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**Political, Moral, and Legal Aspects
of the Resettlement of the German Population
After World War II**
Total war and *Vertreibung*

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Abstract*

This study examines the territorial changes and the transfer of German populations, situating them within the framework of the Allied decisions adopted in 1945.

It proceeds from the premise that Germany initiated a total war (World War II), planning and preparing mass, systematic crimes against civilian populations, fully aware of their consequences.

The study asks whether Allied policy can be justified and how individual guilt, state responsibility, and national historical accountability should be distinguished and evaluated.

The study combines doctrinal legal analysis with political and ethical inquiry. It interprets political instruments and relevant customary and treaty law, reviews political doctrines, and integrates moral reflection and memory studies to evaluate reconciliation initiatives and public discourse.

Under the international law applicable in 1945, territorial changes and population transfers were not prohibited. Nevertheless, their implementation produced individual suffering.

The Potsdam decisions were not punitive acts but measures grounded in the international legal responsibility of an aggressor state, intended to establish durable European security.

* Modified, completed, and updated version (2026) of the study published in *Polish Review of International and European Law*, 2018, Vol. 7, Issue 2.

Avant-propos*

I. The historical experience of generations is not hereditary and societies cannot ignore the past in which they were formed, because the past is a prologue to their future. Otherwise, there is a risk that historical controversies will persist and be instrumentalized for current political purposes. This risk is currently emerging with the rising tide of nationalism and populism.

This study examines selected legal, political, and ethical aspects of Polish-German relations after 1945 and particularly the evaluation of the territorial adjustments and population transfers authorized by the Allied Powers at Potsdam (July–August 1945). The central research question is to what extent Germany's international legal responsibility for aggression and mass atrocities rendered the Potsdam measures lawful and politically necessary, and how individual suffering should be weighed against state responsibility.

The text consists of three main parts: the first evaluates the Potsdam decisions in the context of the change to the Polish–German border and of the transfer of German population (chapters 1–3); the second concerns the political and moral assessment of these decisions (chapters 4–5); the third one (chapter 6) presents the contemporary international law regulation of population displacements.

II. In 1939, Germany consciously initiated a total war, aware of its potential consequences. The Nazi policy deliberately blurred the line between military operations and systematic crimes against civilians. This marked the beginning of the end of a historic era in Central Europe, with irreversible consequences, and the word irreversible refers not only to victims but also to perpetrators.

Wars end through political decisions whose objectives are not determined by judicial considerations, and particularly not by the aggressor. What could the German state and its people expect in 1945? Would Germany's defeat have been any less total than its victory? What would justice look like after *Jedem das Seine* and *Arbeit macht frei*?

Taking into account the extraordinary circumstances of 1945 – the unconditional surrender of German troops, the collapse of central authority, and the Allies' assumption of supreme authority (an international administration distinct from belligerent occupation) – the Potsdam decisions were dictated by the need to shape a new political configuration for European security.

Germany was not a party to the Potsdam Agreement, which was not an act of revenge but a consequence of Germany's international legal responsibility. The Four Powers assumed supreme authority in Germany (Berlin Declaration 1945) and exercised rights and responsibilities toward “Germany as a whole,” for which they did not require Germany's consent. The United States and the United Kingdom formally and publicly confirmed (1996) that the Potsdam decisions “were soundly based on international law.”

III. After 1945, the political partition of the continent (the Cold War) was also reflected in the division of Germany. According to the official position of the Federal Republic, Poland's western frontier on the Oder and Lusatian Neisse was of a temporary nature, pending its final confirmation by a future united Germany. Thus, over the years, this frontier became a political hostage to the question of German unification.

This study outlines, with commentary, the successive stages of treaty-based regulation of the Polish frontiers, recalling the Soviet–German agreements and the division of Polish territory between

* In memory of my mother and her parents, who in winter 1940 were forced by the German authorities to abandon their family home in Poznań forever, carrying only three suitcases. Their displacement was ordered to make room for the *Baltendeutsche Umsiedler*. After a few days in Lager Glowno (*Posen-Ost*), they were deported to Southeast Poland [*Liste N° 23 der evakuierten Personen, die in das Generalgouvernement abtransportiert worden sind*]. They spent five difficult and hungry years in Mielec, living under constant threat to their lives. Their return home became possible as a result of Germany's defeat and the Potsdam decisions of the Great Powers.

those two states (1939), followed by the Potsdam settlement (1945), Poland's treaties with the two German states (1950 and 1970) and, finally, with unified Germany (1990).

The displacement of the German population during and after World War II took three forms. Firstly, relocation by Nazi authorities of ethnic Germans to the Reich or to territories it occupied (*Heim ins Reich* policy). Secondly, massive exodus before the approaching front of the Soviet army, and thirdly, the (forcible) transfer (*Vertreibung* in the German doctrine) as a result of the Potsdam decisions. In 1945 the Nazi policy turned out to be a tragic irony of fate.

IV. In the mid-1990s, there was a debate in the Polish media centred on the question: should we apologize for the resettlement? The initiatives undertaken by civil society groups, including politicians and the Evangelical and Catholic churches, were of vital importance to the difficult process of forgiveness and reconciliation between Poles and Germans. These developments are extensively reflected in this study.

An analytical approach requires a distinction between the perspective of individual criminal guilt and the international legal responsibility of the state, as well as the historical, moral and political responsibility of the nation. This distinction helps avoid confusion resulting from equating guilt with responsibility. The absence of guilt does not imply the absence of responsibility (for the past and the future) and responsibility does not imply guilt.

In this context, forgiveness concerns the past and should be preceded by reflection, being aware of one's own wrongdoing. Reconciliation is directed toward the future and expresses responsibility for the peaceful coexistence of future generations.

V. This study argues that, given the political imperatives and legal standards in force in 1945, the transfer of the German population pursuant to the Potsdam decision was not prohibited. It was not an instrument of the conduct of war and did not apply to the time of a belligerent occupation, but to a temporary, specific, international post-conflict administration.

According to German doctrine, crimes remain crimes even when preceded by other crimes. Thus, Nazi crimes did not allow for the criminal resettlement of the German population (and other Allied crimes). This reflects a misunderstanding: namely, the classification of the political Potsdam decisions – grounded in Germany's international responsibility – as crime equivalent to the offences committed during the chaotic exodus and the subsequent organized transfer.

The varied terminology used may cause additional misunderstandings, because international humanitarian law (IHL) focuses on concepts such as deportation and transfer, or – where needed – evacuation and displacement. In turn, the human rights law uses the term expulsion, considered in principle as legal and not as punishment, but as unilateral administrative (or judicial) act, ordering an alien to leave the territory of a state in times of peace. Such an expulsion, however, is not equivalent to deportation or transfer.

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

Chapter 1: Introduction

For they sow the wind, and they shall reap the whirlwind
Old Testament, Hosea 8:7

1.1. Legal controversies between Poland and Germany were inevitable following the Second World War.¹ The peace settlement with Germany, announced at the Potsdam Conference (11 July – 2 August, 1945), was never concluded. The collapse of the victorious coalition and the division of Europe (including Germany) into two opposing blocs (“the Iron Curtain”, “the Cold War”) created a contested future for Poland.

Several elements contributed to the situation which arose in 1945.

First, the victorious powers (the USA, the USSR, the 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).² This took place in the context not only

¹ E. Seewald, U. Unkauf, *Deutschland und Polen. Die Geschichte der amtlichen Beziehungen*, Berlin 2025; 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. Czaplinski, B. Łukańska (eds), *Problemy prawne w stosunkach polsko–niemieckich u progu XXI wieku*, Warszawa 2009; W.M. Góralski (ed.), *Polska–Niemcy 1945–2007. Od konfrontacji do współpracy i partnerstwa w Europie. Studia i dokumenty*, Warszawa 2007; W.M. Góralski (ed.), *Transfer. Obywatelstwo. Majątek. Trudne problemy stosunków polsko–niemieckich. Studia i dokumenty*, Warszawa 2005; W.M. Góralski (ed.), *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko–niemieckich 1944–2004*, t. I: *Studia*, t. II: *Dokumenty*, Warszawa 2004; L. Janicki, *RFN wobec terytorialno–politycznych następstw klęski i upadku Rzeszy*, Poznań 1986; K. Skubiszewski, *Poland’s Western Frontier and the 1970 Treaties*, “American Journal of International Law”, Vol. 67, 1973, pp. 23–43; *id.*, *The Western Frontier of Poland and the Treaties with Federal Germany*, “Polish Yearbook of International Law”, Vol. 3, 1970, pp. 53–68; *id.*, *Zachodnia granica Polski w świetle traktatów*, Poznań 1975; *id.*, *Zachodnia granica Polski*, 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.*, Warszawa 1960 (French version: *L’Accord de Potsdam du 2 août 1945*, Varsovie 1964); B. Wiewióra, *Granica polsko–niemiecka w świetle prawa międzynarodowego*, Poznań 1957.

² Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers, June 5, 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

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, German international legal responsibility was not limited to the acts of aggression but also included mass and planned war crimes and crimes against humanity, whose range and scale had been hitherto 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. It was no "ordinary" war.

Third, the Potsdam Conference was convened with the aim of swiftly reaching fundamental decisions regarding Germany's responsibility for the war and the future political shape of Europe.³ 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 last 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 defined as a treaty or as a series of treaties, and also regardless of how the Allies were legally bound by them, the result of the conference had a contractual character.⁴ Using the term "Potsdam decisions" does not undermine its character.

1.2. A fundamental 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 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 legality of the Potsdam decisions and their binding character for Germany, because it was not a party (*res inter alios acta*; violation of the right to self-determination);
- 3) Questioning the legality of the Potsdam decisions concerning the transfer of the German population and the confiscation of its private property;

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, November 14, 1944.

³ 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."

⁴ J.Abr. Frowein, *Potsdam Conference (1945)*, "Encyclopedia of Public International Law", 2009.

4) Considering 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;

5) Qualifying the western border of Poland as provisional to the moment of the peace settlement with Germany as a whole (in the Treaty of 1970 the Federal Republic of Germany recognized the western frontier of Poland exclusively in its own name – *Friedensvertragvorbehalt*);

6) Deferring the question of reparations until the moment of a peace settlement with Germany as a whole.

This doctrine sheds light on the political and legal pressure that Poland faced for decades. Let's add that Germany had a tradition of questioning the Polish border since the end of World War I: *Versailler Diktat, blutende Grenze* (Locarno Treaty 1925)⁶, Poland as *Saisonstaat*. From a historical perspective, this policy proved unproductive, both in the interwar period and after Potsdam.

The main premise of German legal doctrine after 1945 was based on the conviction that the decisions of the victorious powers violated international law to a greater or lesser extent. However, it tends to be forgotten that it is politicians who determine the main goals of the peace settlement when a war ends. 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 were not and still are not determined in advance. So, the law is not the only instrument for administering justice and the role of states in this regard remains significant, particularly where their practices influence the evolution of the law.

The German legal positions were not universally accepted and preserved their unilateral character. They were politically manipulated and incompatible with some principles of international law (*bona fides*, clean hands, *nemo iudex in causa sua*).

1.3. The imperial and racist foundations of Nazi Germany produced horrific methods of war which led to irreversible consequences for Germany itself. Striking at the fundamentals of law and morality, the Third Reich took aim at the basic tenets of Western civilization.⁷ It is difficult to assume that the German people were unaware of how far they had strayed from European norms. The Nazi regime was not only concerned with the revision of Versailles treaty, but about a *völkisch*–racist reorganization of Europe.⁸

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?*):⁹

⁵ A. Verdross, B. Simma, R. Geiger, *Territoriale Souveränität und Gebietshoheit. Zur völkerrechtlichen Lage der Oder–Neisse–Gebiete*, Bonn 1980.

⁶ As early as the 1920s, the policy of Foreign Minister Gustav Stresemann employed terms such as *blutende Grenze* (bleeding border) or *offene Wunde* (open wound) in an effort to revise the Polish-German border – specifically regarding Danzig, parts of Upper Silesia, and the Corridor – through diplomatic means and economic pressure on Poland.

⁷ 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; *The Persecution and Murder of the European Jews by Nazi Germany, 1933–1945* (German: *Die Verfolgung und Ermordung der europäischen Juden durch das nationalsozialistische Deutschland 1933–1945*).

⁸ M. Wildt, „Eine neue Ordnung der ethnographischen Verhältnisse“. *Hitlers Reichstagsrede vom 6. Oktober 1939*, „Zeithistorische Forschungen/Studies in Contemporary History“, 2006, Heft 1; see also *Erlaß des Führers und Reichkanzlers zur Festigung deutschen Volkstums*, 7. Oktober 1939 (fn. 90); Axel Frhr. von Freytagh-Loringhoven [Professor der Rechte zu Breslau], *Deutschlands Außenpolitik 1933–1940*, Berlin 1941 [Edition 8].

⁹ Joseph Goebbels, Rede vom 18. Februar 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

Everyone knows that if we lost it, 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 it, if necessary, more total and radical than we can even imagine it today?

SS leader Heinrich Himmler claimed that the destruction of the Jewish people and the enslavement of other nations constituted a glorious chapter in German history:¹⁰

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.

He said that 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*):¹¹

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.

According to a note by Martin Bormann, on 2 October 1940, after dinner at the Führer's apartment, a conversation arose on the nature of the *Generalgouvernement*¹² and the treatment of the Poles:

The Führer stressed once more that there should be one master only for the Poles – the German; two masters, side by side, cannot and must not exist; therefore, all representatives of the Polish intelligentsia are to be exterminated. This sounds cruel, but such is the law of life.¹³

können?“ – https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0200_goe&object=translation&l=de

¹⁰ Speeches by Reichsführer-SS Himmler before senior SS officers in Poznań (Posen), October 4 and 6, 1943. Trials of War Criminals before the Nuernberg Military Tribunals, Washington, U.S Govt. Print. Off., 1949–1953, Vol. XIII, p. 323, and Himmler, Reichsführer-SS – P. Padfield, Henry Holt and Co, NY, 1990, p. 469: – <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/

¹¹ Reichsführer SS Heinrich Himmler über die Behandlung der Fremdvölkischen im Osten (15. Mai 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“ – <http://www.ns-archiv.de/krieg/untermenschen/himmler-fremdvolk.php> /

¹² *Generalgouvernement* was a German zone of occupation established after the invasion of Poland by Nazi Germany (1939). The occupied Poland was split into three zones: the General Government in its centre, Polish areas annexed by Nazi Germany in the west, and Polish areas annexed by the Soviet Union in the east. Its territory was expanded in 1941, after the German invasion of the Soviet Union, to include the new District of Galicia.

¹³ Nuremberg Trial Proceedings Vol. 7, Saturday, 9 February 1946, Morning Session, p. 223–224.

For the category of “sub-human” (*Untermenschen*) there was envisioned a special plan for colonization of the East (*Generalplan Ost*)¹⁴ accompanied by mass murder operations (*Intelligenzaktion*, *Außerordentliche Befriedungsaktion*)¹⁵ whose goal was to eliminate the Polish intellectuals and the upper classes (teachers, priests, physicians, and other prominent members of Polish society). In turn, *Aktion Reinhardt*¹⁶ was the implementation by Germany of the so-called final solution of the Jewish question (*Endlösung*).

The ‘General Plan East’ envisaged shifting the Reich’s ‘ethnic boundary’ by around a thousand kilometres eastwards and southwards as far as the Crimea. More than 30 million people from the occupied territories of Central and Eastern Europe were to be resettled to Siberia, to be replaced by around 10 million German settlers. As the majority of the Slavic peoples were regarded as ‘unsuitable’ for Germanisation and for a future settlement structure, and as ‘Germanisation’ was planned only for a small proportion of them, the plan envisaged settlement by ethnic Germans or Northern Europeans, accompanied by a drastic decimation of the native population.

Between 1939 and 1941, approximately 365,000 Poles from domestic territories annexed by the Third Reich were resettled in the *Generalgouvernement*.

A circular from Himmler dated November 10, 1939, stipulated that the property of displaced persons was to be confiscated for the benefit of the Reich (including German settlers/*Umsiedler*). Strict penalties were imposed for attempting to take items from their homes other than those permitted. The Nazi mayor of Posen, Dr. Scheffler, signed a document containing the following:

Based on the authorization granted to me by the head of the General Civil Administration, I ordered the confiscation of all ownerless property, including all furnishings. All furniture and belongings, all fixtures and equipment, including feather beds and bedding, must remain in place.¹⁷

1.4. The assessment of the Allied decisions, including the decisions on the resettlement of the German population, depends on the answers to some questions.

Were the means applied in 1945 unlawful? Was the Versailles treaty a *diktat* and the Potsdam treaty a *superdiktat*? Referring to Goebbels, why would the German defeat be less total than their victory? On what could the German state and its people count in 1945? What would justice look like after *Jedem das Seine* and *Arbeit macht frei*?

If, according to German legal positions, the decisions of the Four Powers offended international law, we must 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 trial of German war criminals have been left to the German courts? Were there other possibilities that could have effectively insured European political stability and security?

On signing the instrument of military surrender, General Alfred Jodl remarked:

With this signature, the German people and the German armed forces are at the mercy of the victors. In this war, which has lasted over five years, our people have accomplished and endured more than perhaps

¹⁴ *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“, Jahrgang 13, 1965, Heft 4, pp. 426–437.

¹⁵ See J. Böhrer, K.–M. Mallmann, J. Matthäus, *Einsatzgruppen in Polen. Darstellung und Dokumentation*, Darmstadt 2008; A. Meier, *Die Intelligenzaktion. Die Vernichtung der polnischen Oberschicht im Gau Danzig–Westpreußen*, 2008.

¹⁶ Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps*, Holocaust Studies, Indiana University Press, 1999.

¹⁷ J. Kubiak, A. Łuczak (Hrsg.), *Deportacje obywateli polskich z ziem wcielonych do III Rzeszy. Deportationen von polnischen Bürgern aus den ins Dritte Reich eingegliederten Gebieten* [bilingual edition], Poznań 2015; E. Neander, A. Sakson (Hrsg.), *Umgesiedelt – Vertrieben: Deutschbalten und Polen 1939–1945 im Warthegau*, Marburg 2010.

all other nations on earth. I can now only express the hope that the victors will treat them with magnanimity.¹⁸

In the light of fundamental principles of law and justice, an aggressor state cannot determine the limits of its responsibility and the legality of the measures taken against it. In 1945, Germany was not entirely deprived of legal protection; however, such protection was limited.

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, the winning coalition, governed by important principles and the general interests of international security, prepared the way for some new legal developments. For instance, the Nuremberg trials (criticized in Germany as *Siegerjustiz* as opposed to *Sieg der Justiz*) advanced international criminal law; collective sanctions against Germany preceded the construction provided for in Chapter VII of the UN Charter; and supreme authority in Germany presaged the international administration of territory recognized and practiced today.

¹⁸ On signing the Act of Military Surrender (Reims, 7. May 1945) General Alfred 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“, „Welt am Sonntag“, 8 May 2005.

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. In Germany, public memory of the Polish phase of the Second World War, marked by exterminatory German policies in the occupied Polish territories, is practically faint. The brutality and scale of the war in Poland is commonly overshadowed by the crimes committed by German forces in the Soviet Union and by the Shoah.¹⁹

Germany faced no external threat in 1939. On 23 May 1939, Adolf Hitler informed the German generals that the issue at stake was not Danzig/Gdańsk, but the expansion of German living space (*Lebensraum*) in the East, and that achieving this goal required the invasion of Poland, regardless of any legal considerations.

