In the course of the negotiations (...) it was made clear by the Federal Government that the Treaty between the Federal Republic of Germany and the People's Republic of Poland does not and cannot affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and the United States of America as reflected in the known treaties and agreements. The Federal Government further pointed out that it can act only in the name of the Federal Republic of Germany."

⁴⁵ J.Abr. Frowein, *Zur Entstehung und Bedeutung der Ostverträge 1970 – einige persönliche Ergänzungen*, [in:] H.-J. von Cremer, Th. Giegerich, D. Richter, A. Zimmermann (eds.), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger*, Berlin, Heidelberg, New York 2002, pp. 163-178.

⁴⁶ Treaty Between the Federal Republic of Germany and the Soviet Union, signed at Moscow, 12.8.1970.

an important role in the Quadripartite Agreement on Berlin (3 September 1971) and the signing of the Final Act of the Conference on Security and Cooperation in Europe (CSCE) in 1975. The Treaty of 1970 was at the same time a political success for Poland because the Odra and Nysa Łużycka was then confirmed as the state frontier, and it opened up the way for the normalization and intensification of relations with the FRG.⁴⁷

After signing the Treaty of 1970, the FRG started to weaken the legal significance of this Treaty, emphasizing that she is bound by it only in its own name.⁴⁸ The FRG refused to state that the future (united) Germany would comprise the territory of the FRG, GDR, and Berlin. Even if we recognize that FRG could not legally act in place of the Four Powers, the powers could not impose a larger territory on a united Germany against its will.⁴⁹

The unification course of Chancellor Helmut Kohl at the threshold of the 1990s took its shape only under the clear influence of the USA, which in the existing situation foresaw the possibility of a radical reconstruction of the political reality in Europe (retreat from Yalta). If it had not been for the farsighted and strategic determination of American policy, the situation of Germany and Europe would look completely different today.⁵⁰

Holding to the German legal positions did not make negotiations any easier on the Treaty on the Final Settlement with Respect to Germany (12.9.1990 — “2+4” Treaty). Chancellor Kohl shielded himself with the prerogatives of the victorious powers, which allegedly made it impossible for him to take an official stand in the determination of borders

⁴⁷ M. Tomala, *Deutschland – von Polen gesehen. Zu den deutsch-polnischen Beziehungen 1945-1990*, Marburg 2000.

⁴⁸ *Supra* fn. 42. See also German Bundestag. Joint resolution of 17.5.1972: „2. Die Verträge nehmen eine friedensvertragliche Regelung für Deutschland nicht vorweg und schafften keine Rechtsgrundlage für die heute bestehenden Grenzen.“

⁴⁹ Volker Rühle (CDU), a later Minister of Defense in the government of Chancellor Kohl, exposed himself to criticism in the mid 1980s when he proposed that the Federal Republic of Germany should recognize the western border of Poland as politically binding for a future unified Germany. The resistance against this proposition clearly showed that a part of the FRG political elites were ready to maintain the antagonism in the relations with Poland.

⁵⁰ See C. Rice, Ph.D. Zelikow, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europa*, 2001, (*Germany Unified and Europe Transformed: A Study in Statecraft*, Cambridge, Massachusetts 1995).

of the united Germany. This delaying tactic (for example the 10-point plan of Kohl⁵¹ addressing a German confederation but silent about the Polish-German border) was at times perceived by many Polish politicians who had a favourable view of German unification as a painful and embarrassing spectacle.⁵²

The purpose of the chancellor's political maneuvering was to make the confirmation of the border of a united Germany dependent on two things. First, Poland's recognition of the German minority in Poland and, second, the confirmation of the Polish waiver (1953) of reparations.⁵³ Moreover, Kohl presented the acceptance of the Polish-German border as the price to pay for the unification of Germany and not as a consequence of the German responsibility for the war. All of this rhetoric showed a disregard for the long-term Polish-German interests. We need to add that the new Polish government was not opposed to either German reunification or to its full membership in NATO.

Against the background of many years of fallacious German policy, Polish Premier Tadeusz Mazowiecki did not want to confine the border question to the German promises made during confidential diplomatic talks.⁵⁴

In the 1989-1990 period, Polish diplomacy, under the direction of Foreign Minister Krzysztof Skubiszewski, was less concerned with questioning the Polish western border during the process of German unification. Rather it was concerned with the unknown consequences

⁵¹ Speech by Federal Chancellor Helmut Kohl to the German Bundestag on the Ten-Point Program for Overcoming the Division of Germany and Europe on 28.11.1989.

⁵² T. Mazowiecki, *Nieosiągalne czyniąc możliwym* [Making impossible possible], „Rzeczpospolita”, 6-7.11.2004 (lecture delivered 16.9.2004 in the Kiel Opera during the 45th Congress of German Historians):

For me, remembering my recent conversations with the Chancellor, the absence of the 11th point was a great surprise. I took it as something more than just postponing the issue, motivated by the considerations of the election campaign. I was far from suspecting that the Chancellor had moved to the position of the revisionists. What I saw in this, however, was an underestimation of the international significance of taking a clear and definite stand on this issue. I asked myself where the heritage of Adenauer has gone--‘after Paris – Warsaw’?

⁵³ C. Rice, P. Zelickow (fn. 48), p. 292 /German edition/; H.-J. Küsters, D. Hofmann (eds.), *Dokumente zur Deutschlandpolitik. Deutsche Einheit. Sonderedition aus den Akten des Bundeskanzleramtes 1989/90*, München 1998, pp. 863-864, 878, 955-956.

⁵⁴ T. Mazowiecki, *Wiedziałem, że się uda* [I knew it would work], „Gazeta Wyborcza”, 11-12.9.2004.

of political manipulation of this issue for other purposes, including certain concessions to Moscow.

The objective of Polish diplomacy was that the unification of Germany would be carried out within the framework of a wider European context. Poland saw that separating the Polish-German issues from the international framework threatened further political and legal confrontation in bilateral relations.⁵⁵ For Polish politicians, it was beyond doubt that in such a situation a united Germany would return to the path of the so-called legal positions,⁵⁶ with all of the negative consequences for the future of Europe.

During the 1989/1990 turning point, the FRG did not want to negotiate the text of the Polish-German treaties before the formal unification. Poland held firm, leading to pre-unification talks between Polish and German experts. One of the achievements of Foreign Minister Skubiszewski was the guarantee of the participation of Poland in the “2+4” negotiations (the Paris round, 17 July 1990), as described here by Skubiszewski:

In February 1990, on the margins of the Open Skies Conference in Ottawa, the two German states, France, the USA, Great Britain, and the USSR agreed that they will be the exclusive participants in the talks regarding German unification (the so-called “2+4” formula). A peace conference with all of the participants of the World War II taking part was precluded. (...) Thanks to my intervention in Ottawa, the concluding statement was supplemented by an addition to the sentence talking about the purpose of the “2+4” negotiations—‘the discussion of the external aspects of German unification’—of the words: ‘together with the security question issues of the neighboring states.’ This opened the door for us for participating in the “2+4” talks dealing with the German borders and other interests vital for Poland.⁵⁷

⁵⁵ J. Sułek, *Traktaty polsko-niemieckie z 1990 i 1991 roku – prawda i fałsz* [Polish-German treaties of 1990 and 1991 – truth and falsehood], *Przegląd*, 2 and 8.1.2007:

The threat had become real that the worst of the possible scenarios might be realized: that Germany would be unified without the border on the Oder and Nysa Luzycka Rivers being recognized by treaty as final. A situation could arise in which a postponement of the border disagreement could become a proverbial bone of contention between a free and sovereign Poland and a unified Germany.

⁵⁶ As discussed in section 1.2.

⁵⁷ K. Skubiszewski, *Do niepodległości krok po kroku* [Step by step to independence], *Gazeta Wyborcza*, 11.9.2009.

On 17.7.1990 during the Paris session of the “2+4” talks, an agreement was reached with the participation of Poland⁵⁸ concerning the Polish-German border, which was reaffirmed in the Treaty on the Final Settlement with Respect to Germany, signed in Moscow on 12.9.1990.⁵⁹ Moreover, it was agreed that as a result of the expected signing of the “2+4” Treaty, the prospective peace settlement (*Friedensvertragvorbehalt*) from the former documents was pointless.

During this Paris session the Polish minister made sure that the Polish-German border was not subject to the guarantee of the victorious powers⁶⁰:

⁵⁸ See the statement of the Foreign Minister, Krzysztof Skubiszewski, 17.7.1990, text [in:] K. Skubiszewski, *Polityka zagraniczna i odzyskanie niepodległości. Przemówienia, oświadczenia, wywiady 1989–1993* [Foreign affairs and regaining independence. Speeches, statements, interviews 1989–1993], Warszawa 1997, pp. 55–67.

⁵⁹ Treaty on the Final Settlement with Respect to Germany, 12.9.1990:

Having regard to the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole, and the corresponding wartime and post-war agreements and decisions of the Four Powers; Recognizing that thereby, and with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole lose their function; (...) Article 1. (1) The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force. The confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe. (2) The united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law. (3) The united Germany has no territorial claims whatsoever against other states and shall not assert any in the future.

⁶⁰ *Procès-verbal de la réunion des ministres des Affaires étrangères de la France, de la Pologne, de l'Union des Républiques Socialistes Soviétiques, des Etats-Unis d'Amérique, de la Grande-Bretagne, de la République Fédérale d'Allemagne et de la République Démocratique Allemande* – para. 4 (document of the Conference „2+4” with the participation of Poland, Paris round, 17 July 1990, text in: J. Barcz, *Udział Polski w konferencji „2+4”. Aspekty prawne i proceduralne* [Poland’s participation in the “2+4” conference. Legal and procedural aspects], Warszawa 1994, pp. 167-168 (German version in: *Dokumente* (fn. 51), pp. 1369-1370):

Les Quatre puissances alliées déclarent que les frontières de l'Allemagne unifiée auront un caractère définitif qui ne pourra être remis en cause par aucun événement ou circonstance extérieurs. Le Ministre des Affaires étrangères de la Pologne indique qu'aux yeux du Gouvernement Polonais, cette déclaration ne constitue pas une garantie de frontières par les Quatre puissances. Le Ministre de la République Fédérale d'Allemagne indique qu'il a pris connaissance de ce que le gouvernement polonais ne voyait pas dans cette déclaration une

It was important that the USSR stopped functioning as a guarantor of the Polish-German border. I was concerned that the West could potentially make concessions regarding the Soviet sphere of influence in Europe in exchange for the agreement by Moscow for the loss of the GDR and the unification of Germany. Moscow was prepared to write off the loss of Czechoslovakia, Hungary, Poland, however, was perceived differently by various political forces (particularly the military) in the USSR—because of our geographical position between the USSR and Germany. That was the reason for the difficulties in negotiations (also with Russia after the dissolution of the USSR) concerning the withdrawal of Russian troops from Poland.⁶¹

We should add that the guarantee of the Polish-German border by the victorious powers was equally unfavourable for the German side, which saw in such a guarantee a lack of confidence in a democratic Germany.

The German unification took place as a result of convergence of many factors, including the grassroots people's movements in the countries of central Europe (initiated in Poland by the "Solidarity" movement), changes in the leadership of the Soviet Union, and finally the strong position of the United States, together with the rising pressure from the people of the GDR in the final stage. Without the previous acceptance of the western border of Poland by the German side, the unification would not have taken place.

In the Treaty of 1990⁶² Poland and Germany only had to confirm—on the basis of the previously signed treaties—the existing border between

garantie sur les frontières. La RFA s'associe à la déclaration des Quatre puissances alliées et souligne que les événements ou circonstances auxquels cette déclaration fait référence ne se produiront pas, à savoir qu'un Traité de paix ou un règlement de paix ne sont pas envisagés. La RDA souscrit à la déclaration faite par la RFA.

⁶¹ *Do niepodległości* (fn. 55).

⁶² Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them, signed at Warsaw, 14.11.1990:

Article 1. The Contracting Parties reaffirm the frontier between them, whose course is defined in the Agreement between the Polish Republic and the German Democratic Republic concerning the demarcation of the established and existing Polish-German State frontier of 6 July 1950 and agreements concluded with a view to implementing and supplementing the Agreement (Instrument confirming the demarcation of the State frontier between Poland and Germany of 27 January 1951; Agreement between the Polish People's Republic and the German Democratic Republic regarding the delimitation of the sea areas in the Oder Bay of 22 May 1989), as well as the Agreement between the Polish People's Republic and the Federal Republic of Germany concerning the basis for normalization of their mutual relations of 7 December 1970.

them.⁶³ Thus the process of the unification of Germany took place in a way that was favourable for Europe, for Germany, and also for Poland.

In this context, it is important to remember the words of Andrzej Kijowski, a representative of the underground opposition in Poland. In 1978, Kijowski said the border between the FRG and the GDR on the Elbe River “is an insult to the whole civilized world.” He said Poles would be enslaved if they agreed “to build a national identity based on conditions created by Russia.”⁶⁴ For Poland and for Poles “the problem of the unification of Germany is not a question of ‘permission’ or of ‘disagreement,’ but rather – in the first place – to perceive its division and its effects not as a circumstance contributing to the permanent enslavement of Poland and – secondly – that its unification, which is more than likely, and in our belief, unavoidable, would not be done against the interests of Poland.” Taking the broad view, he demanded that “the unification of Germany, when it finally takes place, should not cause any new complications in the Polish-German relationship (...), but to the contrary, should contribute to the general integration of this part of the continent.”⁶⁵

2.4. It is important to note here the degree to which the Poland’s western border was held hostage to FRG strategy.

In the years after the war there was a ruling principle in the FRG: to think intensively about unification, but to say little publicly. Even as unification became part of public discourse, it was not seen as politically realistic. The less politicians believed unification was near at hand, the more they held to the provisional character of the western frontier of Poland. For some German politicians the border was an instrument for exerting pressure directed at the unification of Germany within the borders comprising the FRG, the GDR, and Berlin; others, however, considered at least a partial return to the borders of 1937.

⁶³ J. Barcz, *Podstawy prawne stosunków Polski ze zjednoczonymi Niemcami* [Legal foundations of Poland’s relations with Germany], [in:] *Polska-Niemcy 1945-2007* (fn. 2), pp. 113-158.

⁶⁴ A. Kijowski, *Niemcy, Polacy i inni* [Germans, Poles and others] May 1978, reprint [in:] A. Kijowski, *Rachunek naszych słabości* [Account of our weaknesses], Warszawa 2009, pp. 49, 54.

⁶⁵ *Ibidem*, pp. 54, 58.

The terms which were in general use in the FRG after the Second World War, such as *Wiedervereinigung* (reunification)⁶⁶ or *deutsche Einheit* (German unity)⁶⁷, have negative historical connotations. The pre-war use of the term *Wiedervereinigung* appeared in the context of the annexation by Germany of Austria, of the Sudeten part of Czechoslovakia (*Sudetenland*), of Klaipeda (*Memelland*), as well as of the Free City of Gdansk.

The postwar *Wiedervereinigung* is a complex political concept. In terms of the West German doctrine of “Germany in the borders of 1937”, it would be impossible to unite Germany, given that the GDR was not considered as a separate state. Assuming that Germany survived the defeat of 1945 as a state and as a subject of international law does not mean that its borders remained the same. Parts of German territory were granted to Poland and to the USSR by the victorious powers in Potsdam. The remaining territory was initially divided into occupation zones then, from 1949 on, existed as two states—the FRG, the GDR and, divided between them, Berlin. The unification was about the incorporation of the GDR into the FRG together with East Berlin.

Until 1949 Germany did not have the authority to determine its political system or to accept changes to its borders. After 1949, the two German states confirmed the western frontier of Poland in the treaties of 1950 and 1970, and also affirmed that the borders are inviolable. If the FRG in 1970 acknowledged that it has no territorial claims and that it will not assert such claims in the future (Article I, al. 3 of the Treaty of 1970), then the reaffirmation of the rights and responsibilities of the Four Powers

⁶⁶ Gesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich vom 13. März 1938; Gesetz über die Wiedervereinigung der sudetendeutschen Gebiete mit dem Deutschen Reich vom 21. November 1938; Gesetz über die Wiedervereinigung des Memellandes mit dem Deutschen Reich vom 23. März 1939; Gesetz über die Wiedervereinigung der Freien Stadt Danzig mit dem Deutschen Reich vom 1. September 1939.

⁶⁷ J. Bainville, *Geschichte zweier Völker. Frankreichs Kampf gegen Deutsche Einheit*, Hamburg 1941. In the introduction to this book professor Friedrich Grimm noticed:

Zwei Ideen beherrschen die neueste Geschichte Europas. (...) Die eine ist die englische Lehre vom europäischen Gleichgewicht, die ständig zwischen Deutschland und Frankreich steht und keine dieser Mächte zu stark werden lässt. (...) Die andere Idee ist die Politik, die man in Frankreich die ‘klassische’ (...) zu nennen pflegt. (...) Immer wieder in Deutschland zu intervenieren, die deutsche Zwietracht ausnutzen (...) mit dem Endziel, den ‘germanischen Block’, d.h. ‘die deutsche Einheit zu verhindern’. (...) Der Sinn der deutschen Geschichte aber, wie sie sich heute unter Adolf Hitler vollendet, ist ein Kampf um das Reich, die Einheit der Deutschen“ (p. 5/6). Eine Politik, die Deutschland die ‘nationale Einheit verwehren will’ (...) ist immer Angriffspolitik (p. 18).

concerning Germany as a whole (Article IV) was significant in relation to the role of these powers in potential unification, but not the borders of Poland.

With the confirmation of the western border of Poland in 1970, it was hard to support the thesis of the legal existence of Germany “in the borders of 31 December 1937” (one of the fundamental premises of the West German doctrine). Let us note that there are no reasons why only the pre-war territorial shape of Germany was to be the subject of special protection. This construction appears in some documents of the Allies as a way of ordering facts and emphasizing that the term “Germany” does not relate to territorial gains made by force after 1937. The Allied powers have never obligated themselves to support the unity of Germany in the 1937 borders—the German territory within these borders has never been guaranteed by any treaty. The existence of Germany in these 1937 borders was not confirmed by the Constitution of the FRG. There is a difference between the continuation of the state and the continuation of its borders. State sovereignty refers to the character of its powers; its territory, however, over which this power is held, can undergo changes. The increase or decrease of a state’s territory is not the same as an increase or decrease of its sovereignty.

The supreme authority the Four Powers assumed in Germany led to the construction of their rights and responsibilities relating to Germany as a whole. In the Berlin declaration (1945) the powers reserved for themselves the right to decide about the German territory and to determine its borders. They acted in their own name and in name of Germany, but their authority had a different character and purpose than the norms of the Hague Convention pertaining to a belligerent occupation.⁶⁸ Through a peaceful occupation and using an international administration, the Four Powers decided to introduce radical changes in Germany (the political system, laws, boundaries, politics).⁶⁹

⁶⁸ Convention (IV) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre, La Haye, 18.10.1907:

Article 43. L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie publics en respectant, sauf empêchement absolu, les lois en vigueur dans le pays.

⁶⁹ Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge 2009, p. 32-33:

Along with the acceptance of the Constitution (Basic Law) of the FRG (1949), the three western powers agreed upon an Occupation Statute⁷⁰ (September 1949), regulating their relations with and assuring control

If war ends with an unconditional surrender – and the enemy completely collapses, ceasing to function as a State – occupation of its territory is not reckoned any more as belligerent. The template is the occupation of Germany and Japan following their unconditional surrenders in 1945. (...) Allied occupations of the two principal Axis countries were not seen as belligerent occupations within the purview of the Hague Regulations. (...) [T]he victors introduced in occupied Germany sweeping institutional changes that were incompatible with the law of belligerent occupation as enunciated in the Hague Regulations. (...) [T]he post-surrender occupations of Germany and Japan were ‘transformative’ in their nature.

E. Benvenisti, *The International Law of Occupation*, Oxford 2012, p. 159-164 (“The Allies never treated the law of occupation as the source of their authority in Germany and Japan, nor did they consider their administration bound by the Hague Regulations which they saw as inapplicable in Germany and Japan”, p. 161).

J.Abr. Frowein (fn. 5):

14. Since German territory was under belligerent occupation in 1945, the decisions reached at Potsdam could have legal consequences for Germany as far as they were covered by the international law of belligerent occupation and transformed into measures of the occupation authorities. It is clear, however, that many of the measures agreed upon concerning the international status of Germany, the ‘administration’ of German territory in contrast to occupation, and the transfer of German populations went far beyond what was recognized as legal in 1945 under the rules of belligerent occupation. According to the legal position adopted by the Allies occupying Germany in 1945 this occupation was, in their view, not bound by the general rules of belligerent occupation. This position was never formally recognized by a government representing Germany as a whole.

⁷⁰ The Occupation Statute promulgated on the 12.5. 1949 by the Military Governors and Commanders in Chief of the Western Zones, “Official Gazette of the Allied High Commission for Germany”, 23.9.1949, N° 1:

3. The occupation authorities (...) reserve the right (...) to resume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments. (...) 5. Any amendment of the Basic Law will require the express approval of the occupation authorities before becoming effective. Land constitutions, amendments thereof, all other legislation, and any agreements made between the Federal State and foreign Governments, will become effective 21 days after its official receipt by the occupation authorities unless previously disapproved by them, provisionally or finally. The occupation authorities will not disapprove legislation unless in their opinion it is inconsistent with the Basic Law, a Land constitution, legislation or other directives of the occupation authorities themselves or the provisions of this Instrument, or unless it constitutes a grave threat to the basic purposes of the occupation.

(the High Commissioner) over the newly created Federal Republic. This statute formally ended on 5.5.1955 just as the Paris Treaties entered into force.⁷¹ This did not mean the complete extinction of the rights and responsibilities of the Four Powers, but these rights were being significantly limited and reoriented to address the unification of Germany and the status of Berlin.⁷²

The agreement between the FRG and the three western powers in 1954 reemphasized the continued existence of their rights and responsibilities for Germany as a whole. However, the frontiers of this whole were not specifically defined.⁷³ At the same time the parties to this agreement decided that the future peace settlement concerning Germany should be negotiated between a unified Germany and its former enemies (Article 7)⁷⁴, however

⁷¹ See Bundesgesetzblatt 1955 II, N^{os} 7 and 8.

⁷² Th. Schweisfurth (fn. 29), p. 671:

The German States concluded a Transit-Traffic Agreement which, by being listed in the Final Quadripartite Protocol, became part of the Quadripartite Agreement [on Berlin of September 3, 1971]; by that fact, however, the two German States themselves did not become parties to the Quadripartite Agreement. They had concluded the Transit-Traffic Agreement on the basis of an authorization given by the negotiating States of the Quadripartite Agreement in their capacity as occupation powers. The four powers are the 'masters' of the Transit-Traffic Agreement although it was concluded by the German States in their own names. The four powers not only determined many details of this agreement; its duration also depends solely on them. (...) The Quadripartite Agreement contains further provisions providing for obligations and rights for the Federal Republic of Germany as well as for the GDR. Both German States are legally bound to respect these dispositions not simply because the Quadripartite Agreement contains them but because the contracting States in their capacity of occupation powers are entitled to prescribe them. In relation to the Quadripartite Agreement the two German States are not in the ordinary position of a 'third' State in the sense of Article 34 et seq. of the Vienna Convention but legally subordinated to the four powers because of their continuing rights of belligerent occupation.

See also chapter 2.2.

⁷³ Convention on the Relations between the Three Powers and the Federal Republic of Germany (Deutschlandvertrag), 23.10.1954:

Article 2. In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement.

⁷⁴ Deutschlandvertrag (fn. 71):

Article 7.1. The Signatory States are agreed that an essential aim of their common policy is a peace settlement for the whole of Germany, freely negotiated between Germany

such negotiations would take into account the rights and responsibilities of the Four Powers. There is no mention of the legal existence of Germany as a whole within the 1937 borders, and no promises made in this respect by the Four Powers.

Germany did not question the legality of the rights and responsibilities of the victorious powers emerging from the Berlin Declaration (1945). What is more, it accepted them in the subsequent treaties⁷⁵, and Chancellor Helmut Kohl referenced them as an obstacle to a unilateral political declaration of the FRG concerning the recognition of the western border of Poland in the context of the process of unification in the years 1989-1990.

In 1990 despite the radically different circumstances, the unification of Germany was not possible without the agreement of the Four Powers.⁷⁶ The role of both German states was then recognized, but within the “2+4” formula. The rights and responsibilities of the Four Powers expired only when the “2+4” Treaty (concluded not with Germany, but with two German States) entered into force (and not when it was signed).

2.5. In summary, political factors played the dominant role in determining the Polish-German border, whereas historical and ethnic concerns were of secondary importance.

In 1939, Germany and the Soviet Union proclaimed the extinction of the Polish state and agreed on a common border between them. In 1945, the Soviet Union was a member of the winning coalition and was not required to give up the territorial gains it achieved as an outcome of its alliance with Hitler. The western powers accepted this state of affairs as a *fait accompli* because of the military situation that had arisen in 1945.

Poland had very limited influence on changes to its borders. The issue was subject to the political games of the victorious powers. *Nolens volens*

and her former enemies, which should lay the foundation for a lasting peace. They further agree that the final determination of the boundaries of Germany must await such a settlement. (...) 4. The Three Powers will consult with the Federal Republic on all matters involving the exercise of their rights relating to Germany as a whole.

⁷⁵ Convention on the Settlement of Matters Arising out of the War and the Occupation of 23.10.1954 (“the Settlement Convention”), Bundesgesetzblatt 1955 II, p. 405; Bundesverfassungsgericht. Beschluß des Ersten Senats vom 7. Juli 1975 (1 BvR 274/72), para. 107.

⁷⁶ See R.W. Piotrowicz, S.K.N. Blay, *The Unification of Germany in International and Domestic Law*, Amsterdam 1997, pp. 85-102.

Poland was forced to accept the loss of its eastern territories (to the Soviet Union), leading to the migration of the Polish people from these territories.

The western Polish frontier was a subject of interest of the victorious powers, who—taking into consideration the military situation on the eastern front and the agreements related to it between the USA, Great Britain and the Soviet Union—had foreseen a territorial compensation for Poland in the west. The Polish government supported this intention because otherwise Poland would have become a dwarf state, squeezed between Germany and the Soviet Union, which would have been a postmortem victory for Hitler. The decision regarding the western borders of Poland was made by the Allied powers during the Potsdam Conference. The substantial accessions of territory in the north and west were in the interest of the Soviet Union, which saw in it a way of sustaining the tension between Poland and Germany and putting itself as the main guarantor of the new frontier.

