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Rudolf Dolzer

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The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945

By
Rudolf Dolzer*

I.

INTRODUCTION

A. *Rewriting the Rules of Peacemaking?*

In the future, the appropriate treatment and resolution of war-related claims brought by individuals will depend on the doctrinal framework in which they are placed. The traditional approach assumes that war-related claims by individuals are dealt with in peace treaties or their functional equivalents. Another view holds that war-related claims by individuals are treated the same as individual claims against foreign governments arising in times of peace. A third position equates the status of war-related claims with human rights claims in general.

To assess these three alternative positions in their broader context, this article reviews World War II-related practice of nations and their underlying policies. The limited focus on World War II peacemaking may limit the representative value of the following observations; indeed, a broader empirical study would be desirable. However, in spite of the many wars and war-like situations after 1945, no subsequent war has been of the same magnitude, involved so many actors, and led to so many deliberations and negotiations. Moreover, the process of reparations related to World War II has spanned the entire period from 1945 to the present, with a recent emphasis on juridical pronouncements.

Each of the three approaches identified above creates distinct implications with respect to the mechanism of presenting a war-related claim. The traditional view of the resolution of individual war-related claims in peace treaties links individual claims and government claims to the concept of reparation, and requires their resolution on a government-to-government basis in the broader context of peace arrangements, typically in a peace treaty. The second view, which does not distinguish between claims arising out of peace or war, would require

* Professor of Law, University of Bonn, Germany. In a number of lawsuits against German companies before U.S. courts, the author has filed declarations which have addressed international agreements dealing with reparation issues.

that war-related claims be treated in accordance with laws of diplomatic protection, and a claim of this kind would also have to be raised by a government. It is only under the third view, identifying war claims with human rights claims, that the affected individual himself would arguably have standing to raise a claim before a national court in a country other than that of the defendant government. Further, in order to be consistent with general rules of international law, this third approach would presuppose that domestic law, such as the Alien Tort Claims Act in the United States ("ATCA"), does not violate the accepted rules on territorial jurisdiction, sovereignty or international human rights conventions.

A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine.¹ However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law. These efforts were mainly undertaken before the United States courts, with the defendants such as the German state, the Japanese state, and German and Japanese companies that had been involved in war-related activities during World War II. Efforts of a similar kind were undertaken against Germany before the Greek juridical system.² Moreover, a number of lawsuits for individual claims were brought before German courts.³

No precedent exists for claims of this kind. Thus, the efforts to bring such claims before national courts were dependent upon the success of novel constructive reasoning by way of extension of existing types of claims or by analogy to such claims. First, violations of the laws of war or some reference to human rights in general were alleged. Thereafter, attempts were made to overcome the classical approach of relevant rules of international law, adding three additional levels. Previously, the laws of war had been understood to address states and not individuals. While the Nuremberg and Tokyo tribunals drew criminal consequences from violations of the laws of war, an individual seeking to bring a civil case based on this development in criminal law now argued that Nuremberg and Tokyo were not of singular kind, and also that these novel criminal proceedings reflected similar changes in the rules of civil law.

1. See, e.g., Ignaz Seidl-Hohenveldern, *Reparations*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 178 (Rudolf Bernhardt, ed., 2000) [hereinafter: 4 EPIL].

2. The highest Greek court (Aeropag) rendered a decision on May 10, 2000 in the case concerning German atrocities in the village of Distomo (on file with the author; no English translation is available). Altogether, it appears that more than 60,000 cases were pending in October 2001 before Greek courts dealing with the consequences of World War II.

3. For recent German court decisions in this context, see OLG Köln, 52 NJW 1555 (1999); OLG Stuttgart, 53 NJW 2680 (2000); OLG Hamm, 53 NJW 3577 (2000); Oberverwaltungsgericht NRW, 41 NJW 3202 (1988).

On a second level, the modalities of enforcement of international law in general, and humanitarian law in particular, came into play. While it was traditionally assumed that an internationally defined process would be appropriate and required for monitoring and enforcing the laws of war, the lawsuits in the United States were based on the assumption that the judicial organs of individual states may fashion appropriate remedies in accordance with the peculiarities of a domestic legal system.

Third, a major portion of the legal arguments of plaintiffs before U.S. courts drew upon recent domestic U.S. jurisprudence under the ATCA.⁴ For the past twenty years, the ATCA has been interpreted to allow U.S. domestic courts to enforce rules protecting human rights alleged to be violated by foreign governments in relation to their own citizens, and even foreign legal citizens. Whether or not the jurisdictional concept of unilateralism embodied in the ATCA would withstand the scrutiny test of an international court in light of the accepted rules on jurisdiction under international law is one matter.⁵ No human rights treaty patterned along the lines of the ATCA in terms of the rules of national definition and enforcement has ever been adopted, and it is doubtful that an effort to reach consensus based on the ATCA philosophy would find broad acceptance on the international level.⁶ Indeed, the serious difficulties of finding a common international basis for internationally defined criminal proceedings to counter violations of human rights point to a different conclusion. Even if the ATCA philosophy were to be an acceptable concept governing international relations, however, any legal argument attempting to deduce rules governing war-related conduct from general human rights norms would have to show that the transfer of norms designed to protect the individual in peace time

4. 28 U.S.C. § 1350.

5. According to the 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 713.2 (1986) a person of foreign nationality may pursue any remedy by the law of another state. In the relevant Reporters' Notes, under Nr. 3, no international case or authority is quoted; instead, reference is made to *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1963). The subsequent paragraph properly notes that the courts of other states "... have been less free in assisting nationals of third states." No foreign case or authority in support of a jurisdictional assertion along the lines of the ATCA is quoted.

When the United States passed the Torture Victim Protection Act (TVPA) of 1991 (Pub. L. 102-256, 106 Stat. 73), this was done in order to respond to certain issues which had arisen in the light of different interpretations of the ATCA. The TVPA provides explicitly for a ten year statute of limitation and also provides that a suit in the United States can be brought only after local remedies have been exhausted in the country where the act of torture has occurred.

These restrictions notwithstanding, the U.S. State Department, the Department of Justice and a number of Congressmen objected to the passage of the TVPA in light of the problems which could arise under the rules of international law, including issues related to sovereign immunity, national jurisdiction and retroactivity of legal action. See HOUSE REP. NO. 102-900, at 103, 702 (1991). Upon the signing of the Act, President George H.W. Bush issued a statement in which he warned against broad interpretations of the ATCA and the TVPA. See Geoffrey Watson, *The Death of a Treaty*, 55 OHIO ST. L. J. 781, 884 (1994).

6. The rules on diplomatic protection allow for the home state of the victim to determine, using its own political discretion, whether or not to pursue a claim against the state violating the rights of its national. It is through this process of discretion that the rules on diplomatic protection have long been accepted. The ATCA, if applied in a broad way, would operate so as to disregard the will of the home state and replace it with the will of the individual bringing a suit in the United States.

into the context of the laws of war is structurally appropriate in general, and is contextually legitimate for each individual rule in particular.

Obviously, surmounting each of these jurisprudential hurdles, and thus successfully bringing an individual war-related claim before a domestic court, amounts to a tall order. A review of the decisions by various courts indicates that the recent series of national proceedings has failed to overcome the relevant jurisprudential obstacles. The claims in the U.S., to the extent that they were considered by the courts, were denied, albeit not on the basis of concerns for the classical rules of international law, but rather on the basis of constitutional rules addressing the separation of powers as expressed in the political question doctrine.⁷ Through unpersuasive reasons, the Greek courts have allowed a claim against the German Government,⁸ and the German courts in turn have concluded, in principle, that public international law does not allow such individual claims.⁹

It is beyond the scope of this article to address the details of all relevant national juridical proceedings. The focus here concerns the basic issue of whether or not states' practice after 1945 can be said to have confirmed the classical rules of governmental peacemaking or whether these principles have been altered in a manner which today allows the pursuit of individual war-related claims before national courts. Such alteration of the classical rules however, would only be valid as a matter of international law to the extent that it would be based on corresponding practice. National courts do not have the capacity to unilaterally change the rules of international law. No effort will be made here to outline any special theory of the sources of international law that underlies the following observations. Instead, it is assumed that those sources which are laid down in Art. 38 of the ICJ Statute and generally accepted and applied by the International Court of Justice govern.

Following this route, the initial sections of this paper will briefly address the state of the law as it stood before 1945, defining as well the distinction between war claims and claims arising during peace. The main part of the paper

7. See, e.g., *Alice Burger-Fisher et al v. Degussa AG and Degussa Corp.*, 65 F. Supp.2d 248 (D.N.J. 1999): "Were the court to undertake to fashion appropriate reparations for the plaintiffs in the present case, it would lack any standards to apply. Concededly, the resources are lacking to provide full indemnification for the terrible wrongs which plaintiffs, the plaintiffs in related cases and those they seek to represent suffered at the hands of Nazi Germany and at the hands of the giants of German industry which played an integral part in the perpetration of those wrongs. Wrongs were suffered not only by the classes of persons represented in these proceedings, however, but also by many other classes of persons in many lands. They, too, had claims against German assets. By what conceivable standard could a single court arrive at a fair allocation of resources among all the deserving groups? By what practical means could a single court acquire the information needed to fashion such a standard? This was a task which the nations involved sought to perform as they negotiated the Potsdam Agreement, the Paris Agreement, the Restitution Agreement and the 2+4 Treaty. It would be presumptuous for this court to attempt to do a better job." *Id.* at 284.

8. See *supra* note 2.

9. The First Senate (First Chamber) of German Constitutional Court has noted in 2001 that no single final decision by a German court has ever recognized an individual claim by a person who was forced to labor in a camp or otherwise during the Second World War; see 54 NJW 2159 (2001); see also OLG Hamm, 53 NJW 3577 (2000); Hugo Hahn, *Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg*, 53 NJW 3521 (2000).

will review state practice after 1945, with an emphasis on the modalities of peace making of the Allied Powers with Germany and Japan, and brief reference to the 1947 Peace Treaties and the Austrian State Treaty (1955). Finally, against the background of this course of inter-governmental practice, the concluding sections of this piece will discuss whether the doctrinal considerations emanating from general developments in international law warrant the conclusion that the traditional rules of government-to-government resolution of the consequences of war are, under the *lex lata*, nevertheless open to modifications toward an individual-oriented approach. Beyond the outcome on the legal level, considerations of policy will also be briefly addressed.

B. Reparations: A Category of the Laws of War

The classical view of individual war claims as being covered by the process of negotiating and exacting reparations is based on the difference in the status of war and of peace in international law. In accordance with state practice, textbooks differentiate between war and peace when they set forth the rules for the relations among states. Wars, as understood in international law, exist between states, not within states and not between states and persons. During times of war, the validity of treaties among the parties is affected, as are contracts between states and citizens, and among citizens; diplomatic relations are severed, and special rules govern enemy subjects and property. Neutral states have to observe certain obligations in their relations with the parties at war. Altogether, the entire fabric of the peace-time relations between states as regulated by international law shifts to a different regime, the one in which interrelated rules address the conduct of hostile states.

Given this sharp distinction between the rules for war and peace, it is natural that international law has developed norms which allow distinctions between war and peace, and which promote the transition from war to peace. Thus, peace treaties are among the oldest and the most fundamental institutions of international law.¹⁰ Their objective is to end hostilities and establish the basis for durable accommodation and reconciliation, and to contribute to a new order of stability and security.¹¹ These integrated goals are typically promoted by the inclusion of territorial, political, economic, financial and juridical parts¹² which, in their entirety, form the conditions under which both sides anticipate that a new order will be possible and desirable. Obviously, the various elements amount to a "package deal" in which negotiated compromises are embodied not just for their individual components, but also as a whole. Indeed, peace treaties are permeated by the necessity of negotiated political compromise in order to allow adjustment and stabilization on both sides.

10. Wilhelm Grewe, *Peace Treaties*, in 3 EPIL 938 (1997) [hereinafter *Peace Treaties*]; see also Karl Doehring, *Peace Settlements after World War II*, in 3 EPIL 930 (1997); Krzysztof Skubiszewski, *Peace and War*, in 3 EPIL 912 (1997).

11. *Peace Treaties*, *supra* note 10, at 939.

12. *Id.* at 942.

Naturally, the historical circumstances of each war and of each peace differ, and the basic pattern of a peace treaty will be modified by the parties in light of the specific circumstances. Indeed, in a considerable number of smaller wars the parties have decided not to go through the often painful effort of negotiating a peace treaty, especially when they agreed that the limited consequences of a war did not warrant the effort of formal peace negotiations. In this context, however, it was rightly pointed out that peacemaking by way of peace treaties amounts to an art that must be preserved so as to promote peace and stability, and prevent lingering hostility and insecurity.¹³

The legal modalities of the peace arrangements with Germany and Japan after 1945 will be addressed below. As to the political circumstances that shaped the process and the details of peacemaking, various factors were expressed in subsequent phases. Both Germany and Japan capitulated, in May and August 1945 respectively, on the basis of an unconditional surrender and an occupation regime which left them temporarily without governments that could have negotiated peace treaties. In the case of Germany, this status was retained until 1949 when two separate entities were created—West and East Germany—by the Western Powers and the Soviet Union. In Japan, a new government came into power in 1952. Thus, the victorious states initially assumed the power to determine the modalities of peace, including reparations, without the consent of the defeated.

The second key factor in the process of peacemaking was extraordinary inasmuch as the war-time coalition among the victors broke down and turned into the Cold War before a peace treaty with Germany and Japan could be reached. In addition, the attitude of hostility on the part of the victors toward the defeated states also changed before peace was achieved; in particular, the Western Powers soon favored the political and economic restoration of West Germany and Japan, while the Soviet Union sought to gain acceptance in East Germany. As to the comparison of Germany and Japan, differences existed relating to the past war and to the evolving situation, resulting in substantially different approaches to peacemaking. Whatever the details of these differences, however, it remained necessary to make arrangements with both countries in all those areas covered by classical peace treaties, so as to make room for the new order consistent with the principle of finality.¹⁴

13. Christian Tomuschat, *How to Make Peace after War*, 72 *DIE FRIEDENSWARTE* 1 (1997).

14. In *Ware v. Hylton*, 3 U.S. 199 (1796), Justice Chase summarized the principle of finality of peace treaties as follows:

I apprehend that the treaty of peace abolishes the subject of war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into context again. All violences, injuries damages sustained by the government, or people of either, during the war are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed.

Id. at 230.

When the actions of governments were challenged in the context of reparations and war claims, U.S. courts held that sovereign immunity prevents suits against the states. See *The Schooner Exch. v. Mc Faddon*, 11 U.S. 7, 116 (1812), *Prinze v. F.R.G.*, 26 F.3d 1166 (D. C. Cir. 1994), *cert. denied*,

The special status of the laws of war in international law entails that damages arising out of war must also be considered to be distinct and separate from damages that occur in peacetime, especially in regard to the mechanism of their resolution and enforcement. This difference is especially notable in the context of World War II reparations claims because plaintiffs in the recent proceedings have attempted to shape their arguments in a manner that explicitly or implicitly places war-related and non-war-related damages on the same footing. Thus, precedents were invoked involving the calculation of damages in civil war, damages by government abuses in peacetime, damages caused by multinationals abroad, or damages arising from terrorism outside of a war. None of these types of claims, however, is contextually comparable to a claim arising out of a war.

