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

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

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

INTRODUCTION

The year 2020 marked the 50th anniversary of the 1970 Warsaw Treaty¹ and the 30th anniversary of the 1990 2+4 Treaty.² The latter treaty provides for the conc-

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

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

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

All of these treaties have in common the spirit of fostering mutual relations between Germany and Poland. Yet few political issues have remained so continuously controversial between Germany and Poland as the question of unreturned cultural property in the wake of the Second World War.⁶ From a German perspective, the most prominent sore point is the so-called Berlinka⁷ which is, or was, part of the former Prussian State Library and which is located in Kraków today.⁸ From a Polish perspective, the biggest issue is the unmet reparation claims for extensive destruction and looting of Polish cultural property.⁹ Politicians, diplomats, and legal scholars of both sides have taken, or contributed to, maximalist positions favouring the interests and concerns of their own state,¹⁰ thereby solidifying what have become deeply entrenched and seemingly irreconcilable views.

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

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

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

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

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

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

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

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

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

1. UNRESOLVED CLAIMS OF GERMANY AND POLAND

1.1. German Cultural Property within its Former Eastern Territories

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

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

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

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

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

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

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

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

¹⁶ *Ibidem*.

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

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

This view was further substantiated by the moral argument that this German cultural property only constitutes a fraction of the cultural property destroyed by Germany²⁰ and was therefore owed to Poland as a form of restitution-in-kind.²¹

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

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

1.2. Destroyed and Looted Polish Cultural Property

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

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

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

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

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

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

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

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

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

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

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

It is undisputed that the taking and destruction of cultural property by Germany in the occupied territories constituted a violation of the 1907 Hague Regulations³⁰ and entailed the obligation to return the respective cultural property and to pay compensation in the amount of the value of demolished cultural objects.³¹

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

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

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

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

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

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

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

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

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

This Polish renunciation of reparation claims was confirmed in the course of negotiations of the 1970 Warsaw Treaty by the Polish Foreign Minister³⁵ and continuously upheld until 1989³⁶ and beyond.³⁷ Germany has issued multiple statements to the extent that Poland has, in effect, waived any remaining reparation claims.³⁸ In addition, for Germany all matters concerning reparation, restitution, and compensation as a consequence of the Second World War are final and settled ever since the 1990 2+4 Treaty, because the intention of the framers of the treaty was explicitly “to conclude the final settlement with respect to Germany”.³⁹ Occasionally, the moral argument is added that Germany has already provided reparations for the crimes committed during Nazi rule through various channels.⁴⁰

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

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

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

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

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

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

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

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

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

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

1.3. Underlying conundrums

The cause of this convoluted legal debate – fuelled by occasionally awkward diplomacy and the claims of populist or, even, revisionist politicians⁴⁷ – lies in the conundrums flowing from the practice of the at first three, and later four, Allied Powers at the Potsdam Conference. With regard to questions of territory and reparations, their practice was somewhat outside the tracks of contemporaneous laws.⁴⁸

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

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

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

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

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

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

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

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

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

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

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

⁵⁰ See Klein, *supra* note 17, p. 40.

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

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

⁵³ D’Argent, *supra* note 34, para. 1.

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

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

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

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

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

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

2. OBLIGATIONS TO RETURN CULTURAL PROPERTY BETWEEN GERMANY AND POLAND

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

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

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

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

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

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

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

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

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

3. OUTLOOK: IN SEARCH OF PRAGMATIC SOLUTIONS

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

⁶³ *Ibidem*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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