Germany lost its eastern territories as a result of its own politics and international legal responsibilities. The monstrosity of German crimes, the unconditional surrender of the German armed forces, and the lack of any central authority in Germany, made it necessary for the victorious powers to assume the supreme authority in 1945 and to make the decisions concerning the future of Germany without its consent. For the legality of these decisions, the opinion of the victorious powers played the decisive role, which was confirmed by later practice. The so-called legal positions of the FRG maintained their unilateral character.

Chapter 3: The Resettlement of Germans–War and Causality

“We cannot see the end of the war as a cause for the flight, expulsion, and enslavement. This outcome is rather the result of the beginning of war and of the rule of violence that led up to it. We cannot separate the 8th of May 1945 from the 30th of January 1933.”

Richard von Weizsäcker⁷⁷

3.1. The Second World War was an event that had irreversible effects, one of them being the forced resettlement of populations.⁷⁸ It is a difficult issue in the Polish-German dialogue.

⁷⁷ Speech by Federal President Richard von Weizsäcker on 8.5.1985 in the plenary hall of the German Bundestag on the 40th anniversary of the end of the Second World War:

[W]ir dürfen nicht im Ende des Krieges die Ursache für Flucht, Vertreibung und Unfreiheit sehen. Sie liegt vielmehr in seinem Anfang und im Beginn jener Gewaltherrschaft, die zum Krieg führte. Wir dürfen den 8. Mai 1945 nicht vom 30. Januar 1933 trennen.

⁷⁸ See Ch. Koch (Hrsg.), *War die «Vertreibung» Unrecht? Die Umsiedlungsbeschlüsse des Potsdamer Abkommens und ihre Umsetzung in ihrem völkerrechtlichen und historischen Kontext*, Frankfurt am Main, Berlin, Bern 2015; R.M. Douglas, *Orderly and Humane. The Expulsion of the Germans after the Second World War*, New Haven, London 2012; Ph. Theer, *Ciemna strona państwa narodowych. Czystki etniczne w nowoczesnej Europie* [The dark side of national states. Ethnic cleansing in modern Europe], Poznań 2012; P. Madajczyk, *Czystki etniczne i klasowe w Europie XX wieku* [Ethnic and class cleansing in Europe in XX century], Warszawa 2010; J. Piskorski, *Wygnańcy. Przesiedlenia i uchodźcy w dwudziestowiecznej Europie* [Exiles. Resettlements and refugees in the XXth century Europe], Warszawa 2010; K. Ruchniewicz, *Flucht, Vertreibung, Aussiedlung der deutschen Bevölkerung aus Polen nach 1945. Eine Inhaltsanalyse polnischer Schulbücher für den Geschichtsunterricht in der Mittel- und Oberschule*, „Polen-Analysen“, no 65, 16.2.2010; W. Sienkiewicz, G. Hryciuk (eds), *Wysiedlenia, wypędzenia i ucieczki 1939 - 1959. Atlas ziem Polski. Polacy, Żydzi, Niemcy Ukraińcy* [Resettlements, expulsions and refugees 1939-1959. Atlas of Polish lands. Poles, Jews, Germans, Ukrainians], Warszawa 2008; A.M. Kacowicz, P. Lutomski (ed.), *Population Resettlement in International Conflicts: A Comparative Study*, New York 2007; P. Eberhardt, *Political Migrations in Poland 1939-1948*, Warsaw 2006; J.M. Piskorski, *Polacy i Niemcy. Czy przeszłość musi być przeszkodą?* [Poles and Germans. Does past have to be an obstacle?], Poznań 2004; P. Buras, P.M. Majewski (ed.), *Pamięć wypędzonych. Grass, Beneš i środkowoeuropejskie rozrachunki. Antologia tekstów polskich, niemieckich i czeskich* [Memory of refugees. Grass, Beneš and Central European settlements. The anthology of Polish, German and Czech texts], Warszawa 2003; B. Nitschke, *Wysiedlenie czy wypędzenie? Ludność niemiecka w Polsce w latach 1945-1949* [Resettlement or exile? German people in Poland from 1945 to 1949], Toruń 2000;

Who, then, and when, began the forced resettlement of populations, and what conclusions should have been drawn from it in 1945? How would a return to the *status quo ante* have looked? If we accept that the German population could not have been legally resettled on the basis of the decisions of the victorious powers in Potsdam, then we have a problem of over a million Germans forcefully re-settled by the authorities of the Reich during the Second World War. Were these people supposed to have returned to their original place of habitation in 1945? How would it have been possible for millions of minority Germans to coexist with Czechs or Poles in their countries after such an atrocious war? Can these questions be addressed only in juridical form?

The resettlement of Germans after the end of the war was undoubtedly a painful measure. Was this measure legal, necessary, and proportional? Has it fulfilled the long-term expectations connected with it?

In this context it is important to differentiate between the individual perception of one's fate by those who were resettled and the international legal responsibility of a state for war. It is also essential to look at the difference between the political decision of the victorious powers and its practical execution (where there have been abuses and offenses).

Before the Potsdam Conference, the powers had allowed and accepted the resettlement of German populations from some territories. These movements were driven by, among other factors, changes in borders and the negative pre-war experiences connected with the political use

id., *Vertreibung und Aussiedlung der deutschen Bevölkerung aus Polen 1945 bis 1949*, München 2003; H-J. Bömelburg, R. Stößinger, R. Traba (ed.), *Wypędzeni ze Wschodu. Wspomnienia Polaków i Niemców* [Exiled from the East. Memories of Poles and Germans], Olsztyn 2001; W. Borodziej, H. Lemberg (eds), *Niemcy w Polsce 1945-1950. Wybór dokumentów* [Germans in Poland between 1945 and 1950. Selection of documents], vol. 1-4, Warszawa 2000-2001 (German edition - *Die Deutschen östlich von Oder und Neiß 1945-1950. Dokumente aus polnischen Archiven*. Bde. 1-4, Marburg/Lahn 2000-2004); J. Kranz, K. Bachmann (eds), *Przeprosić za wypędzenie? O wysiedleniu Niemców po II wojnie światowej* [To apologize for expulsion? About the resettlement of Germans after World War II], Kraków 1997 (German edition: *Verlorene Heimat. Die Vertreibungsdebatte in Polen*, Bonn 1998); H. Orłowski, A. Sakson (ed.), *Utracona ojczyzna. Przymusowe wysiedlenia, deportacje i przesiedlenia jako wspólne doświadczenie* [The lost homeland. Compulsory displacements, deportations and resettlements as joint experience], Poznań 1996; M. Podlasek, *Wypędzenie Niemców z terenów na wschód od Odry i Nysy Łużyckiej* [Expulsion of Germans from the territories located to the East from Odra and Nysa Łużycka], Warszawa 1995.

of German minorities and their disloyal attitude toward the states that hosted them⁷⁹, which was a threat to the peace in Europe.

The resettlement of ethnic Germans from other states to the Reich or to the territories it occupied⁸⁰ constituted an instrument of National

⁷⁹ Adolf Hitler, speech to the Reichstag on 1.9.1939:

Danzig war und ist eine deutsche Stadt. Der Korridor war und ist deutsch. Alle diese Gebiete verdanken ihre kulturelle Erschließung ausschließlich dem deutschen Volke. Ohne das deutsche Volk würde in all diesen östlichen Gebieten tiefste Barbarei herrschen. (...) [V]or allem aber [wurden] die dort lebenden deutschen Minderheiten in der qualvollsten Weise misshandelt. (...) Ich weiß nicht, worin die Provokationen der Kinder oder Frauen bestehen sollen, die man misshandelt, die man verschleppt, oder worin die Provokationen derer bestanden haben soll, die man in der tierischsten, sadistischsten Weise teils misshandelt, teils getötet hat. (...) Aber nur eines weiß ich: dass es keine Großmacht von Ehre gibt, die auf die Dauer solchen Zuständen zusehen würde! /Gdansk was and is a German city. The corridor was and is German. All these areas owe their cultural development exclusively to the German people. Without the German people, there would be profound barbarism in all these eastern regions. (...) Above all, however, the German minorities living there were mistreated in the most painful way. (...) I do not know what the provocations of the children or women should be, which are mistreated, abducted, or in which the provocations of those who have been mistreated and sometimes killed in the most animal, sadistic, and sinful ways exist. (...) But only one thing I know: that there is no great power of honor that would watch in the long run of such conditions! /

⁸⁰ Decree of the Führer and Reich Chancellor for the Consolidation of German Nationality, 7.10.1939:

Dem Reichsführer-SS obliegt nach meinen Richtlinien: 1. die Zurückführung der für die endgültige Heimkehr in das Reich in Betracht kommenden Reichs- und Volksdeutschen im Ausland, 2. die Ausschaltung des schädigenden Einflusses von solchen volksfremden Bevölkerungsteilen, die eine Gefahr für das Reich und die deutsche Volksgemeinschaft bedeuten, 3. die Gestaltung neuer deutscher Siedlungsgebiete durch Umsiedlung, im Besonderen durch Sefßhaftmachung der aus dem Ausland heimkehrenden Reichs- und Volksdeutschen

See: http://www.1000dokumente.de/index.html?c=dokument_de&dokument=0075_vot&object=translation&st=&l=de (accessed on: 23.7.2019).

In German sources from the time of war one can find following formulas:

Ansiedlung von volksdeutschen Umsiedlern“; „Rückführung der deutschen Volksgruppe aus dem Ost-Dnjepr-Raum und Wiederansiedlung im Generalgouvernement“; „Nachumsiedlung“; „Aussiedlung der Slowenen und Ansiedlung der Gottschee-Deutschen“; „Zur Platzschaffung für die Ansetzung der rückgeführten Volksdeutschen werden Polen und Juden aus den eingegliederten Ostgebieten ausgesiedelt.

See: <http://midosa.startext.de:8180/barch/MidosaSEARCH/ns19/rightframe.htm?vid=ns19&kid=87AA6444A6AC449FB1FF02DDBC71D62> (accessed on 23.7.2019). See also Der Reichskommissar für die Festigung deutschen Volkstums. Stabshauptamt. *Bericht über den Stand der Um- und Ansiedlung am 1. Juli 1942* (Bundesarchiv Bestand NS 19

Socialist policy.⁸¹ The resettled Germans took over houses of Poles or Jews who had been deported or murdered. Toward the end of the war there was a massive, badly organized evacuation or flight of millions of Germans caused by the advancing front (the greatest number of casualties can be dated back to this period). The final step was the decision of the Allied powers, made in 1945 during the Potsdam Conference, concerning the western border of Poland and “the transfer to Germany of German populations (...) remaining in Poland.” It was a particular and specific price paid to Stalin for preservation of his territorial gains in eastern Poland obtained in 1939 in close cooperation with Hitler. In this way the German policy of *Heim ins Reich* (return to the Reich) in 1945 turned out to be a tragic irony of fate.⁸²

The forced migration of population affected not only Germans. For example, Poles had been resettled by the Germans and Soviets in the fall of 1939. The change of the eastern border in 1945 meant part of the Polish population were evacuated into Polish territory to escape Soviet rule. At the same time (1945) thousands of Poles were deported to forced labor in the Soviet Union. The war started by Germany in 1939 triggered these events. This war also facilitated the expansion of Soviet communism, which for years was a source of suffering for many people and nations.⁸³

3.2. The decisions of the Allied powers dealing with Germany after its defeat in 1945, including the resettlement of the German population, were not a simple matter of revenge.⁸⁴ The decisions were rooted in the aggressive

/Persönlicher Stab des Reichsführers SS/ Akte 2743) – <http://homepages.uni-tuebingen.de/gerd.simon/umsiedlung-statistik.pdf> (accessed on 23.7.2019).

⁸¹ See chapter 6.1.

⁸² United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The human rights dimensions of population transfer, including the implantation of settlers*, Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano, 6.6.1993 (E/CN.4/Sub.2/1993/17): “138. (...) It is ironic that, in respect to Hitler’s Heim-ins-Reich policy, the population-transfer objectives of the Third Reich were realized by the preferences of the victorious Powers, albeit at great hardship to the German people.”

⁸³ See S. Courtois (ed.), *Le Livre noir du communisme. Crimes, terreur, répression*, Paris 1997.

⁸⁴ T. Kaufmann, „Unsere Mütter, unsere Väter“. *Wir armen Täter*, „Kölner Stadt-Anzeiger“, 20.3.2013: *Plötzlich, zwei Jahre, nachdem der Krieg offenbar vom Himmel gefallen war, änderte sich alles. Sogar die anständige Wehrmacht, die bis dahin unter penibler Einhaltung der Haager Landkriegsordnung nur mal anständig Osteuropa annectieren wollte, blieb unter*

policy of Germany and the atrocities committed against the civilian populations of the assaulted countries. Those decisions must be perceived in a wider political perspective.

“The Three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner.”⁸⁵

The Polish and German sides tend to differ in their assessment of the resettlement.⁸⁶ The controversy revolves around, among other issues, the suffering on both sides in the context of different circumstances. In the German narration, the focus is on atrocities committed by both sides. The Allies suffered as a result of war and occupation; Germany suffered as a result of the Allied bombardment of cities and forced resettlements. The children in the Holocaust suffered; the children of the resettled

dem allgemeinen Druck und dem Befehlsnotstand in Russland nicht immer sauber. (...) Genau hier jedoch funktioniert der Film über deutsche Schuld als Mittel der Entschuldigung. Denn es ist ja der Krieg, der ‘macht’ und ‘uns alle entmensch’t. Das genaue Gegenteil stimmt: Der Krieg macht nicht. Er wird gemacht, von Menschen. (...) Der Holocaust und der Vernichtungskrieg der Deutschen in Osteuropa waren geplante und vorab festgelegte Kriegsziele. Da rutschte nicht irgendwann jemandem mitten im Kriegsgetümmel die Hand aus.

See *Alle waren Opfer*, ‘Die Zeit’ 2006, no 49:

Doch woher der Krieg kommt, ja warum es ihn überhaupt gibt, ist nicht zu erkennen. Denn der Krieg, wie ihn der Regisseur Hans-Christoph Blumenberg in dem dreiteiligen Dokudrama Die Kinder der Flucht schildert, gleicht einem von höheren Mächten schicksalhaft verhängten Unglück: nicht nur ungeheuerlich, sondern auch unbegreiflich. Nicht nur unaufhaltsam, sondern unvermeidlich.

⁸⁵ The Berlin (Potsdam) Conference. Protocol of the Proceedings, August 1, 1945, Chapter XII.

⁸⁶ See A. Wolff-Powęska, *Pamięć – brzemień i uwolnienie. Niemcy wobec nazistowskiej przeszłości (1945-2010)* [Memory – the burden and release of it], Poznań 2011; J. Rydel, *Polityka historyczna w Republice Federalnej Niemiec* [The historical policy in Federal Republic of Germany], Kraków 2011; E. Hahn, H.H. Hahn, *Die Vertreibung im deutschen Erinnern. Legenden, Mythos, Geschichte*, Paderborn 2010; T. Petersen, *Flucht und Vertreibung aus Sicht der deutschen, polnischen und tschechischen Bevölkerung*, Bonn 2005; W. Pięciak, *Niemiecka pamięć. Współczesne spory w Niemczech o miejsce III Rzeszy w historii, polityce i tożsamości (1989-2001)* [The German memory. Modern disputes in Germany about the place of the Reich in their history, politics, and identity], Kraków 2002. See also fn. 76.

suffered. The Poles were resettled by the Germans and they also resettled Germans. The suffering on one side could be said to cancel out the suffering on the other⁸⁷.

In the last decade of the twentieth century, the fate of the resettled Germans was compared with the fate of the Kosovars during the Balkan conflict, but not with the role of the Serbs. The question asked by Tadeusz Mazowiecki was never answered: “Was the resettlement a result of the war, or was it its cause?”

In other words, the German side mixes up the cause with the effects.⁸⁸

From the Polish point of view the victims are not seen as equal in all respects, taking into consideration the fact that perpetrators sometimes become the victims of their own deeds. It is clear from the individual perspective as well as from the state perspective.

Władysław Bartoszewski stated in 1995:

I participated in this war, which I did not desire, and I am, as I believe, capable of understanding various individual truths and human experiences, but at the same time after the passing of half a century, I feel deeply connected with the victims of aggression and violence, the victims of oppression and crimes. I cannot in one breath talk about the victims and the oppressors or the ones who passively accepted the evil. I think that differentiating between them is in the interest of all of us—people of good will, concerned about any kind of brutality

⁸⁷ Hans Frank’s (wartime governor of German-ruled Poland) words during his final address to the International Military Tribunal (Nuremberg):

In the witness stand I said that a thousand years would not be enough to erase the guilt of our nation because of Hitler’s behavior in this war. [However,] not only the behavior of our wartime enemies against our people and our soldiers, which has been carefully kept out of these proceedings, but also the enormous mass crimes of the most terrible kind against Germans, which I have only now learned about, especially in East Prussia, Silesia, Pomerania and in the Sudetenland, which have been and are still being carried out by Russians, Poles and Czechs, have now already completely canceled out any possible guilt of our people. Who will ever judge these crimes against the German people?

See IMT (“blue series”), vol. 22, p. 385 – http://www.ihr.org/jhr/v12/v12p167_Weberb.html / (accessed on 23.7.2019). German text quoted in: R. Pemsel, *Hitler* (1986), p. 129/.

⁸⁸ “Aware of his drama, Cain did not come up with the idea of demanding material compensation for damages that he finally suffered as a result of Able’s death”, Bishop Józef Życiński, „Tygodnik Powszechny”, 4.4.2004.

between people and nations, wherever we see it in today's Europe and today's world.⁸⁹

In this context there sometimes appears the concept of the greater German evil and of the lesser Polish evil. The judgment here, however, depends on the circumstances. Good and evil (like equality or justice) do not exist in a vacuum, and in every case have to be specifically defined. A moral assessment is helpful in individual cases, but it may be inadequate for political decisions affecting groups or peoples.

The decisions of the victorious powers about resettlement are one thing, and individual crimes committed during this resettlement are something else. From the point of view of the individual resettled Germans, the Potsdam decisions of the powers are a source of suffering, whereas from the perspective of the security and stability of Europe they can be seen as indispensable. If the reactions of the victorious powers and their political objectives could not have been achieved by means less painful for Germany, then we may suppose that they met the criteria of proportionality (they were adequate, necessary and balanced).

Leaving a German minority in the new borders of Poland would have intensified the tensions and conflicts that were already known in the pre-war period. Even more so given that the minority would have been much more numerous after 1945 than it was before the war. It appears that the view of Krzysztof Skubiszewski was on target:

Directly after the events of 1939 and the years of the occupation, it was very difficult to imagine that Poles and Germans could live side by side within the borders of one country. The Polish-German relations needed to be rebuilt anew and from the ground up. Hitler's aggression and the German occupation destroyed everything that had existed in the sphere of Polish-German co-existence. Any resettlement is by nature a tragic experience, and it was also difficult for the German population affected by it. Forced migration after the Second World War was, after all, the fate not only of Germans. The huge movement of populations in Central and Eastern Europe also embraced millions of Poles.⁹⁰

3.3. The term *Vertreibung* (expulsion) appeared in the Federal Republic of Germany only after the World War II. Apart from its common usage,

⁸⁹ Speech in the special session of Bundestag and Bundesrat on 28.4.1995 in Bonn.

⁹⁰ K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (fn. 2), pp. 323-324.

it is misleading because it suggests that the resettlement of the German population was a punishment similar to the Biblical expulsion from Eden or from the Temple. What it was in fact, however, was a measure used in the context of international legal responsibility of Germany for aggression and numerous crimes.

The so-called Charter of German expellees (Stuttgart 1950)⁹¹ was drafted in this context. “Remembering the immeasurable suffering that the last decade brought to mankind,” it declares that the expellees “renounce revenge and retaliation.” We may ask why Jews, Poles, and other nations have forgotten to create a similar document.

The Stuttgart Charter does not mention the circumstances that led to the loss of their homeland.⁹² Was it only “the last decade” that was the cause of the suffering? Is the renunciation of revenge and retaliation an appropriate motive, especially from a religious perspective? Did they have a right to revenge and retaliation?

It is evident that this Charter does not have a moral or reconciliatory character and is not equivalent to certain initiatives of churches in Poland and Germany. It is a political document whose purpose was the protection of the interests of the expellees. *Nota bene*, these people have not always been welcomed with open arms in the Federal Republic. Therefore, the most important thing was the creation of favorable conditions for the integration of this group, which was finally accomplished. It is necessary to remember, however, that the expellees for many years questioned the Polish-German frontier on the Odra and Nysa Łużycka.

For many years the German Federation of Expellees (*Bund der Vertriebenen*), as well as some German politicians, have been promoting a specific historical policy directed at remembering the resettlement of Germans as one of the most significant events in the history of the 20th century. The “Flight, Expulsion, Reconciliation” Foundation, created by the FRG government in 2008, is perceived with skepticism, and not only in Poland. It puts an emphasis on the issues connected with the resettlement

⁹¹ Charta der deutschen Heimatvertriebenen, Stuttgart, 5.8.1950.

⁹² See Deutscher Bundestag. *60 Jahre Charta der deutschen Heimatvertriebenen – Aussöhnung vollenden* (Drucksache 17/4193, 15.12.2010) and critical observations concerning this resolution – *Historiker kritisieren Bundestagsbeschluss*, ‘Frankfurter Rundschau’, 14.2.2011.

of the German population.⁹³ The Foundation “Center against Expulsion,” created in 2000 by *Bund der Vertriebenen*, raises similar concerns. It is striking that on the Center’s website the Jewish victims of Shoah are given the same status as the German expellees.⁹⁴

The institutions noted above aim not so much at preserving memories, but rather creating a specific image of history.⁹⁵ What is hidden behind this politics of memory is the aim of incorporating the German, Jewish and other victims into a broad picture of a century of expulsions, and evening out different kinds of resettlements without mentioning their causes. The following are put side by side: the population exchange in the Balkans after the First World War, the Shoah during World War II, the resettlement of the Poles during World War II, the resettlement of the Germans by German authorities, the resettlement as a result of the Potsdam decisions, and finally the contemporary Palestinians’ and Kosovars’ loss of their homelands. A community of different kinds of victims is created and, at the same time, the historical context is erased. The causes and effects are mixed up, as well as the individual aspects and the international responsibility of the state. In this context, the resettled German population becomes one of the main victims of destructive nationalism and criminal resettlement politics in the 20th century.

⁹³ Law establishing a foundation „Deutsches Historisches Museum“ of 21.12.2008: § 2 (1). *Zweck der Stiftung ist es, die gesamte deutsche Geschichte in ihrem europäischen Zusammenhang darzustellen. (...) § 15. Unter dem Namen ‘Stiftung Flucht, Vertreibung, Versöhnung’ wird mit Inkrafttreten dieses Gesetzes in Trägerschaft der Stiftung ‘Deutsches Historisches Museum’ eine unselbständige Stiftung des öffentlichen Rechts in Berlin errichtet. § 16 (1). Zweck der unselbständigen Stiftung ist es, im Geiste der Versöhnung die Erinnerung und das Gedenken an Flucht und Vertreibung im 20. Jahrhundert im historischen Kontext des Zweiten Weltkrieges und der nationalsozialistischen Expansions- und Vernichtungspolitik und ihrer Folgen wachzuhalten.*

See also Stiftung „Flucht, Vertreibung, Versöhnung“. *Konzeption für die Arbeit der Stiftung Flucht, Vertreibung, Versöhnung und Leitlinien für die geplante Dauerausstellung*, September 2012.

⁹⁴ Zentrum gegen Vertreibungen – <http://www.z-g-v.de/aktuelles/?id=58> (accessed on: 21.7.2019).

⁹⁵ See e.g. historian Hans-Ulrich Wehler, interview for ‘Welt am Sonntag’, 8.5.2005: *Haben Sie nicht unlängst vor einem deutschen Opfermythos gewarnt? – Wehler: „Doch. Aber nicht wegen des Themas, sondern wegen der dabei häufig verwendeten Sprache. Beispielsweise mutieren in dem Bestseller von Jörg Friedrich über den alliierten Bombenkrieg die Bomberflieger zu ‘Einsatzgruppen’, Luftschutzkeller zu ‘Krematorien’ und die Toten zu ‘Ausgerotteten’. Da werden deutsche Opfer mit Opfern der Deutschen gleichgesetzt und Zusammenhänge verdeckt.*

Chapter 4: Guilt and Responsibility

Die breiten arbeitenden Massen unseres Volkes machen der Regierung nicht zum Vorwurf, dass sie zu rücksichtslos, sondern höchstens, dass sie zu rücksichtsvoll vorgeht.

Joseph Goebbels⁹⁶

Germany started the Second World War in an intentional and conscious manner, although it was not threatened by any other country. The aggressive character of this war is undeniable and needs to be taken into consideration with the assessment of its consequences, including the legal and political responsibility of Germany.

The commencement of World War II was the beginning of the end of an historic epoch in central Europe, which brought irreversible effects (also for Germany and Germans).⁹⁷ Every action can have unpredictable and unwanted consequences—both for the victims and the perpetrators.⁹⁸ The world was set on fire in 1939 by National Socialist Germany, and the fire spread gradually and unrelentingly.

4.1. The question of guilt often arises in connection with the problem of resettlement. Karl Jaspers proposed four categories of guilt in 1946.⁹⁹

- criminal guilt on the grounds of breaking obligatory legal norms by an individual,

⁹⁶ See fn. 7.

⁹⁷ K. Adenauer, *Erinnerungen 1945-1953*, Stuttgart 1980 (4. Auflage), s. 83:

Hitler und seine Leute hatten alles getan, um seinen Ausspruch wahrzumachen, daß das deutsche Volk untergehen solle, wenn es nicht fähig sein sollte zu siegen [wenn das deutsche Volk schon nicht fähig sei, in diesem Krieg zu siegen, dann möge es eben untergehen].