Damages in a civil war concern actions which took place in the course of hostilities among citizens belonging to the same nation; the problem of the preservation of a nation does not pose issues concerning peace between different sovereigns with respect to redistribution of wealth or territory, or the future of political relations between sovereigns. Where a government abuses its powers in peacetime and mistreats its citizens, the interests concerned are intrastate, distinct from an international configuration. In the case of damage caused by a government to a foreign national in peacetime, the contextual setting is again different from a war between states.

Individual claims do not pose the broad kind of economic, financial and political questions as do relations among states in the transition between war and peace, and their treatment does not have to be tailored in view of the broad horizon of government-to-government relations.¹⁵ Thus, because war claims necessarily affect nations as a whole, they must be seen as a distinct category of

513 U.S. 1121 (1995). Concerning the interpretation, application and enforcement of existing treaties, courts have assumed that such treaties were not enforceable by individuals. See *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917); *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976).

The special setting of the rules on responsibility for unlawful acts in the context of armed conflict is also reflected in Art. 12 of the 1972 European Convention on State Immunity (11 I.L.M. 470) according to which immunity will be granted for periods of armed conflict, contrary to times of peace; the same position is expressed in a UN Draft Convention on Jurisdictional Immunities of States and their Property. See 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1991/Add. 1 (93.V.9). Neither of these Conventions has entered into force.

15. This context has been underlined, for instance, when peace was to be made in 1951 with Japan:

Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception. On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering. On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people misery of body and spirit that would make them easy prey to exploitation. There would be bitter competition [among the Allies] for the largest possible percentage of an illusory pot of gold.

See U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) cited in *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000).

claims. The resolution of claims within this category must, in turn, follow special procedures and special considerations which are, in their character and their sum, not present in claims arising out of civil wars or government abuse outside the context of war. In terms of legal reasoning for the purposes of conflict resolution, it follows that inferences and analogies from the context of civil war, or from cases of individual extra-war claims, will generally be inappropriate when applied in the context of claims that arise out of an international war. Reasoning by analogy requires the existence of a parallel nature and structure of interests in the contexts concerned, and the distinctness of war-related claims will be seen to be too great to allow a transfer of reasoning into this field.

C. *Types of War Claims*

Before turning to the doctrine of resolving individual war-related claims, it will be useful to outline different types of war claims, and to note their characteristics and distinctions. Indeed, in the recent litigation of war-related claims and the academic discussion of that litigation, there has been a great deal of confusion stemming from a failure to understand the doctrinal differences among different categories of claims.

The primary distinction that must be recognized is that between governmental claims and private claims that lie at the basis not just of the evolution of international claims practice in general, but also of war claims in particular. On a different level, the additional separation between claims raised by individuals on the basis of national law and those asserted under the rules of international law will point to different normative origins and different regimes which will also need to be kept apart. Within the domestic legal order, a third differentiation must be observed, between the general rules of responsibility of the government vis-à-vis the individual and those norms fashioned as special remedies for war-related wrongful acts. Finally, care must be taken to distinguish between payments made to victims of war as a result of legal obligations and those awarded *ex gratia*, in the absence of a corresponding rule of law requiring such a gesture of humanitarian morality and/or political good will.

Following the legal roadmap through these different paths of claiming and awarding payments for war-related actions after World War II requires concentration on the different origins and ratios that underlie the different categories of claims. In a real sense, most of the litigation in the past years dealing with war-related claims has been about distinguishing and separating the different categories of claims. For the public and sometimes even for those members of the legal profession not especially familiar with the evolution of international law, the distinctions between the claims, and the different results in their application to specific cases, may not always have been obvious. Moreover, innovative forensic legal advocacy has been tempted to deliberately blur the lines between the different categories, to blend them together, or even ignore these differences so as to better convince the courts of the merits of the presented cases.

In particular, one of the reasons for the numerous lawsuits in the United States after 1996 was presumably related to the confusion created by a misread-

ing of a judgment by the German Constitutional Court in 1996.¹⁶ The Court, in a lengthy *obiter dictum* on the system of rules concerning war claims, pointed out that individuals may, under certain circumstances, be entitled to sue the German Government or German companies involved in war damages. A careful reading reveals that the Court had in mind, in the relevant sentences, claims based on domestic German law.¹⁷ No ruling was made on the admissibility of claims before national courts based upon international law. Inasmuch as German law in force before and after 1994 has placed significant restrictions on war-related claims, the reference to German domestic law illustrated the tangible consequences of distinguishing the different types of claims. In substance, the Court's judgment stood in the way of the assertion of individual claims under international law before national courts.

As to the broader relevance of the distinction between the various categories of claims, obvious differences exist. Governments will necessarily render their decisions about the raising of a claim against another government in the broader context of the full web of their relations and their strategic concerns vis-à-vis each other. For a war-related claim, this means that the claim will be assessed in light of issues of reconciliation, punishment, assessment of the individual claim within the full range of potential claims, the ability of the other side to pay damages, and generally of the conditions for desirable peace, including the necessity and consequences of territorial changes. Typically, of course, these have been the issues negotiated at the tables of peace conferences, resolved in comprehensive agreements based on multifaceted considerations, and ultimately enshrined in peace treaties.

Needless to say, individual war victims would typically not be directly concerned with, or even fully aware of, the broader intergovernmental historical and political contexts. Rather, they would focus, in a much narrower way, on redressing the consequences of those acts of war by which they were individually affected. Similarly, courts deciding individual claims would not have access to the full specter of events, but only the setting and the contours of each individual case. Thus, the perspective and the approach of a court addressing an individual claim would by no means be necessarily identical to that of a government responsible for, and concerned with, the broad range of implications of a claim regarding the strategic elements of future relations with the counterpart country.¹⁸ These observations are by no means of a theoretical nature. Whoever reads through the archives and the protocols concerned with the issue of reparations to be paid after 1945 by Germany and Japan will constantly be reminded of a variety of strategic considerations, which necessarily form a constant part of governmental decision-making in the context of reparations and of peace-making.

16. Judgment of the German Constitutional Court, May 13, 1966, 94 BVerfGE 315.

17. *Id.* at 330.

18. See also Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL* 1, 23 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

Beyond the distinction between governmental and private claims, the difference between claims based on international law and those based on domestic law played a central role after World War II. International law does not set any boundaries for the volume of reparation, and ultimately leaves the matter in the hands of those who negotiate peace. Courts addressing individual claims based upon international law would likely not be in a position to consider the total sum of claims to be paid by the defeated state, and neither the victor nor the defeated government would control the full financial dimension of peacemaking. In contrast, in the case of a claim based on statutory domestic law of the defeated state, the parliament or legislature enacting the relevant law will consider the range of potential claims, the number of claims, and the individual and total amounts to be paid. The parliament will balance these numbers and figures in light of the existing financial options and limitations, with the possibility to revisit the decision as the program for payments evolves and the financial situation changes.

In this context of domestic rules applicable to war-related damages, the issue has been raised as to whether the general rules regarding torts committed by governmental authorities may form the legal basis for claims by foreign soldiers affected by violations of the laws of war. If the general rules were to govern, this would amount to a self-contained automatic reparations regime. Thus, the general rules should not apply in favor of individuals. This result is consistent with the traditional laws of war, which do not allow claims by individuals. Moreover, the traditional understanding of general domestic tort law has not been in favor of individuals affected by the events of war. Finally, in case of the passage of special norms for redressing war-related claims, it must always be assumed that the legislative intent was to either derogate from the general rules, or, more likely, to fill the gap that was assumed due to the non-applicability of the general rules.

In some respect, payments based on general domestic laws enacted by the defeated state may be seen as comparable to ad hoc payments of lump sums based on humanitarian considerations. However, significant differences may also exist. Payments based on general domestic laws may reflect an understanding between defeated and victor states as to the broad profile of victims that are the intended beneficiaries, and of amounts to be paid. In 1952, for instance, the Allied Powers ceased to exact unilateral reparations from Germany and left it to the German Government to pay "appropriate compensation" based on German domestic law, while reserving the final resolution of reparations to a subsequent peace treaty.¹⁹ With this, a particular link between an international obligation in the context of a reparations concept and a domestic program based on national legislation was established. Lump sum payments might, in theory, be coupled in a similar way with international undertakings.²⁰ However, in many instances Germany made such payments without the formal framework of an international obligation.²¹

19. See *infra* at 327-28.

20. See generally Richard Lillich, *Lump Sum Agreements*, in 3 EPIL, *supra* note 10, at 268.

21. See *infra* at 337.

A unique intermediary approach was chosen in the negotiations leading to German payments after 2000.²² While the negotiations were conducted on the basis of voluntary payments on humanitarian grounds, Germany entered into a binding agreement with the United States, Central and Eastern European governments, and victims' organizations participating in the negotiations. From a legal standpoint, the special character of this arrangement, therefore, consisted in the negotiation of a voluntary payment by Germany and by German companies, which was in the end accepted as a binding commitment.

While it is thus obvious that the distinction between claims based on international law and those based on domestic law may to some extent be blurred by arrangements in practice, as may the difference between voluntary payments and those based on legal obligations, the differences in principle remain. Accordingly, it remains essential to separate the various categories of claims in order to understand the post-World War II practice and the existing law, and also to formulate prudent policies and recommendations for the future.

II.

CLASSICAL PUBLIC INTERNATIONAL LAW: WAR-RELATED ISSUES AS GOVERNMENT-TO-GOVERNMENT BUSINESS

Classical public international law governs the relationships between states, whereas the legal rights and duties of individuals are governed by the domestic laws of each state. The force and effect of public international law begins and ends at a state's borders; internal state matters are beyond the scope of international law. The rights and duties of the individual are attributed to the realm of the state's internal order. The individual could, therefore, bear no rights or duties on the level of international law. International law is seen to indirectly affect individual rights, but these rights are considered to be "mediated" by the state. In 1927, the Permanent Court of International Justice summarized this historical development in the famous sentence: "Public international law regulates relations between sovereign states."²³

This fundamental concept of the state and the individual was bound to find its most direct expression in the context of regulation of claims following the violation of rules addressing the interests of individuals. Prior to the Twentieth century, international law had gradually developed rules meant to protect individuals; however, only foreigners were covered by these rules, with the citizens of each state left to the legal order of their state.²⁴ Increasing international trade and communication meant that indifference of a state to the fate of its citizens abroad could not be maintained; as a result, so-called minimum standards of public international law developed which each state was required to observe once it admitted foreigners to its territory. However, in the formulation and

22. *Id.*

23. The Lotus Case, 10 PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES A 18 (1927) [hereinafter PCIJ SERIES A].

24. See EDWIN BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 11 (1915) [hereinafter PROTECTION OF CITIZENS ABROAD].

implementation of this body of rules, the primacy of the state in public international law was, and is, preserved and reconfirmed in the manner in which claims arising out of the violations of these standards are addressed. The right to enforce these rules is not vested in the foreign individual, but in the state of his citizenship, which is accorded the right to offer diplomatic protection to its nationals.

In an early textbook of international law published in 1758, the legal position is expressed as follows:

Whoever uses citizens ill, indirectly offends the state which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.²⁵

This legal position thus described remains the same today. In 1970, the International Court of Justice expressed the principle as follows: "[I]n inter-state relations, whether claims are made on behalf of a state's national or on behalf of the state itself, they are always the claims of the state."²⁶

A leading international textbook today expresses the same rule: "[T]he subject matter of the claim is the individual and his property; the claim is that of the state."²⁷

The Restatement (Third) of Foreign Relations, equally confirms this rule:

[A] state's claim for violations that cause injury to rights or interests of private person is a claim of the state and is under the state's control. The state may determine what individual remedies to pursue, may abandon the claim, or settle it. The state may merge the claim with other claims with a view to an en bloc settlement. The claimant state may settle these claims against it by the respondent state. Any reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state.²⁸

The laws of war as they developed historically and as they stand today have been based on the same notions and principles governing the state, the individual, and the protection of individual claims. From the viewpoint of the individual who suffers war damages, the consequence of this legal position is that only his state is empowered to seek redress in his name against the enemy state. During the First World War, the principle was described as such:

A long course of practice and the Hague Regulations have given some authority to certain rules for the treatment of alien enemies in the country of the territorial sovereign. But even a departure from these rules, which has occurred in several instances during the present European War, can hardly give rise to individual pecuniary claims in law. The alien enemy's individual grievances are settled by the treaty of peace, and if his country should happen to lose in the war, he is without redress. If his country should be the conqueror, indemnities may be de-

25. EMERIC DE VATTTEL, *THE LAW OF NATIONS* (J. Schitty ed., 1985) (1785).

26. Case concerning the Barcelona Traction, Light and Power Company, Ltd., 1970 I.C.J. 3, 46 § 85.

27. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 482 (5th ed. 1998).

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 902 (h), (i) (1987) (emphasis added.); see also *id.* at §§ 703(3), 713(a), 906(b) and 907(2).

manded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state.²⁹

Consistent with this legal position regarding states' and individual rights, the Hague Convention does not grant rights to an individual who has suffered an injury due to an enemy state's violation of international law. Indeed, the United States courts recognize to this day that Art. 3 of the Hague Convention, to which Hague Regulations are annexed, does not in any way grant individual rights.³⁰ ". . . [T]he cases are unanimous, however, in holding that nothing in the Hague Convention even impliedly grants individuals the right to seek damages for violation of (its) provisions."³¹

Events during the First and the Second World Wars, and their regulation in subsequent treaties, must be examined and understood against the background of this rule—that war claims for damages to individuals can only be raised by the individual's home state.³²

As to the type of actions covered by the rules regarding acts arising out of war, state responsibility also exists where a non-state actor, performing activity under the guidance and control of a government, acts contrary to rules of international law. Such governmental control need not be complete or comprehensive. So long as the government establishes the framework and the policies within which the actor performs, state responsibility follows. Thus, state to state reparations have been held to flow from a private actor's violation of international law in furtherance of a government policy.³³

29. PROTECTION OF CITIZENS ABROAD *supra* note 24, at 251; *see also id.* at 718 for the general position of the individual under international law.

30. *See Princz, supra* note 14. The original French text of the Hague Convention reads: "La partie belligérante qui violerait les dispositions audit Règlement sera tenue à l'indemnité, s'il y a bien. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée." This norm is also based upon the position that rights are granted to the States parties, not to individuals. *See* Max Huber, *Die Fortbildung des Völkerrechts auf dem Gebiete des Prozess- und Landkriegsrechts durch die II. Internationale Friedenskonferenz im Haag* (1907), in 2 *JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART* 570, 574 (1908); Cuno Hofer, *DER SCHADENSERSATZ IM LANDKRIEGSRECHT* 53 (1912); Alwyn Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, in 88 *RECUEIL DE COURS* 267, 333 (1955).

31. *See also* Fishel v. BASF Group, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230, at *14 (S.D. Iowa 1998).