There must be no principle of avoiding a solution to the problems by adapting to the circumstances. It is rather the circumstances that must adjust to the demands. Without breaking into foreign countries or attacking foreign property, this is not possible. (...) Further success cannot be achieved without bloodshed. (...) Danzig 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.²⁰

The destruction of Poland remains the priority. The aim is to eliminate the living forces, not to achieve a specific line. Even if war breaks out in the West, the destruction of Poland remains the primary objective. In the instigation and conduct of the war, justice is not the deciding factor, only victory. Shut out all compassion. Act brutally. Eighty million people must have their rights upheld. Their very existence must be secured. The stronger party has the right. Utmost severity.²¹

Our strength lies in our speed and our brutality. Genghis Khan drove millions of women and children to their deaths, deliberately and with a light heart. History sees him merely as the great founder of an empire. What the weak Western European civilization says about me is irrelevant. I have given the order – and I shall have anyone shot who utters even a word of criticism – that the aim of the war is not to reach

¹⁹ K. Ruchniewicz, „*Restlose Zertrümmerung Polens!*“ *Vor achtzig Jahren begann mit dem Angriff Nazideutschlands auf Polen der Zweite Weltkrieg*, „DIALOG“ 128 (2019), pp. 55–61; *18 Tage Weltgeschehen. Der Feldzug gegen Polen*. Dargestellt nach amtlichen Dokumenten und Berichten von Dr. E.R. Uderstädt, Berlin 1940; S. Hammerle, H.–Ch. Jasch, S. Lehnstaedt (eds), *80 Jahre danach. Bilder und Tagebücher deutscher Soldaten vom Überfall auf Polen 1939*, Berlin 2019; *Einsatzgruppen in Polen: Darstellung und Dokumentation: 12, 2008* – K.M. Mallmann, J. Böhler, J.M. Matthäus (Hrsg.); see also P. Grzebyk, *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials*, MPILux Research Paper Series 2019 (7), pp. 1–16.

²⁰ „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. Mai 1939 – <http://www.ns-archiv.de/krieg/1939/schmundt/23-05-1939-schmundt.php>

²¹ „Vernichtung Polens im Vordergrund. Ziel ist Beseitigung der lebendigen Kräfte, nicht die Erreichung einer bestimmten Linie. Auch wenn im Westen Krieg ausbricht, bleibt Vernichtung Polens im Vordergrund. (...) Bei Beginn und Führung des Krieges kommt es nicht auf Recht an, sondern auf den Sieg. Herz verschließen gegen Mitleid. Brutales Vorgehen. 80 Millionen Menschen müssen ihr Recht bekommen. Ihre Existenz muss gesichert werden. Der Stärkere hat das Recht. Größte Härte“ – Die zweite Ansprache des Führers vor den Oberbefehlshabern (22. August 1939) – <https://upload.wikimedia.org/wikipedia/commons/1/1b/A-Hitler-08-22-1939-at-Obersalzberg-on-planned-attack-on-Poland-and-extermination-of-Poles.pdf>

certain lines, but the physical annihilation of the enemy. Thus, for the time being only in the East, I have deployed my Death's Head Battalions [*Totenkopfverbände*] with the order to ruthless and merciless send men, women and children of Polish descent and language to their deaths. This is the only way we can gain the living space we need. Who speaks of the extermination of the Armenians today? (...) Poland shall be depopulated and resettled with Germans. My Polish Pact [1934] was intended merely as a means of buying time.²²

The Second World War began on 1 September 1939 as a result of Hitler's provocation and German aggression against Poland. Referring to the staged Gleiwitz incident, Hitler falsely claimed that Poland had fired on German territory.

Poland shot tonight for the first time on our own territory with already regular soldiers. Since 5:45 a.m. we are now shooting back!²³

The WWII did not begin with a clash of military units but with a war crime committed against civilians. At 4:40 a.m. on 1 September 1939, the German Luftwaffe attacked the undefended Polish town of Wieluń,²⁴ destroying 75 percent of the city – including its hospital – and killing 1,200 people.

We should not forget the musical framing */musikalische Umrahmung/* of the German aggression in 1939 in the form of military songs and marches specially composed for the occasion²⁵.

Germany, in cooperation with the Soviet Union (which invaded Poland on 17 September 1939²⁶), forcibly changed Poland's borders and carried out mass resettlement. The secret protocol to the

²² „Unsere Stärke ist unsere Schnelligkeit und unsere Brutalität. Dschingis Chan hat Millionen Frauen und Kinder in den Tod gejagt, bewußt und fröhlichen Herzens. Die Geschichte sieht in ihm nur den großen Staatengründer. Was die schwache westeuropäische Zivilisation über mich behauptet, ist gleichgültig. Ich habe den Befehl gegeben – und ich lasse jeden fusilieren, der auch nur ein Wort der Kritik äußert – daß das Kriegsziel nicht im Erreichen von bestimmten Linien, sondern in der physischen Vernichtung des Gegners besteht. So habe ich, einstweilen nur im Osten, meine Totenkopfverbände bereitgestellt mit dem Befehl, unbarmherzig und mitleidslos Mann, Weib und Kind polnischer Abstammung und Sprache in den Tod zu schicken. Nur so gewinnen wir den Lebensraum, den wir brauchen. Wer redet heute noch von der Vernichtung der Armenier? (...) Polen wird entvölkert und mit Deutschen besiedelt. Mein Polenpakt war nur als Zeitgewinn gedacht“, Mitschrift einer Ansprache Hitlers vor Offizieren der Wehrmacht, 22. August 1939. Akten zur deutschen auswärtigen Politik 1918–1945, Serie D (1937–1945), Bd. VII: Die letzten Wochen vor Kriegsausbruch. 9. August bis 3. September 1939, Nr. 193, Signatur(en): SEL B 2388 – <https://upload.wikimedia.org/wikipedia/commons/1/1b/A-Hitler-08-22-1939-at-Obersalzberg-on-planned-attack-on-Poland-and-extermination-of-Poles.pdf>

²³ „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. Rede vor dem Reichstag am 1. September 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.

²⁴ 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 August 2004; H. Bertram, *Feuertaupe. Der Film vom Einsatz der deutschen Luftwaffe in Polen* (1940); see also fn. 182.

²⁵ See *Weichsel und Warthe – Marsch der Deutschen in Polen* (Hermann Schmidt-Gutberlet, Heinrich Gutberlet, Eugen Naumann), Herausgegeben von Richard Birnbach, Berlin 1939. See also *Das Lied der Front. Liedersammlung des Großdeutschen Rundfunks*, Herausgegeben von Alfred-Ingemar Berndt, Berlin 1940. Sample titles: *Das Lied der ostpreußischen Armee*, „Bei Mława war der erste Strauß“; *Deutsche Musketiere in Polen*, „Ich war Soldat in Polen“; *Das Lied eines Baubataillons*, „Wir marschieren heut' ins Polenland“; *Unbekannter deutscher Soldat*, „Es liegt ein Grab in Polenland“. See also M. Florin, *Der Hitler-Stalin Pakt in der Propaganda des Leitmediums. Der "Völkische Beobachter" über die UdSSR im Jahre 1939*, Berlin 2009.

²⁶ The German Ambassador in the Soviet Union (Friedrich-Werner Graf von der Schulenburg) to the German Foreign Office. Telegram No. 371 of September 16, 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

German–Soviet Nonaggression Pact of 23 August 1939 established a preliminary division of spheres of influence and left open the question of whether an independent Polish state would continue to exist:²⁷

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 Narev, 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.

These arrangements were finalized in the Soviet–German Boundary and Friendship Treaty of 28 September 1939:²⁸

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.

Several days later, Soviet Foreign Minister Vyacheslav Molotov referred to Poland as a “Versailles Treaty bastard.”²⁹ In post–Versailles German propaganda, Poland was similarly described as a *Saisonstaat*. As during the partitions of Poland in the 18th century, Germany and the Soviet Union claimed to be restoring “order” in Polish territory.³⁰

intervene to protect its Ukrainian and White Russian brothers and make it possible for these unfortunate people to work in peace” – <http://www.yale.edu/lawweb/avalon/nazsov/ns073.htm>

²⁷ Geheimes Zusatzprotokoll zum deutsch–sowjetischen Nichtangriffsvertrag vom 23. August 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“.

²⁸ Deutsch–sowjetischer Grenz– und Freundschaftsvertrag, Moskau, 28 September 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 Völkern ein in 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 September 1939 – see also confidential protocols to this agreement.

²⁹ Speech of the Foreign Minister of the Soviet Union, Vyatcheslaw Molotov, of 31 October 1939, text in: A.L. Szcześniak (ed.), *Zmowa. IV rozbiór Polski*, Warszawa 1990, pp. 181–197.

³⁰ 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 Septembre 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 ».

Manifest des Königs von Preussen vom 24. Februar 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 fortpflanzen sucht“.

When the Second World War ended, the British and Americans – taking into account the military situation – accepted the *status quo* as a *fait accompli*, agreeing to changes in Poland's eastern border. Stalin did not intend to relinquish the gains he had achieved in 1939 during his alliance with Hitler.

Poland's borders, however, were not the principal concern of the Allied Powers in Potsdam (1945), who focused instead on creating a new Europe and preventing future German aggression. From this perspective, the issue of Germany's borders and the resettlement of the German population formed part of a broader policy – the “four D's”: demilitarization, denazification, decentralization, and democratization – and went beyond bilateral Polish–German relations. In Potsdam the Soviet Union acted as guarantor of Poland's new western border, while simultaneously perpetuating Polish–German antagonism, which served Soviet interests.

In 1946, the Polish sociologist Stanisław Ossowski wrote:³¹

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 perspective. This territorial change can play a vital role in shaping social life in Central Europe; it may bring about a reversal in the great historical processes that have unfolded in this region. 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 neighbours.

Had Ossowski proposed such a program before the war, it would have been considered a dream. It became reality only because Germany began the Second World War in 1939. Germany's presence in the East became a historical burden and was radically altered by the war. In 1945 the eastern territories were not so much taken away from Germany as lost as a result of its own policies.

German Foreign Minister, Hans–Dietrich Genscher, stated in 1990: “We Germans are aware that the treaty signed today gives up nothing that was not lost long ago as a result of a criminal war and a criminal system.”³²

2.2. The German legal situation in 1945, together with the policies of the victorious powers, was defined in two principal documents. The first was the Berlin Declaration of 5 June 1945, in which the Powers stated that, without any annexation, they assumed supreme authority over Germany.³³

The second, more concrete stage consisted of the Potsdam Agreement and related decisions, through which the Allied Powers further specified their main objectives, including the structure of the political and economic system in Germany, the rights and responsibilities concerning Berlin and Germany as a whole, and the legal consequences for other regions and states.

The Allied Powers did not intend to negotiate peace terms with Germany, as had been the case with previous unconditional surrenders. The Potsdam Agreement clearly envisaged that the peace settlement would be presented to the future German government solely for acceptance.³⁴

³¹ S. Ossowski, *Na tle wydarzeń kieleckich*, „Kuznica”, 1946, n° 38 (56) (reprint in: „Gazeta Wyborcza”, 4 July 1996, pp. 11–13).

³² „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“ – Rede des Bundesministers des Auswärtigen der Bundesrepublik Deutschland, Hans–Dietrich Genscher, bei der Unterzeichnung des deutsch–polnischen Grenzvertrages in Warschau am 14. November 1990.

³³ Declaration (fn. 2); The Berlin (Potsdam) Conference, July 17–August 2, 1945. *Protocol of the Proceedings*, August 1, 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.”

³⁴ The Berlin (Potsdam) Conference, July 17 – August 2, 1945. *Protocol of the Proceedings*, August 1, 1945: “A. The Conference reached the following agreement for the establishment of a Council of Foreign Ministers to do the

Germany's absence from the Potsdam Conference resulted from extraordinary circumstances: military defeat, the unconditional surrender of its armed forces, and the collapse of central political authority. In this situation, the Allied Powers established an international administration in Germany, which was not equivalent to belligerent occupation. The structure of the rights and responsibilities of the Four Powers regarding Germany as a whole expressed 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 German government and prevailing German legal doctrine, a treaty cannot create obligations or rights for a third state without that state's consent (*pacta tertiis nec nocent nec prosunt*).³⁵ Therefore, the Potsdam Agreement allegedly did not produce legal effects for Germany.

Regardless of whether the Potsdam Agreement is considered a source of legal obligations for Germany or an obligation of the Powers concerning the future shape of the German state, there is no doubt that the Agreement addressed Germany's future and produced concrete legal consequences. The main decisions of the victorious Powers were irreversible.

In assessing whether the Potsdam Agreement complied with customary law – as currently reflected in Articles 34 and 35 of the Vienna Convention on the Law of Treaties, dealing with the principle of *pacta tertiis*³⁶ – one must consider the extraordinary circumstances of its conclusion. The Federal Republic of Germany emphasized the customary nature of the provisions later codified in Articles 34 and 35, while noting that Article 75³⁷ (not having such a character) refers only to future events³⁸ and does not constitute an exception to the *pacta tertiis* principle.³⁹

However, Germany's subordination to the authority of the Allied Powers did not result primarily from the Potsdam Agreement but from the Berlin Declaration of 5 June 1945, which did not have the character of a treaty.⁴⁰ Subsequent treaties, declarations, and decisions were instruments of

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."

³⁵ 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.

³⁶ 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."

³⁷ "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).

³⁸ 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."

³⁹ 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, t. III, pp. 2657–2675.

⁴⁰ Th. Schweisfurth, *International Treaties and Third States*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, Vol. 45 (1985), p. 670: "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

Germany's international responsibility.⁴¹ Therefore, the Allied decisions of 1945 should not be assessed under the law of treaties.⁴²

The International Law Commission has stated that the legal consequences of treaties imposing obligations on an aggressor state fall outside the principle laid down in Article 35 of the Vienna Convention.⁴³ Article 75 may be treated as a counterbalance to the legal position of the Federal Republic.⁴⁴

In this context, Article 107 of the UN Charter must also be recalled: "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 Federal Republic does not consider itself legally bound by the Potsdam Agreement, parts of which are officially regarded in Germany as unlawful. Following such logic, the assumption of supreme authority under the Berlin Declaration would also have to be considered illegal. Nevertheless, Germany accepted and respected the consequences of the post-war decisions of the victorious Powers.⁴⁵

Poland supported the decisions of the Allied Powers because its existence as a state had been threatened by Germany and Russia for 200 years. Poland accepted the Potsdam decisions without being a party to the Agreement. Under the Agreement, Poland, as a third state (*pactum in favorem tertii*), obtained new territory on its western border and the right to reparations.⁴⁶

A similar situation arose with the Quadripartite Agreement on Berlin (1971), in which the Soviet Union made commitments to the other three powers, not to the Federal Republic of Germany.

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. 54.

⁴¹ *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 October 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 Beschluss vom 28. Januar 1998 (2 BvR 1981/97), Rz. 1 and Rz. 7.

⁴² C. Laly-Chevalier, F. Rezek, commentary to art. 35, in : *Les Conventions* (fn. 39), t. 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."

⁴³ 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."

⁴⁴ M.E. Villiger (fn. 37): "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).

⁴⁵ J.Abr. Frowein (fn. 4): "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." See also fn. 51, 109, 110.

⁴⁶ 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."

However, these commitments (specified in Annex I to this agreement) contained certain rights for the Federal Republic (*pactum in favorem tertii*).

2.3. After 1945, a guiding principle in the Federal Republic was to think intensively about unification while saying little about it publicly. Even as unification became part of public discourse, it was not seen as politically realistic. The less politicians believed that unification was imminent, the more strongly they emphasized the provisional nature of Poland's western frontier. For some German politicians, the border served as an instrument of pressure aimed at achieving unification within the borders comprising the Federal Republic, the German Democratic Republic, and Berlin; others, however, contemplated at least a partial return to the 1937 borders.

Terms commonly used in the Federal Republic after the Second World War, such as *Wiedervereinigung* (reunification)⁴⁷ or *deutsche Einheit* (German unity)⁴⁸, carry 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 Klaipėda (*Memelland*), as well as of the Free City of Gdansk.

The post-war *Wiedervereinigung* is a complex political concept. 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 allocated to Poland and the USSR by the victorious powers at Potsdam. The remaining territory was initially divided into occupation zones and, from 1949 onward, existed as two states – the FRG and the GDR – with Berlin divided between them. It would be impossible to unite “Germany in the borders of 1937” given that the German Democratic Republic was not considered by the Federal Republic as a separate state. In fact, 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 Federal Republic in 1970 acknowledged that it had 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 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 Poland's western border in 1970, it became difficult to uphold the thesis of Germany's legal existence “within the borders of 31 December 1937” (one of the fundamental premises of the West German doctrine). 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. There are no reasons why only the pre-war territorial shape of Germany was to be the subject of special protection.

The view of the formal (legal) existence of Germany within the borders of 1937, maintained for many years in the post-war legal and political doctrine of the Federal Republic of Germany⁴⁹,

⁴⁷ 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.

⁴⁸ 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).

⁴⁹ See J. Barcz, *Pojęcie „Niemcy w granicach z 31 grudnia 1937 r.” w aktach prawnych mocarstw sprzymierzonych 1945–1949*, „Zeszyty Niemcoznawcze”, PISM I 1986 (1), s. 4–47) – in: J. Barcz, *Stosunki polsko–*

functioned mainly as a pretext for the goal of striving for the unification of Germany. However, this position was in no way a legal basis for claims to unification, and moreover, the Allied Powers never and nowhere guaranteed the restoration of Germany's 1937 borders. The existence of Germany in these 1937 borders was not confirmed by the Constitution of the FRG. There is a distinction between the continuity of a state and the continuity 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.

In the Berlin declaration (1945) the Powers reserved for themselves the right to decide about the German territory and to determine its borders. The supreme authority the Four Powers assumed in Germany led to the concept of their rights and responsibilities relating to Germany as a whole. 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 IV (1907) pertaining to a belligerent occupation. Through an international administration, the Four Powers decided to introduce radical changes in Germany (the political system, laws, boundaries, politics).⁵⁰ This position was never formally recognized by a government representing Germany as a whole.⁵¹

Along with the acceptance of the Constitution (Basic Law) of the FRG (1949), the three western Powers agreed upon an Occupation Statute⁵² (September 1949), regulating their relations with and assuring control (the High Commissioner) over the newly created Federal Republic. This Statute formally ended on 5 May 1955 just as the Paris Treaties entered into force.⁵³ 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.⁵⁴

niemieckie po II wojnie światowej. Problemy prawne. Wybór studiów i artykułów naukowych (1979–2023) – <https://repozytorium.kozminski.edu.pl/pub/7161>

⁵⁰ Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge 2009, p. 32–33: “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).

⁵¹ J. Abr. Frowein (fn. 4): “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”.

⁵² The Occupation Statute promulgated on the 12th May 1949 by the Military Governors and Commanders in Chief of the Western Zones, “Official Gazette of the Allied High Commission for Germany”, 23. September 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.”

⁵³ See Bundesgesetzblatt 1955 II, N°s 7 and 8.

⁵⁴ Th. Schweisfurth (fn. 40), 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];

The agreement between the Federal Republic and the three western Powers (1954) reemphasized the continued existence of their rights and responsibilities for Germany as a whole but the frontiers of this whole were not specifically defined.⁵⁵ 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)⁵⁶, taking 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 openly contest the rights and responsibilities of the victorious Powers arising from the Berlin Declaration (1945). What is more, it accepted them in the subsequent treaties.⁵⁷ In 1990 despite the different circumstances, the unification of Germany was not possible without the agreement of the Four Powers.⁵⁸ 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).