⁹⁸ See H.-J. Bömelburg, J. Kochanowski, *Die deutsche Besatzungspolitik in Polen 1939-1945*, [in:] J. Kochanowski, B. Kosmala (eds.), 'Deutschland, Polen und der Zweite Weltkrieg. Geschichte und Erinnerung', Potsdam-Warschau 2009, pp. 41-54; P. Majewski, *Nationalsozialistische Unterdrückungsmaßnahmen im Generalgouvernement während der Besatzung*, [in:] J. Młynarczyk (ed.), 'Polen unter deutscher und sowjetischer Besatzung 1939-1945', Osnabrück 2009, pp. 173-195; A. Wrzyszczyk, *Okupacyjne sądownictwo niemieckie w Generalnym Gubernatorstwie 1939-1945* [The German occupational judiciary in Generalgouvernement], Lublin 2008; B. Musiał, *Deutsche Zivilverwaltung und Judenverfolgung im Generalgouvernement. Eine Fallstudie zum Distrikt Lublin 1939-1944*, Wiesbaden 1999.

⁹⁹ K. Jaspers, *Die Schuldfrage*, Heidelberg-Zürich 1946.

- political guilt coming from the acts of leaders and state organs,
- moral guilt based on the framework of carrying out the tasks of state institutions, including obeying orders,
- metaphysical guilt coming from co-responsibility for all evil, especially for crimes committed in the presence of an individual or with his knowledge.

The instance of evaluation and judgment in the first case is the court, in the second, political authorities or organs (for example the victors in the case of war), in the third, one's own conscience, and in the fourth, God. However, guilt, in the legal or moral sense, must be individualized, whereas the German state and Germans collectively were responsible for the consequences of the Second World War.

In Jaspers' categorization, in one or other case, we can replace the concept of guilt with the word "responsibility." Essential however for our deliberations, is the development of the question of the historical political responsibility of a nation and the international legal responsibility of states.

In the context of our discussion, we made the distinction between the guilt or responsibility of individuals (criminal, political, moral), the international legal responsibility of states, and the political and historical responsibility of nations (societies). In the discussion below, we will concentrate on the collective variant.

Crimes are committed by individuals, who, after their guilt is determined, undergo punishment.¹⁰⁰ Here it is necessary to determine the extent of their guilt and distinguish, for instance, different levels of intention (*mens rea*), conspiracy, complicity and incitement. This type of individual attribution is not always easy, especially in the case of mass crimes.

If it is an individual who commits crimes, his actions do not always come only from his individual intention or choice, but also from a structure

¹⁰⁰ See C. Kreß, *International Criminal Law*, 'Encyclopedia of Public International Law' 2009. See also Decree of the Fuehrer and Chancellor on granting impunity:

Darüber hinaus gewähre ich für Straftaten und Verwaltungsübertretungen, die im Kampfe für die Erhaltung des Deutschtums in den sudetendeutschen Gebieten oder für ihre Heimkehr ins Reich vor dem 1. Dezember 1938 begangen wurden, Straffreiheit mit folgender Maßgabe: Straftaten, die beim Inkrafttreten dieses Erlasses rechtskräftig erkannt und noch nicht vollstreckt sind, werden ohne Rücksicht auf ihre Höhe erlassen. Anhängige Verfahren werden eingestellt, neue Verfahren werden nicht eingeleitet, 40 Reichsgesetzblatt 1939 I, 1023.

of criminal behavior organized by the state. In other words, apart from individual criminals, there also exists a state-based system of organized crime (national-socialist, fascist, communist). Thus, the legal responsibility is incumbent on the state, on the direct perpetrators and on those who organize the system.

In the case of the international legal responsibility of the state, it is essential to attribute to it the concrete actions that violate international law.¹⁰¹ This responsibility may result from the effective or overall control of the perpetrator, from the lack of due diligence, or from strict liability.

The international legal responsibility of states differs from criminal responsibility because of the difference between the system of international law and the national systems, and also because of the specific character of the perpetrator, which is the state and not an individual (which does not exclude the criminal responsibility of the latter). According to the principle of state continuity, a change in its political system or its government does not exempt the state from its international responsibility. This responsibility takes the form of reparations, restitution, or satisfaction (financial, material, and symbolic). It has in essence a restitutive, disciplinary and preventive character. These legal forms of responsibility, however, do not automatically determine our moral, historical and political judgment.

The international legal responsibility of states inevitably affects their population, which shares the fate of the state both in times of peace and in war. Thus, after losing a war, the people suffer because of the destruction of the national infrastructure and they carry the burden of war reparations¹⁰², to which both the innocent and the guilty must contribute.

¹⁰¹ ILC. *Articles on Responsibility of States for Internationally Wrongful Acts* (2001):

Article 1. Every internationally wrongful act of a State entails the international responsibility of that State. Article 2. There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) Is attributable to the State under international law; and (b) Constitutes a breach of an international obligation of the State. Article 3. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law. Article 4.1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

¹⁰² J. Barcz, J. Kranz, *Reparacje od Niemiec po drugiej wojnie światowej w świetle prawa międzynarodowego. Aspekty prawa i praktyki* [Reparations from Germany after World War II in light of international law. Legal and practical aspects], Warszawa 2019; *Breakthrough*

State borders are often changed, which is not without its effect on citizens. This does not mean, however, that the above-mentioned measures are to be seen as equivalent to collective guilt or punishment, because for this responsibility the guilt of individual people remains irrelevant (as this belongs to the sphere of individualized criminal law).

In turn, the historical-political responsibility (extralegal) affects the nation (organized normally in the form of a state) as a group of individuals united by a common past, culture, and tradition. In this sense the nation is a community based on solidarity, which cannot be freely chosen and which is bound by the shared history of many generations. Individual guilt here does not matter, and the collective aspect of extralegal responsibility comes from the fact that the state authority determines the fate of the nation, including war and peace.

and Challenges. 20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations (W.M. Góralski ed.), Warsaw 2011; P. d'Argent, *Reparations after World War II*, EPIL 2009; *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004* [The issue of reparations, damages and considerations in Polish-German relations 1944–2004], vol. I: *Studia* [Studies], vol. II: *Dokumenty* [Documents], Warszawa 2004 (W.M. Góralski ed.); European Court of Human Rights. *Decision as to the admissibility of application no. 47550/06 by Preussische Treuhand GmbH & Co. KG a.A. against Poland*, 7.10.2008:

45. The applicants complained that (...) they or their predecessors had been forced by the Polish authorities to leave their homes and property (...) in circumstances which amounted to ethnic cleansing – if not genocide – and also to collective extra-judicial punishment, inhuman treatment and, in consequence, a crime against humanity. (...) 52. The Court notes (...) that it cannot (...) be said that the Polish State, which at that time had no *de jure* or *de facto* control over those territories (...) can be held responsible for the alleged acts of violence and expulsion. (...) 59. (...) The applicants or their predecessors lost possession of their property currently situated in Poland in different circumstances and at various dates starting in January 1945. (...) These [Polish] laws were enacted following the Yalta Conference, the Potsdam Agreement and the Three Powers' undertakings in respect of war reparations for Poland, which, in accordance with the relevant international instruments, were satisfied from the previously German-owned assets located in Polish territory, including the regions east of the Oder-Neisse line. (...) 61. (...) There can be no doubt that the former German territories on which the individual applicants had their property were lawfully entrusted to the Polish State under the provisions of the Potsdam Agreement.

See also European Court of Human Rights. *Decision as to the admissibility of application no. 17120/04 by Josef Bergauer and 89 Others against the Czech Republic*, 13.12.2005.

In this case it is not about attributing guilt to the whole nation, but about the collective sense of responsibility for what the state does. It is irrelevant here whether it was the whole nation or only a part of it that supported the actions of the government or were conscious of its criminal intentions. The so-called privilege of being born late (*Gnade der späten Geburt*, a concept developed in post-war Germany) does not play an important role here. Recognizing collective, historical-political responsibility should, in fact, lead to a collective recovery of the sense of humanity.¹⁰³

Not all Germans supported National Socialism, and not all Poles were supporters of the communist dictatorship. In spite of that, both nations, regardless of the guilt of individual persons, bear the consequences of the actions taken by these regimes. In this kind of responsibility, an individual is a part of a larger whole—the state—which, as the organizing and planning agency, is responsible for the unworthy or unlawful actions.

In this case we deal with the extralegal responsibility of a nation both for the past and for the future, in the time of war and of peace. It takes specific collective forms, such as shame, regret, forgiveness, remembrance, silence, but also pride. The Germans, the Poles or the French usually identify themselves with their historical nation—its disasters and its successes. The citizens (the people) recognize their national responsibility both for the contemporary actions and the discreditable events from a more distant past (the acts of their forefathers).

These feelings often have a moral dimension, especially in the case of crimes committed by state organs against other nations or groups. This moral aspect is, however, less discernible in the case of flawed economic policies of a government or of satisfaction over the success of a national sports team, although it still retains its collective character. The expression of pride or of the historical responsibility of the nation does not have

¹⁰³ R. Giordano, *Die zweite Schuld oder von der Last Deutscher zu sein*, München 1990, p. 278; Federal President Joachim Gauck. Speech for the 50th German Historians' Day, Göttingen, 23.9.2014:

Zwar sind wir für unsere Vergangenheit nicht verantwortlich, für den Umgang mit ihr aber allemal. Und dieser Umgang entscheidet über unsere Gegenwart und Zukunft. (...) Die Frage nach dem Sinn von Leid, nach dem Sinn oder der Rechtfertigung von jedem einzelnen Leidenden, jedem einzelnen Opfer, kann nicht historisch beantwortet werden. Aber diese Frage könnte (...) doch die Geschichtsschreibung durchaus begleiten. (...) Geschichtsschreibung kann ihnen keinen Sinn zusprechen, aber Geschichtsschreibung kann ihnen ihre Würde lassen oder wieder geben.

to be shared by everyone. They are often expressed by figures representing the nation in a more or less formal manner.¹⁰⁴

The President of the Federal Republic of Germany, Richard von Weizsäcker, stated in his speech of 8.5.1985:

All of us—the guilty and the innocent, the old and the young—have to accept the heritage of the past. We are all affected by its consequences, for which we are responsible. (...) It is not about overcoming the past, which is in any case impossible. You can't change it or consider that it didn't happen. Whoever closes his eyes to the past becomes blind to the present. Whoever does not want to remember inhuman behaviour, can be infected by new threats. (...) Therefore, we have to understand that memory is a premise of reconciliation.¹⁰⁵

¹⁰⁴ Federal President Joachim Gauck. Speech in Oradour-sur-Glane / France, 4.9.2013: *Der deutsche Philosoph Karl Jaspers formulierte 1946 in seiner Schrift 'Die Schuldfrage' (...) seine These einer 'moralischen Kollektivschuld' der Deutschen für die Geschehnisse der Jahre 1933-45: 'Daß in den geistigen Bedingungen des deutschen Lebens die Möglichkeiten gegeben waren für ein solches Regime, dafür tragen wir alle eine Mitschuld'. Sein Gedanke war klar: Für die 'geistigen Bedingungen des deutschen Lebens' trugen alle Teile der damaligen Gesellschaft eine Mitschuld, also auch für die Taten, die aus diesen geistigen Bedingungen entstehen konnten. Eine kontroverse These, der harte Debatten folgten.*

See also the statement of the president of the FRG, Johannes Rau, Berlin, 17.12.1999:

Ich gedenke heute aller, die unter deutscher Herrschaft Sklavenarbeit und Zwangsarbeit leisten mussten und bitte im Namen des deutschen Volkes um Vergebung. Ihre Leiden werden wir nicht vergessen“; Gesetz zur Errichtung einer Stiftung „Erinnerung, Verantwortung und Zukunft“ vom 2. August 2000 (preamble): „In Anerkennung, dass: (...) das begangene Unrecht und das damit zugefügte menschliche Leid auch durch finanzielle Leistungen nicht wiedergutmacht werden können, (...) bekennt sich der Deutsche Bundestag zur politischen und moralischen Verantwortung für die Opfer des Nationalsozialismus. Er will die Erinnerung an das ihnen zugefügte Unrecht auch für kommende Generationen wach halten.

¹⁰⁵ Speech by Federal President Richard von Weizsäcker on the occasion of the 40th anniversary of the end of the Second World War on 8.5.1985 in the plenary hall of the German Bundestag:

Wir alle, ob schuldig oder nicht, ob alt oder jung, müssen die Vergangenheit annehmen. Wir alle sind von ihren Folgen betroffen und für sie in Haftung genommen. (...) Es geht nicht darum, Vergangenheit zu bewältigen. Das kann man gar nicht. Sie lässt sich ja nicht nachträglich ändern oder ungeschehen machen. Wer aber vor der Vergangenheit die Augen verschließt, wird blind für die Gegenwart. Wer sich der Unmenschlichkeit nicht erinnern will, der wird wieder anfällig für neue Ansteckungsgefahren. (...) Gerade deshalb müssen wir verstehen, dass es Versöhnung ohne Erinnerung gar nicht geben kann.

4.2. The questions of guilt and responsibility of individuals, nations, and states discussed above, are, in practice, particularly complicated. Every nation must account for its past,¹⁰⁶ which is not always easy, especially when there is a lack of democratic institutions.

In the history of every nation there are times in which passivity and especially “loud” silence, lead to historical and political responsibility for evil.¹⁰⁷ Dictators and criminals gladly take advantage of the passivity of the public and also of the so-called *Realpolitik* of democratic countries. This happened not only during the Second World War, but also in later times, for example, the murder of millions of people in China, Cambodia, North Korea, Rwanda, or the Congo.

The aggressive and imperial tendencies in German politics sprang from a political climate that dates back to the nineteenth century and was characterized by anti-Semitism, anti-liberalism, and anti-Polish attitudes. In this context the policy of Hitler was not an isolated historical event.¹⁰⁸

What was striking in Germany was the passive attitude of the people and obedience to the state, as well as the weakness of the resistance among intellectuals.¹⁰⁹ This was the situation during the mass repressions before 1939 and during the period of the war. Did a wave of protests arise

¹⁰⁶ See K. Jaspers, *Wohin treibt die Bundesrepublik? Tatsachen, Gefahren, Chancen*, München 1966; A. Mitscherlich, M. Mitscherlich, *Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens*, München 1967; R. Giordano (fn. 101).

¹⁰⁷ „Was sind das für Zeiten, wo / Ein Gespräch über Bäume fast ein Verbrechen ist / Weil es ein Schweigen über so viele Untaten einschließt!“ – Bertolt Brecht, *An die Nachgeborenen*.

¹⁰⁸ German-Czech Declaration on Mutual Relations and Their Future Development of 21.1.1997:

Die deutsche Seite ist sich auch bewusst, dass die nationalsozialistische Gewaltpolitik gegenüber dem tschechischen Volk dazu beigetragen hat, den Boden für Flucht, Vertreibung und zwangsweise Aussiedlung nach Kriegsende zu bereiten.

¹⁰⁹ J. Reiter, *Rede zum Stauffenberg-Attentat*, Berlin, 20.7.2012:

Wir würdigen die Widerständler heute also nicht, weil sie immer recht hatten, sondern weil sie sich entschlossen, gegen den übermächtigen Strom ihrer Zeit zu gehen und ihr Leben aufs Spiel zu setzen. (...) Manche, wie Helmuth James Graf von Moltke und Dietrich Bonhoeffer, waren seit langem zutiefst überzeugt, dass erst eine Niederlage Deutschlands seine innere Befreiung und Erneuerung möglich machen würde. Es war auch zu spät, um die Ehre Deutschlands zu retten. (...) Diese Chance bot sich erst später, Jahre nach dem Ende des Krieges, nach dem Zusammenbruch Deutschlands. Erst dann konnte der gescheiterte Widerstand seine tiefe Bedeutung offenbaren: als eine Quelle moralischer Legitimation des neuen, demokratischen Deutschland.

when the German officials were defining who is an Aryan, asked Anna Wolff-Powęska.¹¹⁰

During the war, Ludwik Hirszfeld, a Polish scholar and a survivor of the Holocaust, wrote:

Maybe those scholars did not want to murder us and loot our culture. Maybe their sin was only being superficial, vane, and self-aggrandizing. But, for God's sake, why did they not disavow the crimes while the voice of their conscience could shout like a cry of protest. Why did they allow this climate of contempt and hatred, this self-exaltation of their own nation? After losing the war it will be too late to offer one's regrets.¹¹¹

If in the time of National Socialism the expression of patriotism was supposed to be fulfilling duties and obeying orders, what should we think about the actions of the Scholl siblings, who, at the risk of their lives, condemned the behavior of so many of their countrymen?¹¹² Thomas Mann claimed in 1945, "How different everything would have looked if

See:<http://www.sueddeutsche.de/politik/janusz-reiter-zum-stauffenberg-attentat-deutsche-widerstandskampfer-verachteten-polen-1.1418073> (accessed on 23.7.2019).

¹¹⁰ A. Wolff-Powęska, *Niemiecki kłopot z niepamięcią* [German issues with memory], 'Gazeta Wyborcza', 22.8.2009.

¹¹¹ L. Hirszfeld, *Historia jednego życia*, Warszawa 2000, p. 523 (First Polish edition 1946; English translation: *The Story of One Life*, Rochester 2010).

¹¹² *Warum verhält sich das deutsche Volk angesichts all dieser scheußlichsten menschenunwürdigsten Verbrechen so apathisch? Kaum irgendjemand macht sich Gedanken darüber. Die Tatsache wird als solche hingenommen und ad acta gelegt. (...) Und nicht nur Mitleid muss er [der Deutsche] empfinden, nein, noch viel mehr: Mitschuld. Denn er gibt durch sein apathisches Verhalten diesen dunklen Menschen erst die Möglichkeit, so zu handeln, er leidet diese Regierung, die eine so unendliche Schuld auf sich geladen hat, ja, er ist doch selbst schuld daran, dass sie überhaupt entstehen konnte! Ein jeder will sich von einer solchen Mitschuld freisprechen, ein jeder tut es und schläft dann wieder mit ruhigstem, bestem Gewissen. Aber er kann sich nicht freisprechen – Zweites Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell, Juni 1942 – <http://www.dhm.de/lemo/html/dokumente/weisserose2/index.html> Die gerechte Strafe rückt näher und näher! Was aber tut das deutsche Volk? Es sieht nicht und es hört nicht. (...) Deutsche! Wollt Ihr und Eure Kinder dasselbe Schicksal erleiden, das den Juden widerfahren ist? Wollt Ihr mit dem gleichen Maße gemessen werden wie Eure Verführer? Sollen wir auf ewig das von aller Welt gehasste und ausgestoßene Volk sein? (...) Entscheidet Euch, ehe es zu spät ist! – Fünftes Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell mit Korrekturen von Kurt Huber, Januar 1943 – <http://www.dhm.de/lemo/html/dokumente/weisserose5/index.html>*

the Germans on their own had been able to free themselves?”¹¹³ The active members of the resistance movement against Hitler were not, however, initially, thought to be the right models to follow.

Addressing the Balkan tragedy, poet Czesław Miłosz wrote:

Now that a revolution really is needed, those who were fervent are quite cool.

While a country murdered and raped calls for help from the Europe which it had trusted, they yawn (...)

Let them tremble and at the last moment comprehend that the word Sarajevo will from now on mean the destruction of their sons and the debasement of their daughters.

They prepare it by repeating: “We at least are safe,” unaware that what will strike them ripens in themselves.¹¹⁴

Is it worth dying for Gdansk (*mourir pour Dantzig*)¹¹⁵ or Aleppo...? The question has arisen throughout history.

The priest and the philosopher Józef Tischner wrote in 2000:

A decision is, at the same time, the creation of a value. It is not about acting according to a rule, because there are so many rules, that whatever I do I would always find one to justify my actions. So my

¹¹³ T. Mann, *Deutsche Hörer! Radiosendungen nach Deutschland aus den Jahres 1940-1945*, Frankfurt am Main 2004 (4. Auflage), p. 154 (Sendung vom 8.11.1945).

¹¹⁴ *Sarajevo* - Poem by Czesław Miłosz.

¹¹⁵ French politician, Marcel Déat, published in ‘L’Œuvre’ of 4.5.1939, his infamous article “*Mourir pour Dantzig?*”:

Et s’il prend aujourd’hui fantaisie au maître de toutes les Allemagnes de mettre la main sur Dantzig, qui l’en empêchera ? De là à conclure (...) à la nécessité évidente de se battre pour la ville dite libre, il n’y a qu’un pas, allégrement franchi par beaucoup de braves gens, et d’abord par nos amis Polonais. (...) Il y a peu de semaines (...) les Polonais avaient tout l’air de considérer l’affaire de Dantzig comme réglée. (...) D’ailleurs les nazis étaient depuis longtemps les maîtres de la ville. (...) Dans ces conditions, le rattachement au Reich n’était guère qu’une formalité, assurément désagréable, mais nullement catastrophique. Et surtout il ne pouvait être question d’en faire un casus belli. (...) Il ne s’agit pas du tout de fléchir devant les fantaisies conquérantes de M. Hitler, mais je le dis tout net : flanquer la guerre en Europe à cause de Dantzig, c’est y aller un peu fort, et les paysans français n’ont aucune envie de « mourir pour les Poldèves ». (...) C’est Paris et c’est Londres qui doivent avoir la parole d’abord. (...) Combattre aux côtés de nos amis Polonais, pour la défense commune de nos territoires, de nos biens, de nos libertés, c’est une perspective qu’on peut courageusement envisager, si elle doit contribuer au maintien de la paix. Mais mourir pour Dantzig, non !

It was an echo of the politics of appeasement which has found its expression in the Munich Treaty of 29.9. 1938.

decision does not illustrate any existing norm, but—to repeat—it creates a value. I created it not in accord with some general rule, but on the basis of some simple experience: ‘if it has to be done, it has to be done.’ That’s why I’m here.’ (...) The fundamentalists call upon not so much their conscience, but their principles. That is what the disease of pharisaism is all about. It is rules that count, while a man is dying nearby. That’s why conscience is in conflict with fundamentalism.¹¹⁶

Chapter 5: Apology for Resettlement?

*“We want to have compassion only for the German nation,
and beyond that for no one.”*

Hans Frank¹¹⁷

The Potsdam decisions were the work of the USA, Great Britain, the Soviet Union, and France, which had already taken part in the creation of the resettlement plan of 20.11.1945 developed by the Allied Control Council. The support of Poland and Czechoslovakia played no decisive role here. In Germany dissatisfaction was expressed regarding these decisions, and demands were put forward for apologies from, first of all, Poland and the Czech Republic. However, it is characteristic that these demands were not addressed to the victorious powers, and especially not to the Soviet Union (Russia, today).

One of the consequences of the extreme politics and actions of National Socialist Germany was universal conviction about the criminal character of the entire German nation. Such a conviction was the outcome of being infected by the evil and hatred brought about by war. It is, however, impossible to recognize this as a moral justification for the crimes and dishonorable acts committed in individual cases against the resettled German population. The responsibility should be put, first of all, on the individual perpetrators of these crimes. At the same time, however, these crimes cast a shadow on the attitude of the Polish government, which

¹¹⁶ ‘Gazeta Wyborcza’, 1.7.2000, pp. 22-23.

¹¹⁷ „Mitleid wollen wir grundsätzlich nur mit dem deutschen Volk haben, sonst mit niemandem auf der Welt“ – Hans Frank Speech by the Governor-General at a meeting of the Government of the General Government on the plan for the mass extermination of the Jewish population, [in]: A.K. Kunert (ed.), *Polacy – Żydzi. Polen – Juden. Poles – Jews. Wybór źródeł. Quellenauswahl. Selection of documents*, Warszawa 2001, p. 486.

did not react sufficiently to them. According to the Potsdam Agreement, the transfers of German population “should be effected in an orderly and humane manner.”¹¹⁸ That’s why we should talk not only about the specific guilt of individual persons, but also about the political co-responsibility of the Polish state and of the Poles.¹¹⁹

The question of the resettlement became a theme of numerous publications in Poland after 1989, including those of a documentary character.¹²⁰ In the mid 1990s there was a vast debate in the media with the main question of: should we apologize for the resettlement?

5.1. In this context such terms appeared as regrets, apologies, forgiveness, and reconciliation.¹²¹ They can have an individual dimension (between the perpetrator and the victim) or a collective dimension (between states/nations/social groups). In spite of certain similarities, we should separate these dimensions because of their special characteristics. In our discussion we concentrate on the collective aspect, putting aside individual guilt and punishment (especially in the legal meaning) as we refer to historical and political responsibility.

According to Anna Wolff-Powęska:

Forgiveness must be preceded by mature reflection, being aware of one’s own guilt and understanding that without forgiveness there is no chance for change. (...) Forgiving is directed toward the past.

¹¹⁸ See fn. 37.

¹¹⁹ See chapter 5.3.

¹²⁰ See fn. 76.

¹²¹ See Ch. Daase, S. Engert, M.-A. Horelt, J. Renner, R. Strassner (eds), *Apology and Reconciliation in International Relations: The Importance of Being Sorry*, New York 2016; A. Wolff-Powęska (fn. 84), pp. 135-156; K. Wigura, *Wina narodów: przebaczenie jako strategia prowadzenia polityki* [The guilt of nations: forgiveness as a strategy for making politics], Warszawa-Gdańsk 2011; J. Renner, ‘I’m sorry for apologising’: Czech and German apologies and their perlocutionary effects, ‘Review of International Studies’ 2011, vol. 37, pp. 1579–1597; V. Jankélévitch, *Le Pardon*, Paris 1967; id., *Pardonner?*, Paris 1971; G. Schwan, *Politik und Schuld. Die zerstörerische Macht des Schweigens*, Frankfurt am Main 1997; P. Ricoeur, *La mémoire, l’histoire, l’oubli*, Paris 2000; E. Barkan, *The Guilt of Nations. Restitution and Negotiating Historical Injustices*, New York 2000; J. Derrida, *To forgive. The unforgivable and the imprescriptible*, [in:] J. Caputo (ed.), ‘Questioning God’ 2001; A. Jokic (ed.), *War Crimes and Collective Wrongdoing*, Oxford 2001; H. Arendt, J. Kohn, *Responsibility and Judgment*, New York 2003; A. Schaap, *Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the ‘German Question’ in Politics of Reconciliation*, ‘Political Studies’ 2001, vol. 49/4, pp. 749-766.

It means working on memory, which does not mean forgetting but a kind of therapy—freeing oneself from obsessions, hostility, and the desire for revenge. Forgiveness, as Paul Ricoeur says, has a healing value—‘it takes away one’s debt.’ Reconciliation, however, is directed toward the future. It is an expression of responsibility for the peaceful coexistence of future generations. It is a departure from focusing on yourself and turning oneself toward the general good.¹²²

Collective forgiveness is, therefore, an extra-legal act in which a given group (a society, a nation) publically admits to having committed evil, regretting its actions and asking for forgiveness. Reconciliation, in turn, comes from a social need and from caring about the future. These terms have a moral and political dimension, and not a financial or material one (as in the case of reparations or restitution). We share the view of Gesine Schwan that psychological and moral consequences of silence harm future generations.¹²³ The debate concerning historical and political aspects of the war does not necessarily require total agreement on both sides as an indispensable premise for forgiveness and reconciliation.