32. A special issue highlighting the fundamental implications of judicial supplementation or correction of governmental peacemaking on the basis of considerations regarding individual claims. This concerns rulings by national courts which would affect the process of peacemaking agreed upon by third States outside the state of the court ruling in the individual case. Under such circumstances, the court with whom the complaint was filed would be asked to correct or to second guess the political decisions of two sovereign states; the sovereign right of these states to agree upon the appropriate conditions for peace would be negated by a court of a third state. In principle, the situation would not be different if the two states concerned would not have yet started their negotiations. This hypothetical consideration serves only to illustrate that in the specific context of war, peace and reparations, the replacement of the traditional government-to-government approach to peacemaking with one driven by individuals and courts would be inconsistent with the current foundations and the fabric of international law.

33. *See* Earnshaw Case (Great Britain v. United States) 4 R.I.A.A. 160 (1955); Stephens Case (U.S. v. United Mexican States) 4 R.I.A.A. 265 (1951). *See also* ROBERTO AGO, 2 *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION* 262 (1977); PROTECTION OF CITIZENS ABROAD, *supra* note 24, at 213.

Under international law, a state is responsible and must assume liability for the acts of all of its organs and agencies. This rule is not limited to such persons or entities that have been entrusted with governmental functions through a formal document. At times, especially during war, a state may choose to delegate state functions to private citizens, thus creating modification of its formal order of governmental administration. Therefore, the definition of those entities for which the state is responsible is determined by the factual conditions under which a state organizes its domestic order and its governmental functions:

Thus on many occasions what constitutes an 'organ of state' is essentially a question of fact not related to the formal and regular tests provided by a constitution, or other pre-existing local law. It is this question of fact which is to be set against the relevant principle to international law in order to establish responsibility. This conclusion does not invoke an overturning of the principle of reference to criteria of domestic law: It is simply necessary to accept that not infrequently such reference will not give a conclusive answer, and other criteria must be resorted to.³⁴

The corollary of state responsibility under the circumstances thus described is the principle that no separate liability will be assumed on the part of the individual who, or the entity which, is considered to have acted on behalf of the state or has been empowered to exercise elements of governmental authority in furtherance of the war effort.³⁵ From the point of view of international law, private acts and governmental acts are distinct, and will be considered to be mutually exclusive in the context of war-related actions: the characterization of an act as one of government precludes its treatment as a private act, and vice versa. In other words, a finding of state liability excludes the existence of private liability of the actor who has acted on behalf of the government, or has been empowered to exercise elements of governmental authority in war-related efforts.

A. *The Concept of Reparations after World War I*

Up until the First World War, a general consensus had emerged which held the victor entitled to recover its war costs from the defeated state; the terms "war indemnities" or "war claims" were used at the time:

Many modern authors, without going into details, admit a right to war indemnities. Their view is that the victorious State is entitled to demand payments covering its general war costs after exhaustion of its own resources. However, these authors object to excessive war indemnity claims that appear in numerous peace treaties. In addition to the view of indemnities as a means of refunding the victor his general war costs, there is also a school of thought that sees indemnities as reparation for the commissions of war crimes and internationally wrongful acts.³⁶

34. IAN BROWNLIE, *STATE RESPONSIBILITY* 136 (1983).

35. See also *Alice Burger-Fisher*, 65 F. Supp. 2d at 72 (relating to Germany and German industry in WW II); *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 942 (relating to Japan and Japanese industry).

36. *Reparations*, *supra* note 1, at 178; see generally BRUCE KENT, *THE SPOILS OF WAR* (1989).

After the First World War, the Allies chose to rely on new terminology, replacing "war indemnity" with "reparations"; the Versailles Peace Treaty with Germany (1919) did so, as did the peace treaties subsequently concluded with other enemy states in Neuilly (1919), in the Trianon (1920) and in Lausanne (1923). The aim of the Allies behind this change in terminology was to indicate their intention to force the defeated state to pay for all the damage to the state, and for the damage caused to their civilian populations.³⁷

The reasons behind this change of state practice were, on the one hand, that individuals had suffered major damage during the war, and, on the other hand, that the laws of war allowed the victorious states, but not the individuals themselves, to demand compensation for individual losses. Thus, state practice after World War I was fully consistent with the accepted rules of international law governing claims for war damage of individuals and, in turn, reconfirmed and strengthened these rules.³⁸

Details concerning the amount of compensation demanded from Germany after 1919 were left in Versailles to an inter-Allied reparation commission. In principle, it was assumed that Germany would have to pay for all of the damages which had been caused by its war operations. By 1924, the United States and Great Britain had come to believe that this burden surpassed Germany's ability to pay. This led to the revision of German reparations in the Dawes Plan (1924); subsequently in 1930, the Dawes-Plan itself had to be revised, and Germany's obligations were scaled down again in the Young Plan (1930). In hindsight, it is often considered that "the imposition of reparations after World War I provided unsatisfactory experience to all concerned"³⁹ given the magnitude of Germany's obligations and their effect on the German and the world economies. This historical experience underlay the negotiations on reparations to be demanded from Germany as a consequence of World War II.

B. Peace Treaties of 1947 and the Austrian State Treaty (1955)

No effort is made here to comprehensively analyze the details of the peace treaties of 1947 and the Austrian State Treaty of 1955. All of these arrangements were of a special character inasmuch as the five wartime allies of Germany (Bulgaria, Finland, Hungary, Italy, Romania), which concluded the 1947 treaties with the Allied Powers, had already withdrawn from the alliance with Germany prior to the end of the war. The Austrian Treaty of 1955 was called a "state treaty" in light of the special circumstances of the German occupation of Austria during the war.⁴⁰

37. See *Reparations*, *supra* note 1, at 178.

38. A novel element was also that the Versailles Treaty included a clause by which Germany was forced to admit that she was guilty starting the war. For a discussion of the reparation arrangements concluded after World War I, see generally MARC TRACHTENBERG, *REPARATION IN WORLD POLITICS, FRANCE AND EUROPEAN DIPLOMACY, 1916-1923* (1980); RICHARD CASTILLON, *LES RÉPARATIONS ALLEMANDES, DEUX EXPÉRIENCES: 1919-1932, 1945-1952* (1953).

39. *Reparations*, *supra* note 1, at 180.

40. For details see *The Austrian State Treaty*, Department of State Publication 6437 (1957); GERALD STOURZH, *GESCHICHTE DES STAATSVERTRAGS 1945-55* (1980).

It is noteworthy for present purposes that when the 1947 treaties were concluded it was assumed that they would serve as a model for subsequent treaties with Germany and Japan;⁴¹ it was considered at the time that such treaties would be the suitable and appropriate instruments of terminating the state of war with all enemy countries, and that one basic pattern would be applied in all cases. The historical and legal continuity in the use of this pattern becomes apparent in the comparison with the Versailles Treaty: the framework of the 1947 treaty was nearly identical with the Versailles approach.⁴² In essence, the preamble of the treaties stated the responsibility of the five states for engaging in a war of aggression and acknowledged their subsequent withdrawal. The operative part contains provisions on territorial, political, military, economic, financial and juridical matters. Reparations were to be covered mainly on the basis of existing assets and current production, with the Western allies renouncing their war claims. Also, such matters as the use of German assets in the relevant countries, and questions of restitution and pre-war debt were covered. Romania, Hungary and Bulgaria waived all claims against Germany and German nationals, speaking, in each treaty, on their own behalf and on behalf of their nationals.⁴³

With regard to the Austrian State Treaty, it may suffice here to point out that, despite the special situation of Austria during the war, this agreement was based in substance, and in many instances literally, on the text and pattern adopted in the 1947 treaties. Thus, all of the treaties with the smaller Axis Powers not only followed the general approach adopted in Versailles, but also went as far as relying on the classical, basic structure of the peace treaties and even copied some of the details.

C. Reparations by Japan after 1945

After an initial post-war period of occupation of Japan by the Allied Powers, the victors announced their intention to impose reparations in the Potsdam Declaration of August 14, 1945. With regard to Japan, the declaration was aimed at the transfer of Japanese equipment and facilities suitable for rearmament ("interim reparation removals"), and, at the transfer of Japanese assets abroad, while allowing "a minimum civilian standard of living" for the Japanese, taking into account the State of destruction of the Japanese economy.⁴⁴

41. See Ernst Puttkammer, *Peace Treaties of 1947*, in 3 EPIL 953, 954 (1997) [hereinafter *Peace Treaties of 1947*].

42. *Peace Treaties of 1947*, *supra* note 41, at 955; see generally AMELIA LEISS & RAYMOND DENNETT, *EUROPEAN PEACE TREATIES AFTER WORLD WAR II* (1954).

43. One commentator has argued that such waivers of claims of nationals were in violation of the German domestic equal protection clause and rules of equality under international law. See *Alice Burger-Fisher*, 65 F. Supp. 2d at 30 n.7. This view has not won acceptance in theory or state practice.

44. See generally Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, 37 JAPANESE ANN. INT'L L. 38, 39 (1994) [hereinafter *Japan's Settlement*]; Stanley Metzger, *The Liberal Japanese Peace Treaty*, 37 CORNELL L. Q. 382 (1952); Leslie Green, *Making Peace with Japan*, in 6 YEARBOOK OF WORLD AFFAIRS 1(1952); D.P. O'Connell, *Legal Aspects of the Peace Treaty with Japan*, in 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 423 (1952).

Subsequently, the desire of the victors to punish Japan and to call for reparations was modified by strategic considerations in the context of the Cold War and the growing concern of the United States to prevent a course of action which would have required it to in effect finance Japanese reparation payments to third states; in the U.S., Secretary of State John Foster Dulles articulated these concerns with respect to both Japan and Germany.

The key difference in the evolution of the legal position between Japan and Germany lay in the fact that the process of peacemaking with Germany occurred in several stages, while Japan was offered a formal peace treaty, which it accepted on September 8, 1951 in San Francisco. In its scope, this agreement again contained provisions for all subjects typical of a modern peace treaty: territorial issues, political matters, financial and economic elements were included.

As to reparations, the central provision established that Japan was to negotiate arrangements with former occupied countries, and that these negotiations would follow the principle of "viability." Thus, reparations would be limited to "services of the Japanese people in production, salvaging and other work," thereby excluding financial payments or reparations in kind:

It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering. . . . Therefore, Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.⁴⁵

This wording of the Peace Treaty set a clear framework and avoided the continuation of a broad discussion on the reparation issue.⁴⁶

The basic principle of subsuming individual claims in the inter-governmental arrangements for reparations was expressed in Art. 14 (b) of the San Francisco Treaty, patterned after Art. 2 of the 1946 Paris Agreement regarding German reparations, except that claims by the Japanese nationals were not explicitly covered in Paris. Art. 14 (b) states that, except as otherwise provided in the Treaty, "the Allied Powers waive all reparation claims of the Allied Powers (and) other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . ."⁴⁷

Japanese courts, when subsequently confronted with war-related claims by foreign nationals, consistently held that such claims could not be brought under the general norms of the Civil Code.⁴⁸ Also, the Japanese Courts consistently

45. Treaty of Peace with Japan, September 8, 1951, 3 U.S.T. 3169.

46. See *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 945.

47. For details see *Japan's Settlement*, *supra* note 44, at 63; Japanese House of Councilors, 12th Extraordinary Session of the Diet, No. 14 (Nov. 9, 1951) at 5.

48. See Masahiro Igarashi, *Post-War Compensation Cases, Japanese Courts and International Law*, 43 JAPANESE ANN. INT'L. L. 64 (2000) [hereinafter *Post -War Compensation*].

found that the Hague and the Geneva Conventions, even if meant to benefit individuals, could not be interpreted so as to serve as the basis for individual claims.⁴⁹

Following the peace treaty, Japan negotiated a number of bilateral treaties tailored to the specific circumstances and issues with the formerly occupied states; Japan agreed, in various ways, to extend the principle of "services only" to include services for products and also the provision of loans. No precise data is available to indicate whether or not the recipient governments distributed payments and other types of reparations to their citizens with a view to satisfying the needs of those war victims who had been specially affected; however, a general review of this issue might indicate doubts in this respect.

In the case of the so-called comfort women, the Yamaguchi District Court (Kanpu Case), rendered a most remarkable decision in 1998. The court noted a trend to compensate grave violations of human rights, and based its decision to accept a claim on considerations of Japanese constitutional law rather than international law;⁵⁰ along these lines, the court assumed that the Japanese Government had a duty to enact legislation to compensate this group of victims. Also, humanitarian considerations led the Japanese Parliament to pay certain sums to special, narrow groups such as Koreans separated on Sakhalin Island from their families, Korean victims of the atomic bomb, and former soldiers from Taiwan injured while serving in the Japanese army during the war.⁵¹

An assessment of the San Francisco Peace Treaty as a confirmation or a rejection of classical peacemaking as government-to-government business yields a clear-cut conclusion. No doubt was left that the classical model was considered to be valid and appropriate. Indeed, the Treaty explicitly made clear, as did the Versailles Treaty, that the reparations arrangements were meant to pay damages not just to the victor states, but also to those states' citizens. Moreover, the parties clarified explicitly that the arrangements left no room for any claims against Japanese nationals who had been involved in the war activities.⁵²

D. Peacemaking with Germany

Peacemaking with Germany turned out to be much more complex, open-ended and lengthy than with Japan. The complexity stemmed from the absence

49. See *Japan's Settlement*, *supra* note 44, at 66; *Post-War Compensation*, *supra* note 48, at 69.

50. *Post-War Compensation*, *supra* note 48, at 45, 54.

51. *Japan's Settlement*, *supra* note 44, at 62.

52. For a retrospective assessment of the San Francisco Treaty, see *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 948-49:

The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in 1949 in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world services the debt.

Id.

of a counterpart to the San Francisco Treaty with respect to the relations of the Allied powers with Germany.

In 1951, at the time of the conclusion of the San Francisco Treaty, the Allies were, for a number of reasons, not yet prepared to conclude a comprehensive peace treaty with Germany. Instead, a number of limited arrangements in typical fields of peace treaties were negotiated, initially provisional in nature. In 1990, at the end of the period of the war-based division of Germany, an arrangement was negotiated "covering all aspects of occupation," but this arrangement was designated as a "Treaty on the Final Settlement with respect to Germany," rather than "Peace Treaty." Thus, the story of peacemaking with Germany does not follow the Japanese pattern with a straight line and a definite end point, but is in the nature of a meandering curve, in some parts provisional, and without a single formal conclusory framework that would designate it as a "peace treaty."

1. Allied Reparation Practice from 1945 to 1952

During World War II, many respected persons shared the opinion that the mistakes of Versailles should not be repeated, and that, therefore, reparation obligations should not be imposed on Germany after the Second World War.⁵³ It was, hence, not surprising that at the first Allied conferences, in Casablanca in January 1943 and in Teheran in November 1943, the question of reparation was not discussed.⁵⁴

The reparation question was first addressed at the Quebec Conference of September 1944 by the American President and the British Prime Minister.⁵⁵ These discussions mainly addressed the dismantling of German industry after the end of the war and the requisition of German property abroad for purposes of reparations.⁵⁶ The Allies, due to the bad experience with the measures provided in the Treaty of Versailles, already recognized that not all of their claims could be satisfied.⁵⁷

On August 9, 1945, President Truman declared that the Allies did "... not intend to make the mistake of exacting reparations in Germany and lending Germany the money with which to pay."⁵⁸

The Soviet Union, however, suffered especially from the war. The number of Soviet soldiers and civilians killed and wounded by the Germans ran into the tens of millions, and the economic consequences of the war for the Soviet Union

53. See Jacob Viner, *German Reparations Once More*, 21 FOREIGN AFF. 659 (1943); NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS: JEWISH ASPECTS 210 (1944).