German unification resulted from the convergence of many factors: grassroots movements in Central Europe (initiated in Poland by “Solidarity”), changes in Soviet leadership, the strong position of the United States, and pressure from the population of the GDR. Without prior acceptance of Poland’s western border by Germany, unification would not have occurred.

In this context, the words of Andrzej Kijowski, a representative of the Polish underground opposition, are significant. In 1978, he stated that the border between the two German states on the Elbe River “is an insult to the whole civilized world.” He argued that Poles would be enslaved if they agreed “to build a national identity based on conditions created by Russia.”⁵⁹

For Poland, the issue of German unification was not one of “permission” or “disagreement,” but rather of ensuring that Germany’s division did not contribute to Poland’s permanent enslavement, and that unification – in Poland’s view inevitable – would not occur against Polish interests. Kijowski

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.

⁵⁵ Convention on the Relations between the Three Powers and the Federal Republic of Germany (*Deutschlandvertrag*), 23 October 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.”

⁵⁶ *Deutschlandvertrag* (fn. 55): “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 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.”

⁵⁷ Convention on the Settlement of Matters Arising out of the War and the Occupation of 23 October 1954 (“the Settlement Convention”), *Bundesgesetzblatt* 1955 II, p. 405; *Bundesverfassungsgericht. Beschluß des Ersten Senats vom 7. Juli 1975* (1 BvR 274/72), para. 107.

⁵⁸ See R.W. Piotrowicz, S.K.N. Blay, *The Unification of Germany in International and Domestic Law*, Amsterdam 1997, pp. 85–102.

⁵⁹ A. Kijowski, *Niemcy, Polacy i inni* (May 1978), reprint in: A. Kijowski, *Rachunek naszych słabości*, Warszawa 2009, pp. 49, 54.

insisted that German unification should not create new complications in Polish–German relations but should instead contribute to the integration of this part of Europe.⁶⁰

2.4. The Potsdam Agreement⁶¹ leaves no doubt as to the intentions of the great powers both with regard to Poland's western border and the expulsion of the German population. Terms such as “the former German territories” and “the transfer to Germany of German populations (...) remaining in Poland” were explicit. Nevertheless, certain terms regarding Poland's western border required interpretation, particularly the notions of “administration” and “final delimitation.”

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* cast 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.

In Anglo–Saxon usage, administration encompassed legislative, executive, and judicial powers and was not limited to administration in the narrow, continental sense. Moreover, the territory granted to Poland was not part of the Soviet occupation zone nor subject to the Allied Control Council. As Krzysztof Skubiszewski noted, “Poland exercised its administration in the former German territories *à titre de souverain*.”⁶²

Skubiszewski rightly observed that Poland's acquisition (1945) of part of German territory was atypical and “to some extent can be related to the so–called *adjudicatio* of territory by the Allied Powers”. However, “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.”⁶³

The delayed peace settlement and final delimitation constituted a political burden and a source of tension until the unification of Germany in 1990. However, it is difficult to assume that the four powers made significant and far–reaching decisions in Potsdam in the belief that the Polish–German

⁶⁰ Ibidem, pp. 54, 58.

⁶¹ The Berlin (Potsdam) Conference, July 17 – August 2, 1945. Protocol of the Proceedings, August 1, 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. 1), pp. 64–87, 153–192.

⁶² K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, “Archiv des Völkerrechts”, 1985, Vol. 23. (1./2.): “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. 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*” (p. 39).

⁶³ K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (fn. 1), p. 329; id., *The Great Powers and the Settlement in Central Europe*, „Jahrbuch für öffentliches Recht”, Vol. 18, 1975, 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”, Vol. 67, 1973, pp. 23–43. For the historical perspective D.–E. Khan, *Die deutschen Staatsgrenzen. Rechtshistorische Grundlagen und offene Rechtsfragen*, Tübingen 2004, and G. Labuda, *Polska granica zachodnia*, Poznań 1971.

border would change and the resettled millions of German people would return to their original places of residence.

The Zgorzelec/Görlitz Treaty of 1950 between Poland and the German Democratic Republic⁶⁴ 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 evolution of the German position (*Ostpolitik*) occurred largely because the Federal Republic began to feel the negative consequences of its earlier policy and recognized that the 1970 agreements (with Moscow and Warsaw) were linked to the Soviet Union’s readiness to liberalize the situation in West Berlin. It became widely understood that the Federal Republic could not avoid legally confirming Poland’s western frontier.⁶⁵

The normalization agreement between Poland and the Federal Republic of Germany of 7 December 1970⁶⁶ confirms in Article I that “the existing boundary line, the course 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.” The Treaty contains no reference to the German border – both parties merely confirm the legal status of the existing Polish western frontier. The term “state frontier” in relation to Poland clearly indicates that the Polish state lies east of the Odra and Nysa Łużycka.

Article IV reminds us 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).⁶⁷ This does not mean, however, that in case of the unification of Germany, the border established in 1970 could have changed without Poland’s consent.

The Moscow⁶⁸ and Warsaw treaties of 1970 enabled the Federal Republic to enter the broader European political arena and to play an important role in the Quadripartite Agreement on Berlin (3 September 1971) and in the signing of the Final Act of the Conference on Security and Cooperation in Europe (CSCE) in 1975. For Poland, the 1970 Treaty was a political success: the Odra and Nysa

⁶⁴ 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. July 1950: „Artikel 1. Die Hohen Vertragschließenden 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“.

⁶⁵ J.Abr. Frowein, *Zur Entstehung und Bedeutung der Ostverträge 1970 – einige persönliche Ergänzungen*, in: H.-J. von Cremer, Th. Giegerich, D. Richter, A. Zimmermann (Hrsg.), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger*, Berlin, Heidelberg, New York 2002, pp. 163–178; id., *Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages*, „Jahrbuch für Internationales Recht“ 18 (1975), p. 11–61; id., *Der Warschauer Vertrag von 1970 nach 50 Jahren*, *ZaöRV* 82 (2022), p. 757–768.

⁶⁶ Treaty between the Federal Republic of Germany and Poland Concerning the Basis for Normalizing Their Mutual Relations, signed at Warsaw, 7 December 1970 (Vertrag zwischen der Bundesrepublik Deutschland und der Volksrepublik Polen über die Grundlagen der Normalisierung ihrer gegenseitigen Beziehungen vom 7. Dezember 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 die Lausitzer Neiße entlang bis zur Grenze mit der Tschechoslowakei festgelegt worden ist, die westliche Staatsgrenze der Volksrepublik Polen bildet.“

⁶⁷ Note from the Government of the Federal Republic of Germany to the three Western Powers (19 November 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.”

⁶⁸ Treaty Between the Federal Republic of Germany and the Soviet Union, signed at Moscow, August 12, 1970.

Łużycka were confirmed as the state frontier, opening the way for normalization and intensification of relations with the Federal Republic.⁶⁹

After signing the 1970 Treaty, the Federal Republic began to weaken its legal significance, emphasizing that it was binding only in its own name (and not on behalf of Germany as a whole), that it was merely concerned about renouncing the use of force, and that the treaties with Moscow and Warsaw “do not anticipate a peace treaty regulation for Germany and did not create a legal basis for the borders that exist today.”⁷⁰

Bonn refused to state that a future united Germany would comprise the territories of the FRG, the GDR, and Berlin. Even if one accepts that the Federal Republic could not legally replace the Four Powers, the Powers could not impose a larger territory on a united Germany against its will.⁷¹

Chancellor Helmut Kohl’s course toward unification at the turn of the 1990s took shape under the clear influence of the United States, which foresaw the possibility of a radical reconstruction of Europe’s political reality (retreat from Yalta). Without the strategic determination of American policy, the situation of Germany and Europe would look different today.⁷²

German legal positions complicated negotiations on the Treaty on the Final Settlement with Respect to Germany (the “2+4 Treaty,” 12 September 1990). In relation to Poland, the Chancellor’s policy can be assessed as ambiguous. Chancellor Kohl invoked the prerogatives of the victorious Powers, claiming that these prevented him from taking an official position on the borders of a united Germany. This delaying tactic – for example, Kohl’s Ten-Point Plan,⁷³ which addressed a German confederation but remained silent on the Polish–German border – was perceived by Polish politicians supportive of German unification as a painful and embarrassing spectacle.⁷⁴

Helmut Kohl’s political manoeuvring aimed to make confirmation of the border of a united Germany dependent on two conditions: Poland’s recognition of the German minority in Poland and confirmation of Poland’s 1953 waiver of reparations.⁷⁵ Moreover, the Chancellor presented acceptance of the Polish border as the price for German unification, rather than as a consequence of Germany’s responsibility for the war.

⁶⁹ M. Tomala, *Deutschland – von Polen gesehen. Zu den deutsch–polnischen Beziehungen 1945–1990*, Marburg 2000.

⁷⁰ *Supra* fn. 67. See also Deutscher Bundestag. Gemeinsame EntschlieÙung vom 17. Mai 1972: „2. Die Verträge nehmen eine friedensvertragliche Regelung für Deutschland nicht vorweg und schafften keine Rechtsgrundlage für die heute bestehenden Grenzen.“

⁷¹ 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 was ready to maintain the antagonism in the relations with Poland.

⁷² See C. Rice, Ph.D. Zelickow, *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).

⁷³ Rede von Bundeskanzler Helmut Kohl vor dem Deutschen Bundestag über das Zehn-Punkte-Programm zur Überwindung der Teilung Deutschlands und Europas am 28. November 1989.

⁷⁴ T. Mazowiecki, *Nieemożliwe czyniąc możliwym*, „Rzeczpospolita”, 6–7 November 2004 (lecture delivered 16 September 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’?”

⁷⁵ C. Rice, P. Zelickow (fn. 72), p. 292 /German edition/; H.–J. Küsters, D. Hofmann (Hrsg.), *Dokumente zur Deutschlandpolitik. Deutsche Einheit. Sonderedition aus den Akten des Bundeskanzleramtes 1989/90*, München 1998, pp. 863–864, 878, 955–956; J. Sulek, *Traktat Graniczny RP–RFN z 14 listopada 1990 roku jako ostateczne zamknięcie polsko–niemieckiego sporu o granicę po II wojnie światowej (ze wspomnień głównego negocjatora po 25 latach)*, „Niepodległość i Pamięć” 2017, 24/1 (57), pp. 103–127; see also W. Jarząbek, *W cieniu problemu granicznego 1989–1990*, „Rocznik polsko–niemiecki” 17(2009), p. 54–86 (German translation: *Im Schatten des Grenzproblems. Polen und der Wiedervereinigungsprozeß Deutschlands in den Jahren 1989–1990*, „Forum für osteuropäische Ideen und Zeitgeschichte”, 2012, Heft 1).

Against the background of many years of misguided German policy, Polish Prime Minister Tadeusz Mazowiecki refused to rely solely on German promises made during confidential diplomatic talks.⁷⁶ In 1989–1990, Polish diplomacy under Foreign Minister Krzysztof Skubiszewski was less concerned with questioning Poland’s western border during the unification process and more with the potential consequences of political manipulation of this issue, including possible concessions to Moscow.

The new Polish government was not opposed to German unification and, moreover, supported full German membership of NATO. Poland’s objective was that German unification be carried out within a broader European framework. From a Polish perspective, separating Polish–German issues from the international context risked further political and legal confrontation in bilateral relations.⁷⁷ Polish politicians were convinced that, in such circumstances, a united Germany would return to its earlier legal positions,⁷⁸ with all the negative consequences this would entail for Europe’s future.

During the turning point of 1989–1990, the Federal Republic did not want to negotiate Polish–German treaties before formal unification. Poland insisted, leading to pre-unification talks between Polish and German experts.

One of the achievements of Minister Krzysztof Skubiszewski was securing Poland’s participation in the “2+4” negotiations:⁷⁹

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 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 neighbouring 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.

On 17 July 1990, during the Paris session of the “2+4” talks, an agreement was reached – with Poland’s participation⁸⁰ – concerning the Polish–German border. This agreement was reaffirmed in the Treaty on the Final Settlement with Respect to Germany (12 September 1990).⁸¹ It was also agreed

⁷⁶ T. Mazowiecki, *Wiedziałem, że się uda*, „Gazeta Wyborcza”, 11–12 September 2004.

⁷⁷ J. Sulek, *Traktaty polsko–niemieckie z 1990 i 1991 roku – prawda i fałsz*, „Przegląd”, 2 and 8 January 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 Łużycka 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.”; idem, *Die diplomatische Entstehungsgeschichte des Grenzbestätigungsvertrages vom 14. November 1990*, in: *Ein Historischer Akt. 30 Jahre Vertrag über die Bestätigung der deutsch–polnischen Grenze an Oder und Lausitzer Neiße* (Herausgegeben von J. Barcz und K. Ruchniewicz), Wrocław–Warszawa 2022, pp. 32–61.

⁷⁸ *Supra* 1.2.

⁷⁹ K. Skubiszewski, *Do niepodległości krok po kroku*, „Gazeta Wyborcza”, 11 September 2009.

⁸⁰ Statement of the Foreign Minister, Krzysztof Skubiszewski, 17 July 1990, text in: K. Skubiszewski, *Polityka zagraniczna i odzyskanie niepodległości. Przemówienia, oświadczenia, wywiady 1989–1993*, Warszawa 1997, pp. 55–67.

⁸¹ Treaty on the Final Settlement with Respect to Germany, September 12, 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.”

that, following the signing of the “2+4” Treaty, the earlier peace–settlement reservation (*Friedensvertragvorbehalt*) became obsolete.

During the Paris session, the Polish minister ensured that the Polish–German border was not subject to a guarantee by the victorious powers.⁸²

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.

A guarantee of the Polish–German border by the victorious powers was equally unfavourable for Germany, which saw such a guarantee as implying a lack of confidence in a democratic Germany.⁸³

Finally, in “2+4” Treaty it was decided:

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.

(4) The Governments of the Federal Republic of Germany and the German Democratic Republic shall ensure that the constitution of the united Germany does not contain any provision incompatible with these principles. This applies accordingly to the provisions laid down in the preamble, the second sentence of Article 23, and Article 146 of the Basic Law for the Federal Republic of Germany.

In the Treaty 14 November 1990, Poland and Germany merely had to confirm – on the basis of previously signed treaties – the existing border between them.⁸⁴ Thus, German unification proceeded in a manner favourable to Europe, Germany, and Poland. That being, it is important to note the extent

⁸² *Do niepodległości* (fn. 79).

⁸³ *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*, Warszawa 1994, pp. 167–168 (German version in: *Dokumente* (fn. 75), 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 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 ».

⁸⁴ Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them, signed at Warsaw, 14 November 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.”

to which Poland's western border was effectively held hostage to the Federal Republic's unification strategy.

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 was compelled to accept the loss of its eastern territories (to the Soviet Union), leading to the migration of the Polish people from these territories. About 320,000 Polish citizens were deported to the interior of the USSR in 1940/41. The change of the eastern border of Poland in 1945 resulted in the flight or transfer of part of the population into the Polish territory (within the newly defined framework) to escape Soviet rule. At the same time (1944–1945) thousands of Poles were deported from then Polish territory to forced labour in the Soviet Union.

When it comes to Poland's territorial losses in the east, German sources often refer to the role of Moscow. This is an “elegant” way of overlooking whose assistance Stalin relied upon to expand his territory as early as mid–September 1939, whilst sending certain German population groups “*Heim ins Reich*”.

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 amounted to a posthumous victory for Hitler.

Germany lost its eastern territories as a consequence of its own policies and of its international legal responsibility. The victorious Powers assumed the supreme authority in 1945 and made the decisions concerning the future of Germany without its consent. For the legality of these decisions, the views of the Powers played the decisive role – a conclusion confirmed by subsequent state practice.

Chapter 3: The Resettlement of Germans as a consequence of the war

We cannot regard the end of the war as the cause of the flight, expulsion, and enslavement. These outcomes were rather the result of the beginning of the war and of the rule of violence that led up to it. We cannot separate 8 May 1945 from 30 of January 1933.

Richard von Weizsäcker⁸⁵

It is possible that the highest degree of love is to love without possessing.

Marion Gräfin Dönhoff⁸⁶

3.1. The Second World War was an event with irreversible consequences, one of which was the large-scale resettlement of populations.⁸⁷ It is a difficult issue in the Polish–German dialogue.

Who, then, initiated the transfer of the German population, and when? And what conclusions should have been drawn from it in 1945? What would a return to the *status quo ante* have looked like? If we accept that the German population could not have been legally resettled on the basis of the Potsdam decisions, we face the problem of over a million Germans resettled by the authorities of the Reich during the war. Were these people supposed to have returned to their original places of

⁸⁵ Ansprache des Bundespräsidenten Richard von Weizsäcker am 8. Mai 1985 im Plenarsaal des Deutschen Bundestages zum 40. Jahrestag der Beendigung des Zweiten Weltkrieges: „[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“.

⁸⁶ 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“.

⁸⁷ See G. Hryciuk, *Przesiedleńcy. Wielka epopeja Polaków, 1944–1946*, Kraków 2023; Urban Th., *Polen als „Erbe“ der Ostgebiete*, „Einsichten und Perspektiven“, Themenheft 1/2021; 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, *Die dunkle Seite der Nationalstaaten. Ethnische Säuberungen im modernen Europa*, Göttingen 2011; A.T. Demshuk, *The Lost German East: Forced Migration and the Politics of Memory*, New York 2012 (see also the former dissertation of the author: *The Lost East: Silesian Expellees in West Germany and the Fantasy of Return, 1945–1970* – <https://core.ac.uk/download/4825263.pdf>); P. Madajczyk, *Czystki etniczne i klasowe w Europie XX wieku*, Warszawa 2010; J. Piskorski, *Wygnańcy. Przesiedlenia i uchodźcy w dwudziestowiecznej Europie*, 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“, Nr. 65, 16. Februar 2010; W. Sienkiewicz, G. Hryciuk (eds), *Wysiedlenia, wypędzenia i ucieczki 1939 – 1959. Atlas ziem Polski. Polacy, Żydzi, Niemcy Ukraińcy*, Warszawa 2008; A.M. Kacowicz, P. Lutomski (eds), *Population Resettlement in International Conflicts: A Comparative Study*, New York 2007; A.M. de Zayas, *Die deutschen Vertriebenen – Keine Täter sondern Opfer: Hintergründe*, 2007; P. Eberhardt, *Political Migrations in Poland 1939–1948*, Warsaw 2006; J.M. Piskorski, *Polacy i Niemcy. Czy przeszłość musi być przeszkodą?*, Poznań 2004; P. Buras, P.M. Majewski (eds), *Pamięć wypędzonych. Grass, Beneš i środkowoeuropejskie rozrachunki. Antologia tekstów polskich, niemieckich i czeskich*, Warszawa 2003; B. Nitschke, *Wysiedlenie czy wypędzenie? Ludność niemiecka w Polsce w latach 1945–1949*, Toruń 2000; id., *Vertreibung und Aussiedlung der deutschen Bevölkerung aus Polen 1945 bis 1949*, München 2003; H.-J. Bömelburg, R. Stößinger, R. Traba (eds), *Wypędzeni ze Wschodu. Wspomnienia Polaków i Niemców*, Olsztyn 2001; W. Borodziej, 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); H. Ammon, *Die Vertreibung der Deutschen. Defizite der deutschen Zeitgeschichtsschreibung*, München 1999; J. Kranz, 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); H. Orłowski, A. Sakson (eds), *Utracona ojczyzna. Przymusowe wysiedlenia, deportacje i przesiedlenia jako wspólne doświadczenie*, Poznań 1996; M. Podlasek, *Wypędzenie Niemców z terenów na wschód od Odry i Nysy Łużyckiej*, Warszawa 1995; P. Lippóczy, T. Walichnowski, *Przesiedlenie ludności niemieckiej z Polski po II wojnie światowej w świetle dokumentów*, Warszawa 1982.

residence? How could millions of minority Germans coexist with Czechs or Poles after such a brutal war? Was the resettlement of Germans as a result of the Potsdam decisions a legal and necessary measure?⁸⁸ Can these questions be viewed solely through a legal lens?

