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

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

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

INTRODUCTION

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

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

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

1. THE NOTION OF REPARATIONS UNDER INTERNATIONAL LAW

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

2. THE HISTORICAL DEVELOPMENT

2.1. 8/9 May 1945

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

2.2. Potsdam Agreement of 1945

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

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

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

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

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

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

2.3. London Debt Agreement of 1953

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

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

2.4. Protocol of 1957

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

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

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

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

2.5. Polish-German Treaty of 1970

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

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

2.6. The 2+4 Treaty of 1990

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

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

2.7. The Charter of Paris of 1990

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

2.8. The Germany – Poland Treaty of 1991

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

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[9] BGBl. 1972 II 361.

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

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

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

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

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

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

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

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

CONCLUSIONS

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

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

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

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

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

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

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

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

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