54. See Gottfried Zieger, *Das Thema der Reparationen im Hinblick auf die besondere Lage Deutschlands*, 26 RECHT DER INTERNATIONALEN WIRTSCHAFT 11 (1980).

55. See Ignaz Seidl-Hohenveldern, *Kriegsentschädigung*, in 2 WÖRTERBUCH DES VÖLKERRECHTS 339 (Karl Strupp and Hans-Jürgen Schlochauer, eds., 1961) [hereinafter 2 WÖRTERBUCH].

56. See Hedwig Maier, *Demontage*, in 1 WÖRTERBUCH DES VÖLKERRECHTS 343 (Karl Strupp and Hans-Jürgen Schlochauer, eds., 1961) [hereinafter 1 WÖRTERBUCH].

57. See D. GINSBURG, THE FUTURE OF GERMAN REPARATIONS 44 (1947); Cf. John Keynes, *Activities 1941-1946 Shaping the Post-War World, Bretton Woods and Reparations*, in 26 THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 352 (Elizabeth Johnson, ed. 1980).

58. Erich Kaufmann, *Die Reparationsschäden*, 88 ARCHIV DES ÖFFENTLICHEN RECHTS 1 (1963).

were far-reaching. Thus, the Soviet Union considered from the beginning that it had carried a major burden in the defeat of Germany.

At the insistence of the Soviet Union, the question of reparations was discussed at the Yalta Conference in early 1945, and a basic agreement was reached that Germany would have to pay reparations.⁵⁹ Against this background, an agreement was reached that mainly material, rather than cash contributions, would be exacted from Germany after the War.⁶⁰ Accordingly, the Allied Powers, through the Yalta Agreement of February 11, 1945, agreed: "We have considered the question of the damage caused by Germany to the Allied nations in this war and recognized it as just that Germany be obliged to make compensation for this damage in kind to the greatest extent possible."⁶¹ The lessons drawn from Versailles concerning limitations of Germany's ability to pay reparations were reflected in the Agreement at Section III B ("Economic Principles"), Nr. 19:

Payment of reparations should leave enough resources to enable the German people to subsist without external assistance. In working out the economic balance of Germany, the necessary means must be provided to pay for imports approved by the Control Council in Germany. The proceeds of exports from current production and stock shall be available in the first place for payment for such imports.⁶²

In addition to the official document from the Yalta Conference, a secret protocol was concluded between the Three Powers. In this "Protocol on German Reparations," details are recorded in 4 points. First, Germany would provide non-monetary ("in kind") compensation, and the states which carried most of the burden of the war, suffered most damage, and contributed most to the defeat of the enemy, would receive in kind reparation "in the first instance"; Second, reparations would be made by Germany in three forms: (1) removals of German national wealth both within and outside Germany within 2 years of the surrender, ("chiefly for purpose of destroying the war potential of Germany"), (2) delivery of goods from current production once a year for an unspecified period, and (3) use of German labor. Generally speaking, the volume of reparations was

59. For details, see *Protocol of the Proceedings, Crimea Conference, Feb. 11, 1945*, in DEPARTMENT OF STATE PUBLICATION 8484: 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1013, 1016 (Charles Bevans, ed. 1969) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS]; See also WOLFGANG MARIENFELD, KONFERENZEN ÜBER DEUTSCHLAND 149 (1962); KLAUS-JÖRG RUHL, NEUBEGINN UND RESTAURATION 44 (2nd ed. 1984).

It is remarkable that at the time these conferences were held, it was the Soviet Union, not a party to the Treaty of Versailles, which was most critical of the treaty's reparation provisions. See FRIEDRICH JERCHOW, DEUTSCHLAND IN DER WELTWIRTSCHAFT 1944 BIS 1947: ALLIIERTE DEUTSCHLAND- UND REPARATIONSPOLITIK UND DIE ANFÄNGE DER WESTDEUTSCHEN AUßENWIRTSCHAFT 32 (1978) [hereinafter JERCHOW]. The Soviet Union took the clear position after World War II that only partial compensation was feasible. See 2 TEHERAN, YALTA, POTSDAM, KONFERENZDOKUMENTE DER SOWJETUNION 164 (1986); see also 3 TEHERAN, YALTA, POTSDAM, KONFERENZDOKUMENTE DER SOWJETUNION 359 (1986) for the Soviet position in Potsdam. Cf. Schlochauer, *Yalta-Konferenz von 1945*, in 1 WÖRTERBUCH, *supra* note 56, at 162.

60. See JERCHOW, *supra* note 59, at 32.

61. Crimea (Yalta) Conference Report, Feb. 11, 1945, reprinted in TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 59, at 1005.

62. *Amtsblatt des Kontrollrats* 30. April 1946, 1 ERGÄNZUNGSBLATT 4.

to be determined by Germany's ability to pay, not by covering the damages suffered.

Third, an Inter-allied Reparation Commission would be formed with headquarters in Moscow, and members representing the U.S.S.R., the U.S., and Great Britain, having the task of formulating a detailed reparation plan on the basis of the principles upon which the Allies had already agreed.

Fourth, the specific amount of reparations was discussed. On this point no agreement was reached. The Soviet Union proposed that the total sum should be U.S. \$ twenty billion, and that the Soviet Union should receive half of this amount. While the American delegation agreed to this proposal, the British delegation objected. Their dissent was recorded at point four.⁶³

The Reparation Commission mentioned in the third point of the secret protocol met only once, in Moscow in July 1945. The Soviet Union proposed, as it had at Yalta, that Germany should be responsible for reparation of U.S. \$ twenty billion, and that the Soviet Union should receive U.S. \$ ten billion, the U.S. eight billion, and the Great Britain two billion. Once again, no agreement was reached.

In July 1945, after Germany's military defeat, the United States, the United Kingdom and the Soviet Union met in Potsdam for their last major war conference, and German reparations were again on the agenda. The Allied Powers agreed upon a comprehensive structure for reparations. The victorious powers would take reparations in the form of German industrial equipment—with no distinction between public and private ownership—to be removed from their respective zones of occupation, and from German external assets. In addition, the Western Powers agreed to provide a percentage of the industrial assets from the Western Zones to the U.S.S.R., above and beyond the assets within the Soviet Zone. The Potsdam Agreement was written in terms of specific percentages of assets to be used for reparations, and provided time-tables for the removal of those assets.⁶⁴

63. The English text of the *Protocol on German Reparations* is reproduced in: 7 EUROPA-ARCHIV 4692 (1952).

64. The relevant part of the Potsdam Agreement reads in its entirety:

III. Reparations from Germany:

1. Reparations claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R., and from appropriate German external assets.

2. The U.S.S.R. undertakes to settle the reparations claims of Poland from its own share of reparations.

3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets.

4. In addition to the reparations to be taken by the U.S.S.R. from its own zone of occupation, the U.S.S.R. shall receive additionally from the Western Zones:

(a) 15 percent of such usable and complete industrial capital equipment, in the first place from the metallurgical chemical and machine manufacturing industries as is unnecessary for the German peace economy and should be removed from the Western Zones of Germany, in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon.

The division of German reparations among the victorious powers was stated clearly in Part III, No. 8 and 9 of the Potsdam Agreement. According to Art. 8, the Soviet Union renounced "... all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets except those specifically listed." Consequently, the U.S. and the U.K. renounced their reparations claims to shares of German enterprises in the Eastern zone of occupation, as well as to German foreign assets in some Central and Eastern European states.

Germany was thus divided into zones of occupation for economic purposes, as well as for the purposes of stationing troops and general aims of occupation. In principle, the scheme of reparations was also based upon the same zones of occupation, with the Western victorious powers receiving reparations from their Western Zone of occupation and the Soviet Union from the Eastern Zone. The scheme was modified only inasmuch as a certain sum of the reparations from the Western Zone was to be transferred to the Soviet Union.

No room was left for, and the considerations did not include, reparations for war-related claims via private lawsuits against the same private and public assets that were to be divided among the allied states. The decisions of the Potsdam conference were first put into effect in March 1946, when the Allied Council completed a common plan for industry in all four zones of occupation.⁶⁵

(b) 10 percent of such industrial capital equipment as is unnecessary for the German peace economy and should be removed from the Western Zones, to be transferred to the Soviet Government on reparations account without payment or exchange of any kind in return.

5. The amount of equipment to be removed from the Western Zones on account of reparations must be determined within six months from now at the latest.

6. Removals of industrial capital equipment shall begin as soon as possible and shall be completed within two years from the determination specified in paragraph 5. The delivery of products covered by 4 (a) above shall begin as soon as possible and shall be made by the U.S.S.R. in agreed instalments within five years of the date hereof. The determination of the amount and character of the industrial capital equipment unnecessary for the German peace economy and therefore available for reparation shall be made by the Control Council under policies fixed by the Allied Commission on Reparations, with the participation of France, subject to the final approval of the Zone Commander in the Zone from which the equipment is to be removed.

7. Prior to the fixing of the total amount of equipment subject to removal, advance deliveries shall be made in respect to such equipment as will be determined to be eligible for delivery in accordance with the procedure set forth in the last sentence of paragraph 6.

8. The Soviet Government renounces all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets in all countries except those specified in paragraph 9 below.

9. The Governments of the U.K. and U.S.A. renounce all claims in respect of reparations to shares of German enterprises which are located in the Eastern Zone of occupation in Germany, as well as to German foreign assets in Bulgaria, Finland, Hungary, Rumania and Eastern Austria.

10. The Soviet Government makes no claims to gold captured by the Allied troops in Germany.

Potsdam Declaration June 5, 1945, 68 U.N.T.S. 190.

65. For details see JERCHOW, *supra* note 59, at 202.

Later during the year of 1946, however, differences of opinion among the Allies began to emerge.⁶⁶ In May, 1946, the three western occupation powers decided to suspend the transportation, agreed to in the Potsdam Agreement, of dismantled industrial plants to the Soviet Union because the economic unity of the occupation zones had not yet been brought about.⁶⁷

The Potsdam Agreement was the last consensus between the four occupation powers on the question of reparation. By virtue of its political and economic foundations, that Agreement formed the basis for the practical execution of the reparation policies for the Allies. The Potsdam Agreement did not, however, contain final conclusions on reparation policies, because no agreement was achieved on the total amount of reparations, or on the period during which Germany would have to make such contributions.⁶⁸ This fact proved to be decisive in later developments. Thus, the division of the reparation area into eastern and western zones became the practical basis for future reparations considerations.

On January 14, 1946, in the so-called Paris Reparation Agreement,⁶⁹ the U.S., Great Britain and France, together with 15 other Allied states, reached an agreement concerning German reparations and the return of mint gold, forming an Interallied Reparation Agency.⁷⁰ According to the Potsdam Protocol, the amount due to the western Allies had been limited to approximately seventy-five percent of assets in the western zone. This share was divided among the 19 participating states. The Paris Reparation Agreement was based on the division of the reparations into two categories. Category B consisted of dismantled material, merchant, and inland ships, while Category A absorbed all other reparation assets, including assets located abroad. From each category, each signatory state (and only a state) was allotted a certain share.

The Interallied Reparation Agency ("IARA") was given the task of ascertaining the value of seized and confiscated German assets, and of dividing them among the contracting states. The Agency was unable to decide, however, on the amount to which each signatory state was entitled. The Agency maintained an account for each signatory state into which its claims and receipts were entered.

An upper limit to Germany's reparation obligations to the three Western Powers was mentioned for the first time in Art. 2(a) of the Paris Agreement of January 1946. Subject to the conclusion of a peace treaty, the parties agreed that the shares allotted to them from categories A and B in relation to the shares allotted to the other contracting parties would be final with respect to all claims

66. See Helmut Rumpf, *Die Deutsche Frage und die Reparationen*, 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 344, 365 (1973) [hereinafter Rumpf].

67. See JERCHOW, *supra* note 59, at 219.

68. See BERT-WOLFGANG EICHHORN, REPARATION ALS VÖLKERRECHTLICHE DELIKTSHAFTUNG 129 (1992) [hereinafter EICHHORN].

69. Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, 555 U.N.T.S. 69 [hereinafter Paris Reparation Agreement].

70. For developments in the post war period see BRUCE KUKLICK, AMERICAN POLICY AND THE DIVISION OF GERMANY, THE CLASH WITH RUSSIA OVER REPARATIONS (1972).

of the creditor states and their citizens against Germany and German citizens. The unified consideration of the claims of the creditor states and their citizens was consistent with the previous practice in public international law.

Furthermore, the eighteen Allies recognized that certain stateless persons who "have suffered at the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation . . . will be unable to claim the assistance of any Government receiving reparations from Germany" ⁷¹

These persons were to receive a share of reparations from Germany pursuant to the Agreement. This was the only class of individual claimants addressed separately, rather than being subsumed entirely by payments to national governments. These particular claimants were allotted a share of reparations from Germany, but were not given a right to bring private actions of any kind.

Three of the underlying principles of the 1946 Paris Agreements deserve to be highlighted. First, the parties acted on the belief that Germany's reparations would be calculated on the base of certain defined German assets, not on the basis of the full loss and injuries caused by the total war of Germany; thus, the notion of a duty of partial compensation on the part of Germany for the damages caused in World War II implicitly formed the basis of the agreements agreed upon in Paris. Second, the signatories expressly recognized that the reparations received by a government covered all claims of such government's nationals against the Reich and agencies of the Reich—which were the only entities bound to pay reparations since claims against all private German citizens were subsumed in the claims against the Reich:

The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering *all its claims and those of its nationals against the former German Government and its Agencies*, of a governmental or private nature, arising out of the war (which are not otherwise provided for). . . . ⁷²

Finally, the Allies did not intend the 1946 Paris Agreement to finally resolve all of their issues of reparation, and expressly reserved therein to each signatory state its rights "with respect to the final settlement of German reparation." Final settlement of reparations was to occur either through a final multilateral peace treaty or earlier bilateral agreements, not by private action. ⁷³

The policy behind the formula "all its claims and those of its nationals" was articulated in a statement by the U.S. Representative Angell:

The primary purpose of paragraph A, of Section 2, on the settlement of wartime claims, is to record the agreement between the signatory governments that all claims, of whatever nature, by a government for reparation from Germany are, in effect, consolidated into a single claim which has been considered at this Conference, and furthermore that the German reparation which is made available to each government in accordance with its agreed quota shall be the sole source of satisfaction of its consolidated reparation claim against Germany. If this were not the intention of paragraph A, a legion of reparation claims by individual governments would continue to exist to be presented for satisfaction outside the framework of

71. Paris Reparation Agreement, *supra* note 69, art. 9.

72. *Id.* at art. 2A (emphasis added).