In this context it is important to distinguish between the individual perception by those who were resettled and the international legal responsibility of the state. It is also essential to look at the difference between the political decision of the victorious powers and its practical execution, where abuses and offenses occurred.⁸⁹

Consideration of these issues should begin with the Decree of the Führer and Reich Chancellor on the Consolidation of German National Identity (7 October 1939):

The consequences of the Treaty of Versailles in Europe have been eliminated. This gives the Greater German Reich the opportunity to welcome and settle within its territory German people who until now have been forced to live abroad, and to organise the settlement of ethnic groups within its sphere of interest in such a way as to achieve clearer dividing lines between them. I entrust the implementation of this task to the Reichsführer-SS. (...) I. According to my directives, the Reichsführer-SS is responsible for: 1. the repatriation of Reich and ethnic Germans abroad who are eligible for permanent return to the Reich, 2. the elimination of the harmful influence of those foreign population groups who pose a danger to the Reich and the German national community, 3. the development of new German settlement areas through resettlement, in particular through the settlement of Reich and ethnic Germans returning from abroad. (...) To fulfil the tasks assigned to him in paragraph 1, no. 2, the Reichsführer-SS may assign specific residential areas to the population groups in question.⁹⁰

In the opinion of the German authorities:

After the campaign of 18 days [aggression against Poland, September 1939], the most generous resettlement operation (*Umsiedlungsaktion*) in world history began. All ethnic groups that had fulfilled their tasks outside were called back to the homeland of their fathers by the Führer. You are now helping with the expansion and consolidation of the Greater German Reich.⁹¹

The relocation of ethnic Germans from other states to the Reich or to occupied territories constituted an instrument of National Socialist policy. In German sources the following formulas were used: „*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*

⁸⁸ See infra 3.4. and 6.1.

⁸⁹ See Chapter 4.

⁹⁰ Erlaß des Führers und Reichkanzlers zur Festigung deutschen Volkstums, 7. Oktober 1939: „Die Folgen von Versailles in Europa sind beseitigt. Damit hat das Großdeutsche Reich die Möglichkeit, deutsche Menschen, die bisher in der Fremde leben mußten, in seinem Raum aufzunehmen und anzusiedeln und innerhalb seiner Interessengrenzen die Siedlung der Volksgruppen so zu gestalten, daß bessere Trennungslinien zwischen ihnen erreicht werden. Die Durchführung dieser Aufgabe übertrage ich dem Reichsführer-SS. (...) I. 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 Seßhaftmachung der aus dem Ausland heimkehrenden Reichs- und Volksdeutschen. (...) Zur Erfüllung der ihm in Absatz 1 Nr. 2 gestellten Aufgaben kann der Reichsführer-SS den in Frage stehenden Bevölkerungsteilen bestimmte Wohngebiete zuweisen“ – https://www.1000dokumente.de/index.html?c=dokument_de&dokument=0075_vot &object=translation&st=&l=de (BArch R 43 II/604, Bl. 27–28)

⁹¹ „Nach dem Feldzug der 18 Tage [Aggression gegen Polen, September 1939] begann die bisher großzügigste Umsiedlungsaktion der Weltgeschichte. Alle Volksgruppen, die draußen ihre Aufgaben erfüllt haben, rief der Führer zurück in die Heimat ihrer Väter. Sie helfen jetzt mit beim Ausbau und der Festigung des großdeutschen Reiches“, NS-Propagandaplakat zur Kolonisierung des „Warthegaues“ (1939/41), Bundesarchiv, R 49 Bild-0705 (<https://www.bild.bundesarchiv.de/dba/de/search/?query=R+49+Bild-0705>)

*Ansetzung der rückgeführten Volksdeutschen werden Polen und Juden aus den eingegliederten Ostgebieten ausgesiedelt“.*⁹²

A special institution was created for this purpose 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 September 28, 1939,⁹³ or the German–Italian Agreement of October 21, 1939, concerning Southern Tyrol.⁹⁴

Thus, the displacement of the German population during and after World War II took three forms. Firstly, relocation by German authorities of ethnic Germans to the Reich or to territories it occupied (*Heim ins Reich* policy). The allegedly voluntary nature of this operation was largely illusory.⁹⁵ In total, over 900,000 “ethnic Germans” were affected but, contrary to the earlier information, only a minority was settled in the territory of the German Reich.⁹⁶ Most of them came to the areas that were annexed to the Germany or the occupied areas, e.g. in the formerly Polish “Warthegau”, where they were supposed to promote “Germanization”. The resettled Germans took over houses of Poles who had been expelled or murdered. Between 1939 and 1941, 360,000 ethnic Germans were settled in the Polish territories annexed by the Reich; by 1944, this number had risen to over 630,000.⁹⁷

⁹² <http://midosa.starttext.de:8180/barch/MidosaSEARCH/ns19/rightframe.htm?vid=ns19&kid=87AA6444A6AC449FB1FF02DDBC71D62>; 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 /Persönlicher Stab des Reichsführers SS/ Akte 2743) – <http://homepages.uni-tuebingen.de/gerd.simon/umsiedlung-statistik.pdf>

⁹³ Deutsch–sowjetischer Grenz- und Freundschaftsvertrag vom 28. September 1939. Vertrauliches Protokoll: „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./

⁹⁴ *The human rights dimensions* (fn. 98), paras 44, 128–137; H. Hecker, *Die Umsiedlungsverträge des Deutschen Reiches während des Zweiten Weltkrieges*, Hamburg 1971; D.A. Loeber, *Diktierter 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.

⁹⁵ See 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 Suwalkigebiet) in die Litauische Sozialistische Sowjetrepublik (10. Januar 1941).

⁹⁶ „Insgesamt waren über 900.000 „Volksdeutsche“ von den Umsiedlungen betroffen. (...) Entgegen den Ankündigungen wurde allerdings nur eine Minderheit im Territorium des deutschen Reichs angesiedelt. Die meisten kamen in die dem Deutschen Reich angegliederten oder die eroberten Gebiete, insbesondere in den vormals polnischen „Warthegau“, wo sie die „Eindeutschung“ vorantreiben sollten“ – Zwangsmigrationen in Europa 1938–48. „Heim ins Reich“ – <https://library.fes.de/library/netzquelle/zwangsmigration/32heim.html>

⁹⁷ See fn. 17.

Secondly, massive exodus (*Flucht*) before the approaching front of the Soviet army. The massive and poorly organized evacuation or flight of millions of Germans before the advancing Soviet front caused the greatest number of casualties.

Thirdly, 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, Czechoslovakia, and Hungary.” Approximately three million Germans were resettled from Poland between 1945 and 1949.

In this way the Nazi policy of *Heim ins Reich* became, in 1945, a tragic irony of fate.⁹⁸

3.2. The decisions of the Allied Powers after Germany’s defeat, including the resettlement of the German population, were not acts of revenge. They must be understood within a broader political context and were rooted in aggressive German policies and wartime atrocities.

Adolf Hitler, who recalled alleged discrimination and persecution of German minorities,⁹⁹ used them as an instrument for destabilizing neighbouring states.

The Powers had allowed and accepted the resettlement of German populations. However, according to the Potsdam Agreement (1945):

XII. Orderly Transfer of German Populations. 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*.

Poles and Germans differ in their assessment of this transfer.¹⁰⁰ German narratives often juxtapose German suffering with the suffering of other peoples, thereby creating a “*tu quoque*” argument: 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 suffered. The Poles were resettled by the Germans and they also resettled Germans.

In doing so, the ‘crucial question’ once posed by the former Polish Prime Minister Tadeusz Mazowiecki is overlooked: “Was the resettlement a result of the war, or was it its cause?” In other words, the German position mixes up cause and effect. From the Polish perspective the perpetrators sometimes become the victims of their own deeds.

The term *Vertreibung* (often translated as “expulsion”) emerged in West Germany only after the Second World War. It is misleading, suggesting a biblical punishment (expulsion from Eden or from the Temple) rather than a measure connected to Germany’s international legal responsibility for aggression and crimes.

⁹⁸ 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 July 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.”

⁹⁹ Adolf Hitler, Rede vor dem Reichstag am 1. September 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. (...) [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!“.

¹⁰⁰ See A. Wolff-Powęska, *Pamięć – brzemień i uwolnienie. Niemcy wobec nazistowskiej przeszłości (1945–2010)*, Poznań 2011; J. Rydel, *Polityka historyczna w Republice Federalnej Niemiec*, 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)*, Kraków 2002.

The Charter of German Expellees (Stuttgart 1950) speaks of their “immeasurable suffering” and renunciation of “revenge and retaliation” but omits the circumstances that led to the loss of homeland.¹⁰¹ 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? Should we ask other nations why they have forgotten to create a similar document? Should the *Vertreibung* be regarded as one of the most significant events of the twentieth century, and the German population as one of the principal victims of the Second World War?¹⁰²

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 aimed at protecting expellees’ interests.

The German Federation of Expellees (*Bund der Vertriebenen*), as well as some German politicians, have been promoting a specific memory politics. For this reason, in 2008 the *Foundation Flucht, Vertreibung, Versöhnung* (Exodus, Expulsion, Reconciliation) was established in the Federal Republic,¹⁰³ and earlier (2000) the *Bund der Vertriebenen* established the *Foundation Zentrum Gegen Vertreibungen* (Center against Expulsion).

On the one hand, according to some views, the resettlement of the German population pursuant to Allied decisions (1945) was illegal, and its unique nature means that it should be regarded as part of the German national identity.

On the other hand, the objective of this politics of memory is incorporating the German and other victims into the broad picture of a century of migrations, 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 resettlement of the Poles during World War II, the resettlement of the German population under the Potsdam decisions, and finally the contemporary Palestinians’ and Kosovars’ loss of their homelands.

In this way, a community of disparate categories of victims is constructed, while the historical context is effectively erased. The causes and effects are mixed, as are the individual aspects and the

¹⁰¹ See Deutscher Bundestag. *60 Jahre Charta der deutschen Heimatvertriebenen – Aussöhnung vollenden* (Drucksache 17/4193 v. 15. Dezember 2010) and critical observations concerning this resolution – *Historiker kritisieren Bundestagsbeschluss*, „Frankfurter Rundschau“, 14. Februar 2011.

¹⁰² See e.g. historian Hans-Ulrich Wehler interview for „Welt am Sonntag“, 8. Mai 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“; see also T. Kaufmann, „Unsere Mütter, unsere Väter“. *Wir armen Täter*, „Kölner Stadt-Anzeiger“, 20. März 2013: „Plötzlich, zwei Jahre, nachdem der Krieg offenbar vom Himmel gefallen war, änderte sich alles. (...) Genau hier jedoch funktioniert der Film über deutsche Schuld als Mittel der Entschuldigung. Denn es ist ja der Krieg, der ‘macht’ und ‘uns alle entmenscht’. Das genaue Gegenteil stimmt. (...) 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“; *Alle waren Opfer*, „Die Zeit“, 2006, Nr. 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“.

¹⁰³ Gesetz zur Errichtung einer Stiftung „Deutsches Historisches Museum“ vom 21. Dezember 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.

international responsibility of the state. In any case, the German policy of population displacement was undoubtedly a means of waging war, which cannot be applied to each displacement.

Therefore, it is an abuse to equate the Holocaust with the *Vertreibung* of the German population pursuant to the Potsdam decisions.¹⁰⁴ The Jewish population was not subject to *Umsiedlung* or *Vertreibung*.

Germany envisaged only one path for the Jews, known as the *Endlösung*...

der Tod ist ein Meister aus Deutschland sein Auge ist blau

er trifft dich mit bleierner Kugel er trifft dich genau (...)

er hetzt seine Rüden auf uns er schenkt uns ein Grab in der Luft

*er spielt mit den Schlangen und träumet der Tod ist ein Meister aus Deutschland*¹⁰⁵

3.3. The Potsdam decisions of the Powers are one thing, and individual crimes committed during the 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 of Europe they can be seen as adequate and necessary.

Leaving a German minority in the new borders of Poland would have intensified the tensions that were already known in the pre-war period. In the opinion of Krzysztof Skubiszewski (1975):¹⁰⁶

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.

According to the Czech–German declaration of 1997:

The German side is also aware that the National Socialists’ policy of violence towards the Czech people helped to pave the way for flight, expulsion and forced resettlement after the end of the war.¹⁰⁷

Some opinions classify the Potsdam decision regarding the transfer of the German population as a crime (*Verbrechen*). However, it is unclear whom this accusation targets – specific individuals, particular states (e.g., Poland), or the Four Powers.

In the case of individual perpetrators, the situation is less complicated and extends to the area of criminal law and judicial procedure (the issue of guilt). Furthermore, a prison sentence may be accompanied by additional negative consequences, for example deterioration of health or loss of income from professional work. This aspect does not appear to be the subject of controversies.

In turn, in the perspective of the Potsdam decisions regarding the displacement of the German population, freely interpreted terms such as *Unrecht*, *Vertreibung*, *Verbrechen*, *Völkermord* appear.

¹⁰⁴ Zentrum gegen Vertreibungen: „Gehören unverzichtbar zum ZENTRUM GEGEN VERTREIBUNGEN auch Vertreibung und Genozid an anderen Völkern, insbesondere in Europa. Allein in Europa waren bzw. sind mehr als 30 Volksgruppen von solchen Menschenrechtsverletzungen betroffen. Von den Albanern, Armeniern, Azeris über die Esten, Georgier, Inguschen, Krim-Tataren, Polen, Tschetschenen, Ukrainern bis zu den Weißrussen und griechischen Zyprioten und die singuläre Verfolgung und Massenvernichtung der Juden Europas durch den Nationalsozialismus“ – <https://www.z-g-v.de/zgv/unsere-stiftung/aufgaben-und-ziele>; see also – <https://www.z-g-v.de/zgv/fakten-und-hintergruende/vertreibungen-anderer-europaeischer-voelker>

¹⁰⁵ P. Celan, *Todesfuge* (Death Fugue): “death is a master from Deutschland his eye is blue / he strikes you with lead bullets his aim is true / a man lives in the house your golden hair Margarete / he sets his dogs on us he gifts us a grave in the air / he plays with the snakes and dreams death is a master from Deutschland” (translated by Pierre Joris – <https://poets.org/poem/death-fugue>).

¹⁰⁶ K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów* (fn. 1), pp. 323–324.

¹⁰⁷ Deutsch-tschechische Erklärung über die gegenseitigen Beziehungen und deren künftige Entwicklung vom 21. Januar 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“.

These decisions are sometimes qualified as contrary to the Atlantic Charter (1941) and the right of peoples to self-determination, while simultaneously fulfilling the premises for crimes against humanity (including genocide¹⁰⁸). Let us cite two official opinions.

In a declaration from 1996, the Minister of Foreign Affairs, Klaus Kinkel, stated¹⁰⁹:

In accordance with German international legal scholarship, all previous federal governments and also the current government have always condemned the expulsion [*Vertreibung*] of Germans after the end of the war as unlawful and have not considered the decisions of the Potsdam Conference of August 2, 1945, as justification for the expulsion.

Similarly, in the statement (1998) of the German Bundestag:¹¹⁰

The German Bundestag shares the view of the Federal Government – as well as that of all previous Federal Governments – which has consistently regarded and described the expulsion of Germans from their ancestral homelands following the end of the Second World War as a grave injustice and a violation of international law.

However, the rulings of international courts, punishment of criminals (e.g. the Nuremberg trials) or peace treaties can hardly be regarded as a crime. The political doctrine in Germany did not change the Four Powers' decisions and the Federal Republic implemented the Potsdam decisions and sometimes even invoked them against Poland. Moreover, the competence of the German authorities seems questionable when it comes to assessing the legality of the Potsdam decisions.

Germany has received an unequivocal and official response from the United States and the United Kingdom (1996), namely that the Potsdam decisions “were soundly based in international law.”¹¹¹

3.4. Some other opinions invoke a form of moral symmetry: no wrong, however grave, justifies another; crimes remain crimes even when preceded by other crimes;¹¹² we have committed an

¹⁰⁸ A.M. de Zayas, *A Terrible Revenge. The Ethnic Cleansing of the East European Germans, 1944–1950*, New York 1994; F. Ermacora, *Die sudetendeutschen Fragen: Rechtsgutachten*, München 1992.

¹⁰⁹ „Stuttgarter Nachrichten“ (20 February 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“. See also *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 April 1996.

¹¹⁰ Deutscher Bundestag. Drucksache 13/10845 (27.05.1998), 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), Para. 4. Der Antrag ist mit den Stimmen der Koalitionsfraktionen gegen die Stimmen der Fraktion Bündnis 90/Die Grünen und der Gruppe der PDS angenommen worden. Die SPD hat sich enthalten.

¹¹¹ US Declaration of 14 February 1996: “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 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 recognized 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” – Text in: „Die Friedens-Warte“, 1997, No. 73, pp. 107–108.

¹¹² Konzeption für die Arbeit der „Stiftung Flucht, Vertreibung, Versöhnung“ und Leitlinien für die geplante Dauerausstellung (29. August 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“.

injustice – but so did you! However, this symmetry ignores causality. Moreover, political and legal decisions regarding state's responsibility are sometimes treated (including in Germany) primarily from a *vae victis* perspective.¹¹³

In this context, the concept of symmetrical Polish and German evil appears. However, the assessment depends on the circumstances. Good and evil (like equality or justice) do not exist in a vacuum. A moral assessment is helpful in individual cases, but it may be inadequate for political decisions affecting groups or peoples.

As Władysław Bartoszewski stated in 1995:¹¹⁴

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

There is also a peculiar view that the mass expulsion and murder of millions of Germans (as well as the Allied bombing of German cities) constituted a crime entitling Germany to reparations. However, Germany did not file claims against the Allies because the issue was included in the 1990 Two Plus Four Treaty.¹¹⁵

Such opinions resurface periodically, but they primarily serve domestic political purposes. They contribute to reviving old controversies and hinder the pursuit of policies geared toward the challenges of the future. In this context, one could ask why Cain did not come up with the idea of claiming compensation for the damages he ultimately suffered as a result of Able's death?¹¹⁶

Recently, a controversy has arisen in Germany regarding the draft bill regarding an amendment to the statute of the *Foundation Flucht, Vertreibung, Versöhnung*.