Regardless of our attempts to define terms, answers to some questions remain open. For instance: are there unforgivable crimes?¹²⁴ Should asking for forgiveness constitute the initial phase of the reconciliation process (only under the condition of previous expression of regret and remorse), or should it be the beginning of reconciliation? Is reconciliation possible without forgiving? Does forgiveness always lead to reconciliation?

It is necessary to take into consideration that forgiveness and reconciliation will bear fruit only when they have a foundation with a relatively wide social consensus, a dialogue in truth, and when they are accepted by both sides. Otherwise they will remain only empty slogans.

There are two separate terms in Polish—*bezprawie* (illegality/unlawfulness) and *krzywda* (harm/wrong) that are germane to post-war discussions. In the German language there is only one word, *Unrecht* (the root is the word *Recht*—law), expressing, depending on the context, unlawfulness/illegality or harm/wrong in the moral sense. Ambiguities and double meanings that arise in this context influence the assessment of the Polish-German controversies.

¹²² A. Wolff-Powęska, *Wielki dar przebaczenia* [The great gift of forgiveness], ‘Gazeta Wyborcza’, 12-13.11.2005.

¹²³ G. Schwan (fn. 119).

¹²⁴ See S. Wiesenthal, *Die Sonnenblume*, Gerlingen 1982.

5.2. For the difficult process of increased understanding between Poles and Germans, the initiatives of some social circles, and especially the church, were of vital importance.¹²⁵

In the memorandum of the German Evangelical Church of 19.10.1965, we read:

The expulsion of the German population from the eastern territories of Germany, and the fate of these territories are part of the great tragedy, a fault of the German nation against itself and other nations. This guilt cannot be isolated. (...) The legal positions mutually limit each other, law against law or—even more precisely—*Unrecht* [unlawfulness/wrongdoing] against *Unrecht*. In such a situation insisting on maintaining conflicting legal positions, due to which both sides represent only their own interests, becomes pointless and even a threat to the peace between the two nations. On this level conflict is unresolvable. This is why we should seek a compromise (*Ausgleich*) that would lead to a new harmony between the Germans and the Poles. It is true that in this way we cannot justify the past, but we can at least secure peaceful coexistence between both nations in the future.¹²⁶

¹²⁵ B. Kerski, *Die Rolle nichtstaatlicher Akteure in den deutsch-polnischen Beziehungen vor 1990*. Wissenschaftszentrum Berlin für Sozialforschung, January 1999. See also E. Osmańczyk, *Sprawy Polaków* [Affairs of Poles], Katowice 1946.

¹²⁶ *Die Lage der Vertriebenen und das Verhältnis des deutschen Volkes zu seinen östlichen Nachbarn. Eine evangelische Denkschrift*. Verlag des Amtsblattes der Evangelischen Kirche in Deutschland, Hannover 1965:

Die Vertreibung der deutschen Ostbevölkerung und das Schicksal der deutschen Ostgebiete ist ein Teil des schweren Unglücks, das das deutsche Volk schuldhaft über sich selbst und andere Völker gebracht hat. Auch diese deutsche Schuld steht nicht isoliert da. (...) Die rechtlichen Positionen begrenzen sich gegenseitig; Recht steht gegen Recht oder - noch deutlicher - Unrecht gegen Unrecht. In solcher Lage wird das Beharren auf gegensätzlichen Rechtsbehauptungen, mit denen jede Partei nur ihre Interessen verfolgt, unfruchtbar, ja zu einer Gefahr für den Frieden zwischen beiden Völkern. Auf dieser Ebene ist der Konflikt nicht zu lösen. Daher gilt es, einen Ausgleich zu suchen, der eine neue Ordnung zwischen Deutschen und Polen herstellt. Damit wird nicht gerechtfertigt, was in der Vergangenheit geschehen ist, aber das friedliche Zusammenleben beider Völker für die Zukunft ermöglicht.

See also the previous document – Erklärung des Rates der Evangelischen Kirche in Deutschland gegenüber den Vertretern des Ökumenischen Rates der Kirchen vom 19.10.1945 (Stuttgarter Schuldbekennntnis):

Mit großem Schmerz sagen wir: Durch uns ist unendliches Leid über viele Völker und Länder gebracht worden. Was wir unseren Gemeinden oft bezeugt haben, das sprechen wir jetzt im Namen der ganzen Kirche aus: Wohl haben wir lange Jahre hindurch im Namen Jesu Christi gegen den Geist gekämpft, der im nationalsozialistischen Gewaltregiment seinen furchtbaren

An essential element here was the letter of reconciliation from the Polish Catholic Bishops to the Bishops of Germany on 18.11.1965:

The Polish border on the Odra and Nysa is, for the Germans, as we well understand, an exceptionally bitter fruit of the last war and of the mass destruction, and similarly bitter is the suffering of the millions of refugees and of the resettled persons. (It happened as the consequence of the inter-allied order of the Allied Powers issued in Potsdam in 1945). Fearing the advancing Russian front, the greater part of that [German] population fled to the West. For our Motherland [Poland], which emerged from this mass murder not as a victor but as a thoroughly exhausted country, it is a matter of existence (not a matter of expanding our 'living space') (...) We ask you, Catholic Shepherds of the German Nation, that you celebrate our Christian Millennium together with us in your own way: by prayer or by setting aside a special day for it. We will be grateful for any such gesture. And we ask you to pass on our regards and expressions of gratitude to our German Evangelical brothers who, together with you and us, are making efforts to find a solution to the difficulties between us. In this most Christian and most human spirit, we stretch out our hands to you, sitting in the seats at the Second Vatican Council, which is about to end, we forgive you and ask for forgiveness. If you, German Bishops and Fathers of the Council, take our brotherly outstretched hands, only then could we celebrate our Millennium with a peaceful conscience and in a way that would be most Christian. We most cordially invite you to Poland for these celebrations.

Ausdruck gefunden hat; aber wir klagen uns an, dass wir nicht mutiger bekannt, nicht treuer gebetet, nicht fröhlicher geglaubt und nicht brennender geliebt haben /Statement by the Council of the Protestant Church in Germany to the Representatives of the Ecumenical Council of Churches, Stuttgart, 19.10.1945):

The Council of the Protestant Church of Germany welcomes the representatives of the Ecumenical Council of Churches to its meeting in Stuttgart on October 18 and 19, 1945. We are especially grateful for this visit, because we know that we, along with our people, are not only in a community of suffering, but also in a community of guilt. It causes us great anguish to state that we have brought unimaginable, unending suffering upon many peoples and many countries. What we have often testified to in our communities, we now declare in the name of the whole church: it is true that we fought for many long years against the spirit that found its terrible expression in the violent National Socialist regime; however, we also accuse ourselves of not having professed our faith more courageously, of not having prayed more faithfully, of not having believed more joyfully, and of not having loved more fervently/.

The answer of the German bishops¹²⁷ turned out to be distanced and the formula “we forgive you and ask for forgiveness” was not fully reciprocated. As a matter of fact, the Episcopate of West Germany hid behind the legal and political position of the Federal Republic authorities and the mood of the society, which was to a certain degree understandable, but (compared with the Polish bishops) not so courageous and not so farsighted.¹²⁸

A memorandum of German Catholic intellectuals stated in 1968:

We Germans have to admit to ourselves that the crimes that were committed in the name of Germany against Poland (...) are of such a nature that any attempt at balancing out the mutual responsibility should not even be attempted. No one can close his eyes to the fact that the nation whose leaders started the war and then lost it has to bear the responsibility not only in point of fact but also out of a sense of justice. If we seriously want peace, we cannot avoid this responsibility, which burdens the entire German nation. As a consequence we must carry not only the burden of reparations

¹²⁷ *Wir sind dankbar, dass Sie auch angesichts der Millionen polnischer Opfer jener Zeit sich an die Deutschen erinnern, die dem Ungeist widerstanden und zum Teil ihr Leben dafür hingegeben haben. (...) Wir sind dankbar, dass Sie neben dem unermesslichen Leid des polnischen Volkes auch des harten Loses der Millionen vertriebener Deutscher und Flüchtlinge gedenken. (...) Alles menschliche Unrecht ist zunächst eine Schuld vor Gott, eine Verzeihung muss zunächst von ihm erbeten werden. An ihn richtet sich zuerst die Vaterunserbitte 'Vergib uns unsere Schuld!' Dann dürfen wir auch ehrlichen Herzens um Verzeihung bei unseren Nachbarn bitten. So bitten auch wir zu vergessen, ja wir bitten zu verzeihen. (...) Die Bitte um Verzeihung ist ein Anruf an jeden, dem Unrecht geschah, dieses Unrecht mit den barmherzigen Augen Gottes zu sehen und einen neuen Anfang zuzulassen. (...) Am Schluß Ihres Schreibens stehen die kostbaren Worte, die für unsere beiden Völker eine neue Zukunft eröffnen können: 'Wir strecken unsere Hände zu Ihnen hin in den Bänken des zu Ende gehenden Konzils, gewähren Vergebung und bitten um Vergebung'. Mit brüderlicher Ehrfurcht ergreifen wir die dargebotenen Hände – Antwortschreiben der deutschen Bischöfe an die polnischen Bischöfe vom 5. Dezember 1965, Text [in:] 'Deutschland und Polen. Kirche im Dienst der Versöhnung' (ed. by the press office of the German Bishops' Conference), Bonn, April 1996, pp. 54-56.*

¹²⁸ See B. Kerski, T. Kycia, R. Żurek, „Przebaczamy i prosimy o przebaczenie”. *Orędzie biskupów polskich i odpowiedź niemieckiego episkopatu z 1965 roku. Geneza, kontekst, spuścizna* [“We forgive and ask for forgiveness”. The message of Polish bishops and the response of German episcopate of 1965], Olsztyn 2006; J. Rydel, *Nowe elementy mozaiki. Nieznane niemieckie dokumenty dyplomatyczne o Liście Biskupów z 1965 roku* [New elements of the mosaic. Unknown German diplomatic documents about the Letter of Bishops from 1965], 'Więź', January 2011, pp. 101-110; F. Boll (ed.), „Wir gewähren Vergebung und bitten um Vergebung“. *40 Jahre deutsch-polnische Verständigung*, Friedrich-Ebert-Stiftung 2006 (Gesprächskreis Geschichte, Heft 68).

and redress, but also accept the political losses. In this context we also cannot exclude territorial losses.¹²⁹

Somewhat later, on the Polish side, oppositionist and literature specialist, Jan Józef Lipski¹³⁰, wrote in 1981:

We have taken part in depriving millions of people of their homeland, some of whom were surely guilty of having supported Hitler, others only of passively accepting his crimes, still others were only unable to find the courage for a heroic fight against his monstrous machine of terror—in a situation where their state was at war. The evil that has been done to us, even the greatest evil, is not, however, and cannot be a justification for the evil that we have done ourselves. Removing people from their homes can be at best a lesser evil, never, however, an act of good. It is true without any doubt that it would not be just if a nation attacked by two rogues had to pay all the costs of the attack by itself. The choice of a solution—which as it seems—is less unjust, the choice of a lesser evil, cannot, however, make us insensitive to moral considerations. Evil is evil, and never good, even if it is a lesser and unavoidable evil. (...) After centuries of the development of the German culture alongside of the Polish culture in Silesia, the Lubuskie region, Warmia and Mazury, in Gdańsk (overwhelmingly German)—and for a long time exclusively German in Western Pomerania—as a result of historical transformations we have inherited a rich collection of German architecture and other works of art together with other items of historical importance. In the face of humanity, we are the depositary of these cultural achievements. It obligates us to protect these cultural treasures for the future, also

¹²⁹ *Ein Memorandum deutscher Katholiken zu den polnisch-deutschen Fragen* (Das Bensberger Memorandum) of 2.3.1968, Mainz 1968, pp. 13-14:

So werden wir Deutsche uns zu sagen haben, daß die im Namen Deutschlands gegen Polen unternommenen Verbrechen (...) von solcher Art sind, daß jeder Versuch von Gegenrechnungen verstummen muß. (...) Niemand kann die Augen davor verschließen, dass ein Volk, dessen politische Führung einen Krieg vom Zaun gebrochen und verloren hat, nicht nur tatsächlich, sondern auch unter dem Gesichtspunkt der Gerechtigkeit dafür zu haften hat. Dieser Haftungspflicht, die die deutsche Nation als ganze trifft, können wir uns nicht entziehen, wenn wir den Frieden ernsthaft wollen. In ihr liegt beschlossen, dass wir über Schadenersatz und individuelle Wiedergutmachung hinaus auch politische Nachteile hinzunehmen haben. Dabei können auch Gebietsverluste nicht prinzipiell ausgeschlossen werden.

¹³⁰ Jan Józef Lipski (1926–1991) was a Polish critic, literature historian and politician. As a soldier of the Home Army (Armia Krajowa), he fought in the Warsaw Uprising (1944).

our future, with the full awareness of the fact that we are protecting German culture, without any mistruths or silence in this area.¹³¹

Neither Polish nor German voices from the Catholic church received an unambiguous reception and both were met with harsh criticism. The voice of Lipski was not widely echoed in Germany.

During a meeting with the Polish and German Episcopate in 1990, after the regime change in Poland, the Polish Primate, Cardinal Józef Glemp, reminded us:

The idea of Christian forgiveness, which our two Episcopates declared as a power inspiring two nations to reconcile, was a shock to the societies of the time. The shock was brought about not only by the fact that those societies were spiritually unprepared for introducing the principles of Christian love on the international scene, but first of all by the fact that the Bishops of our two nations reached out their hands to one another over the wall of the political separation of peoples which was supposed to fan the fire of hatred.¹³²

During the same meeting, Bishop Joseph Homeyer observed:

On the German side we still, as I believe, do not give enough consideration to how great was the influence of the German state in the partitions of Poland in the 18th century, as well as what the later German-Soviet alliance cost Poland, and the impact both had on the image of Germany and German policy. The Ribbentrop-Molotov pact led to wiping Poland off the map of Europe. For this reason we must learn to better understand Polish fears. But it is also necessary to say that Poles for a long time tended to underestimate their own fault in relations to the Germans who have been expelled. The *Unrecht*, which the Germans suffered from the Poles, was also a reason for the pain and embitterment of millions of innocent people. For many years it was difficult for the Poles to understand and openly admit

¹³¹ Essay by Jan Józef Lipski *Dwie ojczyzny, dwa patriotyzmy* [Two homelands, two patriotisms], appeared in 'Nowa' (No 144, June 1981) and in „Kultura” (Paris, No 409, 10/1981). German text was published in Germany in a special issue of the magazine „Kontinent” (No 22/1982). Later also in bilingual edition – J.J. Lipski, *Powiedzieć sobie wszystko. Eseje o sąsiedztwie polsko-niemieckim* (ed. Georg Ziegler), Gliwice-Warszawa 1996, pp. 192-193.

¹³² Speech of Cardinal Józef Glemp, Primate of Polish Catholic Church, at the meeting of Polish and German bishops, Gniezno, 20-22.11.1990, „Tygodnik Słowa” (Powszechnego), 13.12.1990.

that *Unrecht* is *Unrecht*, and that fault is fault, and that experiencing *Unrecht* does not justify anyone committing *Unrecht* to another.¹³³

In 1995, on the thirtieth anniversary of the exchange of letters, Polish and German bishops met and released the following statement:

Today on the 50th anniversary of the end of the World War we declare together: 'We forgive and we ask for forgiveness.' At the same time we remember the entire wrong [in the German version, *Unrecht*, in the Polish version *krzywda*], which was done during the war and in its aftermath. Only the truth can set us free (see John 8. 32); the truth which cannot beautify anything and does not omit anything, which is not silent about anything and does not demand making up for the wrong, because it would be contrary to the prayer which we are constantly offering up: 'forgive us our sins as we forgive those who sin against us.' Before our eyes, however, there are still the criminal aggression of National Socialist Germany and the innumerable wrong doings which were consequently done to Poles by Germans. With this prayer we embrace the wrong (*Unrecht*) that has been done to many Germans by Poles as a result of the expulsion, and the loss of their own local motherland on the basis of the decision of the victorious Powers. The violence that was set loose by Germany eventually turned against the nation itself. Only today, when we are free to talk about it in Poland, we realize the magnitude of the wrongdoing (*Unrecht*), which in connection with this same decision led to the loss of the territories in the East.¹³⁴

¹³³ Address by Bishop Homeyer during the ceremony on 21 November 1990 in the context of the German-Polish Episcopal Meeting in Gniezno, [in:] *Deutschland und Polen* (fn. 125), pp. 79-80:

Auf deutscher Seite wird immer noch, wie ich meine, viel zuwenig berücksichtigt, wie sehr die Mitwirkung deutscher Staaten an den drei Teilungen Polens im 18. Jahrhundert und die auch später erfolgten deutsch-russischen Annäherungen zu Lasten Polens das Bild vom Deutschen und von deutscher Politik in Polen geprägt haben. Der Hitler-Stalin-Pakt führte dann erneut zur Auslöschung des polnischen Staates. Darum muß man bei uns in Deutschland polnische Ängste besser verstehen lernen. Aber lassen Sie mich auch dies bitte in dieser Stunde in aller Offenheit sagen: Das Unrecht, das Deutsche durch Polen erlitten, hat Millionen Unschuldiger ebenfalls tief verwundet und verbittert. Darf ich diese Frage, die wirklich nicht verletzen, sondern aufarbeiten will, ganz offen stellen? Fiel es den Polen nicht lange schwer, dies von ihnen an Deutschen begangene Unrecht zu verstehen und ihrerseits klar zu bekennen, daß Unrecht Unrecht und Schuld Schuld ist und daß auch erlittenes Unrecht niemandem das Recht gibt, anderen Unrecht zuzufügen?

¹³⁴ The common word of the Polish and German Bishops on the occasion of the 30th anniversary of the exchange of letters (1965- 1995), 'Tygodnik Powszechny', 24-31.12.1995.

On the occasion of the 70th anniversary of the beginning of the Second World War (2009), the Polish and German Episcopates declared:

The results of Nazi aggression were also a painful experience of people who lost their family home and property. The first to experience this were the Poles, who fell victim to acts of war and occupation, and also forced deportation resulting from the Nazi and Soviet military operations. As a result of the Soviet expansionist plans of a new order on the territory of Central and Eastern Europe and of the decisions of the victorious Powers, many Germans also suffered, not only at the end of the war, but also later, when they experienced the fate of refugees and expellees. In this context we return to the common declaration of the Polish and German Episcopates from December 1995: 'Only truth can set us free; the truth which cannot beautify anything and does not omit anything, which is not silent about anything and does not demand making up for the wrong' (see John 8. 32). In this spirit, in the face of the fact of the criminal military aggression of Nazi Germany, the magnitude of the wrongdoings (*Unrecht*), which as a consequence were done to Poles by Germans, and the wrongdoings (*Unrecht*) which Germans experienced because of their expulsion and loss of their homeland, we repeated, together: 'We forgive and ask for forgiveness.' The German and Polish bishops issued a common condemnation of war crimes. We are also in agreement in condemning the expulsions, not forgetting, however, the complex causation and succession of events.

It is worth noting that in the German versions of the above-mentioned documents, the word *Unrecht* is used; it may have a double meaning—a legal meaning (unlawfulness/illegality), or a moral sense (harm, wrongdoing). In the Polish text, however, the word *krzywda* (harm/wrongdoing) is used.

5.3. After the fall of Communism in 1989, Krzysztof Skubiszewski, Minister of Foreign Affairs in the government of Tadeusz Mazowiecki, addressed the issue of reconciliation:

In the face of the unification of Germany and the uniting of Europe, the Second World War and its consequences now belong to the past. (...) Those terrible years, days, and hours, must remain in our memories as a warning, not as a source of hatred and prejudice. The bold Church initiatives in both countries resulted in a breakthrough in the thinking about Polish-German relations. Twenty-five years ago the words of the Polish Roman Catholic Bishops about forgiveness were spoken in the name of the Polish nation. At that time the government did not represent the nation. And the Catholic Church in Poland often spoke for the entire nation, because this nation had lost its

sovereignty. The words of the Bishops about mutual forgiveness still retain their validity and is part of our politics and political philosophy. I have deep understanding for the suffering of those Germans who lost their homeland as a result of military operations, expulsion, or resettlement. Those Germans experienced much suffering and injustice. It is a burden for me, and the fact that it happened pains me. But today those events are history. Poles and Germans need peace in their minds and hearts. We have to turn toward the future. Our mission today is creating peaceful coexistence and cooperation.¹³⁵

The preamble of the treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them (14.11.1990), signed by Krzysztof Skubiszewski, states: "The immense suffering which was brought about by the war, including also the loss of their homeland by many Poles and Germans as a result of expulsion or resettlement (*Vertreibung oder Aussiedlung*), constitute a warning and a challenge for shaping peaceful relations between both nations and states."

Both citations point to the suffering of the past, but at the same time they emphasize the necessity of reconciliation and make efforts directed at a better future for both nations.

The President of the Polish Republic, Lech Wałęsa, in his speech marking the 50th anniversary of the Warsaw Uprising¹³⁶, stated in the presence of the President of the Federal Republic of Germany:

Our nations were divided by a sea of blood. It also includes the blood of the Warsaw Uprising. Across this sea there is a long distance between

¹³⁵ Speech of the Foreign Minister, Krzysztof Skubiszewski, Berlin, 5.10.1990, text in: *Deutsches Helsinki Menschenrechtskomitee e. V., Internationales Symposium „Europa auf dem Wege zu neuen Institutionen“*, 5.-6.10.1990, Berlin, ed. by Hartwig Bierhoff, Bonn 1991, p. 61. In this vein also K. Skubiszewski's exposé of 26.4.1990 in the Polish Parliament and the statement made on the fifty first anniversary of the outbreak of the World War II, Deutschland Sender Berlin, 1.9.1990 – both in: K. Skubiszewski (fn. 56), pp. 49 and 91.

¹³⁶ Around 150.000 civilians and around 20.000 Polish combatants were killed in the Warsaw Uprising (1.8.1944 – 2.10.1944). W. Borodziej, *Geschichte Polens im 20. Jahrhundert*, München 2010, p. 251:

Die entsprechenden deutschen Befehle der ersten Augusttage sind nicht direkt, sondern über Nachkriegsgeständnisse überliefert: 1. Alle Aufständischen sollten nach der Gefangennahme erschossen werden, ohne Unterschied, ob ihre Kampfhandlungen dem Haager Abkommen entsprechen oder nicht. 2. Der nicht kämpfende Teil der Bevölkerung wäre ohne Unterschied niederzumachen. 3. Die ganze Stadt sei dem Erdboden gleich zu machen, d.h. alle Häuser, Straßen und alles, was sich in der Stadt befindet, soll zerstört werden.

See also N. Davies, *Rising '44: The Battle for Warsaw*, 2003.

us. Glory to those who first found the courage to say the words, 'We forgive and ask for forgiveness.' Glory to those who knelt down in Warsaw. (...) We don't absolve the murderers of Warsaw. But we don't transfer these emotions to the German nation. We want to and we can live with you in friendship. Like good neighbors. It has happened many times in history. I believe that it will happen again. It has to happen again.¹³⁷

In reply the President of the FRG, Roman Herzog, said: "I bow down before the warriors of the Polish Uprising, as before all Polish victims: I ask for your forgiveness for what befell you at the hands of the Germans."¹³⁸

Władysław Bartoszewski commented on this statement as follows:

Brave and sincere were the words of German President Roman Herzog, spoken to the Polish nation during the celebrations in Warsaw on 1 August 1994. Many Poles read them as a genuine, long-awaited reply of the highest representative of Germany to the address of the Polish Bishops of 1965. The Presidents of Poland and Germany persuaded even the skeptics that anniversaries that divide can at the same time give an impulse for the shaping of a better future. A future that will bring nations together.¹³⁹

The speeches of Presidents Wałęsa and Herzog were not well publicized in Germany, as was also the case with the 2002 speech of Minister of Foreign Affairs Bronisław Geremek.

Let us also add that, before Herzog's visit to Warsaw, no other representative of the highest German authorities had ever been invited to any celebrations connected with the events of the Second World War by any other country of the former anti-Nazi coalition (a fact which was practically unnoticed in Germany). The invitation to German military units to Paris for the parade of 14 July 1994 was not related to the Second World War, but only to the anniversary of the liberation of the Bastille.

¹³⁷ 'Gazeta Wyborcza', 2.8.1994, p. 4.

¹³⁸ Speech by Federal President Roman Herzog on the occasion of the commemoration of the 50th anniversary of the Warsaw Uprising on 1.8.1994 in Warsaw: „Heute verneige ich mich vor den Kämpfern des Warschauer Aufstandes wie vor allen polnischen Opfern des Krieges: Ich bitte um Vergebung für das, was ihnen von Deutschen angetan worden ist“.

¹³⁹ Gedenken an das Ende des Zweiten Weltkrieges und der nationalsozialistischen Gewaltherrschaft, Bonn, 28.4.1995 – Speech of the Foreign Minister, Władysław Bartoszewski.

Germany, however, did not invite the President of the Republic of Poland to Berlin for the celebration of the 50th anniversary of the end of the war, which demonstrates the difference in the degree of historical sensitivity and political courage in the governments on both sides of the Odra and Nysa rivers.