73. *Id.* at art. 2B (ii).

the reparation program envisaged under the Potsdam Agreement. Under such circumstances, the reparation quotas we have been discussing would be meaningless because the quotas would have no relative significance whatever, and the work of the Paris Conference would be valueless.⁷⁴

In 1948, in a Memorandum written by the United States Secretary of State George Marshall to the Foreign Relations Committee of the U.S. Senate, the Secretary highlighted that the Paris Agreement was based on the recognition that Germany's ability to pay reparations was limited, and that each signatory state which had been at war with Germany declared to be satisfied with a certain quota of overall German reparations, without knowing their full amount.⁷⁵

The official records of the Paris Conference clearly indicate that the consequences of forced labor were also considered to be a part of the war damage which fell under the reparation arrangements; thus, in preparing the Agreement, the signatory states were explicitly asked to indicate the value which they attached to the forced labor that the Nazi regime had required of their nationals.⁷⁶

By the end of 1949, the IARA had, according to its own reports, assessed approximately U.S. \$517 million (at the 1938 exchange). At the 1949 exchange rate, this sum would be doubled. The general opinion was that the values ascertained by the IARA were too low.⁷⁷

The IARA report also sheds light on the reparation policies of the Soviet Union, the U.S., and England during this period. It shows that the occupation powers of the western zone had agreed on a revised level of industrial development for Germany in August 1947, and had prepared a new list of the industrial plants affected. According to this revised level, Germany was to achieve roughly the same industrial capacity as it possessed in 1936; originally this was to have been only 75 % of the 1936 level.

The United States Congress strove to ensure that the dismantling program would not conflict with the European redevelopment program initiated by the U.S.⁷⁸ On the whole, the IARA Report shows that the U.S. in particular, suc-

74. 3 FOREIGN RELATIONS OF THE UNITED STATES: 1945, at 1478-79 (1945) (emphasis added) [hereinafter FOREIGN RELATIONS 1945].

75. See *A Decade of American Foreign Policy: Basic Documents 1941-49*. Prepared at the Request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State (1950) (reprinted 1968), Doc. O. 207, at 994.

76. FOREIGN RELATIONS 1945, *supra* note 74, at 1269.

77. A list in which the total sum is divided between the individual states may be found in Wilhelm Cornides and Hermann Volle, *Der Abschluss der Westdeutschen Reparationsleistungen*, 8 EUROPA-ARCHIV 3281-82 (1953) [hereinafter *Der Abschluss*]. In the report of the IARA it is stated:

There can be no doubt that the Soviet Union took, for itself and Poland, more than the \$10 billion originally demanded as reparation, while all 19 of the IARA states together received only a fraction of this sum, irrespective of the manner in which the valuation is made. Among the recipients are Czechoslovakia, Yugoslavia and Albania, who together received approximately 10% of the reparation mediated through the IARA.

Id. at 3283 (translation by the author); a review of the activity of the IARA from 1946-1949 is found in 8 EUROPA-ARCHIV 3284-90 (1953); *Cf. Der Abschluss, supra*, at 3282.

78. See The Humphrey Committee, *Recommendation Concerning the Retention in Germany or Removal as Reparations of the German Industrial Plants*, Mar. 31, 1949, T.I.A.S. 2142.

cessively and deliberately reduced its reparation demands after 1946.⁷⁹ Operations of the IARA were concluded in 1959.

2. Soviet Practice Toward Germany

As noted above, the Potsdam Protocol awarded reparations to the Soviet Union—for itself and Poland—out of the Soviet occupation zone and the German assets in Eastern Europe. In addition, twenty-five percent of the industrial equipment from the Western Zone was to be delivered to the Soviet Union. In the period after Potsdam, the Soviet Union extracted considerable reparations from the Eastern zone of occupation. Also, the territory of Soviet Union was expanded at its Western border at the expense of Polish territory. However, the additional delivery of equipment from the Western Zone, contemplated at Potsdam, occurred to a very limited extent.⁸⁰ It is believed that the Soviet Union ultimately received goods and payments worth much more than the U.S. \$ ten billion that Stalin had demanded at Yalta.⁸¹

On August 15, 1953, shortly after an uprising in the Soviet occupied zone in East Germany, the Soviet Union declared in a note to the Western Powers that: “. . . Germany had already fulfilled most of its financial and economic obligations to the U.S.S.R., France, Great Britain and the U.S. . . .”⁸² The Soviet Union proposed that Germany be released from all further reparation obligations effective January 1, 1954. One week later, on August 22, 1953, a protocol to this effect was signed in Moscow by the Soviet Union and the German Democratic Republic.⁸³ In this protocol, the Soviet Union declared that it

79. The report also contains a review of activities concerning German assets abroad in the years 1945-1949. According to the report, the gross value of these assets in countries which were at war with Germany was approximately \$300 million, in neutral countries approximately \$125 million. By the end of 1949, the member states of the IARA had received approximately two-thirds of the assets available in their countries. In 1946, an agreement was made with Switzerland under which half of the proceeds of the realization of German assets there would be transferred to the Allies. At the time, this was thought to amount to approximately 250 Swiss francs. Also in 1946, an agreement was made with Sweden that estimated the value of German assets in Sweden at approximately 400 Million Swedish krone. In 1948, an agreement was made with Spain concerning German assets there, which were estimated to be approximately 650 million pesetas. See *Der Abschluss*, *supra* note 77, at 3289.

80. See generally 2 - 4 FOREIGN RELATIONS 1945, *supra* note 74; 2 - 4 FOREIGN RELATIONS OF THE UNITED STATES: 1946 (1960). The first adjustment to the Soviet policy of dismantling came in May 1950 when the Soviet Union declared that the German Democratic Republic had, by the end of 1950, made reparation of approximately \$3.6 billion. Having regard to the “efforts of the German people to restore and develop the peoples’ economy in Germany,” the remainder due (estimated by the Soviet Union at \$10 billion) would be reduced by 50% to approximately \$3.17 billion. See DOKUMENTE ZUR DEUTSCHLANDPOLITIK DER SOWJETUNION, VOM POTSDAMER ABKOMMEN AM 02.08.1945 BIS ZUR ERKLÄRUNG ÜBER DIE HERSTELLUNG DER SOUVERÄNITÄT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK AM 25.03.1954, at 243 (1957).

81. See JÖRG FISCH, REPARATIONEN NACH DEM ZWEITEN WELTKRIEG 33 (1992) [hereinafter FISCH]; HERMANN-JOSEF BRODESSER, BERND FEHN, TILO FRANOSCH, WILFRIED WIRTH, WIEDERGUTMACHTUNG UND FRIEDENSLIQUIDATION 63 (2000) [hereinafter WIEDERGUTMACHTUNG].

82. 8 EUROPA-ARCHIV 5954 (1953).

83. Protocol Concerning the Discontinuance of German Reparations Payments and Other Measures to Alleviate the Financial and Economic Obligations of the German Democratic Republic Arising in Consequence of the War, August 22, 1953, 221 U.N.T.S. 129, *reprinted in* 8 EUROPA-ARCHIV 5974 (1953) [hereinafter Protocol Concerning the Discontinuance of German Reparations].

would cease collection of all reparation receipts from the German Democratic Republic by the end of 1953. The conclusion to this agreement reads: "In this context the Soviet Union further declares that Germany is released by the Soviet Union from repayment of post-war state debts."⁸⁴

The parties to this protocol were the Soviet Union and the German Democratic Republic. The wording, however, refers not only to the Soviet occupation zone, but to "Germany."⁸⁵ Against this background, it is generally accepted that the Protocol between the Soviet Union and the German Democratic Republic contains a waiver applicable to Germany as a whole.⁸⁶ The agreements made after the reunification of Germany to which the Soviet Union was a party confirm this.⁸⁷

Poland, too, waived its reparation claims, and those of its nationals, against Germany. In the Protocol concluded on August 22, 1953 between the Soviet Union and the German Democratic Republic, the two States agreed that the Soviet Government would no longer demand reparations from the GDR "in accordance with the Government of Poland."⁸⁸ The authentic Polish text of this protocol refers to "odszkodowan" in the designation of the waiver.⁸⁹ The same term was used in 1921 in the Peace Treaty between Poland, Russia and the Ukraine when the state parties waived their reparation-rights, including the rights of their nationals.⁹⁰

On August 23, 1953, Poland issued a binding declaration which states that:

In consideration of the fact that Germany has already complied to a significant extent with its obligation to pay reparations and the fact that the improvements of the economic situation of Germany lies in the interest of its peaceful development, the government of the People's Republic of Poland has resolved, effective

84. *Id.* at Part V, § 2.

85. The Chairman of the Council of Ministers of the U.S.S.R., on the occasion of the signing of this agreement, directed his address to the whole German people. See 3 ARCHIV DER GEGENWART 4128 (1953).

86. The Soviet Union again expressed its waiver of reparations with respect to Germany as a whole in a draft peace treaty with Germany July 10, 1953. This draft is reproduced in IV:1 DOKUMENTE ZUR DEUTSCHLANDPOLITIK 555. Art. 41 of this draft reads, "The question of payment by Germany of reparations for damage caused during the war to the Allied and united powers is deemed to have been fully settled, and the Allied and united powers waive all claims against Germany for any further payment of reparation." *Id.* See ALBRECHT RANDELZHOFFER & OLIVER DÖRR, ENTSCHÄDIGUNG FÜR ZWANGSARBEIT 69 (1994) [hereinafter ENTSCHÄDIGUNG]; Gottfried Zieger, *Das Thema der Reparation im Hinblick auf die besondere Lage Deutschlands*, 10 RiW 16 (1980).

87. The Soviet Union would return to the theme of a peace treaty with Germany and to the issue of reparations when it presented another draft peace treaty on January 10, 1959. Art. 41 of this document reads: "The question of payment of reparations by Germany for compensation of damages to the allied and united Powers is considered to be totally settled, and the allied and united Powers waive all claims against Germany regarding the further payment of reparations" (emphasis added). This draft also contained far-reaching military and other arrangements and was not accepted by the Western Powers. Nevertheless, its wording sheds light on the Soviet view and position in 1959, namely that the reparation issue had been previously settled. 14 EUROPA-ARCHIV 21 (1959).

88. See 9 EUROPA-ARCHIV 5974 (1954).

89. This term is translated as "compensation, damages, indemnity." The Polish-English Dictionary of Legal Terms 58 (Polish Academy of Sciences, Institute of State and Law ed., 1986); see ENTSCHÄDIGUNG, *supra* note 86, at 69.

90. Peace Treaty Between Poland, Russia, and the Ukraine, 6 LEAGUE OF NATIONS TREATY SERIES 51,123 (English translation).

January 1, 1954, to waive the reparation payments to Poland, in order to thereby make a further contribution to the resolution of the German question in the spirit of democracy and peace in accordance with the interests of the Polish and all peace-loving people.⁹¹

Poland confirmed the validity of this Declaration of December 7, 1970, in the context of negotiating a treaty with the Federal Republic of Germany.⁹²

In October 1999, Germany officially acknowledged Poland's waiver of its nationals' rights.⁹³ The Soviet Union was one of the six states which negotiated the Treaty on the Final Settlement with Respect to Germany, the so-called "2 + 4 Treaty,"⁹⁴ in 1990 with the GDR and with the Federal Republic of Germany. According to its Preamble, the Treaty is intended "to conclude the final settlement with regard to Germany." The Treaty states that the Four Powers terminate their rights and responsibilities relating to Berlin and to Germany as a whole, and that, accordingly, the united Germany was to have full sovereignty over its internal and external affairs.⁹⁵ In this context, no reparation claims of the Soviet Union are recognized or mentioned. This language again confirms that the Soviet Union considered that its claims had earlier been fulfilled or had been waived in 1953.

Also in 1990, the Soviet Union concluded a treaty "On Good Neighbourhood, Partnership and Cooperation" with Germany.⁹⁶ According to its Preamble, this Treaty was concluded "with the desire to finally put an end to the past and to make a substantial contribution to the partition of Europe by way of mutual understanding and reconciliation."⁹⁷ Moreover, the Preamble sets forth that the Treaty is "based upon the foundations which have been laid in the past years through the development of the cooperation of both Federal Republic of Germany and the German Democratic Republic with the Soviet Union." The operative text of the Treaty covers a wide spectrum of principles on which the two States agree and of areas in which they intend to cooperate. For instance, the respect for existing borders, the renunciation of every use of force, regular consultations, economic cooperation, scientific cooperation, improvement of transport between the two states, exchange among social groups, cultural corporations, the care for graveyards and other matters have been agreed upon. Also, it is stated that both states will conscientiously fulfil their treaty obligations.

91. Reprinted in Polish Institute for International Affairs, 172 *German Affairs*, in 9 SERIES OF DOCUMENTS (1953).

92. See 1818 BULLETIN OF THE GERMAN FEDERAL GOVERNMENT 1819 (1970). For an explanation of the position adopted by Federal Chancellor Brandt in the official discussion with Poland after 1970, see WILLY BRANDT, BEGEGNUNG UND EINSICHTEN 538 (1976); see also KRZYSZTOF MISZCZAK, DEKLARATIONEN UND REALITÄTEN (1993); ARNULF BARING, MACHTWECHSEL 486 (1982).

93. 14/1786 BUNDESTAGSDRUCKSACHE 5 (1999). Poland has not consistently agreed with this position.

94. Treaty on the Final Settlement With Respect to Germany, 1990 BGBl. II, 1318 [hereinafter "2 + 4 Treaty"].

95. *Id.*

96. The Treaty On Good Neighborhood, Partnership and Cooperation, 1991 BGBl. II, 702 [hereinafter The Treaty on Good Neighborhood].

97. *Id.* at PmbI., para. 3.

Thus, Article 1 of the 1990 treaty incorporates the reparation waiver agreed upon earlier between the USSR and the GDR.

III.

THE PAYMENT OF REPARATIONS FOR NAZI OPPRESSION THROUGH MULTILATERAL AND BILATERAL AGREEMENTS (1952–1964)

The Allies, through various agreements, effected Germany's loss of its eastern territories worth an extraordinary economic value,⁹⁸ which constituted approximately one-third of the territory of the Federal Republic as it existed prior to the 1990 reunification. Beyond this lay financial reparations.

After the end of the war, the Federal Republic of Germany was not vested with legal capacity. It did not obtain such capacity until the framing of the Basic Law (Constitution) in 1949, and the establishment of the institutions for which that Constitution provided. The first phase of the reparations process, consisting of unilateral decisions by the Allies to appropriate assets, was succeeded after 1949 by a second phase, in which the Federal Republic had the legal capacity to enter into agreements with other nations. In certain domestic laws and international agreements, Germany granted limited rights to foreign citizens above and beyond those obligations imposed upon a state by international law.⁹⁹

Because of the immeasurable suffering inflicted on the Jews in Germany and in the occupied lands during the period of National Socialism, the first reparation agreement entered into by the Federal Republic was concluded with Israel. This "Luxembourg Agreement" came into legal effect on March 27, 1953.¹⁰⁰ In it, the Federal Republic of Germany declared that compensation for the victims of persecution should not be dependent on their nationality, and that the Jews of German nationality were thereby included.¹⁰¹

In concert with the agreement with Israel, both from the point of view of time and content, the Federal Republic also agreed to the so-called "Hague Protocols,"¹⁰² under which a fund of 450 Million Deutschemarks ("DM") was

98. See Ernst Deuerlein, *Die Verabschiedung der Deutschland-Bestimmungen des Potsdamer Abkommens*, 3 DEUTSCHLAND-ARCHIV 681 (1970).