Every federal government, and indeed every political party, should have an interest in German history and thus also in the fate of the expulsion of millions of Germans.¹¹⁷

Historical context and debates about causality do not justify atrocities. (...) The mass expulsion and murder of Germans remain a crime. (...) They fled from Germany (...) if they came from Breslau or Königsberg – not from Poland or the Soviet Union. Or they lived in other countries and were of German ethnicity. (...) This is not just any migration history, but part of our identity.¹¹⁸

Contemporary debates in Germany reveal a trend toward the renationalization of memory and the amplification of German victimhood at the expense of historical context and reconciliation. Professor

¹¹³ Hans Frank's (wartime governor of *Generalgouvernement* on the Polish territory) words during his final address to the International Military Tribunal – IMT (Nuremberg): "I said that a thousand years would not be enough to erase the guilt of our nation because of Hitler's behaviour in this war. [However,] not only the behaviour 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 cancelled out any possible guilt of our people. Who will ever judge these crimes against the German people?", IMT ("blue series"), vol. 22, p. 385 – http://www.ihr.org/jhr/v12/v12p167_Weberb.html /German text quoted in: R. Pemsel, *Hitler* (1986), p. 129.

¹¹⁴ Rede in der Sondersitzung von Bundestag und Bundesrat am 28. April 1995 in Bonn.

¹¹⁵ R. Müller, *Deutschland, der ewige Schuldner?*, „Frankfurter Allgemeine Zeitung“, 19. September 2022: „Etwa zwölf Millionen Deutsche wurden teils auf völkermordartige Weise umgebracht und aus ihrer Heimat vertrieben. Das war ein Verbrechen, das einen Anspruch Deutschlands auf Schadenersatz begründet hat, also auf Wiederherstellung des ursprünglichen Zustands beziehungsweise auf Entschädigung“. See also *infra* fn. 131.

¹¹⁶ Bishop Józef Życiński in: „Tygodnik Powszechny“, 4 April 2004.

¹¹⁷ R. Müller, *Was haben wir eigentlich gelernt?*, „Frankfurter Allgemeine Zeitung“, 27.03.2026.

¹¹⁸ R. Müller, *Die Vertreibung der Deutschen war ein Verbrechen*, „Frankfurter Allgemeine Zeitung“, 06.06.2026. However, the decisions of the Potsdam refer to “the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia, and Hungary”.

Felix Ackermann rightly notes: “In this worldview, the flight and expulsion of Germans are not a consequence of the German war of annihilation.”¹¹⁹

The German Association of Historians aptly criticizes the “growing trend toward the renationalization of memory” in the draft bill concerning the “*Stiftung Flucht, Vertreibung, Versöhnung*” because, through structural changes, it explicitly focuses the foundation's tasks on the suffering of Germans and replaces the historical contextualization of exode and resettlement with a self-referential national narrative. The third component of the foundation's name – reconciliation – is thus relegated to the background in favour of a German victim narrative.¹²⁰

Professor Krzysztof Ruchniewicz notes that the resettlement of millions of Germans at the end of the war was accompanied by human suffering. Remembering this suffering is legitimate – and no serious historian denies it. The dispute concerns not remembrance itself, but its classification, context, and interpretation.

¹¹⁹ „Statt (...) die Geschichte der Vertreibungsgebiete in den Blick zu nehmen, soll die Arbeit der Stiftung auf das Schicksal ethnischer Deutscher begrenzt werden. (...) In dieser Weltsicht sind Flucht und Vertreibung der Deutschen keine Folge des deutschen Vernichtungskriegs. (...) Die Gleichzeitigkeit der Bemühungen um eine ethnische Engführung der Erinnerung an das Vertreibungsgeschehen des Zweiten Weltkriegs und die Aktualisierung eines ethnischen Kriteriums für die Neuregelung von Migration zeigt (...) [dass damit] die rechtsextreme Vorstellung bedient wird“ – F. Ackermann, *Neue deutsche Erinnerungspolitik*, „Frankfurter Allgemeine Zeitung“, 19.07.2026.

¹²⁰ „Zusammen mit strukturellen Veränderungen sieht der Gesetzesentwurf auch einen erinnerungspolitischen Paradigmenwechsel der Stiftung Flucht, Vertreibung, Versöhnung vor. Er fokussiert die Aufgaben der Stiftung explizit auf das Leid der Deutschen und ersetzt die historische Kontextualisierung von Flucht und Vertreibung durch ein selbstbezügliches nationales Narrativ. Der dritte Namensbestandteil der Stiftung – Versöhnung – tritt auf diese Weise zugunsten einer deutschen Opfererzählung in den Hintergrund“ – <https://www.historikerverband.de/wp-content/uploads/2026/05/Stellungnahme-Gesetzesentwurf-Stiftung-Flucht-Vertreibung-Versöhnung.pdf>; see also Constantin Goshler, “Die Welt“ vom 05.06.2026; J. Buchsteiner, *Schuld und Leid gleichzeitig aushalten*, „Frankfurter Allgemeine Zeitung“, 05.06.2026.

Chapter 4: Guilt and Responsibility

*For evil to flourish, all it takes is good people who do nothing –
(Damit das Böse gedeiht, braucht es nur gute Menschen,
die nichts unternehmen)*

– Simon Wiesenthal

*Be faithful to the eleventh commandment: do not be indifferent
– Marian TurSKI¹²¹*

4.1. Germany initiated the Second World War intentionally and with awareness that its actions could lead to unpredictable consequences. The aggressive nature of this war is undeniable and must be taken into account when assessing its consequences, including Germany's legal and political responsibility.

World War II marked the end of a historical epoch in Central Europe, bringing unwanted and irreversible consequences not only for the victims but also for the perpetrators.¹²² This war facilitated the expansion of Soviet communism in 1945, which for decades was a source of suffering for many peoples and nations.¹²³

The German population, not without its own involvement, became the hostage of aggressive political leaders. The world was set on fire in 1939 by National Socialist Germany. In Hitler's reasoning, the German people were destined to perish if they proved unable to win.¹²⁴

In relation to the transfer of the German population various terms, not always (legally) clear-cut, are used on different occasions and in different contexts, e.g., transfer (Potsdam Conference), resettlement, displacement, expulsion, relocation, deportation (in German, terms such as *Transfer*, *Umsiedlung*, *Vertreibung*, *Rückführung*, *Ausweisung* or *Deportation*). Consequently, confusion arises that is difficult to resolve, as the application and definition of each term lack precision.

Anticipating the analysis in Chapter 6, international humanitarian law (IHL), applicable to the situation of an armed conflict, most often uses the terms "deportation" and "transfer," and, where needed, "evacuation" and "displacement." In turn, the international protection of human rights focuses on times of peace, and its norms are centred on the term "expulsion" (*Ausweisung*), which is not a punishment, but a unilateral administrative (or judicial) act, ordering an alien to leave the territory; in this context, the use of the term *Vertreibung* can be considered inappropriate.¹²⁵

Two aspects are important here: first, regardless of terminology, the transfer (resettlement) of the German population after 1945 was forced and irreversible; second, it was not a form of punishment

¹²¹ Speech on the 75th anniversary of the liberation of Auschwitz.

¹²² See M. Becker, *Mitstreiter im Volkstumskampf. Deutsche Justiz in den eingegliederten Ostgebieten 1939–1945*, München 2014; H.-J. Bömelburg, J. Kochanowski, *Die deutsche Besatzungspolitik in Polen 1939–1945*, in: J. Kochanowski, B. Kosmala (Hrsg.), *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 (Hrsg.), *Polen unter deutscher und sowjetischer Besatzung 1939–1945*, Osnabrück 2009, pp. 173–195; A. Wrzyszczyk, *Okupacyjne sądownictwo niemieckie w Generalnym Gubernatorstwie 1939–1945*, Lublin 2008; B. Musiał, *Deutsche Zivilverwaltung und Judenverfolgung im Generalgouvernement. Eine Fallstudie zum Distrikt Lublin 1939–1944*, Wiesbaden 1999.

¹²³ See S. Courtois (ed.), *Le Livre noir du communisme. Crimes, terreur, répression*, Paris 1997.

¹²⁴ 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“.

¹²⁵ See Chapter 6.2.3.

for individual guilt but the result of a political decision by the Four Powers in the context of Germany's international legal responsibility for the war.¹²⁶

4.2. In the context of World War II, reflection on the question of guilt is unavoidable, including in relation to the issue of resettlement.

In 1946, Karl Jaspers proposed four categories of guilt:¹²⁷

- criminal guilt on the grounds of breaking obligatory legal norms by an individual,
- political guilt, resulting from the acts of leaders and state organs;
- moral guilt, connected with the performance of duties within state institutions, including obedience to orders;
- metaphysical guilt, stemming from co-responsibility for all evil, especially for crimes committed in one's presence or with one's knowledge.

The instance responsible for evaluation differs – courts for criminal guilt; political authorities (including victors in war) for political guilt; one's conscience for moral guilt; and God for metaphysical guilt. In one or the other case, the term responsibility (instead of guilt) seems more appropriate, but this does not change the importance of Jaspers' view.

Crimes are committed by individuals, who, once their guilt is established, are punished.¹²⁸ Determining the degree of guilt requires distinguishing intention, conspiracy, complicity, and incitement – a difficult task, especially in cases of mass crimes. Individuals may also bear moral or political responsibility for their actions or omissions, or for the reprehensible acts of their subordinates.

We therefore must distinguish between the guilt of individuals (criminal, political, moral), the international legal responsibility of states, and the political and historical responsibility of nations. The discussion below focuses on the collective dimension. The absence of guilt does not imply the absence of responsibility, and responsibility does not imply guilt.

4.3. When an individual commits crimes, his actions do not always stem solely from personal intention or choice. Beyond individual criminals, there exist state-based systems of organized crime (National Socialist, fascist, communist). Thus, legal responsibility lies with the state, the direct perpetrators, and those who organized the system. German wartime law at times exempted individuals from criminal responsibility for unlawful acts committed on orders.¹²⁹

¹²⁶ 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 October 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 December 2005.

¹²⁷ K. Jaspers, *Die Schuldfrage*, Heidelberg-Zürich 1946.

¹²⁸ C. Kreß, *International Criminal Law*, "Encyclopedia of Public International Law", 2009.

¹²⁹ Erlass des Führers und Reichskanzlers über die Gewährung von Straffreiheit: "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

International legal responsibility requires attributing to the state specific conduct that violates international law.¹³⁰ This responsibility of states differs from criminal responsibility because of the difference between the international law and the national systems, and also because of the specific character of the perpetrator, which is the state and not an individual. Such responsibility may arise from effective or overall control, lack of due diligence, or strict liability.

According to the principle of state continuity, changes in political system or government do not exempt a state from responsibility. This responsibility takes the form of reparations, restitution, or satisfaction (financial, material, symbolic). It is essentially restitutive, disciplinary, and preventive.

International responsibility inevitably affects the population, which shares the fate of the state in both peace and war. After losing a war, people suffer destruction of infrastructure and bear the burden of reparations,¹³¹ to which both innocent and guilty contribute. Borders are often changed, affecting citizens. However, these measures must not be equated with collective guilt or punishment, since guilt is individual and remains irrelevant in this context.

4.4. Extra-legal (political, moral, and historical) responsibility concerns both the past and the future, times of war and times of peace, failures and successes. It relates to state actions or omissions (or those of national groups) that violate international law or are politically or morally reprehensible (e.g., refusing assistance or concluding harmful treaties). The appeasement policy before World War II is one example.¹³²

A nation is a community that cannot be freely chosen and is bound by shared history. Belonging to a nation does not permit moral and political responsibility to be treated selectively. It is irrelevant that only a small part of the nation supported criminal actions or knew of them. The nation is not guilty, because the concept of guilt does not apply to nations. Yet the nation is entirely morally and politically responsible – in various forms and degrees – for the actions of the state or national groups. This is not about attributing guilt to the entire nation but about collective responsibility and the

ohne Rücksicht auf ihre Höhe erlassen. Anhängige Verfahren werden eingestellt, neue Verfahren werden nicht eingeleitet“, 40 Reichsgesetzblatt 1939 I, 1023.

¹³⁰ 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.”

¹³¹ J. Kranz, *Reparationen: Inwieweit ist die Vergangenheit reparierbar?*, „Archiv des Völkerrechts“, Bd. 61 (2023), p. 15–26; idem, *Kriegsbedingte Reparationen und individuelle Entschädigungsansprüche im Kontext der deutsch-polnischen Beziehungen*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, 2020 (Vol. 80), p. 325–377; J. Barcz, J. Kranz, *Reparacje od Niemiec po drugiej wojnie światowej w świetle prawa międzynarodowego. Aspekty prawa i praktyki*, Warszawa 2019; *Breakthrough 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; R.M. Buxbaum, *A Legal History of International Reparations*, “Berkeley Journal of International Law”, Vol. 23:2 (2005), p. 314–346; *Problem reparacji, odszkodowań i świadczeń w stosunkach polsko-niemieckich 1944–2004*, t. I: Studia, t. II: Dokumenty, Warszawa 2004 (W.M. Góralski ed.).

¹³² French politician, Marcel Déat, published in “L’Œuvre” of 4 May 1939, *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. (...) 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 September 1938.

recovery of humanity.¹³³ The concept of responsibility allows neither easy accusation nor easy acquittal.

The idea of a nation oppressed by its elites is overly simplistic. Dictatorship, ignorance, helplessness, or indoctrination do not absolve the nation of collective responsibility.¹³⁴ Resistance by a minority does not absolve the majority. The “privilege of late birth” (*Gnade der späten Geburt*) is irrelevant. Collective responsibility does not allow arbitrary exceptions or self-justification.

Nations identify with their historical experiences – disasters and successes. Citizens recognize responsibility for contemporary actions and discreditable events of the past. Even if not all Germans supported National Socialism, and not all Poles supported communism, both nations bear the consequences of their states’ actions. This applies also to Germans displaced after 1945.

Extra-legal responsibility manifests in collective forms (in relation to the past and for the future, in times of war and times of peace): shame, regret, forgiveness, remembrance, silence, pride. These feelings often have a moral dimension, especially regarding crimes committed by state organs. They may also concern flawed economic policies or national achievements. They need not be shared by all; they are often expressed by figures representing the nation.¹³⁵

Such actions require political courage, wisdom, and foresight.

An example of this attitude is Chancellor Willy Brandt, who knelt before the monument to the heroes of the Warsaw Ghetto (December 7, 1970). But at the same time, a question arose in Germany whether he was allowed to kneel down, as well as accusations of voluntary humiliation.

And then kneels the one who does not have to kneel, on behalf of all those who should but do not kneel, because they do not have the courage, cannot or dare not. And then he confesses a guilt that does not burden him and asks for forgiveness that he himself does not need. And so, he is kneeling on behalf of Germany.¹³⁶

¹³³ R. Giordano, *Die zweite Schuld oder von der Last Deutscher zu sein*, München 1990, p. 278; Bundespräsident Joachim Gauck. Rede zum 50. Deutscher Historikertag, Göttingen, 23. September 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.“

¹³⁴ See J. Kranz, *Russian Crimes in Ukraine: Between Guilt and Responsibility*, “Polish Yearbook of International Law” 2022, pp. 33–54.

¹³⁵ Bundespräsident Joachim Gauck. Rede in Oradour-sur-Glane/Frankreich, 4. September 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. Dezember 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“.

¹³⁶ „Dann kniet er, der das nicht nötig hat, da für alle, die es nötig haben, aber nicht da knien – weil sie es nicht wagen oder nicht können oder nicht wagen können. Dann bekennt er sich zu einer Schuld, an der er selber nicht zu tragen hat, und bittet um eine Vergebung, derer er selber nicht bedarf. Dann kniet er da für Deutschland“, Hermann Schreiber, *Ein Stück Heimkehr*, „Der Spiegel“, Nr. 51, 14. Dezember 1970, p. 29–30.

This symbolic gesture by the Chancellor was evidence of his moral and political foresight – a quality so often lacking in politics. For example, going beyond the limits of the *Realpolitik* in relations with Poland was a problem for Chancellor Helmut Schmidt.¹³⁷

The President of the Federal Republic of Germany, Richard von Weizsäcker, stated in his speech of 8 May 1985:¹³⁸

We all, whether guilty or not, old or young, must come to terms with 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 pretend that it didn't happen. Whoever closes his eyes to the past becomes blind to the present. Those who refuse to remember inhumanity become susceptible to new forms of contagion. (...) Precisely for this reason, we must understand that there can be no reconciliation without remembrance.

4.5. Does a dictatorship give rise to a servile society, or does a servile society give rise to a dictatorship? Were the Germans completely powerless against the Nazi regime?

The legal responsibility of Germany as a state and the political/moral responsibility of the German nation have a specific character and differ from many 'ordinary' wars. The Nazi crimes, especially the racist Holocaust, were planned, massive, systematic, industrialized, and directed primarily against the civilian population. The goal was to achieve the racial purity of the new *Volk* through public programs of hatred against outsiders. Aggressive and imperial tendencies in German politics stemmed from a nineteenth-century climate of antisemitism, antipolonism and anti-liberalism.

These criminal actions were characterized by the dehumanization of the victims (*Untermenschen*, *lebensunwerte Ungeziefer*/vermin unworthy of life), mainly Jews and Slavs, and by indifference to evil resulting from the deliberate destruction and distortion of moral principles. The National Socialist authorities 'bought' social peace and political support thanks to extensive social programs, including reducing unemployment as a result of the expansion of the arms industry. This development was underpinned by a dictatorial system of governance, including an extensive police apparatus and concentration camps.

The scale and scope of World War II, which extended across the entire continent (including Russia), meant that millions of Germans were implicated, directly or indirectly, in the criminal activities of the Third Reich: soldiers, police officers, civil servants, railway workers or an extensive (civil and military) administration apparatus in the occupied territories. Millions of deported forced labourers worked between 1939 and 1945 for the German state and its economy, including for churches in Germany. A great deal of participation was required to organize the Nazi system and keep it efficient. In other words, the war was not waged solely by the Nazi (*Hitlers clique*) or by soldiers alone.

Before 1939 and during the WWII, the obedience to the state and weak resistance among intellectuals was striking. If patriotism was supposed to be fulfilling duties and obeying orders, what should we think about the Scholl siblings who, at the risk of their lives, opposed the dictatorship?¹³⁹

¹³⁷ See D. Pick, *Brücken nach Osten. Helmut Schmidt und Polen*, Bremen 2011 (Studien der Helmut und Loki Schmidt – Stiftung, Band 7).

¹³⁸ Ansprache des Bundespräsidenten Richard von Weizsäcker zum 40. Jahrestag der Beendigung des Zweiten Weltkrieges am 8. Mai 1985 im Plenarsaal des Deutschen Bundestages: „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“.

¹³⁹ „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

The members of the resistance movement against Hitler¹⁴⁰ were not, however, initially, thought to be the right models to follow. For many years, the courts of the Federal Republic stigmatized members of the German resistance and deserters by denying them social benefits and rehabilitation.

As Anna Wolff-Powęska asks: did a wave of protests arise when German officials were determining who qualified as an Aryan?¹⁴¹

Ludwik Hirszfeld, a Polish scholar and a survivor of the Holocaust, wrote during the war:¹⁴²

Maybe those scholars did not want to murder us and loot our culture. Perhaps their fault lay merely in being superficial, vain, 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 would be too late to express regret.

Thomas Mann claimed in 1945, "How different everything would have looked if the Germans on their own had been able to free themselves?"¹⁴³

To conclude, the issues of guilt and responsibility are complex. Every nation must reckon with its past, a task that is not always easy.¹⁴⁴ Passivity and "loud silence" can lead to historical and political responsibility for evil. Dictators and criminals readily exploit public passivity and the *Realpolitik* of democracies – not only during World War II.

Addressing the Balkan tragedy, poet Czesław Miłosz wrote:¹⁴⁵

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.