The earlier invitation to Polish Foreign Affairs Minister Władysław Bartoszewski was a kind of “consolation prize.” During the celebratory meeting of Bundestag and Bundesrat on 28 April 1995, Bartoszewski gave a speech devoted to Polish-German relations, in which he said:

During the war and after its end, millions of people were forced to leave their homelands. For many Poles it was the land on the other side of the River Bug, for many Germans on the other side of the Odra and Nysa rivers. Those two groups of people could not talk to each other. If it had been so, both nations could have communicated and understood each other much earlier. But the displaced Poles from the east could not even engage in a monologue on these issues. And if they settled on the new Polish western territories, they appeared there not as victors, but rather saw themselves as victims of a war which they had never wanted and for whose outbreak they were not guilty. The transformation of 1989 created a new possibility for free political discussion. If it was now possible to talk about the fate of people relocated from Vilnius and Lvov, it was easier to notice the human drama of the people who were resettled from Wrocław and Szczecin. The legal-political regulations of the problem of the unification of Germany and its borders resulted in the fact that today the talk of a lost homeland does not have to create fear about peace in Europe. (...) Poland recovered its political sovereignty. It is also recovering its spiritual sovereignty. Its measure is a sense of moral responsibility for all of history in which—as always—there are both bright and dark chapters. As a nation particularly affected by the war, we experienced the tragedy of forced resettlements and the related violence and crimes. We remember that they also affected huge numbers of the German population, and sometimes the perpetrators were also Poles. I want to openly state that we feel the pain of the individual fate and suffering of innocent Germans touched by the consequences of the war, who lost their homeland. (...) I fully identify with the position of my late friend, Jan Josef Lipski; we worked together in the democratic opposition. I would like to remind everyone of the text that stimulated a stormy discussion among thoughtful Poles. I also think that it is regretful that the civil courage of its author was not fully noticed in Germany at that time.¹⁴⁰

¹⁴⁰ *Ibidem.*

Minister Bartoszewski held the same views as Jan Józef Lipski and Krzysztof Skubiszewski—and just like them, only expressed his regrets over the fate of the “innocent Germans touched by the consequences of the war,” and he did not apologize for the Potsdam decisions.

A slightly different accent appeared in the speech of Minister of Foreign Affairs, Bronisław Geremek, delivered in the German Bundestag on 28.2002 on the occasion of the Remembrance Day for the Victims of National Socialism:

The message of the Polish Bishops, the historic words, ‘We forgive and ask for forgiveness’ were not recognized [in Poland] as a call for reconciliation and an idea directed towards the future, but as a political attack against the government—as it was presented in the official propaganda—a betrayal of Polish national interests. (...) On 1 September 1989, when Johannes Rau visited Warsaw on the occasion of the 50th anniversary of the German aggression against Poland, I said in an interview for one of the German newspapers that ‘Solidarity’ is convinced that both Poland and all of Europe need the unification of Germany, because this would invalidate the existing order based on violence and lawlessness, and it would create conditions for the reconciliation between Germans and Poles. I had no doubts that Poland would greatly benefit from it, but the Communist Party (...) circulated a letter among its members that issued a warning against this threat of treason. (...) I know that politics has to be governed by realistic principles. But the actions of the Polish opposition did not meet the demands of political realism—they were against the views of those who thought that the Soviet Union remained the sole partner in eastern politics, and that the post-Yalta world order would remain—at least in the foreseeable future—unassailable. Polish uprisings and rebellions could be perceived as romantic folly or madness. However, it turned out that sometimes it is worth crossing the limits of political realism, because the romantic impulse brings to politics the element that is needed in a moment of breakthrough—which is vision and courage. For this it is indispensable to remember what was great and to remember what was despicable in the history of Europe. That is why the German Day of Remembering the Victims of National Socialism is so important. On this day Germany is close to Europe, and Europe is close to Germany. Such a memory is the hope of the world.¹⁴¹

¹⁴¹ German text in: <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=815&id=1062>; Polish translation in ‘Gazeta Wyborcza’, 21.7. 2008.

The last sentences spoken by Bronisław Geremek seem to be an expression of a special kind of reconciliation with the Germans by a person who managed to survive the Holocaust.

The attitude of Poles toward the extermination of the Jews (Holocaust) during the Second World War, was explored by Jan Błoński¹⁴²:

Our fatherland is not a hotel in which it is enough to clean up after a visit by unexpected guests. It is built, above all, out of memories; in other words, we are who we are only thanks to the memories of the past. We are not free to use it in any way we wish, although—as individuals—we are not directly responsible for it. We have to carry it within ourselves, even though it may be sad or painful. (...) In total sincerity and honesty we have to face the question concerning our co-responsibility. We can't hide this: this is one of the most painful questions that we can face. (...) Participation and responsibility are not the same thing. One can share the responsibility for the crime without taking part in it. Our responsibility is for holding back, for insufficient effort to resist. Which of us could claim that there was sufficient resistance in Poland? It is precisely because resistance was so weak that we now honor and pay homage to all those who did have the courage to take this historic risk [during the war]. Although it may sound strange, I do believe that this responsibility through failure to act is less relevant for our question. More significant is the fact that if only we had behaved more humanely in the past, had acted in a wiser, nobler, more Christian way, then genocide would have perhaps been 'less imaginable.' It would probably have been considerably more difficult, and almost certainly would have met with greater resistance. In other words, it would not have infected the society that witnessed it with indifference and moral turpitude.¹⁴³

¹⁴² Jan Błoński (1931–2009) was a Polish historian, literary critic, publicist and translator. He was a leading representative of the Kraków school of literary criticism, regarded as one of the most influential critics of postwar Poland.

¹⁴³ J. Błoński, *Biedni Polacy patrzą na getto* [Poor Poles look at the ghetto], "Tygodnik Powszechny" 1987, no 2 (11.1.1987) – German translation: *Die armen Polen blicken aufs Getto*, [in:] M. Klecel (Hrsg.), *Polen zwischen Ost und West. Polnische Essays des 20. Jahrhunderts*, Frankfurt am Main 1995. As to complicated Polish-Jewish relations see for example A. Polonsky (ed.), *My Brother's Keeper? Recent Polish Debates about the Holocaust*, London 1990; *Polacy – Żydzi* [Poles - Jews] (fn. 115); J. Tokarska-Bakir, *Pod klątwą. Społeczny portret pogromu kieleckiego* [Under a curse. Social portray of the Kielce pogrom], Warszawa 2018; B. Engelking, J. Grabowski (eds), *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski* [Still the night. Fate of Jews in selected counties of occupied Poland], Warszawa 2018.

The last chord was the visit to Poland of the President of Germany (Frank-Walter Steinmeier) in 2019 on the 80th anniversary of the outbreak of World War II. After President Herzog's statement (1994) Steinmeier's speeches in Warsaw and Wieluń constitute the most comprehensive and most complete official version of the admission of German guilt and crimes and an explicit apology.

As the German President together with the German Chancellor, today we say to all Poles: We will not forget. We do not forget the wounds that Germans have inflicted on Poles. We forget neither the suffering of the Polish families nor their courage to resist. (...) It is Poland's spirit – it is your spirit of liberation that has torn the Iron Curtain. It is your spirit of reconciliation that has given us Germans the new beginning. (...) I look with gratitude to the freedom struggle of the Polish people. I bow in mourning to the suffering of the victims. I ask for forgiveness for Germany's historical debt. I confess our lasting responsibility.¹⁴⁴

In this hour 80 years ago, the inferno broke over Wieluń, sparked by German race mania and the will to exterminate. (...) Wieluń was an indication, a terrorist attack by the German Luftwaffe and a forerunner of everything that should follow in the next six years. (...) Our responsibility does not go away. We know this. As German President I want to assure you: we will not forget. We want and we will remember. And we accept the responsibility that our history gives us. I bow to the victims of the raid on Wieluń. I bow to the Polish victims of German tyranny. And I ask for forgiveness.¹⁴⁵

¹⁴⁴ Speech of the President of Germany Frank-Walter Steinmeier at the Polish commemoration on the occasion of the 80th anniversary of the beginning of the Second World War on 1.9.2019 in Warsaw: „Als deutscher Bundespräsident gemeinsam mit der deutschen Bundeskanzlerin sagen wir heute allen Polinnen und Polen: Wir werden nicht vergessen. Wir vergessen die Wunden nicht, die Deutsche Polen zugefügt haben. Wir vergessen das Leiden der polnischen Familien ebenso wenig wie ihren Mut zum Widerstand. Wir werden niemals vergessen. (...) Es ist Polens Geist – es ist Euer Geist der Befreiung, der den Eisernen Vorhang zerrissen hat. Es ist Euer Geist der Versöhnung, der uns Deutschen den Neubeginn geschenkt hat. (...) Als deutscher Gast trete ich barfuß vor Sie auf diesen Platz. Ich blicke in Dankbarkeit auf den Freiheitskampf des polnischen Volkes. Ich verneige mich in Trauer vor dem Leid der Opfer. Ich bitte um Vergebung für Deutschlands historische Schuld. Ich bekenne mich zu unserer bleibenden Verantwortung“.

¹⁴⁵ Speech of the President of Germany Frank-Walter Steinmeier at the commemoration of the 80th anniversary of the beginning of the Second World War in the city of Wieluń on 1.9.2019: „In dieser Stunde vor 80 Jahren brach das Inferno über Wieluń herein,

5.4. In summary, the post-war attitude of Polish public opinion about the German resettlement evolved over time.¹⁴⁶

Initially, resentment or even hatred toward Germans prevailed, together with indifference to evil. In the first years following the war there were acts of pillage and even murder. Numerous German monuments and cemeteries were destroyed, which showed the desire to annihilate all traces of any German presence (on the territory granted to Poland). It all took place under conditions of war-induced chaos and a decline in morality.¹⁴⁷ In the mid 1950s, there was the first mass exodus of Polish citizens of German origin to the FRG. Between 1956 and 1989 more than a million people emigrated.

Until the transformation of 1989, unrestricted public debate about the resettlement of the German population was not possible in Poland, much like the stifled debate about the Poles who had lost their homeland as a result of flight or relocation from the Polish territories in the East. Public discourse was made difficult by the Polish regime, on the one hand, and by German legal positions on the other hand. In the 1960s new reflections were voiced, independent of the government, that sought out historical truths and addressed the pain caused by the loss of the homelands.

After 1989 there appeared an opening on both sides, a softening that was fed by earlier social initiatives. The dialogue that followed was productive and relations between both states and societies, despite huge historical burdens, entered a new phase.

entfacht von deutschem Rassenwahn und Vernichtungswillen. (...) Wieluń war ein Fanal, ein Terrorangriff der deutschen Luftwaffe und ein Vorzeichen für alles, was in den kommenden sechs Jahren folgen sollte. (...) Unsere Verantwortung vergeht nicht. Das wissen wir. Als deutscher Bundespräsident will ich Ihnen versichern: Wir werden nicht vergessen. Wir wollen und wir werden uns erinnern. Und wir nehmen die Verantwortung an, die unsere Geschichte uns aufgibt. Ich verneige mich vor den Opfern des Überfalls auf Wieluń. Ich verneige mich vor den polnischen Opfern der deutschen Gewaltherrschaft. Und ich bitte um Vergebung“.

¹⁴⁶ See K. Ziemer (ed.), *Versöhnung und Politik. Polnisch-deutsche Versöhnungsinitiativen der 1960er-Jahre und die Entspannungspolitik*, Bonn 2009; E. Dmistrów, *Niemcy i okupacja hitlerowska w oczach Polaków. Poglądy i opinie z lat 1945-1948* [Germans and Hitler's occupation in the eyes of Poles. Views and opinions from 1945 to 1948], Warszawa 1987.

¹⁴⁷ See M. Zaremba, *Wielka Trwoga. Polska 1944 – 1947. Ludowa reakcja na kryzys* [The great anxiety. Poland between 1944 and 1947. People's reaction to the crisis], Kraków 2012; M. Łuszczyna, *Mała zbrodnia. Polskie obozy koncentracyjne* [Little crime. Polish concentration camps], Kraków 2017.

In the Pomeranian village, Trzyglów/Trieglaff, the nest of the von Thadden family, since 2002 a bilingual sign can be seen with the inscription: “*Pax vobis*. To the memory of the German inhabitants of Trieglaff, who lived here and were happy, with wishes of happiness for those who have their home here today.”¹⁴⁸

It brings to mind the words of Marion Countess Dönhoff: “It is possible that the highest degree of love is to love without possessing.”¹⁴⁹ We can hope that the post-war wounds have stopped hurting, even if the scars remain.

A similar opinion can be expressed regarding post-war Polish-Russian¹⁵⁰ and Polish-Ukrainian¹⁵¹ relations.

¹⁴⁸ „*Pax vobis*. Zur Erinnerung an viele Generationen deutscher Einwohner von Trieglaff, die hier lebten und glücklich waren, und mit guten Wünschen für die, die hier ihre Heimstatt fanden“.

¹⁴⁹ Marion Gräfin Dönhoff, *Kindheit in Ostpreußen*, Berlin 1988, p. 221:

Ich kann mir (...) nicht vorstellen, daß der höchste Grad der Liebe zur Heimat dadurch dokumentiert wird, daß man sich in Haß verrennt gegen diejenigen, die sie in Besitz genommen haben, und daß man jene verleumdet, die einer Versöhnung zustimmen. (...) Vielleicht ist dies der höchste Grad der Liebe: zu lieben, ohne zu besitzen.

¹⁵⁰ As to Polish-Russian relations, see the Common Proclamation of the Chairman of the Conference of the Episcopate of Poland, Józef Michalik, Archbishop of the Przemyśl Diocese, and Cyril, Head of the Russian Orthodox Church, Patriarch of Moscow and all Russia, to the Polish and Russian nations, Warsaw, 17.8.2012:

Reconciliation also presupposes a readiness to forgive the harm and injustice that have been suffered. We are obligated for such a readiness by the prayer, Our Father (...) forgive us our sins as we forgive those who sin against us. We appeal to our faithful to ask for the forgiveness of the wrongs and injustices and all the evil that we have done to each other. We are convinced that this is the first and most important step toward the restoration of the mutual trust, without which there cannot be any lasting human community or any full reconciliation. Forgiveness obviously does not mean forgetfulness, for memory constitutes a significant part of our identity. We also owe this memory to the victims of the past who were brutally murdered and gave their lives for their faith in God and their faithfulness to their earthly homeland.

See also *The Katyń crime before the European Court of Human Rights. Documents submitted by the Government of the Republic of Poland in the case Janowiec and Others v. Russia*, Warszawa 2015.

¹⁵¹ As to complicated Polish-Ukrainian relations, see *Wspólna rzymskokatolicko-greckokatolicka deklaracja w sprawie zbrodni wołyńskiej* (28.6.2013) /A joint Roman Catholic – Greek Catholic declaration on the Volyn crime/:

We know that a Christian judgment of the Volyn crime (1943) requires from us a clear condemnation and an apology (...). Today we want to pay homage to the innocent who were murdered, but also to apologize to God for the crimes that were committed and to appeal again to everyone, the Ukrainians and the Poles, to boldly open their

Chapter 6: Tracing a Line from Wrongdoing/Harm to Unlawfulness

This territorial change can play a vital role in the shaping of social life in central Europe—it can bring about a reversal in the great historical processes on its territories.

Stanisław Ossowski¹⁵²

If, from the individual point of view, the results of resettlements remain painful, it is still debatable if and to what extent the post-war decisions of the victorious powers, including the Potsdam Agreement, could have violated the international law in force at that moment. The general interest demanded not only punishing the perpetrators, but also making far reaching political decisions for the future. What could have been the reaction to the inscription “*Jedem das Seine*” (to each his own) displayed

minds and hearts to mutual forgiveness and reconciliation. (...) As the head of the Greek Catholic Church, I want to apologize to our Polish brothers for the crimes committed in 1943. In the name of the truth, we believe that the attitude of these Poles who did harm to Ukrainians and answered violence with violence also requires an apology and a request for forgiveness. (...) As the head of the Episcopate of Poland, I ask my Ukrainian brothers for forgiveness. (...) Thinking about the future, we are aware that without our mutual forgiveness, our Church would not be credible in fulfilling its evangelical mission, and our nations will not have a perspective for cooperation and development either on religious or political grounds.

See also the *Proclamation of the Synod of Bishops of the Ukrainian Greek Catholic Church to the faithful and all the people of good will on the occasion of the 70th anniversary of the Wołyn tragedy* ('Gazeta Wyborcza', 18.3.2013) and *The Letter on Reconciliation of the Polish and Ukrainian Bishops*, ('Gazeta Wyborcza', 19.6.2005). See also K. Persak, *Akcja „Wisła” – próba kwalifikacji prawnej* [Operation Vistula: An attempt at legal qualification], 'Studia Polityczne', 2018, vol. 46, nr 1, s. 24-54; J. Pisiuliński, *Akcja specjalna „Wisła”*, Rzeszów 2017; E. Misiło (ed.), *Akcja „Wisła”, Dokumenty* [Special operation 'Vistula'], Warszawa 1993 (second ed. Warszawa 2012); E. Misiło (ed.), *Repatriacja czy deportacja. Przesiedlenie Ukraińców z Polski do USRR 1944-1946* [Repatriation or deportation. Resettlement of Ukrainians from Poland to USRR 1944-1946], vol. 1 – Dokumenty 1944-1945 [Documents 1944-1945], Warszawa 1996; vol. 2, Dokumenty 1946 [Documents 1946], Warszawa 1999/ Operation Vistula was a codename for the 1947 forced resettlement of the Ukrainian minority from the south-eastern provinces of post-war Poland, to the Recovered Territories in the west of the country. The action was carried out by the Soviet-installed Polish communist authorities with the aim of removing material support and assistance to the Ukrainian Insurgent Army/.

¹⁵² See fn. 19.

at the gate of Buchenwald concentration camp? What would justice look like after Auschwitz?

It is true that not all crimes and not all international criminals were eventually punished. The military tribunal and the Nuremberg trials led gradually to the development of international criminal courts. Criminals today do not sleep easily, given that Auschwitz and Shoah did not constitute the last chapter in the history of crimes against humanity.

In Germany the view prevails that part of the decisions of the victorious powers (including the resettlement of Germans and the confiscation of their assets) were unlawful.¹⁵³ This was the position taken by the German Foreign Minister Klaus Kinkel in 1996,¹⁵⁴ who, however, received a reply from the governments of the United States and Great Britain stating that the decisions of the Potsdam Conference “were soundly based in international law.”¹⁵⁵ The view of the German minister

¹⁵³ J. Barcz, J.Abr. Frowein, *Gutachten zu Ansprüchen aus Deutschland gegen Polen in Zusammenhang mit dem Zweiten Weltkrieg*, funded on behalf of the Governments of the Federal Republic of Germany and the Republic of Poland, ‘*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2005, vol. 65, no. 3, pp. 625-650; *Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher*, created on behalf of the German Bundestag by Univ.-Prof. Dr. Eckart Klein, Potsdam, 15.2. / 4.4.2005.

¹⁵⁴ Das Auswärtige Amt. Mitteilung für die Presse, Nr. 1026/96 (19.2.1996); see also the statement of Klaus Kinkel in: ‘*Stuttgarter Nachrichten*’ (20.2.1996):

In Übereinstimmung mit der deutschen Völkerrechtswissenschaft haben alle früheren Bundesregierungen und auch die jetzige Regierung die Vertreibung der Deutschen nach Kriegsende immer als rechtswidrig verurteilt und die Beschlüsse der Potsdamer Konferenz vom 2. August 1945 nicht als Rechtfertigung der Vertreibung angesehen;

Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke und der Gruppe der PDS – Das Potsdamer Abkommen und die Haltung der Bundesregierung zu diesem Abkommen in den Verhandlungen mit der tschechischen Regierung, Deutscher Bundestag. Drucksache 13/4439, 23.4.1996.

¹⁵⁵ Text in: ‘*Die Friedens-Warte*’, 1997, No. 73, pp. 107–108. US Declaration:

The decisions made at Potsdam by the governments of the United States, United Kingdom, and the then-Soviet Union in July/August of 1945 were soundly based in international law. The Conference conclusions have been endorsed many times since in various multilateral and bilateral contexts. The Conference recognized that the transfer of the ethnic German population of Czechoslovakia had to be undertaken. Article XIII of the Conference Report called for this relocation to be ‘orderly and humane’. The conclusions of the Potsdam Conference are historical fact, and the United States is confident that no country wishes to call them in question. It would be inappropriate for the United States to comment on any current bilateral discussions under way between the Czech Republic and Germany”; British Declaration: “The conclusions of the Potsdam

finds confirmation in many earlier and later official voices in the FRG. The criminal nature of the politics and actions of National Socialist Germany is acknowledged in those voices, although it is also claimed that it was not legally acceptable to address one unlawfulness with another unlawfulness.¹⁵⁶ The core of the controversy is whether in the latter case we can use the term unlawfulness.

6.1. In the international politics of the twentieth century, especially in the first half, resettlement of population constituted an instrument recognized by law.¹⁵⁷ It also took place on the basis of treaties signed in the context of the end of international conflicts, especially in connection with national minorities. These treaties envisioned forced resettlement¹⁵⁸

Agreement were endorsed by the Governments of the UK, USA and the USSR at Potsdam in July/August 1945. As far as the United Kingdom is concerned, the conclusions were soundly based in international law. The Potsdam conference recognised that the transfer of the German population of Czechoslovakia had to be undertaken, and that it should be effected in an orderly and humane manner.

¹⁵⁶ Concept for the work of the “Stiftung Flucht, Vertreibung, Versöhnung” and guidelines for the planned permanent exhibition (29.8.2012):

Unrecht hat in der Geschichte oft zu neuem Unrecht geführt, doch schafft früheres Unrecht, auch wenn es noch so groß war, keine rechtliche oder moralische Legitimation für neues Unrecht. Das gilt auch und gerade für die Vertreibung der Deutschen im östlichen Europa nach 1945“ (p. 5); „Der Deutsche Bundestag teilt die Auffassung der Bundesregierung – wie auch aller früheren Bundesregierungen –, die die im Zusammenhang mit dem Ende des Zweiten Weltkrieges erfolgte Vertreibung von Deutschen aus ihrer angestammten Heimat stets als großes Unrecht und als völkerrechtswidrig angesehen und auch so bezeichnet hat.

Deutscher Bundestag. Drucksache 13/10845 (27.5.1998), Antrag der Fraktionen der CDU/CSU und FDP – *Vertriebene, Aussiedler und deutsche Minderheiten sind eine Brücke zwischen den Deutschen und ihren östlichen Nachbarn*, Plenarprotokoll 13/239 (29.05.1998); see also the reply of the Polish Sejm of 3.7.1998, ‘Monitor Polski’, 1998, no. 23.

¹⁵⁷ See *The human rights dimensions* (fn. 80); International Law Commission (Fifty-ninth session). *Third report on the expulsion of aliens by Mr. Maurice Kamto*, Special Rapporteur (A/CN.4/581, 19.4.2007):

99. *In Europe, there were cases of collective expulsion dating back to the seventeenth century. (...) 101. Other than by the political protests of Governments whose nationals have been victims of these mass expulsions, such expulsions have not been contested on the basis of international law. The literature of the period saw nothing but the exercise by the expelling States of the ‘right to expel aliens’ recognized by international law. (...) 102. In other words, the collective expulsion of aliens, even in time of peace, was not prohibited.*

¹⁵⁸ For example Convention between Turkey and Greece Concerning the Exchange of Greek and Turkish Populations, Lausanne 30.1.1923:

or contained the so-called option clause.¹⁵⁹ The criticism that sometimes followed was related not so much to the instruments of resettlements

Article 1. As from the 1st May, 1923, there shall take place a compulsory exchange of Turkish nationals of the Greek Orthodox religion established in Turkish territory, and of Greek nationals of the Moslem religion established in Greek territory. These persons shall not return to live in Turkey or Greece respectively without the authorisation of the Turkish Government or of the Greek Government respectively.

See also Treaty of Peace between the British Empire, France, Italy, Japan, Greece, Roumania and the Serb-Croat-Slovene State of the one part, and Turkey of the other part, signed at Lausanne, 24.7.1923 (Articles 32 and 142); L. Leontiades, *Der griechisch-türkische Bevölkerungsaustausch*, 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht' 1935, vol. 5, pp. 546-576; U. Özsu, *Nation-Building, International Law, and the Greek-Turkish Population Exchange*, 'Leiden Journal of International Law', 2011, no 4, pp. 823-847.

¹⁵⁹ For example Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27.11.1919:

Article 56. Bulgaria undertakes to place no obstacles in the way of the exercise of the right which persons may have under the present Treaty, or under the treaties concluded by the Allied and Associated Powers with Germany, Austria, Hungary, Russia or Turkey, or with any of the Allied and Associated Powers themselves, to choose whether or not they will recover Bulgarian nationality. Bulgaria undertakes to recognise such provisions as the Principal Allied and Associated Powers may consider opportune with respect to the reciprocal and voluntary emigration of persons belonging to racial minorities.

Convention between Greece and Bulgaria Respecting Reciprocal Emigration, signed at Neuilly-sur-Seine, 27.11.1919:

Article 1. The High Contracting Parties recognize the right of those of their subjects who belong to racial, religious or linguistic minorities to emigrate freely to their respective territories. (...) Article 4. The right of voluntary emigration belongs to every person over 18 years of age. It may be exercised during a period of two years from the date of constitution of the Mixed Commission provided for in Article 8, by means of a declaration before its representatives.

See also P.G. Danchin, E.A. Cole, *Protecting the Human Rights of Religious Minorities in Eastern Europe*, New York 2002:

From the Liberation to World War II, the Kingdom of Bulgaria was involved in four population exchanges, in the course of which members of non-Bulgarian ethnic minorities were evicted from Bulgaria and 'exchanged' for Bulgarians from other countries. All those exchanges were based on treaties and agreements involving Bulgarian citizens of Turkish, Greek, Romanian, and German origins (p. 325).

See also Agreement concluded at Munich between Germany, the United Kingdom, France and Italy, 29.9.1938:

(7) There will be a right of option into and out of the transferred territories, the option to be exercised within six months from the date of this agreement. A German-Czechoslovak commission shall determine the details of the option, consider ways

as to the manner in which they were carried out and their political effectiveness.¹⁶⁰ In the case of the so-called option clauses the voluntary choice depended on the pressure of circumstances.

The resettlement of population was a measure applied by National Socialist Germany, not only against the aliens on the occupied territories, but also against ethnic Germans in the context of the *Heim ins Reich* policy (return to the Reich) or of settling them in the occupied territories.¹⁶¹ For this purpose a special institution was created in 1939—*Deutsche Umsiedlungs-Treuhand GmbH* (with divisions in Poznań, Łódź, Gdańsk, Lublin, and Katowice). Examples of that policy (*Umsiedlung*) were, *inter alia*, the supplementary secret protocol to the Soviet-German Boundary and Friendship Treaty of 28.9.1939,¹⁶² or the German-Italian Agreement

of facilitating the transfer of population (*Austausch der Bevölkerung, les échanges de populations*) and settle questions of principle arising out of the said transfer.

¹⁶⁰ On the forcible displacement of the population (about 3 millions) by the tsarist authorities in 1915 (Бежанство) see A. Prymaka-Oniszk, *Bieżeństwo 1915. Zapomniani uchodźcy* [Bieżeństwo 1915. Forgotten refugees], Wołowiec 2016; P. Gatrell, *A Whole Empire Walking. Refugees in Russia during World War I*, Indiana 2005.