99. The German domestic programs compensating war-related damages are summarized in BUNDESMINISTERIUM DER FINANZEN, DOKUMENTATION 3/99; WIEDERGUTMACHUNG, *supra* note 81. Between 1949 and 1981, a special journal "Rechtsprechung zum Wiedergutmachungsrecht" was devoted to this field of domestic German law. The U.N. has concluded that Germany's efforts to compensate victims were remarkable; see U.N. ECONOMIC AND SOCIAL COUNCIL, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, U.N. Doc. E/CN.4/Sub 2/1993/8 (July 2, 1993).

100. Agreement Between the Federal Republic of Germany and Israel, September 10, 1952, 1953 BGBl. II, 37 [hereinafter the Luxembourg Agreement].

101. This is one example of the government of the Federal Republic going beyond its legal obligations under public international law. See EICHORN, *supra* note 68, at 158.

102. 1953 BGBl. II, 85 (1953). See ERNST FÉAUX DE LA CROIX, 3 INTERNATIONAL-RECHTLICHE GRUNDLAGEN DER WIEDERGUTMACHUNG 194; see also Ernst Katzenstein, *Jewish Claims Conference und die Wiedergutmachung nationalsozialistischen Unrechts*, in Festschrift für Martin Hirsch 219 (Hans-Jochen Vogel, pub., 1981).

made available to the Claims Conference for distribution to aid individual victims of the Nazis.”

The Luxembourg Agreement was concluded by the Federal Republic with the “determination, within the limits of their capacity, to make good the material damage caused by these acts”;¹⁰³ that is, by the persecution policies of National Socialism. Correspondingly, the Federal Republic guaranteed to the State of Israel, on the basis of the claims invoked, payment of the costs of integration that Israel incurred in accepting Jewish refugees from Germany and the other territories formerly subject to German rule.¹⁰⁴ On this basis, a sum of 3 billion DM was paid to the State of Israel in the form of goods and services.¹⁰⁵

In addition to the creation of such international funds, Germany proceeded to implement domestic compensation legislation. This followed the new policy of the Western Powers “to integrate the Federal Republic of Germany into the community of free nations,” and the conclusion of the state of occupation of Germany in 1952.¹⁰⁶

This legislation followed international agreements and their nineteen Appendices, which were signed in May 1952, but could not at first be brought into force because of the failure of the related plans for a European Defense Community. After fresh negotiations in Paris in October 1954, these agreements were signed once more and came into legal effect on May 6, 1955.¹⁰⁷ This web of treaties is referred to as the Bonn and Paris Agreements.¹⁰⁸ While the Allied Powers themselves had until that time directly controlled and managed the reparation process, those Powers thereafter entrusted this task to Germany itself. The measure for Germany’s future policy was “adequate compensation.”

In detail, the Bonn and Paris agreements consisted mainly of a General Treaty,¹⁰⁹ a Forces Convention,¹¹⁰ a Financial and Taxation Agreement,¹¹¹ and a Transition Agreement.¹¹² The General Treaty dealt mainly with the ending of the state of occupation, the legal status of Germany, of Berlin and the stationing and security of the Allied armed forces. The Transition Agreement dealt with many questions arising in the context of the war and with the occupation issues. In this regard, many provisions were included on matters that are normally reserved for a peace treaty. For example, Chapter III of the Transition Agreement

103. The Luxembourg Agreement, *supra* note 100, Preamble.

104. *See id.*

105. *Id.* at art. 1(a).

106. *See Communiqué on Germany, September 19, 1950* (reprinted in 13 EUROPA-ARCHIV 3406 (1958)).

107. 1955 BGBl. II, 256.

108. *See* Wilhelm Kewenig, *Bonn and Paris Agreements on Germany (1952 and 1954)*, 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 422 (1992).

109. Convention on Relations between the Three Powers and the Federal Republic of Germany, October 23, 1954, 331 U.N.T.S. 327.

110. Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, October 23, 1954, 332 U.N.T.S. 3.

111. Finance Convention, October 23, 1954, 332 U.N.T.S. 157; Agreement on the Tax Treatment of the Forces and Their Members, 332 U.N.T.S. 219.

112. Convention on the Settlement of Matters Arising out of the War and the Occupation, 332 U.N.T.S. 219 [hereinafter the Transition Agreement].

dealt with the restitution of identifiable property to victims of the Nazi regime; Chapter IV stated the obligation of the Federal Republic to compensate the victims of the Nazi regime and Chapter V regulated the details for restitution of property seized abroad by Germany or its allies during the war.¹¹³

Chapter VI of the Transition Agreement states that the Federal Republic would not in the future "raise any objections to the measures taken or to be taken against German property abroad or otherwise which has been seized for the purposes of reparation or restitution or because of the state of war or on the basis of agreements made or which will be made by the Three Allied Powers with other allied states, with neutral states or with former allies of Germany."¹¹⁴

Forbidden were "claims and suits against persons, international organizations or foreign governments which have acquired or transferred property on the basis of the measures mentioned in paragraphs 1 and 2."¹¹⁵

The Federal Republic had already reached similar arrangements with Switzerland in August 1952.¹¹⁶ A special provision in respect of legal relations with Austria was included in the Transition Agreement.¹¹⁷

Chapter IX of the Transition Agreement expressed the waiver by Germany, subject to the provisions of a peace treaty, on its own behalf, and also on behalf of its citizens, of claims against foreign states and their citizens. This referred not only to claims arising from the war, but also to claims based upon events after June 5, 1945. Chapter X thereof addressed the question of foreign assets seized by Germany.

The Transition Agreement charged the Federal Republic with compensating previous German owners of property outside Germany seized by the Allied Powers: "The Federal Republic will ensure that the previous owners of the valuables, which have been seized on the basis of the measures stated in Art. 2 and 3 of this part, be compensated."¹¹⁸

Under Art. 4 of Part 6 of the Transition Agreement, the right to negotiate claims concerning lost German property assets abroad was restored to the Federal Government to a certain extent. As a result, negotiations and agreements concerning remaining assets followed with certain countries, including some Latin American countries, Turkey and Switzerland.¹¹⁹ Discussions with the U.S. regarding such an agreement did not progress beyond the initial stage, and were then broken off. German assets in the U.S. were estimated at U.S. \$ 600 million in 1947.¹²⁰

113. *Id.*

114. *Id.* art. 3 § 1.

115. *Id.* art. 3 § 3.

116. 1953 BGBl. II, 15.

117. See EIKE BURCHARD, DER VÖLKERRECHTLICHE VERZICHT DES STAATES AUF RECHTSGÜTER SEINER STAATSANGEHÖRIGEN IM AUSLAND 44 (1972).

118. The Transitions Agreement, *supra* note 112, art. 5

119. See Rumpf, *supra* note 66, at 94.

120. See WILHELM GREWE, RÜCKBLENDEN 1976-1951, at 535 (1979); Martin Domke, *The War Claims Act of 1962*, 57 AM. J. INT'L L. 354 (1963).

A turning point for the further development of the reparation policies was manifested through the fact that Art. 1 of Part VI of the Transition Agreement provided that the Western Allies would waive deliveries for reparation purposes from current German production, and declared that the question of reparations should be dealt with in the peace treaty or, prior to that, through appropriate international agreements:

The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at not time assert any claim for aggression against the current production of the Federal Republic.¹²¹

As to the general status of the reparations issue in 1952, the Allies could have demanded and forced the receipt of any particular reparation program, but by 1952, they had clearly come to understand that the reparation program after the First World War had contributed to, and not avoided, a future conflict. As the Cold War developed, any initial plans for a demilitarized and agrarian German economy ceased, having been replaced by a vision of an industrialized German economy serving as a key NATO partner.

As part of this process, Germany was to be left with the responsibility to create a restitution mechanism to compensate those injured by the Nazi horrors. As early as November 1947, the U.S. Military Government had enacted Law No. 59 on the Restitution of Identifiable Property, parallel to English and French ordinances with the same purpose. According to these regulations, identifiable property taken by the Nazis from their victims was returned, or, when no longer existent, the latter were compensated for the value of the property. In case no owners or heirs survived, the assets were restituted to Jewish "successor organizations." Through the Transition Agreement, the United States and its Allies assigned to Germany, and Germany acknowledged the need for and assumed:

[T]he obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article I of this Chapter [Internal Restitution] and the programmes [sic] for restitution and reallocation thereunder provided. The Federal Republic shall entrust a Federal agency with ensuring the fulfilment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law.¹²²

Thus, reparation was henceforth to be entrusted to international treaties, and restitution legislation enacted in Germany and adjudicated by a German court. It was understood that the standard for compensation would be imperfect, for no amount of restitution could compensate the victims of Nazi tyranny for the egregious wrongs committed. German internal legislation was built upon this premise.¹²³ The post-war regulation of German debt, national and international, was based on the fact that Germany's total debt amounted to an almost unimaginable figure of about 800 billion Reichsmark, and that, for all practical

121. See HANS KUTSCHER, *BONNER VERTRAG UND ZUSATZVERSICHERUNGEN* (1952).

122. The Transition Agreement, *supra* note 112, Art. 2.

123. See 2 *BUNDESTAGSDRUCKSACHE* 84 (1949).

purposes, Germany was bankrupt.¹²⁴ Thus the standard established by the United States and its allies in the Bonn Convention was to be "adequate" compensation, not full compensation:

The Federal Republic acknowledges the obligation to ensure in accordance with the provisions of paragraphs 2 and 3 of this Chapter *adequate compensation* to persons persecuted for their political convictions, race, faith or ideology, who thereby suffer damage to life, limb, health, liberty, prosperity, their possessions or economic prospects. . . .¹²⁵

In essence, the United States and the other allied governments reserved their rights to assert further reparations claims against Germany, but, for the time being, left to Germany the task of creating and implementing such programs for "adequate compensation."

The status of forced labor in the process of Allied and German efforts to compensate Nazi victims was discussed in the context of Germany's domestic legislation for compensation to Jewish victims, enacted in 1953. Inasmuch as forced labor, per se, was not to be treated as a separate category for which compensation was due under the legislation, it was suggested that Germany ought to change the legislation to add such a category. This initiative failed due to the position expressed by United States Secretary of State John Foster Dulles: "British proposal would open Federal Republic to liability for fantastic sums of money and indirectly would reopen entire reparation problem."¹²⁶

This reaction on the part of the United States confirms the position that compensation for people being used as forced laborers during the war was a state-to-state reparations issue, a position fully consistent with the rules of general international law.

In the years 1959-1964, the Federal Republic agreed upon lump sum payments as compensation for the persecution under National Socialism with 12 states. These were Luxembourg, Norway, Denmark, Greece, Holland, France, Belgium, Italy, Switzerland, Austria, Great Britain and Sweden.¹²⁷ Overall, the sums included in these 12 agreements amounted to 971 million DM. From the total payments that the Federal Republic transferred, each of these states had to pay its own citizens who had suffered bodily injury, health damage or loss of freedom under National Socialist persecution.¹²⁸

124. See 15 BVerfGE 126, 141-42; decision of the Appellate Court of Cologne, 52 NJW 1555 (1999).

125. Transition Agreement, *supra* note 112, Chapter IV, §1 (emphasis added).

126. CONSTANTIN GOSCHLER, WIEDERGUTMACHUNG 303 (1992).

127. For details of the bilateral agreements see Ernst Féaux de la Croix, *Staatsvertragliche Ergänzungen der Entschädigung*, in DER WERDEGANG DES ENTSCHÄDIGUNGSRECHT 201 (Ernst Féaux de la Croix and Helmut Rumpf, eds., 1985) (3 DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND (Bundesminister der Finanzen and Walter Schwarz, eds., 1985)).

128. Also relevant in this context is the agreement for compensation of the victims of pseudo-medical experimentation which took place in Nazi run concentration camps. Previously, according to a cabinet decision of July 26, 1951, applications for compensation for such experimentation would only be accepted from victims residing either in Germany or in one of the states that maintained diplomatic relations with Germany. In 1960, however, compensation was extended to those who resided in states which did not maintain diplomatic relations with Germany. This compensation was

A. *The London Debt Treaty (1953)*

The London Debt Treaty addressed and regulated several categories of German debts—some from the First World War, some from the inter-war period, some from the Second World War, and some even from the post-war period: for all these categories of debt, new conditions were laid down.

The London Debt Treaty¹²⁹ distinguished between debts “to be settled”¹³⁰ and “claims excluded from the agreement.”¹³¹ Questions concerning claims arising out of the Second World War came under Art. 5, that is, among the debts which are excluded from the treaty. In other words, such issues were not to be settled under the treaty, but rather their state-to-state resolution would be deferred until the final settlement of the issue of reparation.

The text of the first three sections of Article 5 of the London Debt Treaty, as ratified by the United States, reads as follows:

(1) Consideration of governmental claims against Germany arising out of the first World War shall be deferred until a final general settlement of this matter.

Consideration of claims arising out of the second World War by countries which were at war with or were occupied by Germany during the war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of Germany occupation, credits acquired during occupation of clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the problem of reparation.

Consideration of claims, arising during the second World War, by countries which were not at war with or occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including credits acquired on clearing accounts, shall be deferred until the settlement of these claims can be considered in conjunction with the settlement of the claims specified in paragraph (2) of this Article (except in so far as they may be settled on the basis of, or in connexion [sic] with, agreements which have been signed by the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America and the Government of any such country (emphasis added)).¹³²

In interpreting Art. 5 sec. 2, it bears emphasis that the “deferral” of consideration was not due to a lack of time or such other reasons on the part of the signatory states. The background to the formulation of Art. 5, together with its meaning, shows that the assertion and satisfaction of these deferred claims was

facilitated by an agreement with the International Committee of the Red Cross (“ICRC”) in Geneva. Through the intervention of the ICRC, the parties agreed that a neutral commission with quasi-judicial independence would determine the validity of the compensation applications and the amount to be awarded. Between 1965 and 1972, the Federal Republic of Germany concluded such compensation through this mechanism by entering into agreements with Yugoslavia, Hungary, Czechoslovakia and Poland. Payments by the Federal Republic were distributed among the affected victims through this commission. The total sum provided for compensation for pseudo-medical experimentation was approximately 175 million Deutsch marks, of which about 50 million were distributed in Eastern Europe by the ICRC. EICHORN, *supra* note 68, at 158.

129. Agreement on German External Debts, Feb. 27, 1953, 1953 BGBl. II, 333 [hereinafter the London Debt Treaty].

130. The London Debt Treaty, *supra* note 129, art. 4.

131. *Id.* at art. 5.

132. The equally authentic German text of art. 5 (3) does not fully correspond to the phrase “against . . . agencies of the Reich.”

not then considered possible. The common understanding among all parties was that the effectiveness of the London Debt Treaty was not to be endangered by an attempted resolution of the deferred claims. Regard was had to the ability of Germany to meet these claims.¹³³

Generally speaking, the entire Treaty reflected the wishes and intentions of the U.S. and the British governments. This was quite understandable given the role that these two governments had played during the war and in the evolution of policies vis-à-vis Germany since 1945. U.S. and British dominance is reflected in the manner in which claims of neutral states against Germany were regulated. In Art. 5 sec. 4, claims of neutral governments and their nationals arising during the Second World War were deferred, whether they were war-related or not. Thus, they were treated less favorably than the claims of those at war with Germany. For understandable reasons, the Allied creditors considered that states and creditors who had remained neutral in the war should not benefit from their position. The Allies deferred and did not waive their own reparation claims, in part because the Allies did not wish to stand at a disadvantage compared to other states and creditors who did not choose to be subject to the London Debt Treaty.¹³⁴ They did so notwithstanding the desire of the German side to be able to finally resolve the reparations question as soon as possible.