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>

¹⁴⁰ J. Reiter, *Rede zum Stauffenberg-Attentat*, Berlin, 20. Juli 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 Deutschlands“ – <http://www.sueddeutsche.de/politik/janusz-reiter-zum-stauffenberg-attentat-deutschewiderstands-kaempfer-verachteten-polen-1.1418073>

¹⁴¹ A. Wolff-Powęska, *Niemiecki kłopot z niepamięcią*, „Gazeta Wyborcza”, 22 August 2009.

¹⁴² L. Hirszfeld, *Historia jednego życia*, Warszawa 2000, p. 523 /First Polish edition 1946; English translation: *The Story of One Life*, Rochester 2010/.

¹⁴³ T. Mann, *Deutsche Hörer! Radiosendungen nach Deutschland aus den Jahres 1940–1945*, Frankfurt am Main 2004 (4. Auflage), p. 154 (Sendung vom 8. November 1945).

¹⁴⁴ 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. 133); G. Ziemer, *Education for Death: The Making of the Nazi*, Oxford 1941.

¹⁴⁵ *Sarajevo* – Poem by Czesław Miłosz.

Chapter 5: An Apology for Resettlement?

Mitleid wollen wir grundsätzlich nur mit dem deutschen Volk haben, sonst mit niemandem auf der Welt.

Hans Frank¹⁴⁶

The Potsdam resettlement decisions (July–August 1945), later specified by the Allied Control Council in the plan of 20 November 1945, were adopted by the United States, the United Kingdom, the Soviet Union, and France. The support of Poland and Czechoslovakia played no decisive role.

Nevertheless, criticism and accusations voiced in Germany were directed primarily at Poland and the Czech Republic, accompanied by expectations that these countries – rather than the victorious Powers, and certainly not the Soviet Union or Russia – should apologize.

Polish writer Stefan Chwin, living in Gdańsk and well known in Germany (author of *Tod in Danzig*), recalls several conversations with German interlocutors:¹⁴⁷

I explained that my parents, resettled from their hometowns by the Germans and Russians, had bought this house from the Polish state with their life savings. To which he replied: ‘Property bought from a fence is no property at all. It is property that is against international law, human rights and European Union law. When you enter the Union, something will have to be done about it!’. Curiously, this man did not demand that the Russia return my father’s house in Vilnius, which had been taken from him after the war.

During a discussion with Peter Glotz at the Berlin Academy of Sciences, Chwin observed a similar asymmetry: Glotz spoke passionately about the suffering of resettled from Pomerania, Silesia, and the Sudetenland, yet did not mention German property located “temporarily” under Russian administration in the Kaliningrad district. The focus remained exclusively on expulsions attributed to Poles and Czechs, with repeated references to the Beneš decrees.

5.1. The question of German resettlement became the subject of numerous publications in Poland after 1989, including documentary works.¹⁴⁸ In the mid–1990s, a broad media debate emerged around a central question: should Poles apologize for the resettlement?

Terms such as regret, apology, forgiveness, and reconciliation entered the debate.¹⁴⁹ These concepts may have an individual dimension (between perpetrator and victim) or a collective one (between states, nations, or social groups). Despite certain similarities, these dimensions must be distinguished because of their specific characteristics. Here we focus on the collective aspect, leaving aside individual guilt and punishment, and referring instead to historical and political responsibility.

¹⁴⁶ “We want to have compassion only for the German nation, and beyond that for no one” – Hans Frank, Rede des Generalgouverneurs auf einer Tagung der Regierung des Generalgouvernements über den Plan zur Massenvernichtung der jüdischen Bevölkerung, in: A.K. Kunert (ed.), *Polacy – Żydzi. Polen – Juden. Poles – Jews. Wybór źródeł. Quellenauswahl. Selection of documents*, Warszawa 2001, p. 486.

¹⁴⁷ S. Chwin, *Szczęście wypędzonych*, „Tygodnik Powszechny” 39/2003 (28. September 2003).

¹⁴⁸ See fn. 87.

¹⁴⁹ 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. 100), pp. 135–156; K. Wigura, *Wina narodów: przebaczenie jako strategia prowadzenia polityki*, Warszawa–Gdańsk 2011; J. Renner, ‘I’m sorry for apologising’: Czech and German apologies and their perlocutionary effects, „Review of International Studies”, vol. 37 (2011), pp. 1579–1597; V. Jankélévitch, *Le Pardon*, Paris 1967; *id.*, *Pardonnez?*, 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”, Vol. 49/4 (2001), pp. 749–766.

Polish distinguishes between *bezprawie* (illegality/unlawfulness) and *krzywda* (harm/wrong), whereas German uses a single term, *Unrecht*, which depending on context may denote illegality or moral wrong. This ambiguity influences Polish-German debates.

Anna Wolff-Powęska writes:¹⁵⁰

Forgiveness must be preceded by mature reflection, being aware of one's own guilt and understanding that without forgiveness there is no possibility of change. (...) Forgiving is directed toward the past. 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 oriented toward the future and expresses responsibility for the peaceful coexistence of future generations. It is a departure from focusing on yourself and turning oneself toward the general good.

Collective forgiveness concerns wrongs committed by one group against another, usually assuming public acknowledgment of wrongdoing and remorse. Forgiveness does not imply forgetting or the expiry of moral claims. Reconciliation arises from social need and concern for the future. These actions have moral and political dimensions, not financial or material ones (as in reparations or restitution).

Dialogue does not require full agreement on historical interpretation. However, one must agree with Gesine Schwan that the psychological and moral consequences of silence harm future generations.¹⁵¹ Forgiveness and reconciliation bear fruit only when grounded in broad social consensus, truthful dialogue, and approval by both sides. Otherwise, they remain empty slogans.

In relations between nations – such as Poles and Germans – responsibility cannot be balanced like an equation. Wrongdoing does not cancel out wrongdoing.

Thus, several questions remain open: Are some crimes unforgivable?¹⁵² Must forgiveness be preceded by remorse? Is reconciliation possible without forgiveness? Does forgiveness always lead to reconciliation? Can forgiveness exclude punishment? Can one forgive on behalf of others?

Christian forgiveness does not wait for repentance. In 1965, Polish Catholic bishops offered forgiveness without waiting for German apology – an evangelical gesture with profound political and moral consequences.

5.2. For Polish-German relations after 1945, initiatives by civil society – especially churches – were crucial.¹⁵³

One of the earliest documents was the 1945 statement of the German Evangelical Church:¹⁵⁴

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

¹⁵⁰ A. Wolff-Powęska, *Wielki dar przebaczenia*, „Gazeta Wyborcza”, 12–13 November 2005.

¹⁵¹ G. Schwan (fn. 149).

¹⁵² See S. Wiesenthal, *Die Sonnenblume*, Gerlingen 1982; see also Czech film *Coach to Vienna* (Czech: *Kočár do Vídně*, in USA released as *Carriage to Vienna*) directed by Karel Kachyňa (1966).

¹⁵³ U. Pękala, *Versöhnungsasymmetrien. Die deutsch-polnische und die deutsch-französische Versöhnung nach dem Zweiten Weltkrieg*, in: *Perspektiven eines Dialogs. Studien zu deutsch-polnischen Transferprozessen im religiösen Raum*, A. Chylewska-Tölle (Hrsg.), Berlin 2016, p. 83–98; G. Feindt, *Zwischen „Recht auf Heimat“ und Versöhnung: Die Kirchen in der Bundesrepublik und ihr Verhältnis zu Polen 1956 bis 1965*, „Zeitschrift für Ostmitteleuropa-Forschung“ 58 (2009), H. 4, p. 433–467; B. Kerski, *Die Rolle nichtstaatlicher Akteure in den deutsch-polnischen Beziehungen vor 1990*. Wissenschaftszentrum Berlin für Sozialforschung, Januar 1999. See also E. Osmańczyk, *Sprawy Polaków*, Katowice 1946.

¹⁵⁴ *Erklärung des Rates der Evangelischen Kirche in Deutschland gegenüber den Vertretern des Ökumenischen Rates der Kirchen vom 19. Oktober 1945* (Stuttgarter Schuldbekennntnis) /Statement by the Council of the Protestant Church in Germany to the Representatives of the Ecumenical Council of Churches, Stuttgart, October 19, 1945/: „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 Ausdruck gefunden hat; aber wir klagen uns an, dass wir nicht mutiger bekannt, nicht treuer gebetet, nicht fröhlicher geglaubt und nicht brennender geliebt haben“.

this visit because we know that we, along with our people, are not only in a community of suffering, but also in a solidarity of guilt. It causes us great anguish to state that we have brought 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.

Heinrich August Winkler recalled in 2009 that this confession met with opposition, as many feared it confirmed the Allied thesis of German collective guilt:¹⁵⁵

When the Council of the Evangelical Church in Germany spoke of a 'solidarity of guilt' between church and people in the 'Stuttgart Confession of Guilt' in October 1945, this also met with widespread opposition within the church. The sentence: 'We have brought unending suffering upon many peoples and many countries' was considered as an inappropriate confirmation of the Allied thesis of German 'collective guilt'. The most terrible of all crimes against humanity committed by National Socialism, the murder of around six million European Jews, was not expressly mentioned in the 'Stuttgart Confession of Guilt'.

On 16 October 1960, Cardinal Julius Döpfner, bishop of Berlin, broke a taboo by acknowledging that Germany must bear heavy sacrifices for peace¹⁵⁶.

He preached in St. Edward's Church:¹⁵⁷

The German people can achieve peace only through very great sacrifices. It would be a momentous self-deception to assume that a people do not have to pay too much for a policy such as that which that regime has pursued towards other peoples. (...) For the future, the community of peoples and states is more important than border issues. A distressed past teaches that in many cases the national borders cannot exactly correspond to the nationality. (...) The injustice [*Unrecht*] that has been done in the name of the German people is answered by the sacrifice of our expellees and refugees, affirmed in the spirit of Christ, which they take upon themselves for us all and which we want to bear with them through our brotherly love and help.

¹⁵⁵ Ansprache von Professor Dr. Heinrich August Winkler vom 8. Mai 2009 (70. Jahrestag des Endes des Zweiten Weltkrieges in Europa – Gedenkstunde im Plenarsaal des Deutschen Bundestages): „Als der vorläufige Rat der Evangelischen Kirche in Deutschland im Oktober 1945 im „Stuttgarter Schuldbekenntnis“ von einer „Solidarität der Schuld“ zwischen Kirche und Volk sprach, stieß das auch innerhalb der Kirche auf verbreiteten Widerspruch. Als unangebrachte Bestätigung der alliierten These von einer deutschen „Kollektivschuld“ galt vor allem der Satz: „Durch uns ist unendliches Leid über viele Völker und Länder gebracht worden.“ Vom schrecklichsten aller Menschheitsverbrechen des Nationalsozialismus, der Ermordung von etwa sechs Millionen europäischen Juden, war im „Stuttgarter Schuldbekenntnis“ nicht ausdrücklich die Rede“ – <https://www.bundesregierung.de/breg-de/suche/8-mai-70-jahrestag-des-endes-des-zweiten-weltkrieges-in-europa-gedenkstunde-im-plenarsaal-des-deutschen-bundestages-ansprache-von-professor-dr-heinrich-august-winkler-805330>

¹⁵⁶ R. Żurek, *Gescheiterter Vorstoß?: die Predigt des Berliner Kardinals Julius Döpfner vom 16. Oktober 1960 und ihre Folgen*, Religion, Staat, Gesellschaft, 2013, Vol. 14/2, pp. 223–245; H. Stehle, *Der Briefwechsel der Kardinäle Wyszyński und Döpfner im Deutsch-Polnischen Dialog von 1970–1971*, „Vierteljahrshefte für Zeitgeschichte“, 1983, Vol. 31/3, pp. 536–553; H. Stehle, *Seit 1960 Der mühsame katholische Dialog über die Grenze*, in: W. Plum (Hrsg.), *Ungewöhnliche Normalisierung: Beziehungen der Bundesrepublik Deutschland zu Polen*, Bonn 1984, pp. 155–178.

¹⁵⁷ Kardinal Julius Döpfner, Bischof von Berlin, Predigt am 16. Oktober 1960 in der St. Eduardkirche: „Das deutsche Volk kann nach allem, was in seinem Namen geschehen ist, den Frieden nur unter sehr großen Opfern erlangen. Es wäre eine folgenschwere Selbsttäuschung, anzunehmen, daß ein Volk eine Politik, wie sie jenes Regime gegenüber anderen Völkern betrieben hat, nicht hoch begleichen muß. (...) Für die Zukunft ist die Gemeinschaft der Völker und Staaten wichtiger als Grenzfragen. Eine notvolle Vergangenheit lehrt, daß in vielen Fällen die Staatsgrenzen dem Volkstum nicht genau entsprechen können. (...) Dem Unrecht, das im Namen des deutschen Volkes geschehen ist, antworte das im Geiste Christi bejahte Opfer unserer Heimatvertriebenen und Flüchtlinge, das sie für uns alle auf sich nehmen und das wir durch unsere brüderliche Liebe und Hilfe mit ihnen tragen wollen“.

This sermon came only three months after Chancellor Konrad Adenauer clearly stated:¹⁵⁸

The annexation of the German eastern territories and the expulsion of the German population are serious violations of international law. (...) The decision on the German eastern territories can only be made in a peace treaty concluded with an all-German government. And until this treaty is concluded, nobody is entitled to decide on this part of Germany”

In 1961, eight prominent West German intellectuals declared:¹⁵⁹

We cannot absolve any of the political parties from the reproach that they repeatedly withheld the truth from the people. (...) In this situation it was a dubious way to resolve the human rights-based demand for the maintenance of freedom in West Berlin and for the self-determination of Germans in the GDR with the national concern not only of reunification, but also of the restoration of the borders of 1937. The international discussion of the last few months has shown that our indispensable rights have been cast into a dubious light by this policy in the world public. (...) The freedom of the people living in Berlin is a right recognized by the whole world, but the national concern of reunification in freedom cannot be enforced today, and we have to give up our claim of sovereignty over the areas beyond the Oder-Neisse line.

The memorandum of the German Evangelical Church (October 19, 1965) stated:¹⁶⁰

The expulsion of the German population from the eastern territories, and the fate of those territories, form part of the great tragedy (*Unglück*) – a fault of the German nation against itself and other nations. This guilt cannot be isolated. (...) The legal positions mutually limit each other, law (*Recht*) 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

¹⁵⁸ Bundeskanzler Konrad Adenauer. Ansprache anlässlich des Bundestreffens der Landsmannschaft Ostpreußen in Düsseldorf am 10. Juli 1960: „Die Annexion der deutschen Ostgebiete und die Vertreibung der deutschen Bevölkerung sind schwere Verletzungen des Völkerrechts. (...) Die Entscheidung über die deutschen Ostgebiete kann nur in einem mit einer gesamtdeutschen Regierung abgeschlossenen Friedensvertrag getroffen werden. Und bis dieser Vertrag geschlossen ist, ist niemand berechtigt, über diesen Teil Deutschlands zu entscheiden“; Sprecher der Landsmannschaft Ostpreußen Dr. Alfred Gille, Düsseldorf am 10. Juli 1960: „Wir sind der Meinung, daß es niemals eine deutsche Bundesregierung geben kann, die in der Lage wäre, auch nur Teile unseres deutschen Heimatbodens im Osten preiszugeben und ihre Unterschrift unter einen Verzicht zu setzen. Eine solche Bundesregierung würde niemals mehr den notwendigen Glauben und das Vertrauen im Volke finden, welches notwendig ist, um ihre Führungsfunktionen wahrzunehmen“.

¹⁵⁹ *Das Memorandum der Acht* – Tübingen, den 6. November 1961 (Text in: „Die Zeit“, 2. März 1962, Nr. 9/1962): „Wir können keine der politischen Parteien von dem Vorwurf freisprechen, daß sie dem Volk die Wahrheit, die es wissen muß, vielfach vorenthalten und stattdessen gesagt haben, wovon sie meinten, daß man es gern hört. (...) In dieser Lage war es ein bedenklicher Weg, die auf die Menschenrechte gegründete Forderung nach Aufrechterhaltung der Freiheit in Westberlin und nach der Selbstbestimmung der Deutschen in der DDR mit dem nationalen Anliegen nicht nur der Wiedervereinigung, sondern darüber hinaus der Wiederherstellung der Grenzen von 1937 zu verknüpfen. Die internationale Diskussion der letzten Monate hat gezeigt, daß auch unsere unabdingbaren Rechte durch diese Politik in der Weltöffentlichkeit in ein zweifelhaftes Licht gerückt worden sind. (...) Wir sagen nichts Neues, wenn wir die Ansicht aussprechen, daß zwar die Freiheit der in Berlin lebenden Menschen ein von der ganzen Welt anerkanntes Recht ist, daß aber das nationale Anliegen der Wiedervereinigung in Freiheit heute nicht durchgesetzt werden kann, und daß wir den Souveränitätsanspruch auf die Gebiete jenseits der Oder-Neiße-Linie werden verloren geben müssen“ – Rechtsanwalt Hellmut Becker; Präses D. Dr. Joachim Beckmann; Intendant D. Klaus von Bismarck; Professor Dr. Werner Heisenberg; Dr. Günter Howe; Dr. Georg Picht; Professor Dr. Ludwig Raiser; Professor Dr. Carl-Friedrich Freiherr von Weizsäcker.

¹⁶⁰ *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“.

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.

The Pastoral Letter of the Polish Bishops to their German Brothers of 18 November 1965 remains a milestone.¹⁶¹ It acknowledged German suffering, emphasized Poland's existential need for secure borders, and concluded with the famous words:

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 at the same time very human spirit, we extend our hands to you (...) granting forgiveness and asking for forgiveness.¹⁶²

The German bishops' response proved rather reserved: it lacked detail regarding the Polish-German border and offered no unequivocal stance on the call for mutual forgiveness.¹⁶³ As a matter of fact, the German Episcopate hid behind the legal and political position of the Federal Republic authorities, which (compared with the Polish bishops) was not so courageous and not so farsighted.¹⁶⁴

¹⁶¹ Text in Polish – http://www.opoka.org.pl/biblioteka/W/WE/kep/oredzie-niem_18111965.html; German version: Hirtenbrief der polnischen Bischöfe an ihre deutschen Amtsbrüder vom 18. November 1965 und die Antwort der deutschen Bischöfe vom 5. Dezember 1965 – http://berlin.msz.gov.pl/de/bilaterale_zusammenarbeit/deplbeziehungen/deplzusammenarbeit/hirtenbrief_der_polnischen_bischofe_an_ihre_deutschen_amtsbruder_vom_18_november_1965_und_die_antwort_der_deutschen_bischofe_vom_5_dezember_1965

¹⁶² „In this most Christian and at the same time very human spirit, we extend our hands to you in the benches of the Council that is coming to an end, granting forgiveness and asking for forgiveness” [pl: *W tym jak najbardziej chrześcijańskim, ale i bardzo ludzkim duchu, wyciągamy do Was, siedzących tu, na ławach kończącego się Soboru, nasze ręce oraz udzielamy wybaczenia i prosimy o nie.*].

¹⁶³ „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* (hrsg. von der Pressestelle der Deutschen Bischofskonferenz), Bonn, April 1996, pp. 54–56.

¹⁶⁴ See B. Kerski, T. Kycia, R. Żurek, „Przebaczamy i prosimy o przebaczenie”. *Oređzie biskupów polskich i odpowiedź niemieckiego episkopatu z 1965 roku. Geneza, kontekst, spuścizna*, Olsztyn 2006; J. Rydel, *Nowe elementy mozaiki. Nieznane niemieckie dokumenty dyplomatyczne o Liście Biskupów z 1965 roku*, „Więź”, January 2011, pp. 101–110; F. Boll (Hrsg.), „Wir gewähren Vergebung und bitten um Vergebung“. *40 Jahre deutsch-polnische Verständigung*, Friedrich-Ebert-Stiftung 2006 (Gesprächskreis Geschichte, Heft 68).