¹⁶¹ See fn. 78, and *The human rights dimensions* (fn. 80), paras 44, 128-137; H. Hecker, *Die Umsiedlungsverträge des Deutschen Reiches während des Zweiten Weltkrieges*, Hamburg 1971; D.A. Loeber, *Diktierte Option. Die Umsiedlung der Deutsch-Balten aus Estland und Lettland 1939-1941*, Neumünster 1972; M. Leniger, *Nationalsozialistische „Volkstumsarbeit“ und Umsiedlungspolitik 1933-1945. Von der Minderheitenbetreuung zur Siedlerauslese*, Berlin 2006.

¹⁶² German-Soviet Border and Friendship Treaty of 28.9.1939. Confidential Protocol: *Die Regierung der UdSSR wird den in ihren Interessengebieten ansässigen Reichsangehörigen und anderen Persönlichkeiten deutscher Abstammung, sofern sie den Wunsch haben, nach Deutschland oder in die deutschen Interessengebiete überzusiedeln, hierbei keine Schwierigkeiten in den Weg legen. Sie ist damit einverstanden, dass diese Übersiedlung von Beauftragten der Reichsregierung im Einvernehmen mit den zuständigen örtlichen Behörden durchgeführt wird und dass dabei die Vermögensrechte der Auswanderer gewahrt bleiben. Eine entsprechende Verpflichtung übernimmt die Deutsche Reichsregierung hinsichtlich der in ihren Interessengebieten ansässigen Personen ukrainischer oder weißrussischer Abstammung.* / Confidential Protocol. The Government of the U.S.S.R. shall place no obstacles in the way of Reich nationals and other persons of German descent residing in the territories under its jurisdiction, if they desire to migrate to Germany or to the territories under German jurisdiction. It agrees that such removals shall be carried out by agents of the Government of the Reich in cooperation with the competent local authorities and that the property rights of the emigrants shall be protected. A corresponding obligation is assumed by the Government of the German Reich in respect to the persons of Ukrainian or White Russian descent residing in the territories under its jurisdiction. Moscow, September 28, 1939./

of 21.10.1939, concerning Southern Tyrol. The voluntary character of these resettlements was rather illusory.

In the postwar period there were numerous resettlements that affected other nations, for example, Hungarians, Slovaks, Rumanians, Serbs, Croats, and Poles.¹⁶³ Although they had a partially voluntary character, they were in effect compulsory and would not have happened had German aggression not triggered the Second World War.

The right to self-determination (despite its vague character) could not be fully respected in 1945 because of the international legal responsibility of Germany for the war (the limited international legal protection of the aggressor). For the Great Powers it was clear that the Atlantic Charter of 1941 was not applicable in relation to the defeated Germany.¹⁶⁴

Under German political and legal doctrine, the Allied Powers, through their Potsdam decisions concerning the resettlement of the German population, violated the norm of international law of peremptory character (*ius cogens*). This seems to be a misunderstanding as the German doctrine refers to legal norms or concepts not in force at the time of the war. To this day there is no unambiguously and formally acknowledged list of peremptory norms, and certainly such a list did not exist in 1945.

See also Deutsch-Sowjetisches Abkommen über die Umsiedlung der deutschstämmigen Bevölkerung aus dem zur Interessenzzone der UdSSR und der ukrainischen und weissrussischen Bevölkerung aus dem zur Interessensphäre des Deutschen Reiches gehörenden Gebieten des früheren polnischen Staates (16. November 1939); Vereinbarung zwischen der Deutschen Reichsregierung und der Regierung der UdSSR über die Umsiedlung von Reichsdeutschen und Volksdeutschen aus den Gebieten der Lettischen und Estnischen Sozialistischen Sowjetrepubliken in das Deutsche Reich (10. Januar 1941); Vereinbarung zwischen der Deutschen Reichsregierung und der Regierung der UdSSR über die Umsiedlung der deutschen Reichsangehörigen und der Personen Deutscher Volkszugehörigkeit aus der Litauischen Sozialistischen Sowjetrepublik in das Deutsche Reich und die Umsiedlung der litauischen Staatsangehörigen und der Personen litauischer, russischer und belorussischer Volkszugehörigkeit aus dem Deutschen Reich (ehemaliges Memelgebiet und Suwalkagebiet) in die Litauische Sozialistische Sowjetrepublik (10. Januar 1941).

¹⁶³ For example Treaty of Peace with Hungary (Paris, 10.2.1947), Article 1.4(e):

In the event of a bilateral agreement not being concluded between Hungary and Czechoslovakia concerning the transfer to Hungary of the population of the ceded area, Czechoslovakia guarantees them full human and civic rights. All the guarantees and prerogatives stipulated in the Czechoslovak-Hungarian Agreement of 27.2.1946 on the exchange of populations will be applicable to those who voluntarily leave the area ceded to Czechoslovakia.

¹⁶⁴ See also Article 107 UN Charter.

The German doctrine is thus founded on imprecise concepts which were not in force at the end of the war and which are treated instrumentally for political purposes.

6.2. To examine the legality of the resettlements, we need to analyze the most important international legal regulations, including the norms that were in force at the end of World War II.

It is necessary to note that the legal regulation that was created after the end of the war was not applicable to the Potsdam decisions. A brief overview of it is presented here to show the range of the specific regulations, which do not reflect a codification of the customary law. In the documents presented below there appear various terms (for example, deportation, resettlement, expulsion), whose definitions were often ambiguous. Their application in political and legal practice is not the same. For example, the norms of humanitarian law, which pertain to the displacement of civilians, can be divided into three categories relating to three different situations: an occupied territory, an international armed conflict and a non-international armed conflict.¹⁶⁵

6.2.1. The first group of norms relate to the international law of military conflicts (humanitarian law). They are obligatory in times of armed conflict, apply to the states that are engaged in such conflict and presuppose their international legal responsibility for actions violating norms relating to the protection of combatants, prisoners of war, and civilians. States are obligated to set up national legal norms indispensable for punishing perpetrators of violating humanitarian law.¹⁶⁶

In the pre-1939 international legal norms there was no ban on forcible resettlement of population. It does not appear in the Hague Convention IV of 1907, including the attached Regulations Respecting the Laws and Customs of War on Land.

In the postwar Geneva Conventions of 12.8.1949, there is a differentiation between deportation, transfer, evacuation and displacement. Those terms relate to various situations.

¹⁶⁵ V. Chetail, *The Transfer and Deportation of Civilians*, [in:] A. Clapham, P. Gaeta, M. Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford 2015, pp. 1185-1213; id., *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 'Leiden Journal of International Law' 2016, vol. 29, pp. 917-943.

¹⁶⁶ Geneva Convention IV, Article 146.

The most important of them is Article 49 of the Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, which concerns the forcible displacement of people in times of occupation. This article provides:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased. (...) The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.¹⁶⁷

The Protocol Additional to the Geneva Conventions of 12.8.1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8.6.1977, states in Article 85(4):

In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention.

The Protocol Additional to the Geneva Conventions of 12.8.1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8.6.1977, provides:

¹⁶⁷ Commentaire du Comité international de la Croix Rouge (1958):

la Conférence diplomatique a préféré ne pas interdire de manière absolue toute espèce de transferts, certains de ceux-ci lui paraissant pouvoir, jusqu'à un certain point, rencontrer l'adhésion de ceux qui en sont l'objet. Elle pensait notamment au cas de personnes protégées qui, en raison de leur appartenance à des minorités ethniques ou politiques, auraient fait l'objet de mesures discriminatoires ou de persécutions et qui souhaiteraient pour cette raison quitter le pays. C'est pour tenir compte de ce désir légitime que la Conférence a décidé d'autoriser implicitement les transferts volontaires, prohibant seulement les transferts 'forcés'.

Article 17.1. The displacement¹⁶⁸ of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out all possible measures shall be taken on order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Article 17 is similar to Article 49 of the GC IV, although its content is more restrictive.

6.2.2. The following group of norms concerns international criminal law, especially the statutes of the international criminal courts. The development of these regulations is marked by the Nuremberg Trials after the end of the Second World War and by the conflict in the former Yugoslavia in the 1990s.

Those norms define, with a greater or lesser degree of precision, individual crimes and relate to the international criminal responsibility of individuals. The scope of their application was initially limited to the period of armed conflict; however, in relation to crimes against humanity, it was expanded beyond that period.

In accordance with Article VI of the Charter of the International Military Tribunal (IMT) of 8.8.1945, the Tribunal “shall have the power to try and punish persons who, acting in the interests of the European Axis countries whether as individuals or as members of organizations, committed any of the following crimes: (...) (b) war crimes: namely, (...) deportation to slave labor or for any other purpose of civilian population of or in occupied territory, (...) (c) crimes against humanity: namely, (...) deportation, and other inhumane acts committed against any civilian population, before or during the war.”¹⁶⁹

The IMT Charter related to individual criminal responsibility for crimes of war or crimes against humanity, and most certainly did not relate to the Potsdam decisions concerning the resettlement of the German population.

¹⁶⁸ The notions of transfer and deportation referred to in Article 49(1) GC IV are encapsulated in Article 17(1) within the generic term of ‘displacement’.

¹⁶⁹ In this sense *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 1950.

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) does not identify the forced resettlement of population with genocide.¹⁷⁰ In the doctrine and public commentaries the so-called ethnic cleansing is sometimes mentioned. Ethnic cleansing, however, is not a legal term¹⁷¹ and could be understood as genocide only if it was committed with a special intention (*dolus specialis*) – “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” The phrase “as such” is of fundamental importance for the definition.¹⁷²

¹⁷⁰ “Article 2. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

¹⁷¹ International Criminal Court for the former Yugoslavia (ICTY), Trial Chamber II, *Prosecutor v. Milomir Stakić* (Case No. IT-97-24-T), Judgement of 31.7.2003: “It does not suffice to deport a group or a part of a group. A clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide” (para. 519). See also ICTY, Trial Chamber, *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-T), Judgement of 24.3.2016: „553. (...) Forcible transfer alone would not suffice to demonstrate the intent to ‘destroy’ a group but it is a relevant consideration as part of the Chamber’s overall factual assessment.”

¹⁷² International Court of Justice (ICJ). *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26.2.2007:

190. The term ‘ethnic cleansing’ (...) is in practice used (...) to mean ‘rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area’ (...). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition ‘measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment’ was not accepted (A/C.6/234). (...) Neither the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can as such be designated as genocide. (...) This is not to say that acts described as ‘ethnic cleansing’ may never constitute genocide. (...) In other words, whether a particular operation described as ‘ethnic cleansing’ amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term ‘ethnic cleansing’ has no legal significance of its own. That said, it is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.

The resettlement of the German population does not fulfill the above-mentioned criteria.

The International Criminal Court for the former Yugoslavia (1993), has the jurisdiction to prosecute and punish individuals for “unlawful deportation or transfer” of civilians during international or non-international armed conflict.¹⁷³ The situation in the case of the International Criminal Court for Rwanda is similar, but with one difference, however, namely that its jurisdiction is not limited to the time of armed conflict, and the act of deportation outside of this period can also be prosecuted (as a crime against humanity).¹⁷⁴ Deportation as a crime against humanity must be part of a widespread or systematic attack.

The Statute of the International Criminal Court (ICC) provides:

Article 7.1 For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (...) (d) Deportation or forcible transfer of population; (...) 2. For the purpose of paragraph 1: (...) (d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.¹⁷⁵

See also European Court of Human Rights, *Jorgić v. Germany* (No. 74613/01), Judgment of 12.7.2007, para. 45.

¹⁷³ Statute of the International Criminal Tribunal for the Former Yugoslavia (1993):

Article 2. The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (...) (g) unlawful deportation or transfer or unlawful confinement of a civilian. (...) Article 5. Crimes against humanity. The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (...) d) deportation.

¹⁷⁴ Statute of the International Criminal Tribunal for Rwanda (1994): “Article 3. Crimes against Humanity. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (...) (d) Deportation.”

¹⁷⁵ *The Elements of Crimes*. Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10.9.2002, Article 7(1)(d). Crime against humanity of deportation or forcible transfer of population (p. 6).

No differentiation seems to be made here between a period of armed conflict and a time of peace. The term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment. “Deported or forcibly transferred” is interchangeable with “forcibly displaced.”

In accordance with the Statute of the ICC:

Article 8.2. For the purpose of this statute, ‘war crimes’ means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (...) (vii) Unlawful deportation or transfer or unlawful confinement; (...) (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: (...) (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory. (...) (e)(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.¹⁷⁶

The non-legally binding Draft Code of Crimes against the Peace and Security of Mankind (1996) qualifies “Arbitrary deportation or forcible transfer of population” as a war crime, whereas “unlawful deportation or

¹⁷⁶ *The Elements of Crimes* (fn. 171):

Article 8(2)(a)(vii)-1. War crime of unlawful deportation and transfer. Elements. 1. The perpetrator deported or transferred one or more persons to another State or to another location; 2. Such person or persons were protected under one or more of the Geneva Conventions of 1949; 3. The perpetrator was aware of the factual circumstances that established that protected status; 4. The conduct took place in the context of and was associated with an international armed conflict; 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict”; “Article 8(2)(e)(viii). War crime of displacing civilians. Elements. 1. The perpetrator ordered a displacement of a civilian population; 2. Such order was not justified by the security of the civilians involved or by military necessity; 3. The perpetrator was in a position to effect such displacement by giving such order; 4. The conduct took place in the context of and was associated with an armed conflict not of an international character; 5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

transfer” as a crime against humanity if it is committed on a large scale and in a systematic manner.¹⁷⁷

The special UN commission dealing with the problem of resettlement of population terminated its task in 1997 with a report and a non-legally binding declaration that bans unlawful population transfers.¹⁷⁸

In the norms of humanitarian law and international criminal law the most frequently used terms are “deportation” and “transfer,” and, where needed, “evacuation,” and “displacement.” According to some opinions,

¹⁷⁷ International Law Commission. *Draft Code of Crimes against the Peace and Security of Mankind*, 1996:

Article 18. A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (...) (g) arbitrary deportation or forcible transfer of population.” Article 20: “Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: (a) any of the following acts committed in violation of international humanitarian law: (...) (vii) unlawful deportation or transfer of unlawful confinement of protected persons. (...) (c) any of the following acts committed wilfully in violation of international humanitarian law: (i) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies.

¹⁷⁸ *Draft Declaration on Population Transfer and the Implantation of Settlers* (E/CN.4/Sub.2/1997/23, 27.6.1997) – originally published as *Human rights and population transfer* [final report of the Special Rapporteur, Mr. Aun al-Khasawneh, Annex II] and welcomed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in *Freedom of Movement and Population Transfer*, 1997/29, 28.8.1997:

Article 3. Unlawful population transfers entail a practice or policy having the purpose or effect of moving persons into or out of an area, either within or across an international border, or within, into or out of an occupied territory, without the free and informed consent of the transferred population and any receiving population. (...) Article 4.3. The displacement of the population or parts thereof shall not be ordered, induced or carried out unless their safety or imperative military reasons so demand. All persons thus displaced shall be allowed to return to their homes, lands, or places of origin immediately upon cessation of the conditions which made their displacement imperative. (...) Article 6. Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful. Article 7. Population transfers or exchanges of population cannot be legalized by international agreement when they violate fundamental human rights norms or peremptory norms of international law. (...) Article 9. The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.

the difference between deportation and transfer seems to be based on whether they are carried out within the territory of a state or whether they have a trans-border character.¹⁷⁹ This view is not unchanging and tends to be questioned.¹⁸⁰ Both acts can have a permanent or temporary

¹⁷⁹ ICTY, Trial Chamber, *Prosecutor v. Radislav Krstić* (No. IT-98-33-T), Judgment of 2.8.2001: “521. Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.”

¹⁸⁰ ICTY, Trial Chamber II, *Prosecutor v. Milomir Stakić* (fn. 167): “679. For the purposes of the present case, the Trial Chamber finds that Article 5(d) of the Statute must be read to encompass forced population displacements both across internationally recognised borders and *de facto* boundaries, such as constantly changing frontlines, which are not internationally recognized. The crime of deportation in this context is therefore to be defined as the forced displacement of persons by expulsion or other coercive acts for reasons not permitted under international law, from an area in which they are lawfully present to an area under the control of another party.”; ICTY, Trial Chamber II, *Prosecutor v. Dragan Nikolić* (No. IT-94-2-S), Judgment of 18.12.2003, para. 109 (footnote): “The Trial Chamber (...) notes that forcible transfer is an equivalent term to forcible displacements, forcible transfer and deportations as discussed in *Krnjelac* Appeal Judgment, paras 217-223, *Stakić* Trial Judgment, paras 671-684 and *Krstić* Trial Judgment, paras 520-523”; ICTY, *Prosecutor v. Milomir Stakić* (No. IT-97-24-A), Judgment of the Appeals Chamber, 22.3.2006:

278. The Appeals Chamber is of the view that the *actus reus* of deportation is the forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, without grounds permitted under international law. (...) 295. The 1991 precursor to the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, predating the acts alleged as deportation in this case, states that ‘[d]eportation, already included in the 1954 [D]raft Code, implies expulsion from the national territory, whereas the forcible transfer of population could occur wholly within the frontiers of one and the same State’. (...) 300. (...) The Appeals Chamber also accepts that under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation.

See also *Prosecutor v. Milomir Stakić*, 2006 – Partly Dissenting Opinion of Judge Shahabuddeen:

72. I reach three conclusions. First, it is not entirely correct to say, as the Appeals Chamber says, that, under customary international law, ‘the crime of deportation requires the displacement of individuals across a border’; under customary international law, the concept of deportation can apply in relation to the crossing of a front line even if the front line is not a border. Second, even if existing materials always used the term ‘deportation’ in relation to the crossing of a border, the term was reasonably capable of applying in relation to the crossing of a front line, inclusive of a constantly

character in contrast to evacuation, for example, which has a temporary and humanitarian character.¹⁸¹

The definition of deportation as a war crime or, sometimes, as a crime against humanity is explained by the gradually developing intention to broaden the protection of the population against the actions of its own state, independently of an international armed conflict.¹⁸² In the initial phase of the post-war international regulations, the term of crime against humanity was limited to the period of armed conflict. The statute of the International Criminal Tribunal for Rwanda (1994), and then the ICC statute (1998) broadened the scope of the concept of deportation or transfer to situations outside of armed conflicts.

6.2.3. The last group of norms that are relevant to our discussion concerns the international protection of human rights. If the norms of humanitarian law are applicable to the situation of an armed conflict, it is important to remember that the protection of human rights is first of all foreseen as applying in times of peace, and its application in a time of armed conflict is seen only as supplementary and situational. Those norms are centered on the term “expulsion.”

According to Article 9 of the Universal Declaration of Human Rights (1948) “No one shall be subject to arbitrary arrest, detention or exile.”

The Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR) of 1950 initially limited the issue to the question

changing front line. Third, even if customary international law rigidly confined the use of the term ‘deportation’ to the crossing of a border, it still recognized the crossing of a front line as a crime and it was open to the Security Council to provide in the Statute for the prosecution of this crime as a ‘deportation’.

¹⁸¹ *Prosecutor v. Milomir Stakić*, 2006 (fn. 176):

306. Article 49 of Geneva Convention IV itself, the underlying instrument prohibiting deportation regardless of the motive behind the act, contains no suggestion that deportation requires an intent that the deportees should not return. The Appeals Chamber (...) finds that the Commentary to Article 49 in particular is primarily an attempt to distinguish ‘evacuation’, a form of removal permitted by the Convention which is by definition provisional, from the crimes of deportation and forcible transfer. 307. The Appeals Chamber therefore chooses to follow the text of Article 49 and concludes that deportation does not require an intent that the deportees should not return.

¹⁸² *Prosecutor v. Milomir Stakić*, 2006 (fn. 176): “289. (...) [D]eportation as a crime against humanity developed out of deportation as a war crime – as a way of extending the scope of the crime’s protection to civilians of the same nationality as the perpetrator.”

of deprivation of freedom.¹⁸³ The problems connected with expulsion appeared only in 1963 in the Protocol n° 4 to this Convention.

Article 3 of the Protocol stipulates:

1. No one may be expelled from the territory of which he is a citizen, either individually or in the framework of a collective expulsion.
2. No one may be deprived of the right to enter the territory of a state of which he is a citizen.

In turn, Article 4 states:

“Collective expulsion of aliens is forbidden.”

Protocol n° 7 establishes additional procedural guarantees. They deal only with the expulsion of aliens legally residing in a state and envisage restrictions of certain guarantees in cases that are justified by considerations of public order or national security.¹⁸⁴ Let us also note the exceptions included in Article 15 of the CPHR.¹⁸⁵

¹⁸³ “Article 5.1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

¹⁸⁴ Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984): Article 1.1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed: a) to submit reasons against his expulsion, b) to have his case reviewed, and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority. 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

¹⁸⁵ Article 15:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

See also Article 4 International Covenant on Civil and Political Rights (1966) and Article 27 American Convention on Human Rights (1969).

Two other regional conventions (American and African), relating to the protection of human rights, are basically modeled on the CPHR.¹⁸⁶

The International Covenant on Civil and Political Rights (1966) declares in Article 13:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision

¹⁸⁶ American Convention on Human Rights (1969):

Article 22.5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it. 6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law. (...) 9. The collective expulsion of aliens is prohibited.

African Charter on Human and Peoples' Rights (1981):

Article 12.4. A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. 5. The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

See also African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention – 2009):

Article 3.1. States Parties (...) shall: (a) Refrain from, prohibit and prevent arbitrary displacement of populations; (...) Article 4. Obligations of States Parties relating to Protection from Internal Displacement. (...) 4. All persons have a right to be protected against arbitrary displacement. The prohibited categories of arbitrary displacement include but are not limited to: a) Displacement based on policies of racial discrimination or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population; b) Individual or mass displacement of civilians in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, in accordance with international humanitarian law; c) Displacement intentionally used as a method of warfare or due to other violations of international humanitarian law in situations of armed conflict; d) Displacement caused by generalized violence or violations of human rights; e) Displacement as a result of harmful practices; f) Forced evacuations in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected; g) Displacement used as a collective punishment; h) Displacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international law, including human rights and international humanitarian law. (...) Article 10.1. States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors.

League of Arab States. Arab Charter on Human Rights, 22.5.2004:

Article 27.1. No one may be arbitrarily or unlawfully prevented from leaving any country, including his own, nor prohibited from residing, or compelled to reside, in any part of that country. 2. No one may be exiled from his country or prohibited from returning thereto.

reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by competent authority.¹⁸⁷

This Covenant refers only to aliens lawfully staying in the territory of a state; it does not mention collective expulsion, however the reference to cases individually reviewed lead us to think that such an expulsion would be prohibited.

The Charter of Fundamental Rights of the European Union proclaims:

Article 19. Protection in the event of removal, expulsion or extradition.
1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

This Charter takes its inspiration from Protocol n° 4 of the CPHR, though it is limited to aliens coming from outside of the European Union territory.

The norms concerning the protection of human rights apply to times of peace and are centered on the term “expulsion.” In these regulations there is no mention of forcible means (of deportation or transfer), which is characteristic of humanitarian law and periods of armed conflict.

The terms “deportation” and “expulsion” are sometimes used interchangeably, but they are separate concepts in a legal sense.¹⁸⁸ Use of expulsion results from the territorial and personal competence of a state. Expulsion is not a punishment, but a unilateral administrative (or possibly a judicial) act, ordering an alien to leave the territory of a state under threat of the use of force (defined sometimes as deportation) in the case

¹⁸⁷ See also:

Article 12.1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.

¹⁸⁸ ILC (Fifty-eighth session). *Expulsion of aliens. Memorandum by the Secretariat* (A/CN.4/565, 10.7.2006), paras. 91-92, 179-184.

of refusal to obey an order.¹⁸⁹ It applies to individuals who – having arrived on the territory of a state in a lawful or unlawful manner – have violated the law, and constitute a threat to the public interest, public order or the security of a state.¹⁹⁰ In this context, the expulsion of an alien is a legal act providing certain conditions are fulfilled.¹⁹¹

Let us observe that while the question of expulsion is regulated by the norms protecting human rights, the norms of humanitarian law are silent on the issue of expulsion of aliens in times of armed conflict.¹⁹²

¹⁸⁹ ILC. *Draft articles on the expulsion of aliens, with commentaries* – 2014:

Article 2. For the purposes of the present draft articles: (a) ‘expulsion’ means a formal act, or conduct consisting of an action or omission, attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien, other than a refugee, to a State; (b) ‘alien’ means an individual who does not have the nationality of the State in whose territory that individual is present.

¹⁹⁰ International Law Association. *Declaration of Principles of International Law on Mass Expulsion*, 62nd Conference of the ILA, Seoul, 24-30.8.1986, Conference Report 1986: <expulsion> in the context of the present Declaration may be defined as an act, or failure to act, by a State with the intended effect of forcing the departure of persons, against their will from its territory for reason of race, nationality, membership of a particular social group or political opinion.(...) <a failure to act> may include situations in which authorities of a State tolerate, or even aid and abet, acts by its citizens with the intended effect of driving groups or categories of persons out of the territory of that State, or where the authorities create a climate of fear resulting in panic flight, fail to assure protection to those persons or obstruct their subsequent return.

See also *Memorandum* (fn. 184), paras. 68-73 (constructive expulsion).

¹⁹¹ *Draft articles on the expulsion of aliens* (fn. 185):

Article 3. A State has the right to expel an alien from its territory. Expulsion shall be in accordance with the present draft articles, without prejudice to other applicable rules of international law, in particular those relating to human rights.” “Article 4. An alien may be expelled only in pursuance of a decision reached in accordance with law.” Commentary: “(1) Draft article 4 sets out a fundamental condition to which a State’s exercise of its right to expel aliens from its territory is subject. That condition is the adoption of an expulsion decision by the expelling State in accordance with law. (2) The requirement that an expulsion decision must be made in accordance with law has, first of all, the effect of prohibiting a State from engaging in conduct intended to compel an alien to leave its territory without notifying the alien of a decision in that regard. The prohibition of any form of disguised expulsion is contained in draft article 10, paragraph 1.