The content, meaning and purpose of the provisions of the London Debt Treaty can be judged only against the historical background of the 1950s. At that time, the most urgent task of domestic German politics was the rebuilding of the post-war economy. Financing through German resources was impossible. Therefore, Germany was dependent on foreign capital. The United States Marshall Plan had provided the decisive initial contribution. It was soon clear, however, that the United States was willing to support the rebuilding of the German economy with public U.S. funds only for a limited period. Both the American and the German side endeavoured to ensure that such support would be replaced by finances in the form of loans to Germany from the private sector. The fact that the question of Germany's foreign debts was still unresolved presented a serious impediment to this goal. Only the due servicing of the old debt could restore foreign confidence in German creditworthiness, and the London Conference was to open the path in this direction.¹³⁵

Closely related to the efforts to stabilize the German economy was the political goal of the Western Powers and the Federal Republic of regularising the legal standing of the Federal Republic under public international law. Against this background, the foreign ministers of France, Great Britain and the United States of America had already developed a position at a conference in New York from September 12 through 18, 1950, which produced fundamental changes in the West's policy toward Germany and, therefore, toward the issue of repara-

133. See 18 BGHZ 22, 27.

134. See 22 BGHZ 18, 29.

135. See ERNST FÉAUX DE LA CROIX, BETRACHTUNGEN ZUM LONDONER SCHULDENABKOMMEN, FESTSCHRIFT FÜR BILFINGER 27-8 (1954) [hereinafter FÉAUX DE LA CROIX].

tions.¹³⁶ The new principles aimed at integrating Germany into the community of free countries, at extending the authority of the Federal Government in the economic area, at revising the Statutes of Occupation, and, *inter alia*, re-examining the production restrictions which were still in force.¹³⁷

In the historical evolution of Allied reparation policy vis-à-vis Germany after 1945, the London Debt Treaty consolidated the two fundamental earlier steps by Allied Powers. First, it built upon the 1946 Paris Agreements which had stipulated that, for the time being, the reparations as assigned to the three powers would cover the entirety of war damage and losses for which Germany was responsible. Second, it confirmed the agreement reached earlier in the negotiations on the Settlement Convention that final resolution of reparations issues would be deferred until a peace treaty or earlier intergovernmental agreements were redacted. Standing upon these pillars, the London Debt Treaty reconfirmed that war claims of individuals had to be asserted, regulated and confirmed by agreements among governments.

U.S. Representative Kearney explicitly confirmed during the London Conference that its deliberations were based upon the decisions reached in the 1946 Paris Agreement.¹³⁸ This position was also expressed against the background of a Netherlands initiative in London to draft the Agreement in a manner which would have allowed individual states to deviate from the 1946 Agreement and to negotiate war claims with Germany before a final peace Treaty was reached.¹³⁹

136. The Communiqué of the Conference of September 19, 1950 is *reprinted* in 5 EUROPA-ARCHIV 3406 (1950).

137. The Allied High Commission had written to the Federal Government on October 23, 1950 calling on the Federal Government to clarify the state of its foreign debts in the future—after it had taken over responsibility for its foreign affairs. This request covered both the foreign debts from the pre-war period and the economic assistance that the occupying Allies had provided in the post-war period. The clear position of the Allies was that the servicing of post-war debts had to take priority over pre-war debts. Enclosed with this letter from the Allied Powers to the Federal Government was a draft agreement in which the liability of the Federal Republic for pre-war debts of the Germany Reich and for debts in respect of post-war economic assistance was articulated.

The letter of October 23, 1950 served as a starting point and laid a foundation for the negotiations at the London Debt Conference in February 1953. On March 6, 1951, the Chancellor of the Federal Republic of Germany sent a letter to the High Commission expressing his readiness to cooperate in the settlement of German's foreign debt in the manner suggested. *See* 1953 BGBI. II, 473.

On February 27, 1953, in addition to the London Debt Treaty, the Federal Republic of Germany signed an agreement with the United States concerning certain kinds of German bilateral debt and several bilateral agreements concerning economic assistance granted to Germany by the Allied side. At the same time, an agreement was reached between Germany and private U.S. and British creditors regarding loans granted in 1930. For details *see*, FÉAUX DE LA CROIX, *supra* note 135, at 37.

138. *See Protocol of the Final Negotiations*, reprinted in 4478 BUNDESDRUCKSACHE 54 §§ 5-7. In 1953, the parties agreed that that this Protocol would have special weight with respect to the interpretation of the Treaty [hereinafter Protocol].

139. Protocol, *supra* note 138, at 54 § 7; *see also* HERMAN ABS, 2 ENTSCHIEDUNGEN 223 (1991). The London Conference concluded that claims of forced laborers could only be pursued on the basis of domestic German legislation; *see* Conference Document, February 4, 1953, VI GENERAL DOCUMENTS 1.

B. The Resolution of the Issue of Reparations in the "2 + 4 Treaty"

A comprehensive and formal general peace treaty of peace or settlement was never negotiated between the Allies and Germany in any single document at the end of the Second World War. The necessary provisions were made step-by-step after 1945 and the final documents were agreed upon in the "2 + 4 Treaty."¹⁴⁰

Thus, the "2 + 4" Treaty will have to be considered the final element of a series of agreements which in their sum constitute the functional equivalent of a Peace Treaty with the consequences required under *Ware v. Hilton*.¹⁴¹ (Were it otherwise, it would necessarily be the case that the bar against consideration of war claims contained in Article 5(2) and (3) of the London Debt Treaty would still be in operation.)

The United States supported Germany's position not to re-open the question of reparations in the context of a peace conference.¹⁴² Thus, the "2 + 4 Treaty" contains no express clauses on the reparation question. Nevertheless, clause 12 of the preamble states that the agreement contains the final settlement with Germany ("intending to conclude the final settlement with regard to Germany"). As indicated in the Preamble, the former Allied Powers no longer consider themselves as occupants of Germany. ("Recognizing that thereby, 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*").¹⁴³ Any negotiations on war issues and reparations could have been undertaken only in the status of enemies or of an occupying power:

According to Clause 12 of the Preamble the Settlement Agreement contains the final settlement provisions with Germany. Thereby, it is clear that between Germany and the four major victorious powers, there are not further questions arising out of the war or the occupation to be settled, which have either not yet been mentioned or have not already been settled in earlier agreements or which are not settled by this agreement.¹⁴⁴

The "2 + 4 Treaty" nowhere mentions or addresses issues left open after the war in general, or reparations in particular. To the contrary, the Preamble

140. 1990 BGBl. II, 1318. For the background and content of the Agreement see Dietrich Rauschnig, *Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland*, DVBl 1275 (1990) [hereinafter Rauschnig]; Dieter Blumenwitz, *Der Vertrag vom 12. 09. 1990 über die abschließende Regelung in bezug auf Deutschland*, 43 NJW 3042 (1990); Wilfried Fiedler, *Die Wiedererlangung der Souveränität Deutschlands und die Einigung Europas*, 685 JZ 688 (1991); WLADYSŁAW CZAPLINSKI, 35 DIE FRIEDLICHE REGELUNG MIT DEUTSCHLAND IN RECHT UND OST UND WEST 133 (1991).

141. See *Ware v. Hilton*, *supra* note 14.

142. The issue was discussed on February 24, 1990 at Camp David by President Bush and Chancellor Kohl. See DEUTSCHE EINHEIT: SONDEREDITION AUS DEN AKTEN DES BUNDESK- ANZLER- AMTES 1989/90, at 860 (Hanns Jürgen Küsters and Daniel Hofmann, eds., 1998) [hereinafter SONDEREDITION]. As to the German domestic deliberations, see *The Memorandum by Ministerial Director Horst Teltschik to the Federal Chancellor*, in SONDEREDITION, *supra*, at 955.

143. The "2 + 4 Treaty," *supra* note 94, Preamble (emphasis added).

144. Rauschnig, *supra* note 140, at 1279 (translation by the author).

clearly indicates that matters regarding the war shall no longer be on the agenda ("finally put an end to the past").¹⁴⁵

It would be entirely unrealistic to assume that the reparations issue was forgotten in 1990. Moreover, a side agreement to the "2 + 4 Treaty" in fact addressed this subject and provided that Germany would continue its domestic programs for payments to those groups defined in earlier legislation and extend this program to persons living in the former German Democratic Republic.¹⁴⁶

As we have seen, the Soviet Union, as early as 1953, had waived reparations against Germany. The Western Allied Powers, on the contrary, had, in the Transition Agreement and the London Debt Treaty, left the "problem of reparation" to be settled by a peace treaty or earlier agreements. While advocates of the legitimacy of private claims see the absence of an express waiver thereof in the "2 + 4 Treaty" as evidence of their continuing existence, the stated position of the concerned governments indicates otherwise.

Specifically, the German Government has said:

Inasmuch as states have not waived their claims, such claims cannot be raised against the Federal Republic because such claims would necessarily have presupposed the conclusion of treaties on the level of international law. According to generally accepted international practice, reparation claims have always been regulated in their existence and amount by a treaty; usually they have been laid down in a peace treaty after the end of war operations. It follows from the meaning of a reparation agreement as a process securing and preserving peace that such arrangements will have to be concluded in an appropriate chronological context with the end of the state of war if they are meant to fulfil their purpose. 50 years after the end of the Second World War, far more than 30 years after the Allied Powers have declared the termination of war at different times, after decades of peaceful, and fruitful cooperation in mutual confidence of the Federal Republic of Germany with the international community and sizeable transfers for compensation purposes, the question of reparations has lost its justification.¹⁴⁷

This position was repeated by the Federal Government on October 27, 1997:

The London Debt Treaty had deferred consideration of war-related claims of states at war with Germany and their nationals until a final settlement of the question of reparations. Due to the well-known differences of the main victorious powers, such a settlement was never reached. Fifty years after the end of World War II, the question of reparations has become moot. The Federal Republic has based its agreement to the Treaty on the Final Settlement upon this understanding.¹⁴⁸ This understanding was reconfirmed by the current German Government in October, 1999.¹⁴⁹

In 1990, the "2 + 4 Treaty" on the Final Settlement With Respect to Germany" was presented to the United States Senate for ratification. The Treaty was referred to the Senate Foreign Relations Committee. Senator Claiborne Pell, the Chairman of the Committee, sought and received from the Congress-

145. The "2 + 4 Treaty," *supra* note 94, Preamble.

146. Rauschning, *supra* note 140, at 1279.

147. 13/4787 BUNDESDRUCKSACHE 2 (translation by the author).

148. 13/8840 BUNDESTAGSDRUCKSACHE 2 (translation by the author).

149. See 14/1786 BUNDESTAGSDRUCKSACHE 8, par. 23, Exhibit 94.

sional Research Service an analysis relating to the issues before the Committee. According to that report, the question of reparations was "no longer an issue on the agenda between Bonn and Washington."¹⁵⁰

C. *Payments Based on German Programs, 1980–2000*

Few, if any, of the reparations paid to the U.S.S.R. on its own behalf and on behalf of Poland were used to compensate individual victims of the Nazi regime. Thus, for a long time, persons residing in Central and Eastern Europe did not benefit from domestic German legislation, nor did Germany conclude any lump sum agreements which applied to such persons before the end of the Communist era, with the exception of agreements to benefit victims of pseudo-medical Nazi practices. As noted above, the Soviet Union had waived all possibly remaining reparations claims against Germany on behalf of itself and its nationals as early as 1953.¹⁵¹ Regarding Yugoslavia and Poland, Germany granted certain types of loans with special conditions in the 1970s that were considered to reflect, "in part," the German moral debt arising from the Second World War.¹⁵²

In 1980, Germany created a Hardship Fund with the Jewish Claims Conference to benefit those Jewish persons who had been able to emigrate from the Soviet Union and other Eastern European countries. The Fund was originally made up of 400 million DM, and was increased to 535 million DM in 1992.¹⁵³ Beneficiaries were those who had not been eligible for compensation under previous arrangements and were now living under difficult conditions.

In the negotiations of the "2 + 4 Treaty," Germany agreed to continue her national programs to benefit victims of Nazi persecution. Pursuant to a Law on Open Property Questions, amended in 1997,¹⁵⁴ property worth billions of German Marks was restored to former Jewish owners, their heirs, or the Claims Conference. The German program continues to operate.

Compensation claims based on domestic German law were not affected by the Treaty. The Notification of the Agreement of September 27-28, 1990 to the Agreement on Relations between the Federal Republic of Germany and the Three Powers (in its amended version), as well as the Agreement on the Settlement of War and Occupation Questions,¹⁵⁵ expressly stated that the German Indemnification Law and the Restitution Law and Compensation Law remained in force and also applied in the territory of the Former German Democratic Republic.¹⁵⁶ The Federal Government has since continued to apply and expand its domestic compensation legislation.

150. LEGAL ISSUES RELATING TO THE FUTURE STATUS OF GERMANY, SENATE COMM. ON FOREIGN RELATIONS (G.P.O. June 1990). The Report has referred generally to claims which remained subject to intergovernmental negotiations.

151. See *supra* at 323.

152. See Helmut Rumpf, *Die Regelung der deutschen Reparationen nach dem Zweiten Weltkrieg*, 23 ARCHIV DES VÖLKERRECHTS 74, 99 (1985).

153. WIEDERGUTMACHUNG, *supra* note 81, at 120.

154. 1997 BGBl. I, 1975.

155. 1990 BGBl. II, 386.

156. *Id.* at art. 3.

In October 1991, as part of its effort to meet its moral obligation, Germany agreed to pay to a Polish fund an amount of 500 million DM to benefit persons who have been persecuted by Nazis, experience serious health problems and are in a difficult economic situation. A Polish foundation administers the fund.

Similarly, in March 1993, Germany agreed with Russia, Byelorussia and the Ukraine to establish foundations to benefit persons persecuted by the Nazis. So far, about 1.5 billion German Marks has been committed to these foundations. An agreement with the Czech Republic that is primarily intended to benefit persons suffering from Nazi-persecution has established a so-called Future Fund with 140 million German Marks. Other former Eastern states received about eighty million German Marks between 1998 and 2000.

Also, in 1998 the German Government agreed to contribute an additional 200 million German Marks to the Claims Conference, in order to broaden benefits to Jewish persons persecuted by the Nazis in Eastern Europe. Germany's effort to meet its moral obligation is therefore ongoing.¹⁵⁷

As noted above, the last decade of the twentieth century saw the institution of lawsuits against Germany and certain of its private companies before national courts in, among other places, Germany and the United States, by victims of Germany's forced labor and other war-related programs. Although, as mentioned, no German or American court rendered a final judgment in favor of any such claimant, economic and political considerations led to arrangements intended both to continue Germany's moral atonement for the suffering inflicted at its hands, and to assuage perceived social forces positioned to potentially cause economic losses by, for example, boycotts and similar activities.