The memorandum of German Catholic intellectuals (1968) contains the following passage:¹⁶⁵

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

Somewhat later, on the Polish side, opposition activist and literary scholar Jan Józef Lipski¹⁶⁶ wrote in 1981:¹⁶⁷

We took part in depriving millions of people of their homeland – some of whom were surely guilty of supporting Hitler, others guilty only of passively accepting his crimes, and still others simply unable to find the courage to resist his monstrous machinery 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 when it is the 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 eyes of humanity, we are the custodians of these cultural achievements. It obligates us to protect these cultural treasures for the future, also our future, with the full awareness of the fact that we are protecting German culture, without any mistruths or silence in this area.

Magdalena Grzebałkowska recalls in this context the ‘original way’ in which the German army treated the cultural heritage of the city of Breslau, which was transformed in 1945 into a *Festung* (fortress) defended hopelessly until the last days of the war:¹⁶⁸

In March [1945], the Germans introduce a new combat tactic, which they call *toten Räume* (dead zone). They forcibly evacuated the residents of the suburbs within moments and set fire to their tenement houses. They demolish churches and monuments. The Russians do not give up. (...) Airplanes bring supplies to the city. In total, they bring 1,638 tons of supplies, mainly ammunition. When the city's main airport in Gandau is threatened, Gauleiter Hanke comes up with the idea of building a new one in the center of Breslau. He is supported by the next commander of the Festung Breslau, Hermann Niehoff. (...) Numerous buildings and offices were dynamited and cleared by the civilian population. Three thousand

¹⁶⁵ *Ein Memorandum deutscher Katholiken zu den polnisch-deutschen Fragen* (Das Bensberger Memorandum) vom 2. März 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.“

¹⁶⁶ Jan Józef Lipski (1926–1991) was a Polish scholar, literature historian and politician. As a soldier of the Home Army (Armia Krajowa), he fought in the Warsaw Uprising (1944).

¹⁶⁷ Essay by Jan Józef Lipski *Dwie ojczyzny, dwa patriotyzmy*, 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.

¹⁶⁸ M. Grzebałkowska, 1945. *Wojna i pokój*, Warszawa 2015, pp. 245–246.

people, including children, will die during work on the new airport. (...) On May 2, Berlin capitulates. Commander Niehoff surrenders Festung Breslau four days later.

Neither Polish nor German voices from the Catholic church received an unambiguous reception and both were met with harsh criticism. Lipski's voice did not find a wide echo 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:¹⁶⁹

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.

During the same meeting, Bishop Joseph Homeyer observed:¹⁷⁰

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

In 1995, on the thirtieth anniversary of the exchange of letters, Polish and German bishops met and released the following statement:¹⁷¹

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.

¹⁶⁹ Speech of Cardinal Józef Glemp, Primate of Polish Catholic Church, at the meeting of Polish and German bishops, Gniezno, 20–22 November 1990, „Tygodnik Słowa” (Powszechnego), 13 December 1990.

¹⁷⁰ Ansprache von Bischof Homeyer in der Feierstunde am 21. November 1990 im Rahmen des deutsch–polnischen Bischofstreffens in Gnesen, in: *Deutschland und Polen* (fn. 163), 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?“

¹⁷¹ 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 December 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 resettlement, not forgetting, however, the complex causation and succession of events.

Finally, let us note a bold analysis of the role of the Catholic Church in Germany¹⁷² It was presented by the German Bishops’ Conference to mark the 75th anniversary of the end of the War.¹⁷³

In order to enable us to live together in peace, the European House needs a culture of dialogue and of respect for people’s suffering. The sound of empathy, sorrow and reflectiveness should be more determining for us than the shrill tones of mutual accusations. [p. 11] Despite Her distanced internal stance towards National Socialism, and at times even open opposition, the Catholic Church in Germany was part of the war society. [p. 12] Any open protest on the part of the German bishops against the National Socialist war of annihilation was conspicuous by its absence, both in September 1939 and after that period. The Church’s traditional view of war and the national awareness clashed with the doubts that had arisen. Virtually no one in the Church in Germany raised a voice against the outrageous crimes committed against Others who were the object of discrimination as “racially alien”, and were persecuted, these being Jews in particular. [p. 14] They failed to address the diabolic entanglements in the crimes and the resulting hardships. What is more, they share in the guilt for the War, given that the bishops did not say an unambiguous “No”, but that most of them strengthened the will to persevere. [p. 15]

5.3. After the fall of Communism in 1989, Krzysztof Skubiszewski, Minister of Foreign Affairs, addressed the issue of reconciliation:¹⁷⁴

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

¹⁷² *Bischöfe, haben Sie endlich den Mut zur Wahrheit!* Brief von Prof. em. Dr. Heinrich Missalla an die deutschen katholischen Bischöfe zum 80. Jahrestag des Kriegsbeginns: „Nach nunmehr 80 Jahren ist es hoch an der Zeit, auch zur Unterstützung des Hitler–Krieges durch unsere damalige Kirchenleitung Stellung zu nehmen. (...) Zahllose Menschen erfuhren während des Krieges Stärkung und Trost durch ihre Bischöfe, die ihnen zusicherten, dass sie mit ihrer Opfer– und Todesbereitschaft ganz dem Willen Gottes folgten. (...) Wir müssen heute aber feststellen, dass sie die Gläubigen unter Inanspruchnahme ihrer geistlichen Autorität verpflichtet haben, in einem ungerechten Krieg ihre angebliche Pflicht zu erfüllen.“

¹⁷³ The German bishops in the World War. Statement on the end of the Second World War 75 years ago, April 29, 2020 – https://www.dbk.de/fileadmin/redaktion/diverse_downloads/presse_alt/presse_2020/2020-04-29_DB_107_Englisch.pdf

¹⁷⁴ Speech of the Foreign Minister, Krzysztof Skubiszewski, Berlin, 5 October 1990, text in: *Deutsches Helsinki Menschenrechtskomitee e. V., Internationales Symposium „Europa auf dem Wege zu neuen Institutionen“*, 5.–6. Oktober 1990, Berlin, bearb. v. Hartwig Bierhoff, Bonn 1991, p. 61. In this vein also K. Skubiszewski’s exposé of 26 April 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. September 1990 – both in: K. Skubiszewski (fn. 80), pp. 49 and 91.

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.

The President of the Polish Republic, Lech Wałęsa, in his speech marking the 50th anniversary of the Warsaw Uprising¹⁷⁵, stated in the presence of Roman Herzog, the President of the Federal Republic of Germany:¹⁷⁶

Our nations were divided by a sea of blood. It also includes the blood of the Warsaw Uprising [1944]. Across this sea there is a long distance between 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 neighbours. It has happened many times in history. I believe that it will happen again. It has to happen again.

In reply the President Herzog, declared:¹⁷⁷

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.

Władysław Bartoszewski commented on this statement as follows:¹⁷⁸

Courageous 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 sceptics 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.

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 note that before Herzog's visit to Warsaw (1994), no other representative of the highest German authorities had ever been invited to any celebrations connected with the events of the Second

¹⁷⁵ Around 150.000 civilians and around 20.000 Polish combatants were killed in the Warsaw Uprising (1 August – 2 October 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; *Rede Heinrich Himmlers von den Wehrkreisbefehlshabern und Schulkommandeuren*, Jägershöhe, 21. September 1944: „Ich habe gleichzeitig den Befehl gegeben, daß Warschau restlos zerstört wird. Sie können sich nun denken, ich sei ein furchtbarer Barbar. Wenn Sie so wollen: ja, das bin ich, wenn es sein muß. Der Befehl lautete: Jeder Häuserblock ist niederzubrennen und zu sprengen, so daß sich in Warschau keine Etappe nicht mehr festnisten kann“ – <https://archive.org/details/19440921HeinrichHimmlerRedeVorWehrkreisbefehlshabernUndSchulkommandeurenInJaegerhoehe1h53m>

¹⁷⁶ „Gazeta Wyborcza“, 2 August 1994, p. 4.

¹⁷⁷ Ansprache von Bundespräsident Roman Herzog anlässlich des Gedenkens an den 50. Jahrestag des Warschauer Aufstandes am 1. August 1994 in Warschau: „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“.

¹⁷⁸ Gedenken an das Ende des Zweiten Weltkrieges und der nationalsozialistischen Gewaltherrschaft, Bonn, 28 April 1995 – Speech of the Foreign Minister, Władysław Bartoszewski (https://www.bundestag.de/parlament/geschichte/gastredner/bartoszewski/rede_bartoszewski-245134).

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.

Germany 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:¹⁷⁹

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 displaced 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.

Minister Bartoszewski held the same views as Jan Józef Lipski and Krzysztof Skubiszewski – and just like them, expressed his regrets over the fate of the “innocent Germans touched by the consequences of the war,” but 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 January 2002 on the occasion of the Remembrance Day for the Victims of National Socialism:¹⁸⁰

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. (...)

¹⁷⁹ Ibidem.

¹⁸⁰ German text in: <http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=815&id=1062>; Polish translation in “Gazeta Wyborcza”, 21 July 2008.

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.

The 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 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 responsibility 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.¹⁸¹

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.¹⁸²

¹⁸¹ Rede des Bundespräsidenten Frank–Walter Steinmeier bei der Gedenkfeier der Republik Polen zum 80. Jahrestag des Beginns des Zweiten Weltkriegs am 1. September 2019 in Warschau: „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“.

¹⁸² Rede des Bundespräsidenten Frank–Walter Steinmeier bei der Gedenkfeier zum 80. Jahrestag des Beginns des Zweiten Weltkrieges in der Stadt Wieluń am 1. September 2019: „In dieser Stunde vor 80 Jahren brach das Inferno über Wieluń herein, 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“.

5.4. In a similar climate, opinions and statements concerning the Polish–Russian¹⁸³ (including the Katyn massacre¹⁸⁴) and Polish–Ukrainian¹⁸⁵ relations (including the Volhynia massacre and the Operation Vistula¹⁸⁶) should be noted.

Polish columnist Jan Błoński¹⁸⁷ commented on the attitude of Poles to the extermination of Jews (Holocaust) during the Second World War as follows:¹⁸⁸

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

¹⁸³ 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 August 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.”

¹⁸⁴ See ECHR. *Janowiec and Others v. Russia* (Applications nos. 55508/07 and 29520/09), Judgments of 16 April 2012 (5th Section) and of 21 October 2013 (Grand Chamber); *The Katyn 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; A. Lityński, *Ludobójstwo: operacja polska NKWD (1937–1938). Uchwała Biura Politycznego KC WKP(b) oraz rozkazy szefa NKWD ZSRR /Genocide: Polish operation of the NKVD (1937–1938). Politbureau CK WKP(b) Resolutions and the NKVD chief's commands/*, *Studia Iuridica Lublinensia*, vol. 19 (2013), p. 181–200.

¹⁸⁵ As to Polish–Ukrainian relations, see Lubomir Husar, Metropolitan of the Ukrainian Greek Catholic Church (June 27, 2001): “The history of our Church in the past century has also known dark and spiritually tragic moments. These consisted in the fact that some sons, and I emphasize some sons and daughters of the Ukrainian Greek Catholic Church, to our great sorrow, knowingly and willingly harmed their neighbours, whether from their own nation or from other nations. For all of them, in your presence, Holy Father, I wish, in the name of the Ukrainian Greek Catholic Church, to ask forgiveness from the Lord, the Creator and Father of us all, and also for forgiveness from those whom we, the sons and daughters of our Church, have in some way wronged, so that the terrible past no longer weighs on us and complicates our lives. We willingly forgive those who have in some way wronged us as well.”

See also *Wspólna rzymskokatolicko–greckokatolicka deklaracja w sprawie zbrodni wołyńskiej* (28 June 2013) /A joint Roman Catholic – Greek Catholic declaration on the Volhynia crime/: “We know that a Christian judgment of the Wolyn 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 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*.” 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 Wolyn tragedy* (“Gazeta Wyborcza”, 18 March 2013) and *The Letter on Reconciliation of the Polish and Ukrainian Bishops*, (“Gazeta Wyborcza”, 19 June 2005).

¹⁸⁶ Operation Vistula was a codename for the 1947 forced resettlement by Polish authorities of the Ukrainian minority from the southeastern provinces of post-war Poland to former German territories obtained in the West as a result of the Potsdam decisions. 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. See G. Motyka, *Akcja „Wisła” ’47. Komunistyczna czystka etniczna*, Kraków 2023; K. Persak, *Akcja „Wisła” – próba kwalifikacji prawnej /Operation Vistula: An attempt at legal qualification/*, “*Studia Polityczne*”, 2018, t. 46, nr 1, s. 24–54; J. Pisiuliński, *Akcja specjalna „Wisła”*, Rzeszów 2017; E. Misiło (ed.), *Akcja „Wisła”, Dokumenty*, Warszawa 1993 (second ed. Warszawa 2012); E. Misiło (ed.), *Repatriacja czy deportacja. Przesiedlenie Ukraińców z Polski do ZSRR 1944–1946*, t. 1 – Dokumenty 1944–1945, Warszawa 1996; t. 2, Dokumenty 1946, Warszawa 1999.

¹⁸⁷ 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.

¹⁸⁸ J. Błoński, *Biedni Polacy patrzą na getto*, “Tygodnik Powszechny”, No. 2/1987 (11 January 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* (fn. 146); J. Tokarska-Bakir, *Pod klątwą. Społeczny portret pogromu kieleckiego*, Warszawa 2018; B. Engelking, J. Grabowski (eds), *Dalej jest noc. Losy Żydów w wybranych powiatach okupowanej Polski*, Warszawa 2018.

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 honour 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.

Polish President Lech Wałęsa, opening an official visit to Israel, appealed for forgiveness in an address to Israel's parliament, the Knesset (21 May 1991): "Here in Israel, in the cradle of our culture and your revival, I am asking your forgiveness. (...) We helped you as we could. Many of the Poles were righteous gentiles" but "there were also evil doers among us."

5.5. One of the consequences of the extreme politics of National Socialist Germany was the belief 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.

In this regard, a distinction must be made between individual guilt and the responsibility of states, as well as between cause and effect. During the flight and transfer of German population in 1944–1945 concrete crimes were committed against the resettled German population. This is a matter of criminal law and it is unacceptable to justify these behaviours with German wartime crimes. The blame should be put, first of all, on the individual perpetrators. At the same time, however, these crimes cast a shadow on the attitude of the Polish authorities, which 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." 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 November 1990) contains the formula:

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.

The post-war attitude of Polish public about the resettlement evolved over time.¹⁸⁹ Initially, resentment or even hatred toward Germans prevailed, together with indifference to evil. During the resettlement of the German population in the first years after the war, there was looting, rape and murder.¹⁹⁰ 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.¹⁹¹ In the mid 1950s, there was the

¹⁸⁹ See K. Ziemer (Hrsg.), *Versöhnung und Politik. Polnisch-deutsche Versöhnungsinitiativen der 1960er-Jahre und die Entspannungspolitik*, Bonn 2009; E. Dmtrów, *Niemcy i okupacja hitlerowska w oczach Polaków. Poglądy i opinie z lat 1945–1948*, Warszawa 1987.

¹⁹⁰ *Dokumentation der Vertreibung der Deutschen aus Ost-Mitteleuropa* (8 Bände).

¹⁹¹ M. Zaremba, *Wielka Trwoga. Polska 1944 – 1947. Ludowa reakcja na kryzys*, Kraków 2012; M. Grzebałkowska (fn. 168); M. Łuszczyna, *Mała zbrodnia. Polskie obozy koncentracyjne*, Kraków 2017. A. Stachowiak, *Niemieckie cmentarze na Ziemiach Zachodnich jako miejsca niepamięci*, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace Etnograficzne 2015 (vol. 43/2), pp. 123–140.

first mass exodus of Polish citizens of German origin to the Federal Republic – 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 in the Polish territories in the East. Public discourse was made difficult by the Polish communist regime, on the one hand, and by German legal positions on the other. 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.¹⁹² Politicians and societies, especially Christian circles, participated in this evolution. It is also impossible to underestimate the importance of the Polish–German treaties of 1990 and 1991. Over time, economic contacts and cooperation between societies have become more important.

The memory about the history of the western lands granted to Poland in Potsdam and the concern for their cultural legacy have now found Polish guardians, and this is happening, entirely in keeping with the above-mentioned wish of Jan Józef Lipski, without any untruths. To conclude, after 1989 the relations entered a completely new phase in which the memory of the past is no longer an obstacle to activities for the future.

In the Pomeranian village, Trzygłów/Trieglaff, the nest of the von Thadden family, since 2002 a bilingual sign can be seen with the inscription:¹⁹³

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.”

New accents appeared in the statement of *Landsmannschaft Schlesien* (2026)¹⁹⁴:

Because of the injustice (*Unrecht*) they experienced firsthand, those affected were all too often unable to adequately appreciate the suffering of others. Today, we are more aware that many of the people who arrived in Silesia at that time also had also endured a difficult fate, were sometimes themselves displaced persons (*Vertriebene*), and often looked back on bitter experiences with the German occupying forces. (...) We unreservedly acknowledge that the descendants of the families who came to Silesia after World War II have now made their home there. (...) This creates a natural connection between us.

¹⁹² O. Tokarczuk, *Świata jest za dużo*, Kraków 2026; Z. Rokita, *Odrzania. Podróż po ziemiach odzyskanych*, Kraków 2023; K. Kuszyk, *Poniemieckie*, Wołowiec 2019; J. Pytlakowski, *Ich matki, nasi ojcowie. Niewygodna historia powojennej Polski*, Poznań 2020; M. Zybura, *Niemieckie dziedzictwo kulturowe w Polsce w relacjach polsko-niemieckich w kontekście Traktatu dobrosąsiedzkiego z 1991 r.*, in: *Akt dobrosąsiedzki. 30 lat Traktatu polsko-niemieckiego o dobrym sąsiedztwie i przyjaznej współpracy* (ed. J. Barcz, K. Ruchniewicz), Wrocław–Warszawa 2021, p. 185–196; Pankiewicz A., Przybyłko M. (eds), *Nieswojość*, 2019.

¹⁹³ „*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“.

¹⁹⁴ „Berliner Erklärung“ der Landsmannschaft Schlesien, 12. Juni 2026: „Als Landsmannschaft haben wir aber auch Lernprozesse durchlaufen. Durch das am eigenen Leibe erfahrene Unrecht konnten die Betroffenen viel zu oft das Leid der anderen Seite nicht genügend würdigen. Heute machen wir uns stärker bewusst, dass auch viele der damals in Schlesien neuangekommenen Menschen ein schweres Schicksal hinter sich hatten, zuweilen selbst Vertriebene waren und häufig auf bittere Erfahrungen mit der deutschen Besatzungsmacht zurückblickten. (...) Wir erkennen vorbehaltlos an, dass die Nachkommen der Familien, die nach dem 2. Weltkrieg nach Schlesien kamen, sich inzwischen dort beheimatet haben und zu einem großen Teil Schlesien so lieben wie wir. Dies schafft eine natürliche Verbundenheit zwischen uns, die es uns erleichtert, zusammen mit den polnischen Schlesiern für unsere gemeinsame Heimat zu arbeiten“.