¹⁹² *Memorandum* (fn. 184):

94. International humanitarian law (...) does not appear to explicitly govern the expulsion of an alien by a State from its territory in time of international or

As far as collective expulsion is concerned (without reviewing individual cases)¹⁹³ the Draft Articles of the International Law Commission (ILC) on the expulsion of aliens prohibits such expulsion outside of armed conflict,¹⁹⁴ although it is less unambiguous in times of armed conflict.¹⁹⁵

non-international armed conflict. (...) 95. The Fourth Geneva Convention (...) addresses the *voluntary* departure of aliens who find themselves in the territory of a State which is a party to the conflict under Article 35. This provision does not address the compulsory departure or the expulsion of aliens by a State from its territory during such a conflict. The commentary to the Fourth Geneva Convention prepared by the International Committee of the Red Cross clearly indicates that Article 35 is concerned only with the voluntary departure of aliens and that the right of a State to expel an alien from its territory is retained notwithstanding the prohibition of forced repatriation. (...) 96. The Fourth Geneva Convention addresses the *compulsory* departure of aliens from the territory of a State as a result of transfer, repatriation or extradition under Article 45. However, this provision does not deal with the compulsory departure of aliens by means of expulsion. The commentary to Article 45 clearly indicates that the right of a State to expel individual aliens from its territory for reasons relating to national security is retained.

¹⁹³ *Memorandum* (fn. 184):

985. The terms 'collective expulsion' and 'mass expulsion' are sometimes used interchangeably. (...) In the first case, the expulsion of even a relatively small number of aliens may violate the prohibition of collective expulsion if the expulsion of each alien is not considered on an individual case-by-case basis. (...) In the second case, the expulsion of a large number of persons may constitute a violation of the prohibition of mass expulsion. (...) The quantitative character of the expulsion of a large number of aliens appears to be the essential element of the notion of *mass* expulsion (as opposed to *collective* expulsion). (...) 990. [T]he collective expulsion of a group of aliens does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion, the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens. (...) The implementation of the decision is carried out with respect to the group of aliens as a whole. (...) 994. [T]he mass expulsion may be viewed as constituting an excessive violation of the prohibition of collective expulsion.

¹⁹⁴ *Draft articles on the expulsion of aliens* (fn. 185):

Article 9. Prohibition of collective expulsion. 1. For the purposes of the present draft article, collective expulsion means expulsion of aliens, as a group. 2. The collective expulsion of aliens is prohibited. 3. A State may expel concomitantly the members of a group of aliens, provided that the expulsion takes place after and on the basis of an assessment of the particular case of each individual member of the group in accordance with the present draft articles.

¹⁹⁵ *Draft articles on the expulsion of aliens* (fn. 185):

Article 9.4. The present draft article is without prejudice to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving

From the practice of states and international jurisprudence it follows that collective expulsion of aliens in times of armed conflict is legal.¹⁹⁶ Such an expulsion, however, is not equivalent to deportation or transfer.

6.3. From the historical perspective of international practice we can observe that forced migrations are the result of unilateral decisions of states, of treaties, or of collective sanctions.

In light of the norms of international law presented above we see a tendency to limit the freedom of states in this matter. These norms aim at preventing deportations or transfers and expulsion of persons (including

the expelling State.” Commentary: “(5) Paragraph 4 of draft article 9 is a ‘without prejudice’ clause referring to situations of armed conflict. This clause, which relates in general terms to the rules of international law applicable to the expulsion of aliens in the event of an armed conflict involving the expelling State aims to avoid any incompatibility between the rights and obligations of the State set out in the present draft articles and those under international humanitarian law.

Memorandum (fn. 184):

951. (...) A State may be entitled to expel all enemy aliens in the context of an armed conflict under international law even though this may result in the expulsion of a large number of individuals. (...) 1020. A State has the right to expel all enemy aliens who are nationals of an opposing State during an armed conflict. This right is an exception to the prohibition of mass expulsion. However, the expulsion of individual enemy aliens must comply with the relevant principles of international humanitarian law and international human rights law which are applicable in time of armed conflict to the extent possible under these exceptional circumstances.

¹⁹⁶ Eritrea-Ethiopia Claims Commission. *Civilians Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia*. *Eritrea’s Claims* 15, 16, 23 & 27–32, Partial Award, The Hague, 17.12.2004:

79. Eritrea alleged that Ethiopia violated international law by engaging in a mass expulsion of Ethiopian nationals of Eritrean origin, contending that Ethiopia’s actions amounted to ‘ethnic cleansing’. (...) Ethiopia maintained that it expelled to Eritrea only persons of Eritrean nationality, and that international humanitarian law recognizes the right of a belligerent to require nationals of the enemy State to return to the State of their nationality. (...) 81. International humanitarian law gives belligerents broad powers to expel nationals of the enemy State from their territory during a conflict. 82. (...) Ethiopia could lawfully expel these persons as nationals of an enemy belligerent, although it was bound to ensure them the protections required by Geneva Convention IV and other applicable international humanitarian law. Eritrea’s claim that this group was unlawfully expelled is rejected.

collective expulsions) as means of persecution or discriminatory treatment, especially in times of armed conflict.¹⁹⁷

The discussed issues are regulated by the norms of humanitarian law, international criminal law and in treaties protecting human rights, but the scope of these regulations is not identical and these norms are not retroactive. They don't have the character of customary law, and relating them to the Potsdam decisions of the Allied powers seems to be misguided. According to a recognized principle of international law, legal acts are evaluated in light of the law existing at the moment they take place.¹⁹⁸

In the report of a special UN commission it is stated that forced migrations of people take various forms, have various causes, and are not governed by any unified or universal international legal regulation.¹⁹⁹ The legality of any state act should thus be evaluated in light of the concrete factual circumstances and concrete legal regulations, taking into account the characteristics of times of peace and of times of armed conflict, and also the situation of individuals and groups of people.²⁰⁰

¹⁹⁷ G. Acquaviva, *Forced Displacement and International Crimes*, Legal and Protection Policy Research Series, UNHCR, June 2011, p. 25:

Acts of forced displacement, whether in international armed conflict, in civil wars, or even in peace time (if the other requirements for crimes against humanity are met) amount to international crimes. Even the difference established by the ICTY between deportation and forcible transfer – should it be accepted by other tribunals in the future – does not change the basic point that all of these acts are criminal, and that forcibly transferring people within a country is as serious as deporting them across a State border.

¹⁹⁸ ILC. Articles on Responsibility of States for Internationally Wrongful Acts (2001): Article 13. An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs"; Permanent Court of Arbitration. *The Island of Palmas Case* (United States of America v. The Netherlands), Award of 4.4.1928: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.

¹⁹⁹ *The human rights dimensions* (fn. 80):

142. Population transfers occur under varying circumstances ranging from aggressive wars, during belligerent occupation, in internal conflicts, or in peace-time, and may include removal as well as settlement of persons, within or across the boundaries of a State. No single legal principle can be applied to all population transfers. Dependent on the unique circumstances of each population transfer and the various groups it affects, different legal standards and principles may apply. (...) 372. Although most population transfers violate established principles of fundamental human rights, there is no legal code that universally prohibits population transfer as such.

²⁰⁰ On Israeli practice see Y. Dinstein (fn. 67), pp. 160-170.

The contemporary norms of humanitarian law point out that forcible deportations and transfers of people are prohibited as an instrument of repression during an armed conflict. The reference is clearly made to the occupied territory in terms of The Hague and Geneva Conventions. There are exceptions only of periodic evacuations or relocations of people justified by special circumstances.

In the norms presented above, especially those of international criminal law, there appear in the context of the prohibition of deportation or transfer of population such adjectives as “forcible,” “arbitrary,” “unlawful,” or “without grounds permitted under international law.” This is an essential and not coincidental legal qualification. The interpretation of these terms and especially their forcible character or their conformity with international law is complex and will remain a subject of controversy.

As far as expulsion is concerned, it is (contrary to deportation or transfer) in principle a legal act.²⁰¹ In practice there appear certain controversies involving collective expulsion, especially in the context of refugees arriving in large numbers and illegally on the territory of a foreign country in times of peace. This is demonstrated both in decisions of the European Court of Human Rights, and of the Court of Justice of the European Union.²⁰² Expulsion during an armed conflict is generally accepted as permissible, but from the legal point of view it is not identical to deportation or transfer.

In conclusion, in international law, there has been progress in the legal regulations of forced transfers, although these regulations still require further development and supplementation.²⁰³

²⁰¹ See fn. 187. *Oppenheim's International Law*, 1996, para. 413, pp. 940–941:

The right of states to expel aliens is generally recognized. (...) On the other hand, while a state has a broad discretion in exercising its right to expel an alien, its discretion is not absolute. Thus, by customary international law it must not abuse its right by acting arbitrarily in taking its decision to expel an alien, and it must act reasonably in the manner in which it effects an expulsion.

²⁰² See e.g. European Court of Human Rights. *Hirsi Jamaa and Others v. Italy* (No. 27765/09), Judgment of 23.2.2012; *Čonka v. Belgium* (no. 51564/99), Judgement of 5.2.2002.

²⁰³ V. Chetail, *The Transfer* (fn. 161), p. 1211:

International humanitarian law has not been conceived for providing a comprehensive and coherent regime of protection against forcible displacement in armed conflicts. Thus one should not be surprised that its impact is fairly limited though still non-negligible. The few provisions contained in GC IV and AP II are alone insufficient; they only make sense when taken together with other applicable rules of human rights

6.4. The transfer of the German population after the end of the Second World War was caused by extraordinary circumstances. It is essential to ask why this transfer happened and what its purpose was. Was it, in light of the aims of the Allied powers and in the context of international legal responsibility, a means that met the criteria of proportionality and necessity?²⁰⁴

The Potsdam decisions were taken by the Great Powers after assuming supreme authority in Germany and they constituted a manifestation of the Allies' rights and responsibilities. The territorial changes of Germany and the transfer of populations were part of the general regulating of the effects of the Second World War.²⁰⁵ They were not only rooted in ethnic considerations or in the intention of taking revenge or punishing the German crimes. The purpose of the Allied powers, acting in the general

law and refugee law. The incomplete reach of international humanitarian law is further exacerbated by its complex normative structure anchored on a traditional triptych: occupation, international armed conflict and non-international armed conflict.

²⁰⁴ ILC, Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001):

Article 25. 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole." Commentary: "(2) The plea of necessity is exceptional in a number of respects. (...) Necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.

ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004, para. 136:

The Court would observe that the restrictions provided for under Article 12, paragraph 3, of the International Covenant on Civil and Political Rights are, by the very terms of that provision, exceptions to the right of freedom of movement contained in paragraph 1. In addition, it is not sufficient that such restrictions be directed to the ends authorized; they must also be necessary for the attainment of those ends.

²⁰⁵ During the session of the Institut de Droit international, the post-war assessment of the population transfers was not uniform, however the opinion prevailed that they are permissible in the extraordinary circumstances, when other measures would be ineffective, especially to secure peace, see Institut de Droit international. *Les transferts internationaux de populations*, 'Annuaire' 1952, vol. 44, no. 2 (1952), pp. 138-199.

interest, was the prevention of imperial tendencies in German politics, creating a new geopolitical order in Europe and ensuring the security of the European continent.

In 1945 the forcible transfer of the German population was an act that was not prohibited by international law and later norms of international law cannot be applied retroactively. What is significant is that this transfer was not a means of war conduct. It did not apply to the time of a belligerent occupation, in terms of humanitarian law, but to a temporary, specific, international post-conflict administration.

These decisions can, to a certain extent, be compared to the sanctions introduced by the UN Security Council within the framework of Chapter VII of the UN Charter, in which case the Council does not have to ask the aggressor's permission to apply coercive measures, even if in other circumstances those measures would not be permissible (for example, the use of armed force). The legal assessment of the decisions of the Great Powers will remain different in Germany from the view taken by many other countries. From the Polish point of view those decisions did not violate the then existing international law.

* * *

Is it possible to justly determine the responsibility for war? Can all problems be solved or settled exclusively from a legal perspective? Maybe for some people Potsdam will always be seen as an illegal action, for others as an expression of strict international legal responsibility, for some as a kind of imperfect justice, and still for others as an opening of a new opportunity for Europe.

Those who consciously and lightheartedly violate the international legal order, as Germany (did) in times of Hitler, break not only concrete norms, but also threaten the very existence of such order and thus put themselves in danger of being deprived of the protection of the norms of this order. After such a violation of the peace, peace and mutual respect for law must be restored. This, however, cannot be presumed, taken for granted,

and especially used to justify one's own demands. In such a situation peace is possible only under the conditions through which it can be reached.²⁰⁶

Driven by the mad idea of conquering Europe, Germany committed aggression not only against Poland but also against many other countries. Some of these countries were to be erased from the map of the world. Those acts were directed especially at the mass extermination of the civilian population. The Germans caused consequences that were tragic for others, but also for their own nation. As to the change of the Polish-German border and the resettlement of the German population, the causes arose at the beginning of the war.

The Second World War marked the beginning of the end of a historical epoch in Eastern Europe, and it brought about irreversible events and processes. After 1945 there could be no return to the pre-war status quo. The resettlement of the German population was a result of, and not the cause of, war. It must be perceived in the context of German legal responsibility for the war's outbreak. The fate of citizens is a consequence of this responsibility. The individual perception of the resettlement and individual guilt are different from the international responsibility of the state and from the political-historical responsibility of the nation.

The changes in borders and the transfers of population were part of the general policy of the Great Powers, with the aim of preventing the aggressive politics of Germany and creating a new geopolitical shape for the European continent. The Potsdam decisions included a certain degree of risk. The collapse of the Allied coalition and the politics of the Soviet empire brought a high level of tension to postwar diplomacy—not a good prognosis for a stable outcome. From today's remove, we can take into account the role of some historical and unexpected events, such as the fall of communism, the collapse of the Soviet Union and, as a result, the unification of Germany.

²⁰⁶ *Das Bensberger Memorandum* (fn. 127), pp. 13-14:

Wer bewusst und mutwillig aus ihr [Völkerrechtsordnung] ausbricht, wie es Deutschland unter Hitler getan hat, verletzt nicht nur einzelne Rechte, sondern stellt auch die Völkerrechtsordnung überhaupt in Frage und setzt damit bislang anerkannte und ihn selbst schützende Rechte aufs Spiel. Nach einem solchen Friedensbruch müssen die Friedensordnungen und die wechselseitige Achtung des Rechts erst neu hergestellt werden; sie können nicht einfach vorausgesetzt, postuliert oder gar zur Rechtfertigung der eigenen Forderungen verwendet werden. Der Friede muss dann unter den Bedingungen erst wieder gewonnen werden, unter denen er erreichbar ist.

The decades since the end of the Second World War affirm that the decisions of the Allies laid a foundation for a secure Europe and for peaceful co-existence, including between the Poles and Germans. The previously quoted opinion of Stanislaw Ossowski²⁰⁷ seems to be insightful and farsighted. Even if it may sound provocative, Germany's loss of its eastern provinces did not make the country less stable, affluent, or secure. This statement does not ignore the pain of the victims of war, including the victims of resettlement of population (not only Germans), nor does it prove that resettlements constitute a kind of miraculous medicine in every case.

More than half a century after the end of the Second World War, aware of its monstrous effects, independently of the collective and individual responsibilities for what happened, we stand before the constant (and constantly adapted to our current time) need for reflection. Today on both sides of the Odra and Nysa developing good relations requires having a sense of responsibility for good and for evil, overcoming the inability to feel regret and indifference to the fate of another person, and curating a desire for a better future and a concern for the common cultural heritage. The suffering, which remains in the background, has not been forgotten, but the emphasis on both sides is on overcoming stereotypes and creating multi-level cooperation. With the worst behind us,²⁰⁸ today in Polish-German relations we witness emotions of a more peaceful nature. That does not mean that new problems are not appearing, but their resolution is taking place under radically changed conditions. The difficult and long-lasting process of reconciliation needs to be recognized as having been completed and to be seen as a success for both states and societies.

Polish-German relations have followed the historical trail from *Ostsiedlung*, *Ostflucht*, *Ostschutz*, *Ostkunde*, *Ostforschung*, *Ostinstitute*, *Generalgouvernement*, *Generalplan Ost*, *Ostfront*, *Ostrausch*,

²⁰⁷ See fn. 19.

²⁰⁸ M. Broszat, *Zweihundert Jahre deutsche Polenpolitik*, München 1963; H.K. Rosenthal, *German and Pole: National Conflict and Modern Myth*, Gainesville 1976; S. Stomma, *Czy fatalizm wrogości. Refleksje o stosunkach polsko-niemieckich 1871-1933* [Fatalism of hostility? Reflections on Polish-German relations 1871-1933], Kraków 1980; K. Zernack, *Preußen – Deutschland – Polen. Aufsätze zur Geschichte der deutsch-polnischen Beziehungen*, Berlin 1991; id., *Polen und Russland. Zwei Wege in der europäischen Geschichte*, Berlin 1994; W. Borodziej, K. Ziemer (eds.), *Deutsch-polnische Beziehungen 1939 – 1945 – 1949. Eine Einführung*, Osnabrück 2000; M. Tomala (fn. 45); id., *Polityka i dyplomacja polska wobec Niemiec – vol. I (1945-1970), vol. II (1971-1990)*, Warszawa 2006.

Ost-Dokumentation, and *Ostblock*; to the time of *Ostpolitik* and *Ostverträge*; and finally to *Osterweiterung* and the totally new situation in which Poland and Germany are members of the same military alliance and of the same community of values.

The Brandenburg Gate remains open, and Europe has taken a new form.

Bibliography

1. Acquaviva G., *Forced Displacement and International Crimes*, Legal and Protection Policy Research Series, UNHCR, June 2011
2. Adenauer K., *Erinnerungen 1945-1953*, Stuttgart 1980 (4th ed.)
3. Aly G., *Hitlers Volksstaat. Raub, Rassenkrieg und nationaler Sozialismus*, Frankfurt am Main 2011
4. Arendt H., Kohn J., *Responsibility and Judgment*, New York 2003
5. Bainville J., *Geschichte zweier Völker. Frankreichs Kampf gegen Deutsche Einheit*, Hamburg 1941
6. Barcz J., *Podstawy prawne stosunków Polski ze zjednoczonymi Niemcami*, [in:] *Polska-Niemcy 1945-2007*
7. Barcz J., *Udział Polski w konferencji „2+4”. Aspekty prawne i proceduralne*, Warszawa 1994
8. Barcz J., Kranz J., *Reparacje od Niemiec po drugiej wojnie światowej w świetle prawa międzynarodowego. Aspekty prawa i praktyki*, Warszawa 2019
9. Barkan E., *The Guilt of Nations. Restitution and Negotiating Historical Injustices*, New York 2000
10. Benvenisti E., *The International Law of Occupation*, Oxford 2012
11. Błoński J., *Biedni Polacy patrzą na getto*, 'Tygodnik Powszechny' 1987, no 2 (German translation: *Die armen Polen blicken aufs Getto*, [in:] M. Klecel (Hrsg.), 'Polen zwischen Ost und West. Polnische Essays des 20. Jahrhunderts', Frankfurt am Main 1995)
12. Boll F. (ed.), *„Wir gewähren Vergebung und bitten um Vergebung“. 40 Jahre deutsch-polnische Verständigung*, Friedrich-Ebert-Stiftung 2006 (Gesprächskreis Geschichte, no 68).
13. Bömelburg H.-J., Kochanowski J., *Die deutsche Besatzungspolitik in Polen 1939-1945*, [in:] 'Deutschland, Polen'
14. Bömelburg H.-J., R. Stößinger, R. Traba (eds), *Wypędzeni ze Wschodu. Wspomnienia Polaków i Niemców*, Olsztyn 2001
15. Borodziej W., *Geschichte Polens im 20. Jahrhundert*, München 2010
16. Borodziej W., H. Lemberg (eds), *Niemcy w Polsce 1945-1950. Wybór dokumentów*, t. 1-4, Warszawa 2000-2001, (German edition - *Die Deutschen*

- östlich von Oder und Neiße 1945-1950. Dokumente aus polnischen Archiven. Bde. 1-4, Marburg/Lahn 2000-2004)
17. Borodziej W., K. Ziemer (eds.) *Deutsch-polnische Beziehungen 1939 – 1945 – 1949. Eine Einführung*, Osnabrück 2000
 18. Broszat M., *Zweihundert Jahre deutsche Polenpolitik*, München 1963
 19. Buras P., P.M. Majewski (eds), *Pamięć wypędzonych. Grass, Beneš i środkowoeuropejskie rozrachunki. Antologia tekstów polskich, niemieckich i czeskich*, Warszawa 2003
 20. Cahier Ph., *Le problème des effets des traités à l'égard des Etats tiers*, Recueil des Cours (Académie de Droit International), 1974-III, vol. 143
 21. Chetail V., *Is There Any Blood on My Hands? Deportation as a Crime of International Law*, 'Leiden Journal of International Law' 2016, vol.29
 22. Chetail V., *The Transfer and Deportation of Civilians*, [in:] A. Clapham, P. Gaeta, M. Sassoli (eds.), 'The 1949 Geneva Conventions: A Commentary', Oxford 2015
 23. Chinkin C., *Third Parties in International Law*, Oxford 1993
 24. Corten O., P. Klein (eds) *Les Conventions de Vienne sur le droit des traités. Commentaire article par article*, Bruxelles 2006
 25. Courtois S. (ed.) *Le Livre noir du communisme. Crimes, terreur, répression*, Paris 1997
 26. Czapliński W., B. Łukańska (eds), *Problemy prawne w stosunkach polsko-niemieckich u progu XXI wieku*, Warszawa 2009
 27. Daase Ch., S. Engert, M.-A. Horelt, J. Renner, R. Strassner (eds), *Apology and Reconciliation in International Relations: The Importance of Being Sorry* New York 2016
 28. Danchin P.G., Cole E.A., *Protecting the Human Rights of Religious Minorities in Eastern Europe*, New York 2002
 29. Davies N., *Rising '44: The Battle for Warsaw*, 2003
 30. Déat M., *Mourir pour Dantzig?*, "L'Œuvre", 4.5.1939
 31. Derrida J., *To forgive. The unforgivable and the imprescriptible*, [in:] J. Caputo (ed.), 'Questioning God', 2001
 32. *Deutschland und Polen. Kirche im Dienst der Versöhnung*, Bonn, April 1996
 33. Dinstein Y., *The International Law of Belligerent Occupation*, Cambridge 2009
 34. Dmitrów E., *Niemcy i okupacja hitlerowska w oczach Polaków. Poglądy i opinie z lat 1945-1948*, Warszawa 1987
 35. Dörr O., K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Berlin-Heidelberg 2012
 36. Douglas R.M., *Orderly and Humane. The Expulsion of the Germans after the Second World War*, New Haven, London 2012
 37. Eberhardt P., *Political Migrations in Poland 1939-1948*, Warsaw 2006
 38. Engelking B., J. Grabowski (eds) *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski*, Warszawa 2018

39. Frowein J.A., *Potsdam Conference (1945)*, 'Encyclopedia of Public International Law', 2009
40. Frowein J.A., *Zur Entstehung und Bedeutung der Ostverträge 1970 – einige persönliche Ergänzungen*, [in:] H.-J. von Cremer, Th. Giegerich, D. Richter, A. Zimmermann (eds), 'Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger', Berlin, Heidelberg, New York 2002
41. Gatrell P., *A Whole Empire Walking. Refugees in Russia during World War I*, Indiana 2005
42. Giordano R., *Die zweite Schuld oder von der Last Deutscher zu sein*, München 1990
43. Góralski W.M. (ed.), *Breakthrough and Challenges. 20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations*, Warsaw 2011
44. Góralski W.M. (ed.), *Polska-Niemcy 1945-2007. Od konfrontacji do współpracy i partnerstwa w Europie. Studia i dokumenty*, Warszawa 2007
45. Góralski W.M. (ed.), *Przełom i wyzwanie. XX lat polsko-niemieckiego Traktatu o dobrym sąsiedztwie i przyjaznej współpracy – 1991-2011*, Warszawa 2011
46. Góralski W.M. (ed.), *Transfer. Obywatelstwo. Majątek. Trudne problemy stosunków polsko-niemieckich. Studia i dokumenty*, Warszawa 2005
47. Góralski W.M., (ed.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004*, vol. I: *Studia*, vol. II: *Dokumenty*, Warszawa 2004
48. Hahn E., Hahn H.H., *Die Vertreibung im deutschen Erinnern. Legenden, Mythos, Geschichte*, Paderborn 2010
49. Hecker H., *Die Umsiedlungsverträge des Deutschen Reiches während des Zweiten Weltkrieges*, Hamburg 1971
50. Hirszfeld L., *Historia jednego życia*, Warszawa 2000 (First Polish edition 1946; English translation: *The Story of One Life*, Rochester 2010)
51. Janicki L., *RFN wobec terytorialno-politycznych następstw klęski i upadku Rzeszy*, Poznań 1986
52. Jankélévitch V., *Le Pardon*, Paris 1967
53. Jankélévitch V., *Pardonnez?*, Paris 1971
54. Jaspers K., *Die Schuldfrage*, Heidelberg-Zürich 1946
55. Jaspers K., *Wohin treibt die Bundesrepublik? Tatsachen, Gefahren, Chancen*, München 1966
56. Kacowicz A.M., P. Lutomski (eds), *Population Resettlement in International Conflicts: A Comparative Study*, New York 2007
57. Karski J., *Courier from Poland: The Story of a Secret State*, Boston 1944
58. Kerski B., *Die Rolle nichtstaatlicher Akteure in den deutsch-polnischen Beziehungen vor 1990*. Wissenschaftszentrum Berlin für Sozialforschung, Januar 1999
59. Kerski B., Kycia T., Żurek R., „Przebaczamy i prosimy o przebaczenie”. Orędzie biskupów polskich i odpowiedź niemieckiego episkopatu z 1965 roku. Geneza, kontekst, spuścizna, Olsztyn 2006