Thus, on July 7, 2000, the German Bundestag established a Foundation "Remembrance, Responsibility and Future"; the German Government and German industry each contributed five billion DM to the Foundation. The law entered into force subsequent to the signing of a Joint Statement on July 17, 2000 by representatives of the U.S., Germany, Israel, Poland, the Czech Republic, Byelorussia, the Ukraine, Russia and the Claims Conference, as well as representatives of German industry and claimants who had instituted suits before national courts, indicating their agreement as to the operations of the Foundation.¹⁵⁸

IV.

HUMAN RIGHTS, HUMANITARIAN LAW AND WAR-RELATED INDIVIDUAL CLAIMS

A new era of international law was ushered in when the United Nations was created in 1945, with its Charter providing that the protection of human rights would be among the main purposes of the organization.¹⁵⁹ Step by step

157. In 1999, the German Ministry of Finance stated that more than 103 billion German Marks had been spent. See BUNDESMINISTERIUM DER FINANZEN, DOKUMENTATION 3/99, at 2, 38.

158. See *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429, 432 (D.N.J. 2000).

159. See U.N. CHARTER art. 1 & 55.

thereafter, the individual became a subject of international law. Building upon the Declaration of Human Rights of 1948, the two Covenants of 1966 became the global foundation of the new architecture, with regional additional conventions in Europe, America and Africa. As to the universal rules, however, it has remained doubtful to what extent the individual is to be seen as a beneficiary rather than the holder of an entitlement within this new universe of rules.

Thus, in the United States, human rights treaties are considered to be non-self-executing, and they do not provide a cause of action for individuals;¹⁶⁰ this position also covers the Torture Convention and the Genocide Convention.¹⁶¹ Also, the modalities of enforcement, which rely on the machinery of state reporting and the separate legal existence of protocols for individual complaints, do not suggest that the status of individuals has been raised to the level of a subject with full rights. Of course, the basic normative structure and fabric of international law with the state as the central actor has not changed either. Thus, for instance, only states are entitled to be parties to proceedings before the International Court of Justice. Furthermore, the mere continued validity of the rules for diplomatic protection stands as a powerful sign for the continuous role of the state in the settlement of claims of foreign nationals.

From a perspective of pure legal logic, it is possible to consider the extension of the concept of human rights to the area of claims settlement in the sense of replacing the rules of diplomatic protection by granting direct standing to an individual to raise a claim against a foreign government. In practice, however, the international community has refrained from drawing such a conclusion, as is evident in every textbook of international law.¹⁶² As far as the specific rules of humanitarian law are concerned, no changes have been introduced in the post-war period which would indicate the will of the international community to alter the general lack of standing of individuals to raise a claim, even though this body of law was revisited by the states on several occasions.

All of these considerations notwithstanding, the broad argument in favor of (1) the applicability of human rights norms during times of war, and (2) a corre-

160. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l. L. 341 (1995).

161. See also Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Legislation*, 66 FORDHAM L. REV. 319 (1997).

162. A leading British international lawyer has expressed the necessity to distinguish between international law and philosophical logic. He has believes that this emphasis on the individual instead of the state is "to express the matter in that way is to abandon law for philosophy. For law is an artificial system which has its own concepts and principles, and anyone invoking the law will find himself confronted by these concepts and principles. Neither international nor municipal law treats the state merely as a convenient piece of machinery; and in international law it may make all the difference in the world to the individual that it is normally his state, not himself, who is the bearer of international rights and duties." See Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 192 (1962).

The Permanent International Court of Justice confirmed, in the Peter Pazmany Case that it is "scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself." PCIJ Series A/B, No. 61. It is noteworthy that decisions of the U.N. Human Rights Committee in the context of individual complaints are in the nature of non-binding recommendations. See United Nations Human Rights Committee, Annual Report 1988, para. 646; D. GOLDRICK, THE HUMAN RIGHTS COMMITTEE 151 (1994).

sponding transfer of the enforcement machinery for the recovery of war-related damages, will have to be considered. Ultimately, the persuasiveness of any effort to base the enforcement of war-related individual claims upon a national law such as the ATCA will depend on the viability of such two-pronged arguments. As to the first part, it must be recognized that the rules *in bello*, i.e., the so-called Geneva and the Hague rules, have been negotiated and designed to protect individuals affected by actions of war. Indeed, these laws of armed conflict have often been called "humanitarian laws," although the relevant treaties do not rely on this term. In any event, the philosophical and legal origins of human rights and of humanitarian laws lie in the conviction that the classical approach of international law needs to be supplemented in certain areas and in certain ways for the benefit of each individual. This common foundation of human rights and of humanitarian law, however, does not imply that they are identical or interchangeable.¹⁶³ Obviously, the right to life of a soldier will not be protected in the same way under the rules of armed conflict during war as under the human rights norms applicable in peace times.

Generally speaking, humanitarian law has been negotiated separately from human rights documents, with a view of benefiting the individual within the framework set by the conduct of war and the recognition that each party to a war attempts to defeat the enemy on the battleground. The difference between the two areas has been appropriately summarized as follows: "Due to their diverse historical origins, their different fields of application, and certain variations of an ideological and systematic character . . . , one should neither regard the protection of human rights as a special field of humanitarian law . . . nor understand humanitarian law as a branch of human rights law."¹⁶⁴ While it is thus clear that human rights are distinct from humanitarian law, it is also beyond doubt that the process of enforcement of human rights on the international level has been negotiated and laid down by the international community in specific terms within the framework of a clearly defined international procedure, a procedure that includes no room for national decision-making. Thus, the evolution of universal human rights in their internationally accepted setting does not support an argument to the effect that universal human rights applicable in peacetime should be applied by domestic courts for purposes of enforcing the laws of armed international conflict.¹⁶⁵

163. See Kathryn Boyd, *Are Human Rights Political Questions?*, 53 *RUTGERS L. REV.* 277, 298, 320 (2001) [hereinafter *Are Human Rights Political Questions*]. Boyd asserts that the sole distinction between reparations claims and human rights claims is that the former relate to the future and the latter to the past. Boyd does not state any basis for this unorthodox view, and does not reconcile it with treaty practice covering individual claims. For Boyd's general view on the role of the state and the individual in current international law see *id.*, at 330.

164. See Karl Partsch, *Humanitarian Law and Armed Conflict*, in 2 *ENCYCLOPEDIA OF PUB. INT'L LAW* 933 (Rudolf Bernhard, ed., 1955).

165. But see *Are Human Rights Political Questions*, *supra* note 163, at 292. Boyd argues that decisions by national courts on war related claims would not interfere with ongoing treaty negotiations. *Id.* The issue, however, is not only whether future negotiations may be affected, but also whether a court ruling is consistent with an existing treaty. In this context, Boyd does not analyze the history of the treaties negotiated after 1945, including the 1946 Paris Agreement which, as noted, covers claims based upon harm to individuals.

V. CONCLUSION

In general, the rules of international law reflect experiences and policies which have been considered valuable and worth preserving. The practice of subsuming war-related claims within the process of reparation, and thus not allowing the individual resolution of such claims by national courts, had a two-fold-basis. First, it was consistent with the broader classical rules of international law under which aliens must have their claims, whether arising from wartime or peacetime events, protected by their home countries. Second, it reflected the practical necessities of peacemaking, as the presence of claims controlled by individuals would further complicate the always difficult process of international peace negotiations.¹⁶⁶

The modern rules *in bello* to benefit the individual in war did not affect these two converging bases of the rules on reparation after World War II. Rather, when the victorious powers made their peace with states in Eastern and Central Europe in 1947, with Japan in 1951, and with Austria in 1955, they deliberately decided to follow the classical approach, notwithstanding the occasional arguments of individual countries (such as that of the Netherlands on the London Debt Treaty of 1953) that a new approach should be followed.

In the case of Germany, the unilateral approach of the victorious side of exacting what reparation it saw fit was ended in 1952 and replaced by a novel scheme under which Germany was obliged, on the basis of a treaty, to pay appropriate compensation within its domestic legal system. When all outstanding issues concerning war, peace and occupation were resolved in 1990 in the "2 + 4

166. "Not infrequently, in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." *U.S. v. Pink*, 325 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling claims of their respective nationals. As one treatises writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), *citing* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 262 (1972).

Within the United States the practice of settling war claims began with the Jay Treaty of 1794 with Great Britain. *See* JOHN MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* Ch. IX and X (1898) [hereinafter *HISTORY AND DIGEST OF INTERNATIONAL ARBITRATION*]. The practice was continued after the French Revolution and the Napoleonic Wars, *see* Jesse S. Reeves, *Note on Exchange v. M. Faddon*, 18 *AM. J. INT'L. L.* 320 (1924), and the American Civil War. *See* *U.S. v. Weld*, 127 U.S. 51 (1888); *HISTORY AND DIGEST OF INTERNATIONAL ARBITRATION*, *supra*, Ch. XIV and XV. After World War I, the United States concluded a separate treaty with Germany to settle certain damages, *see* 42 Stat. 2200. A few years later, a treaty was concluded between the United States and Mexico in the wake of an Mexican revolution of 1912, again settling claims, 43 Stat. 1730; *see also* *Oetjen v. Cent. Leather Co.*, 246 U.S. 297 (1918). After 1945 this tradition of settling claims continued. *See* HENRY STEINER, DETLEV VAGTS AND HOWARD KOH, *TRANSNATIONAL LEGAL PROBLEMS* 472 (4th ed. 1994).

In *Dames & Moore v. Regan*, 453, U.S. 654 (1981), the U.S. Supreme Court upheld the power of the President to enter into the Declaration of Algiers. Under this treaty, both Iran and the United States agreed to adjudicate claims of their governments and their nationals through the Iran-United States Claims Tribunal, despite the fact that this required suspending cases already filed by U.S. nationals in courts of the United States. *See also* RESTATEMENT (THIRD) FOREIGN RELATIONS § 902, Comment i (1987).

Treaty,” the adequacy of the results of this novel scheme were not explicitly addressed. Indeed, archives show that Germany deliberately declined to agree to a formal peace conference, or to agree to a formal peace treaty in order to avoid new demands for reparations. Along these lines, Germany would certainly have welcomed a specific clause on the issue of reparations in the “2 + 4 Treaty” instead of the broader provisions that were included in the Treaty. As to the reasons for the approach ultimately adopted in the Agreement, it is appropriate to assume that the Allied Powers, and the United States in particular, decided not to consent to more a specific language on reparations. Critically, however, neither the “2 + 4 Treaty” nor any of the agreements that preceded it purported to create yet another novel reparations scheme, under which individuals could directly assert claims under international law.

When, almost ten years after the “2 + 4 Treaty” came into effect, individual claims by U.S. citizens were brought before U.S. courts, complex negotiations led the German government and private companies to pay ten billion DM for the benefit of a broad range of victims. Throughout this process, the United States followed the same approach as in 1990, declining either to conclude a treaty with Germany to address the reparations issue, or to pass domestic legislation which would have terminated pending suits and prevented additional proceedings. Thus, the U.S. declined to adopt a final and explicit legal position on the German reparations issue in 1945, 1953, 1990 and 2000. The extraordinary length of time allowed for peacemaking with Germany resulted from the historical reasons underlying U.S. policymaking, including the unprecedented kind and degree of Germany’s atrocities during the war, the initial post-war Allied approach to peacemaking, the commencement and the end of the Cold War, and Germany’s rebirth as a valued ally.

Beyond its execution of an agreement with Germany and its participation in a Joint Statement, the only measure the United States was prepared to publicly take consisted of its filing of a “statement of interest” in all courts in which relevant law-suits were pending or would be filed in the future. It is generally accepted that such statements have considerable persuasive authority, but by their terms they do not claim to be legally dispositive. These statements of interest are in sharp contrast to similar documents filed by the U.S. in the parallel Japanese company U.S. litigation, which firmly rejected any continuing viability of private claims based on the language of the 1951 Peace Treaty. This contrast highlights that it is not a change in international law, but a perceived difference in the structure of peacemaking with Germany and Japan, which underlies American public policy.

The implications for peacemakers charged with negotiating strategies in connection with present and future conflicts having the potential for subsequent private claims for war-related damages are evident. Future negotiators must take into account the differing national court experiences of Germany and Japan. While, as a matter of international law, such private rights of action may not exist, the prudent peace-maker would likely insist on an express waiver of claims against both the defeated state and its nationals, even where, as in the

U.S., precedential legal authority would indicate that silence in a peace treaty reflects such a waiver.¹⁶⁷

A specific, central aspect of peacemaking concerns the nexus between the amount of reparations, their domestic distribution in the recipient country, and the timing of payment by the defeated state.¹⁶⁸ These modalities in the process of peacemaking have a direct and enormous impact on the effectiveness of the entire arrangements for peace. If victims of war receive only a small fraction of whatever is due to them, or if they receive it decades after the end of the war, the purpose of such payments is achieved to a much lesser degree than in case of prompt payment after the war. Moreover, from the point of view of peacemaking as an ending of political hostility and the beginning of friendly relations, any significant delay of reparations-related elements will necessarily stand in the way of an early normalization of the political atmosphere and of reconciliation. In the defeated country, public acceptance of the sacrifices required by reparations will be most likely to be accepted immediately after termination of armed hostilities, and support is therefore likely to decrease as time goes on and persons and circumstances change.

For any arrangement designed to organize peace and normal relations after a war, it is crucial to address the situation of those persons and groups of the victorious powers who have been most affected and who need to receive most benefits under the agreed-upon scheme of reparations. Thus, the political process in the recipient country during the period of negotiations for peace must in future cases focus not only on relations with the defeated state, but also on the necessity to lay the foundations for peace on the domestic front. To this end, those groups especially affected will need to be identified in the political process, and the amount of reparations and their domestic distribution must reflect the requirement of peacemaking within the domestic context. In the past, the weakest front of peacemaking and reparations has been on this domestic side of the victorious powers.

The attempt to privatize peacemaking at the end of a lengthy historical process of government-to-government negotiations in order to provide the appropriate satisfaction for specially affected groups is only a second or third best alternative to comprehensive peacemaking by governments at a time near the end of military hostilities. The lessons after the Second World War have indirectly reconfirmed the wisdom behind the classical rules of international law which place peacemaking into the hands of governments and not of individuals. In principle, governments were rightly prepared after 1945 to follow these rules. However, to the extent that these rules were in part modified and revised by way of adding elements of open-endedness, of permitting delay and of allowing incursions of uncertainty and unilateralism into government-to-government peace-

167. See *Ware v. Hilton*, *supra* note 14.

168. For the compensation scheme in the U.S. after 1945, see War Claims Act of 1948, 50 U.S.C. § 2001. U.S. courts have declined to interfere in the domestic allocation of reparation funds, see *Wolf v. F.R.G.*, 95 F.3d 536 (7th Cir. 1996); *Hirsh v. State of Isr.*, 962 F. Supp. 377 (S.D.N.Y. 1997).

making, the inadequacy of government-to-government action led to lawsuits by individuals, albeit unsuccessful ones. Thus, the central lesson from the long-belated end of the World War II peacemaking process is that governments must more effectively, promptly and carefully incorporate the legitimate concerns of groups and individuals particularly affected by a war into the inter-governmental process of making peace.