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

This territorial change can play a vital role in shaping social life in Central Europe; it may bring about a reversal in the great historical processes that have unfolded in this region.

Stanisław Ossowski¹⁹⁵

Adolf Hitler's primary objective was the destruction and annihilation of the enemy and the unleashing of unrestrained brutality. He openly declared that in the war he initiated, law was irrelevant and international conventions would not apply. Meanwhile, both after World War I and World War II, defeated Germany made international law its main political instrument.

From an individual perspective, the consequences of World War II – including border changes and the displacement of the German population – may be described as painful. However, the question arises whether the postwar decisions of the Four Powers, including the Potsdam Agreement, violated international law in force in 1945.

The general interest required not only punishing the perpetrators but also making far-reaching political decisions for the future. What could the German state and its people expect in 1945? Would Germany's defeat be any less total than its victory (Goebbels)? What would justice look like after „Jedem das Seine“ and „Arbeit macht frei“?

According to German political and legal doctrine, the decisions of the Allied Powers concerning the resettlement of the German population and the confiscation of their assets,¹⁹⁶ were illegal.¹⁹⁷

The official position of the United States and the United Kingdom, however, was and is that the Potsdam decisions “were soundly based in international law.”¹⁹⁸

6.1. In twentieth-century international politics – especially in its first half – population resettlement was an instrument recognized by law.¹⁹⁹ It was implemented through treaties ending international conflicts, particularly those involving national minorities.

¹⁹⁵ See fn. 31.

¹⁹⁶ J. Barcz, J. 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), pp. 625–650; *Gutachten zur Rechtslage des im heutigen Polen entzogenen Privateigentums Deutscher*, erstellt im Auftrag des Deutschen Bundestages von Univ.-Prof. Dr. Eckart Klein, Potsdam, 15. Februar / 4. April 2005.

¹⁹⁷ See Chapter 3.4.

¹⁹⁸ See fn. 111.

¹⁹⁹ *The human rights dimensions* (fn. 98); International Law Commission (Fifty-ninth session). *Third report on the expulsion of aliens by Mr. Maurice Kamto*, Special Rapporteur (A/CN.4/581, 19 April 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.”

These treaties envisaged forced resettlement (transfer)²⁰⁰ or included option clauses.²⁰¹ Criticism focused less on the resettlements themselves than on their criteria, their implementation, and their political effectiveness.²⁰² In the case of option clauses, “voluntary” choice was often shaped by pressure of circumstances.

The forced displacement of the population (approximately 3 million people) – known as (*Бежанство* / *Bezhanstvo*) – carried out by Tsarist authorities in 1915 from the eastern regions of the empire in the wake of the German army's offensive, was a large-scale event, albeit one that remains little known.

Population displacement was a measure applied by National Socialist Germany, not only in the context of the occupied territories but also to ethnic Germans under the *Heim ins Reich* policy or through their settlement in occupied areas.

For the Powers, it was clear that the Atlantic Charter of 1941 did not apply to defeated Germany.²⁰³ International legal responsibility for the war implies that the aggressor enjoy only limited protection under international law.

²⁰⁰ For example Convention between Turkey and Greece Concerning the Exchange of Greek and Turkish Populations, Lausanne 30th January 1923: “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”; 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, July 24, 1923 (Articles 32 and 142); see also L. Leontiades, *Der griechisch-türkische Bevölkerungsaustausch*, „Zeitschrift für ausländisches öffentliches Recht und Völkerrecht“, Bd. 5 (1935), pp. 546–576; U. Özsü, *Nation-Building, International Law, and the Greek–Turkish Population Exchange*, “Leiden Journal of International Law“, 2011/4, pp. 823–847.

²⁰¹ For example Treaty of Peace between the Allied and Associated Powers and Bulgaria, Neuilly-sur-Seine, 27 November 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, November 27th, 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“;

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, September 29, 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 of facilitating the transfer of population [*Austausch der Bevölkerung; les échanges de populations*] and settle questions of principle arising out of the said transfer.”

²⁰² M. Reinkowski, *Der lange Schatten von Lausanne*, „Neue Zürcher Zeitung“, 22. Juli 2023, p. 2: “Die Absurdität des Austauschs, der auf rein religiösen Kriterien basierte, springt ins Auge: Griechen aus Zentralanatolien, die sogenannten Karamanli, sprachen nur Türkisch; Muslime aus Kreta und der Umgebung von Ioannina waren nur des Griechischen mächtig. Der Bevölkerungsaustausch war für die betroffenen Menschen keine Repatriierung, sondern die Deportation in ein fremdes Land: Sie kamen in ein angebliches Heimatland, dessen Sprache und Kultur ihnen oft unvertraut waren“.

²⁰³ See Article 107 UN Charter.

6.2. To assess the legal regulation of population displacement,²⁰⁴ we must analyse the most important international documents, including rules in force at the end of World War II.

The overview below illustrates the range of specific regulations, which do not constitute a codification of customary law. These documents employ various terms – deportation, resettlement, expulsion – whose definitions were often ambiguous. Their application in political and legal practice differed. For example, humanitarian law norms concerning civilian displacement fall into three categories: occupied territory, international armed conflict, and non–international armed conflict.²⁰⁵

6.2.1. The first group of rules relate to the international law of military conflicts. Humanitarian law applies during armed conflict and obliges states to protect combatants, prisoners of war, and civilians. States must adopt national legislation to punish violations.²⁰⁶

Before 1939, international law contained no prohibition on forcible resettlement.²⁰⁷ The Hague Convention (IV) of 1907 and its annex (Regulations concerning the Laws and Customs of War on Land) did not address this issue.

The Geneva Conventions of 1949 distinguish between deportation, transfer, evacuation, and displacement. Those terms relate to various situations.

The most important provision is Article 49 of 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.²⁰⁸

This article provides:

Individual or mass forcible transfers [fr. *transferts forcés*], 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 [fr. *déplacement*] 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 [fr. *déportation ou transfert*] parts of its own civilian population into the territory it occupies.²⁰⁹

The Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 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 wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian

²⁰⁴ See Chapter 3.4.

²⁰⁵ 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”, Vol. 29 (2016), pp. 917–943.

²⁰⁶ Geneva Convention IV, Article 146.

²⁰⁷ See A. Prymaka–Oniszk, *Bieżeństwo 1915. Zapomniani uchodźcy*, Wołowiec 2016; P. Gatrell, *A Whole Empire Walking. Refugees in Russia during World War I*, Indiana 2005.

²⁰⁸ 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’. »

²⁰⁹ On the contemporary aspect of the application of Article 49, and especially its last sentence, see E. Kontorovich, E. Azerrad, *Settlers in Syria: Turkey’s Population Transfers and the Geneva Conventions*, 40 *Emory International Law Review* (2026), p. 535–564. V. Vozniuk, *Beyond Forcible Relocation: Article 49(6) and State–Facilitated Settlement in Occupied Territory*, August 26, 2026 – <https://www.ejiltalk.org/beyond-forcible-relocation-article-496-and-state-facilitated-settlement-in-occupied-territory/>; ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion of 19 July 2024.

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 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, provides:

Article 17.1. The displacement²¹⁰ 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. International criminal law developed through the Nuremberg Trials and later through tribunals for the former Yugoslavia and Rwanda.

Those rules 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 August 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 labour 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.²¹¹

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

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) does not identify the forced resettlement of population with genocide.²¹² In the doctrine and public commentaries the so-called ethnic cleansing is sometimes mentioned. Ethnic cleansing, however, is not a legal term²¹³ and can be understood as genocide only if committed with a special intent (*dolus specialis*) – “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.²¹⁴ The resettlement of the German population does not meet these criteria.

²¹⁰ 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’.

²¹¹ In this sense *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 1950.

²¹² “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.”

²¹³ International Criminal Court for the former Yugoslavia (ICTY). In Trial Chamber II. *Prosecutor v. Milomir Stakić* (Case No. IT-97-24-T), Judgement of 31 July 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. In the Trial Chamber. *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-T), Judgement of 24 March 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.”

²¹⁴ 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 February

The International Criminal Court for the former Yugoslavia (1993), had the jurisdiction to prosecute and punish individuals for “unlawful deportation or transfer” of civilians during international or non–international armed conflict.²¹⁵ The situation in the case of the International Criminal Court for Rwanda is similar, but with one difference, 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).²¹⁶ 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.²¹⁷

No differentiation appears to be made here between periods of armed conflict and times 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 [fr. *la déportation ou le transfert illégal ou la détention illégale*]; (...) (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

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.” See also European Court of Human Rights. *Jorgić v. Germany* (No. 74613/01), Judgment of 12 July 2007, para. 45.

²¹⁵ 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. [fr. *l’expulsion ou le transfert illégal d’un civil ou sa détention illégale*] (...) 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 [fr. *l’expulsion*].”

²¹⁶ 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 [fr. *l’expulsion*].”

²¹⁷ *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 September 2002, Article 7(1)(d). Crime against humanity of deportation or forcible transfer of population (p. 6).

the deportation or transfer [fr. *déportation ou transfert*] of all or parts of the population of the occupied territory within or outside this territory. (...) (e)(viii) Ordering the displacement [fr. *déplacement*] of the civilian population for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand.²¹⁸

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 transfer” as a crime against humanity if it is committed on a large scale and in a systematic manner.²¹⁹

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.²²⁰ The essence of the problem, however, remains the “unlawful” qualification – who makes it and on what basis, as well as the legal nature of such an assessment.

In humanitarian law and international criminal law, the most frequently used terms are “deportation” and “transfer,” and, where necessary, “evacuation” and “displacement.” According to some opinions, the distinction between deportation and transfer depends on whether the act is carried out within the territory of a state or across a border.²²¹ This view is not unchanging and tends to be

²¹⁸ *The Elements of Crimes* (fn. 217): “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”.

²¹⁹ 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 [fr. la déportation ou les transferts forcés].” 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.”

²²⁰ *Draft Declaration on Population Transfer and the Implantation of Settlers* (E/CN.4/Sub.2/1997/23, 27 June 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 August 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.”

²²¹ ICTY. Trial Chamber. *Prosecutor v. Radislav Krstić* (No. IT-98-33-T), Judgment of 2 August 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.”

questioned.²²² Both acts can have a permanent or temporary character in contrast to evacuation, for example, which has a temporary and humanitarian character.²²³

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 its own state, independently of an international armed conflict.²²⁴ 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 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 only supplementary and situational. Those norms are centred 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” (fr. *arrêté, détenu ou exilé*).

²²² ICTY. Trial Chamber II. *Prosecutor v. Milomir Stakić* (fn. 213): “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), Judgement of 18 December 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 Judgement, paras 217–223, *Stakić* Trial Judgement, paras 671–684 and *Krstić* Trial Judgement, paras 520–523”; ICTY. *Prosecutor v. Milomir Stakić* (No. IT-97-24-A), Judgement of the Appeals Chamber, 22 March 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 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’.”

²²³ *Prosecutor v. Milomir Stakić*, 2006 (fn. 222): “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.”

²²⁴ *Prosecutor v. Milomir Stakić*, 2006 (fn. 222): “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.”

The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR) of 1950 initially limited the issue to the question of deprivation of freedom.²²⁵ 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 [fr. *être expulsé*] 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 [fr. *expulsions collectives*] 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.²²⁶ Exceptions are included in Article 15 of the CPHR.²²⁷

Two other regional conventions (American and African), relating to the protection of human rights, are basically modelled on the CPHR.²²⁸

²²⁵ “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.”

²²⁶ 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 [fr. *expulsé*] 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.”

²²⁷ 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).

²²⁸ 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 [fr. *déplacement arbitraire*] 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

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 [fr. *être expulsé*] therefrom only in pursuance of a decision 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.²²⁹

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 [fr. *être éloigné, expulsé ou extradé*] 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 rules concerning the protection of human rights apply to times of peace and are centred 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 Draft Articles of the International Law Commission provide the following definition:²³⁰

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.

The terms “deportation” and “expulsion” are sometimes used interchangeably, but they are separate concepts in a legal sense.²³¹ 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 of refusal to obey an order. 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

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, May 22, 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.”

²²⁹ 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.”

²³⁰ ILC. *Draft articles on the expulsion of aliens, with commentaries* – 2014: (Article 2).

²³¹ ILC (Fifty-eighth session). *Expulsion of aliens. Memorandum by the Secretariat* (A/CN.4/565, 10 July 2006), paras 91–92, 179–184.

a threat to the public interest, public order or the security of a state.²³² In this context, providing certain premises are fulfilled, the expulsion of an alien is a legal act.²³³

While the question of expulsion is regulated by the rules protecting human rights, the norms of humanitarian law are silent on the issue of expulsion of aliens in times of armed conflict.²³⁴ As far as collective expulsion is concerned (without reviewing individual cases)²³⁵ the Draft Articles of the International Law Commission (ILC) on the expulsion of aliens prohibits such expulsion outside of armed conflict,²³⁶ although this prohibition is less clear in times of armed conflict.²³⁷ From the practice

²³² International Law Association. *Declaration of Principles of International Law on Mass Expulsion*, 62nd Conference of the ILA, Seoul, 24–30 August 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. 231), paras 68–73 (constructive expulsion).

²³³ *Draft articles on the expulsion of aliens* (fn. 230): “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.”

²³⁴ *Memorandum* (fn. 231). “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 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.”

²³⁵ *Memorandum* (fn. 231): “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.”

²³⁶ *Draft articles on the expulsion of aliens* (fn. 230): “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.”

²³⁷ *Draft articles on the expulsion of aliens* (fn. 230): “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 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.”

of states and international jurisprudence it follows that collective expulsion of aliens in times of armed conflict is legal.²³⁸ Such an expulsion, however, is not equivalent to deportation or transfer.

6.3. From a historical perspective, forced displacements have resulted from unilateral state decisions, treaty provisions, or collective sanctions.

In light of the international legal norms presented above, there is a clear tendency to limit the freedom of states in this regard. These norms aim to prevent deportations or transfers and expulsion of persons (including collective expulsions) as means of persecution or discriminatory treatment, especially in times of armed conflict.²³⁹

The discussed issues are regulated by the rules of humanitarian law, international criminal law and in treaties protecting human rights, but the scope of these regulations is not identical and these rules are not retroactive. They do not constitute customary international law and applying them retroactively to the Potsdam decisions of the Allied Powers is misguided. According to a well-established principle of international law, legal acts must be assessed in light of the law in force at the time they occurred.²⁴⁰

The report of a special UN commission attest that forced migrations of people take various forms, have various causes, and are not governed by any unified or universal international legal regulation.²⁴¹ The legality of any state action must therefore be evaluated in light of the specific factual circumstances and applicable 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.²⁴²

Memorandum (fn. 231): “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.”

²³⁸ 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, December 17, 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.”

²³⁹ 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.”

²⁴⁰ 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 April 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.”

²⁴¹ *The human rights dimensions* (fn. 98): “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.”

²⁴² On Israeli practice see Y. Dinstein (fn. 50), pp. 160–170.

Contemporary norms of humanitarian law indicate 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.

With respect to the prohibition of deportation or population transfer, the relevant rules – particularly those of international criminal law – are accompanied by qualifiers such as “forcible,” “arbitrary,” “unlawful,” or “without grounds permitted under international law.” This is an essential and not accidental 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 for expulsion, it is – unlike deportation or transfer – generally considered a lawful act.²⁴³ 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.²⁴⁴ Expulsion during an armed conflict is generally regarded as permissible, but from the legal point of view it is not identical to deportation or transfer.

In conclusion, international law has made progress in regulating forced displacements, although these regulations still require further development and supplementation.²⁴⁵

6.4. The transfer (resettlement) of the German population after the Second World War arose from 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 measure that met the criteria of proportionality and necessity?²⁴⁶

The Potsdam decisions were adopted by the Powers after assuming supreme authority in Germany and they constituted a manifestation of the Allies' rights and responsibilities (Germany's consent to the Allied decisions was not needed). The territorial changes of Germany and the transfer

²⁴³ See fn. 233. *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.”

²⁴⁴ See e.g. European Court of Human Rights. *Hirsi Jamaa and Others v. Italy* (No. 27765/09), Judgment of 23 February 2012; *Čonka v. Belgium* (No. 51564/99), Judgement of 5 February 2002.

²⁴⁵ V. Chetail, *The Transfer* (fn. 205), 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 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.”

²⁴⁶ 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 July 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.”

of populations were part of the general regulating of the effects of the Second World War. They were not rooted in an intention to exact revenge or punish German crimes. The purpose of the Allied Powers, acting in the general 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. The legal assessment of the Great Powers' decisions will continue to differ in Germany from the view taken by many other countries.

In 1945, the transfer of the German population was not prohibited under international law. It was not an instrument of war conduct and did not concern belligerent occupation, in terms of humanitarian law, but only temporary, specific, international post-conflict administration.

During the session of the *Institut de Droit international* (1952), assessments of the population transfers were not uniform, however the opinion prevailed that they are permissible in the extraordinary circumstances, when other measures to secure peace would be ineffective.²⁴⁷

These decisions can, to some extent, be compared to sanctions imposed 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).

6.5. Is it possible to determine responsibility for war in a just manner? 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 deliberately and wilfully breaks away from the international legal order, as Germany did in the times of Hitler, not only violates individual rights, 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 breach of the peace, the peace order and mutual respect for law must first 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 under which it is achievable.²⁴⁸

Driven by the delusional ambition of conquering Europe, Germany committed acts of aggression not only against Poland but also against many other countries. 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.

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 *status quo ante*. The resettlement of the German population was a consequence of the war, not its cause. 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 perspective of responsibility of the state and from the political-historical responsibility of the nation.

The Potsdam decisions were not merely an act of revenge and they must be perceived in a wider political perspective of European policy. The changes in borders and the transfers of population were

²⁴⁷ Institut de Droit international. *Les transferts internationaux de populations*, „Annuaire”, Vol. 44, No. 2 (1952), pp. 138–199. See also *Les transferts internationaux de populations*. Etudes et documents, Serie B 2, 1946 (Presses universitaires de France).

²⁴⁸ *Das Bensberger Memorandum* (fn. 165), 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“.

part of the general policy of the Four Powers, with the aim of 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 post-war 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.

The decades since the end of the Second World War confirm that the Allies' decisions laid the foundation for a secure Europe and for peaceful co-existence, including between the Poles and Germans. The previously quoted opinion of Stanislaw Ossowski²⁴⁹ seems to be insightful and farsighted. Even if it sounds provocative, Germany's loss of its eastern provinces did not make the country unstable, poorer or more vulnerable. 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 has not been forgotten, but the emphasis on both sides is on creating multilevel cooperation. With the worst behind us,²⁵⁰ 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 can be regarded as complete and as a success for both states and societies, whilst bearing in mind, however, that it requires the ongoing care of present and future generations. The old demons have shallow graves.

Polish–German relations have followed the historical trail from *Ostsiedlung*, *Ostflucht*, *Ostschutz*, *Ostkunde*, *Ostforschung*, *Ostinstitute*, *Saisonstaat*, *Generalgouvernement*, *Generalplan Ost*, *Ostfront*, *Ostrausch*, *Ost-Dokumentation*, *Ostblock* and *polnische Wirtschaft* 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.

²⁴⁹ See fn. 31.

²⁵⁰ 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*, 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 (Hrsg.), *Deutsch-polnische Beziehungen 1939 – 1945 – 1949. Eine Einführung*, Osnabrück 2000; M. Tomala (fn. 69); id., *Polityka i dyplomacja polska wobec Niemiec – t. I (1945–1970), t. II (1971–1990)*, Warszawa 2006.

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