60. Khan D.-E., *Die deutschen Staatsgrenzen. Rechtshistorische Grundlagen und offene Rechtsfragen*, Tübingen 2004
61. Kijowski A., *Niemcy, Polacy i inni* (1978), reprint in: A. Kijowski, *Rachunek naszych słabości*, Warszawa 2009
62. Klafkowski A., *Umowa poczdamska z dnia 2 VIII 1945 r.*, Warszawa 1960 (French version: *L'Accord de Potsdam du 2 août 1945*, Varsovie 1964)
63. Klecel M., (ed.), *Polen zwischen Ost und West. Polnische Essays des 20. Jahrhunderts*, Frankfurt am Main 1995
64. Koch Ch. (ed.), *War die «Vertreibung» Unrecht? Die Umsiedlungsbeschlüsse des Potsdamer Abkommens und ihre Umsetzung in ihrem völkerrechtlichen und historischen Kontext*, Frankfurt am Main, Berlin, Bern 2015
65. Kochanowski J., B. Kosmala (eds.) *Deutschland, Polen und der Zweite Weltkrieg. Geschichte und Erinnerung*, Potsdam-Warschau 2009
66. Kranz J., K. Bachmann (eds), *Przeprosić za wypędzenie? O wysiedleniu Niemców po II wojnie światowej*, Kraków 1997 (German edition: *Verlorene Heimat. Die Vertreibungsdebatte in Polen*, Bonn 1998)
67. Kranz J., *Polsko-niemieckie kontrowersje prawne – próba syntezy*, [in:] W.M. Góralski (ed.), 'Przełom i wyzwanie' (English version: *Polish-German Legal Controversies – An Attempt At Synthesis*, [in:] W.M. Góralski (ed.), 'Breakthrough and Challenges')
68. Kranz J., Barcz J., *Reparacje od Niemiec po drugiej wojnie światowej w świetle prawa międzynarodowego. Aspekty prawa i praktyki*, Warszawa 2019
69. Kreß C., *International Criminal Law*, 'Encyclopedia of Public International Law', 2009
70. Kunert A.K., (ed.), *Polacy – Żydzi. Polen – Juden. Poles – Jews. Wybór źródeł. Quellenauswahl. Selection of documents*, Warszawa 2001
71. Küsters H.-J., D. Hofmann, (eds.) *Dokumente zur Deutschlandpolitik. Deutsche Einheit. Sonderedition aus den Akten des Bundeskanzleramtes 1989/90*, München 1998
72. Labuda G., *Polska granica zachodnia*, Poznań 1971
73. Lachs M., *La frontière polono-allemande. Droit, vie et logique historique*, Warszawa 1964
74. Laly-Chevalier C., Rezek F., Commentary to art. 35, in: *Les Conventions*
75. Lange K., *Der Terminus „Lebensraum“ in Hitlers „Mein Kampf“*, 'Vierteljahrshefte für Zeitgeschichte' 1965, vol. 13, no 4
76. Lemkin R., *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*, Washington, D.C. 1944
77. Leniger M., *Nationalsozialistische „Volkstumsarbeit“ und Umsiedlungspolitik 1933-1945. Von der Minderheitenbetreuung zur Siedlerauslese*, Berlin 2006
78. Leontiades L., *Der griechisch-türkische Bevölkerungsaustausch*, 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht' 1935, vol. 5.
79. *Les transferts internationaux de populations*, Institut de Droit international, 'Annuaire' 1952, vol. 44, no. 2

80. Lipski J.J., *Dwie ojczyzny, dwa patriotyzmy*, 'Nowa', 1981, no 144, June 1981 and 'Kultura' (Paris) 1981, no 409 / (German text in: „Kontinent”, No 22, 1982)
81. Lipski J.J., *Powiedzieć sobie wszystko. Eseje o sąsiedztwie polsko-niemieckim* (ed. Georg Ziegler) (bilingual edition), Gliwice-Warszawa 1996
82. Loeber D.A., *Diktierte Option. Die Umsiedlung der Deutsch-Balten aus Estland und Lettland 1939-1941*, Neumünster 1972
83. Łuszczyna M., *Mała zbrodnia. Polskie obozy koncentracyjne*, Kraków 2017
84. Madajczyk P., *Czystki etniczne i klasowe w Europie XX wieku*, Warszawa 2010
85. Majewski P., *Nationalsozialistische Unterdrückungsmaßnahmen im Generalgouvernement während der Besatzung*, [in:] J. Młynarczyk (ed.), 'Polen'
86. Mann T., *Deutsche Hörer! Radiosendungen nach Deutschland aus den Jahres 1940-1945*, Frankfurt am Main 2004 (4th edition)
87. Misiło E. (ed.), *Akcja „Wisła”. Dokumenty*, Warszawa 2012 (2nd ed.)
88. Misiło E. (ed.), *Repatriacja czy deportacja. Przesiedlenie Ukraińców z Polski do USRR 1944-1946*, t. 1 – Dokumenty 1944-1945, Warszawa 1996; t. 2, Dokumenty 1946, Warszawa 1999
89. Mitscherlich A., Mitscherlich M., *Die Unfähigkeit zu trauern. Grundlagen kollektiven Verhaltens*, München 1967
90. Młynarczyk J. (ed.), *Polen unter deutscher und sowjetischer Besatzung 1939-1945*, Osnabrück 2009
91. Musiał B., *Deutsche Zivilverwaltung und Judenverfolgung im Generalgouvernement. Eine Fallstudie zum Distrikt Lublin 1939-1944*, Wiesbaden 1999
92. Nitschke B., *Vertreibung und Aussiedlung der deutschen Bevölkerung aus Polen 1945 bis 1949*, München 2003
93. Nitschke B., *Wysiedlenie czy wypędzenie? Ludność niemiecka w Polsce w latach 1945-1949*, Toruń 2000
94. *Oppenheim's International Law*, 1996
95. Orłowski H., A. Sakson (eds), *Utracona ojczyzna. Przymusowe wysiedlenia, deportacje i przesiedlenia jako wspólne doświadczenie*, Poznań 1996
96. Osmańczyk E., *Sprawy Polaków*, Katowice 1946
97. Özsu U., *Nation-Building, International Law, and the Greek-Turkish Population Exchange*, 'Leiden Journal of International Law' 2011/4
98. Persak K., *Akcja „Wisła” – próba kwalifikacji prawnej*, 'Studia Polityczne' 2018, vol. 46, no 1
99. Petersen T., *Flucht und Vertreibung aus Sicht der deutschen, polnischen und tschechischen Bevölkerung*, Bonn 2005
100. Pięciak W., *Niemiecka pamięć. Współczesne spory w Niemczech o miejsce III Rzeszy w historii, polityce i tożsamości (1989-2001)*, Kraków 2002.
101. Piotrowicz R.W., S.K.N. Blay, *The Unification of Germany in International and Domestic Law*, Amsterdam 1997
102. Pisiuliński J., *Akcja specjalna „Wisła”*, Rzeszów 2017

103. Piskorski J.M., *Polacy i Niemcy. Czy przeszłość musi być przeszkodą?*, Poznań 2004
104. Piskorski J.M., *Wygnańcy. Przesiedlenia i uchodźcy w dwudziestowiecznej Europie*, Warszawa 2010
105. Podlasek M., *Wypędzenie Niemców z terenów na wschód od Odry i Nysy Łużyckiej*, Warszawa 1995
106. Polonsky A. (ed.), *My Brother's Keeper?' Recent Polish Debates about the Holocaust*, London 1990
107. Prymaka-Oniszk A., *Bieżeństwo 1915. Zapomniani uchodźcy*, Wołowiec 2016
108. Renner J., *'I'm sorry for apologising': Czech and German apologies and their perlocutionary effects*, 'Review of International Studies' 2011, vol. 37
109. Rice C., Zelikow Ph.D., *Germany Unified and Europe Transformed: A Study in Statecraft*, Cambridge, Massachusetts 1995 (German edition: *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europa*, 2001)
110. Ricoeur P., *La mémoire, l'histoire, l'oubli*, Paris 2000
111. Rosenthal H.K., *German and Pole: National Conflict and Modern Myth*, Gainesville 1976
112. Ruchniewicz K., *Flucht, Vertreibung, Aussiedlung der deutschen Bevölkerung aus Polen nach 1945. Eine Inhaltsanalyse polnischer Schulbücher für den Geschichtsunterricht in der Mittel- und Oberschule*, 'Polen-Analysen' 2010, no 65
113. Rydel J., *Nowe elementy mozaiki. Nieznane niemieckie dokumenty dyplomatyczne o Liście Biskupów z 1965 roku*, „Więź” January 2011
114. Rydel J., *Polityka historyczna w Republice Federalnej Niemiec*, Kraków 2011
115. Sands Ph., *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*, 2016
116. Schaap A., *Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of the 'German Question' in Politics of Reconciliation*, 'Political Studies' 2001, vol. 49/4
117. Schwan G., *Politik und Schuld. Die zerstörerische Macht des Schweigens*, Frankfurt am Main 1997
118. Schweisfurth Th., *International Treaties and Third States*, 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht' 1985, vol. 45
119. Sienkiewicz W., G. Hryciuk (eds), *Wysiedlenia, wypędzenia i ucieczki 1939 - 1959. Atlas ziem Polski. Polacy, Żydzi, Niemcy Ukraińcy*, Warszawa 2008
120. Skubiszewski K., *Gdańsk and the Dissolution of the Free City*, [in]: 'Recht im Dienst des Friedens. Festschrift für Eberhard Menzel zum 65. Geburtstag', Berlin 1975
121. Skubiszewski K., *Poland's Western Frontier and the 1970 Treaties*, 'American Journal of International Law' 1973, vol. 67
122. Skubiszewski K., *Polityka zagraniczna i odzyskanie niepodległości. Przemówienia, oświadczenia, wywiady 1989-1993*, Warszawa 1997

123. Skubiszewski K., *The Great Powers and the Settlement in Central Europe*, 'Jahrbuch für öffentliches Recht' 1975, vol.18
124. Skubiszewski K., *The Western Frontier of Poland and the Treaties with Federal Germany*, 'Polish Yearbook of International Law' 1970, vol. 3
125. Skubiszewski K., *Zachodnia granica Polski w świetle traktatów*, Poznań 1975
126. Skubiszewski K., *Zachodnia granica Polski*, Gdańsk 1969
127. Snyder T., *Bloodlands: Europe Between Hitler and Stalin*, 2010
128. Srebro H. (ed.), *International Boundary Making*, The International Federation of Surveyors, December 2013
129. Stomma S., *Czy fatalizm wrogości. Refleksje o stosunkach polsko-niemieckich 1871-1933*, Kraków 1980
130. Sułek J., *Traktaty polsko-niemieckie z1990 i 1991 roku – prawda i fałsz*, 'Przegląd', 2 and 8.1.2007
131. *The Katyń crime before the European Court of Human Rights. Documents submitted by the Government of the Republic of Poland in the case Janowiec and Others v. Russia*, Warszawa 2015
132. Theer Ph., *Ciemna strona państwa narodowych. Czystki etniczne w nowoczesnej Europie*, Poznań 2012
133. Tokarska-Bakir J., *Pod klątwą. Społeczny portret pogromu kieleckiego*, Warszawa 2018
134. Tomala M., *Deutschland – von Polen gesehen. Zu den deutsch-polnischen Beziehungen 1945-1990*, Marburg 2000
135. Tomala M., *Polityka i dyplomacja polska wobec Niemiec – vol. I (1945-1970), vol. II (1971-1990)*, Warszawa 2006.
136. Tomuschat Chr., *Commentary to Article 75, t. III*, in: *Les Conventions*
137. Wiewióra B., *Granica polsko-niemiecka w świetle prawa międzynarodowego*, Poznań 1957
138. Wigura K., *Wina narodów: przebaczenie jako strategia prowadzenia polityki*, Warszawa-Gdańsk 2011
139. Wildt M., „*Eine neue Ordnung der ethnographischen Verhältnisse*“. *Hitlers Reichstagsrede vom 6. Oktober 1939*, 'Zeithistorische Forschungen/Studies in Contemporary History', 2006, no 1
140. Wolff-Powęska A., *Pamięć – brzemień i uwolnienie. Niemcy wobec nazistowskiej przeszłości (1945-2010)*, Poznań 2011
141. Wrzyszczy A., *Okupacyjne sądownictwo niemieckie w Generalnym Gubernatorstwie 1939-1945*, Lublin 2008
142. Zaremba M., *Wielka Trwoga. Polska 1944 – 1947. Ludowa reakcja na kryzys*, Kraków 2012
143. Zernack K., *Polen und Russland. Zwei Wege in der europäischen Geschichte*, Berlin 1994
144. Zernack K., *Preußen – Deutschland – Polen. Aufsätze zur Geschichte der deutsch-polnischen Beziehungen*, Berlin 1991

145. Ziemer K. (ed.), *Versöhnung und Politik. Polnisch-deutsche Versöhnungsinitiativen der 1960er-Jahre und die Entspannungspolitik*, Bonn 2009

Table of documents (chronologically)

1. Manifest des Königs von Preussen vom 24.2.1793
2. Traité entre Sa Majesté le Roi de Prusse d'une part et Sa Majesté le Roi et la Sérénissime République de Pologne de l'autre, conclu et signé à Grodno le 25.9.1793
3. Convention (IV) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre, La Haye, 18.10.1907
4. Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27.11.1919
5. Convention between Greece and Bulgaria Respecting Reciprocal Emigration, Neuilly-sur-Seine, 27.11.1919
6. Convention between Turkey and Greece Concerning the Exchange of Greek and Turkish Populations, Lausanne, 30.1.1923
7. Gesetz über die Wiedervereinigung Österreichs mit dem Deutschen Reich vom 13.3.1938
8. Agreement concluded at Munich between Germany, the United Kingdom, France and Italy, 29.9.1938
9. Gesetz über die Wiedervereinigung der sudetendeutschen Gebiete mit dem Deutschen Reich vom 21.11.1938
10. Gesetz über die Wiedervereinigung des Memellandes mit dem Deutschen Reich vom 23.3.1939
11. Adolf Hitler, Bericht über eine Besprechung (Schmundt-Mitschrift), 23.5.1939
12. Geheimes Zusatzprotokoll zum deutsch-sowjetischen Nichtangriffsvertrag vom 23.8.1939
13. Gesetz über die Wiedervereinigung der Freien Stadt Danzig mit dem Deutschen Reich vom 1.9.1939
14. Adolf Hitler, Rede vor dem Reichstag am 1.9.1939
15. The German Ambassador in the Soviet Union (Schulenburg) to the German Foreign Office. Telegram No. 371 of 16.9.1939
16. Deutsch-sowjetischer Grenz- und Freundschaftsvertrag, Moskau, 28.9.1939, Vertrauliches Protokoll
17. Erlaß des Führers und Reichkanzlers zur Festigung deutschen Volkstums, 7.10.1939
18. Speech of the Foreign Minister of the Soviet Union, Vyatcheslaw Molotov, 31.10.1939

19. Erlass des Führers und Reichskanzlers über die Gewährung von Straffreiheit, 40 Reichsgesetzblatt 1939 I, 1023
20. Deutsch-Sowjetisches Abkommen über die Umsiedlung der deutschstämmigen Bevölkerung aus dem zur Interessenzzone der UdSSR und der ukrainischen und weissrussischen Bevölkerung aus dem zur Interessensphäre des Deutschen Reiches gehörenden Gebieten des früheren polnischen Staates (16.11.1939)
21. Reichsführer SS Heinrich Himmler über die Behandlung der Fremdvölkischen im Osten (15.5.1940)
22. Vereinbarung zwischen der Deutschen Reichsregierung und der Regierung der UdSSR über die Umsiedlung von Reichsdeutschen und Volksdeutschen aus den Gebieten der Lettischen und Estnischen Sozialistischen Sowjetrepubliken in das Deutsche Reich (10.1.1941)
23. Vereinbarung zwischen der Deutschen Reichsregierung und der Regierung der UdSSR über die Umsiedlung der deutschen Reichsangehörigen und der Personen Deutscher Volkszugehörigkeit aus der Litauischen Sozialistischen Sowjetrepublik in das Deutsche Reich und die Umsiedlung der litauischen Staatsangehörigen und der Personen litauischer, russischer und belorussischer Volkszugehörigkeit aus dem Deutschen Reich (ehemaliges Memelgebiet und Suwalkigebiet) in die Litauische Sozialistische Sowjetrepublik (10.1.1941)
24. Generalplan Ost. Rechtliche, wirtschaftliche und räumliche Grundlagen des Ostaufbaues, vorgelegt von SS-Oberführer Professor Dr. Konrad Meyer, Berlin-Dahlem, June 1942
25. Zweites Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell, June 1942
26. Der Reichskommissar für die Festigung deutschen Volkstums. Stabshauptamt. Bericht über den Stand der Um- und Ansiedlung am 1.7.1942
27. Fünftes Flugblatt der Weißen Rose. Nach einem Entwurf von Hans Scholl und Alexander Schmorell mit Korrekturen von Kurt Huber, January 1943
28. Joseph Goebbels Rede vom 18.2.1943 (Berliner Sportpalast)
29. Speeches by Reichsführer-SS Himmler before senior SS officers in Poznań (Posen), 4 and 6.10.1943
30. Protocol of the Yalta Conference, February, 1945
31. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, 5.6.1945
32. Potsdam Agreement, 1945. Communiqué
33. The Berlin (Potsdam) Conference, 17.7 – 2.8.1945. Protocol of the Proceedings, 1.8.1945
34. Foreign Relations of the United States. Diplomatic Papers: The Conference of Berlin (The Potsdam Conference) – Conference Proceedings, 31.7.1945 (Vol. II)

35. Erklärung des Rates der Evangelischen Kirche in Deutschland gegenüber den Vertretern des Ökumenischen Rates der Kirchen vom 19.10.1945 (Stuttgarter Schuldbekenntnis)
36. Treaty of Peace with Hungary, Paris, 10.2.1947
37. The Occupation Statute promulgated on the 12.5.1949 by the Military Governors and Commanders in Chief of the Western Zones, "Official Gazette of the Allied High Commission for Germany", 23.9.1949, N°1
38. The Agreement between the German Democratic Republic and People's Republic of Poland Concerning the Demarcation of the Established and the Existing Polish-German State Frontier, signed at Görlitz, 6.7.1950
39. Charta der deutschen Heimatvertriebenen, Stuttgart, den 5.8.1950
40. Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, 1950
41. Convention on the Relations between the Three Powers and the Federal Republic of Germany (*Deutschlandvertrag*), 23.10.1954
42. Convention on the Settlement of Matters Arising out of the War and the Occupation, 23.10.1954 (*Überleitungsvertrag*)
43. Die Lage der Vertriebenen und das Verhältnis des deutschen Volkes zu seinen östlichen Nachbarn. Eine evangelische Denkschrift, Verlag des Amtsblattes der Evangelischen Kirche in Deutschland, Hannover 1965
44. Letter from the Polish Catholic Bishops to the Bishops of Germany, 18.11.1965
45. Antwortschreiben der deutschen Bischöfe an die polnischen Bischöfe vom 5.12.1965
46. Draft Articles on the Law of Treaties with Commentaries (1966), Yearbook of the International Law Commission, 1966, Vol. II
47. Ein Memorandum deutscher Katholiken zu den polnisch-deutschen Fragen (Das Bensberger Memorandum) vom 2.3.1968, Mainz 1968
48. Vienna Convention on the Law of Treaties (1969)
49. American Convention on Human Rights (1969)
50. Treaty Between the Federal Republic of Germany and the Soviet Union, Moscow, 12.8.1970
51. Note from the Government of the Federal Republic of Germany to the three Western Powers (19.11.1970)
52. Deutscher Bundestag. Gemeinsame EntschlieÙung vom 17.5.1972
53. African Charter on Human and Peoples' Rights (1981)
54. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984)
55. Ansprache des Bundespräsidenten Richard von Weizsäcker am 8.5.1985 im Plenarsaal des Deutschen Bundestages zum 40. Jahrestag der Beendigung des Zweiten Weltkrieges

56. International Law Association. Declaration of Principles of International Law on Mass Expulsion, 62nd Conference of the ILA, Seoul, 24-30.8.1986, Conference Report 1986
57. Rede von Bundeskanzler Helmut Kohl vor dem Deutschen Bundestag über das Zehn-Punkte-Programm zur Überwindung der Teilung Deutschlands und Europas am 28.11.1989
58. Procès-verbal de la réunion des ministres des Affaires étrangères de la France, de la Pologne, de l'Union des Républiques Socialistes Soviétiques, des Etats-Unis d'Amérique, de la Grande-Bretagne, de la République Fédérale d'Allemagne et de la République Démocratique Allemande, Paris, 17.7.1990
59. Treaty on the Final Settlement with Respect to Germany, 12.9.1990
60. Speech of the Foreign Minister, Krzysztof Skubiszewski, Berlin, 5.10.1990, [in:] Deutsches Helsinki Menschenrechtskomitee e.V., Internationales Symposium „Europa auf dem Wege zu neuen Institutionen“, 5.-6.10.1990, Berlin, bearb. v. Hartwig Bierhoff, Bonn 1991
61. Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them, signed at Warsaw, 14.11.1990
62. Rede des Bundesministers des Auswärtigen der Bundesrepublik Deutschland, Hans-Dietrich Genscher, bei der Unterzeichnung des deutsch-polnischen Grenzvertrages in Warschau am 14.11.1990
63. United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. The human rights dimensions of population transfer, including the implantation of settlers, Preliminary report prepared by Mr. A.S. Al-Khasawneh and Mr. R. Hatano, 6.7.1993 (E/CN.4/Sub.2/1993/17)
64. Ansprache von Bundespräsident Roman Herzog anlässlich des Gedenkens an den 50. Jahrestag des Warschauer Aufstandes am 1.8.1994 in Warschau
65. Władysław Bartoszewski (Foreign Affairs Minister), Gedenken an das Ende des Zweiten Weltkrieges und der nationalsozialistischen Gewaltherrschaft, Speech in Bonn, 28.4.1995
66. The common word of the Polish and German Bishops on the occasion of the 30th anniversary of the exchange of letters (1965-1995), December 1995
67. Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke und der Gruppe der PDS – Das Potsdamer Abkommen und die Haltung der Bundesregierung zu diesem Abkommen in den Verhandlungen mit der tschechischen Regierung, Deutscher Bundestag. Drucksache 13/4439, 23.4.1996
68. International Law Commission. Draft Code of Crimes against the Peace and Security of Mankind, 1996

69. Deutsch-Tschechische Erklärung über die gegenseitigen Beziehungen und deren künftige Entwicklung vom 21.1.1997
70. Draft Declaration on Population Transfer and the Implantation of Settlers (E/CN.4/Sub.2/1997/23, 27.6.1997)
71. Deutscher Bundestag. Antrag der Fraktionen der CDU/CSU und FDP – Vertriebene, Aussiedler und deutsche Minderheiten sind eine Brücke zwischen den Deutschen und ihren östlichen Nachbarn, Plenarprotokoll 13/239 (29.5.1998)
72. Zur Einigung über die Höhe des Stiftungsvermögens zur Entschädigung von Zwangsarbeitern, Erklärung von Bundespräsident Johannes Rau, Berlin, 17.12.1999
73. International Law Commission. Articles on Responsibility of States for Internationally Wrongful Acts (2001)
74. The Elements of Crimes. Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10.9.2002
75. League of Arab States. Arab Charter on Human Rights, 22.5.2004
76. Jan Barcz, Jochen Abr. Frowein, Gutachten zu Ansprüchen aus Deutschland gegen Polen in Zusammenhang mit dem Zweiten Weltkrieg, erstattet im Auftrag der Regierungen der Bundesrepublik Deutschland und der Republik Polen, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, Bd. 65, Nr. 3 (2005)
77. Eckart Klein, Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher, 15.2/4.4.2005
78. International Law Commission. Expulsion of aliens. Memorandum by the Secretariat (A/CN.4/565, 10.7.2006)
79. Gesetz zur Errichtung einer Stiftung „Deutsches Historisches Museum“ vom 21.12.2008
80. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, Kampala 2009
81. Deutscher Bundestag. 60Jahre Charta der deutschen Heimatvertriebenen – Aussöhnung vollenden (Drucksache17/4193 v. 15.12.2010)
82. Janusz Reiter, Rede zum Stauffenberg-Attentat, Berlin, 20.7.2012
83. Józef Michalik, Archbishop of the Przemyśl Diocese, and Cyril, Head of the Russian Orthodox Church, Patriarch of Moscow and all Russia, Common Proclamation of the Chairman of the Conference of the Episcopate of Poland to the Polish and Russian nations, Warsaw, 17.8.2012
84. Stiftung „Flucht, Vertreibung, Versöhnung“. Konzeption für die Arbeit der Stiftung Flucht, Vertreibung, Versöhnung und Leitlinien für die geplante Dauerausstellung, September 2012
85. Wspólna rzymskokatolicko-greckokatolicka deklaracja w sprawie zbrodni wołyńskiej /A joint Roman Catholic – Greek Catholic declaration on the Volyn crime/, 28.6.2013

86. Bundespräsident Joachim Gauck. Rede in Oradour-sur-Glane/Frankreich, 4.9.2013
87. International Law Commission. Draft articles on the expulsion of aliens, with commentaries (2014)

Table of cases (chronologically)

1. *The Government of the State of Eritrea v. the Government of the Republic of Yemen* (Phase one: Territorial sovereignty and scope of the dispute), Arbitration Tribunal, Award of 9.10.1998
2. International Criminal Court for the former Yugoslavia (ICTY). Trial Chamber. *Prosecutor v. Radislav Krstić* (No. IT-98-33-T), Judgment of 2.8.2001
3. European Court of Human Rights (ECHR). *Čonka v. Belgium* (No. 51564/99), Judgement of 5.2.2002
4. ICTY. Trial Chamber II. *Prosecutor v. Milomir Stakić* (No. IT-97-24-T), Judgement of 31.7.2003
5. ICTY. Trial Chamber II. *Prosecutor v. Dragan Nikolić* (No. IT-94-2-S), Judgement of 8.12.2003
6. International Court of Justice. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9.7.2004
7. Eritrea-Ethiopia Claims Commission. *Civilians Claims between The State of Eritrea and The Federal Democratic Republic of Ethiopia. Eritrea's Claims 15, 16, 23 & 27-32*, Partial Award, 17.12.2004
8. ECHR. *Decision as to the admissibility of application no. 17120/04 by Josef Bergauer and 89 Others against the Czech Republic*, 13.12.2005
9. ICTY. *Prosecutor v. Milomir Stakić* (No. IT-97-24-A), Judgement of the Appeals Chamber, 22.3.2006
10. ICJ. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26.2.2007
11. ECHR. *Jorgić v. Germany* (No. 74613/01), Judgment of 12.7.2007
12. ECHR. *Decision as to the admissibility of application no. 47550/06 by Preussische Treuhand GmbH & Co. KG a.A. against Poland*, 7.10.2008
13. ECHR. *Hirsi Jamaa and Others v. Italy* (No. 27765/09), Judgment of 23.2.2012
14. ICTY. In the Trial Chamber. *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-T), Judgement of 24.3.2016