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von der Dunk, Frans and Kooijmans, Peter H., "The Unification of Germany and International Law" (1991).
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THE UNIFICATION OF GERMANY AND INTERNATIONAL LAW

Frans G. von der Dunk and Peter H. Kooijmans***

I. INTRODUCTION: ONE GERMANY?

The process of German unification, at least as far as its international legal aspects are concerned, is almost complete now.¹ After the first *Staatsvertrag*,² creating as of July 1, 1990, a monetary union between the Federal Republic of Germany ("FRG") and the German Democratic Republic ("GDR"), the second *Staatsvertrag*³ uniting the two States as of October 3 legally sealed the inter-German aspects of the unification.

At the same time, the September 12 Treaty⁴ between the four former occupation powers — the United States, the Soviet Union, Great Britain and France — and the two former occupied German States took care of the remaining international aspects, along with the Treaty of Friendship between the FRG and the Soviet Union⁵ and the German-Polish Treaty⁶ on boundaries and friendly relations.

Then on December 2, the first all-German free elections were held

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1. For a summary of relevant events, see the various *Zeittafel* in 44 EUROPA ARCHIV (1989) and 45 EUROPA ARCHIV (1990).

2. Treaty Establishing a Monetary, Economic and Social Union, May 18, 1990, FRG-GDR, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 63/S. 517 (1990) [hereinafter First State Treaty], reprinted in 29 I.L.M. 1108 (1990) (entered into force July 1, 1990).

3. Treaty on the Unification of Germany, Aug. 31, 1990, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 104/S. 877 (1990) [hereinafter Second State Treaty], reprinted in 30 I.L.M. 457 (1991) (entered into force October 3, 1990).

4. Treaty on the Final Settlement With Respect to Germany, Sept. 12, 1990, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 109/S. 1153 (1990) [hereinafter Two Plus Four Treaty], reprinted in 29 I.L.M. 1186 (1990). This treaty became final on March 4, 1991, when the Soviet Union, as the last of the signatories, ratified the treaty. See NRC Handelsblad, Mar. 5, 1991, at 7, col. 1. But at any rate, the object and purpose would have stood after the conclusion of those treaties last fall. See Vienna Convention on the Law of Treaties, art. 18, opened for signature May 23, 1969, 1155 U.N.T.S. 331, entered into force Jan. 27, 1980 [hereinafter Vienna Convention], reprinted in 8 I.L.M. 679, 686 (1969). This article obliges a State not to defeat the "object and purpose of a treaty," prior to its entry into force, once it has signed such a treaty.

5. Treaty on Good Neighbourly Relations, Partnership and Cooperation, Nov. 9, 1990, FRG-USSR, reprinted in Die Welt, Sept. 18, 1990, at 8, col. 1; also reprinted in 30 I.L.M. 504 (1991).

6. Treaty on Boundaries and Friendly Relations, Nov. 14, 1990, Germany-Poland, NRC Handelsblad, Nov. 14, 1990, at 11, col. 1.

in realization of a much disputed article of the FRG's Constitution.⁷ The results confirmed in large measure the consent of the German people to the fact and modalities of unification. Now all that remains is the possibility of a referendum, to be held in the next few years, which could result in a new Constitution. Such a Constitution might lead to the replacement of the FRG, for all practical purposes, by a new state "Germany" — or "United Germany" or "United Federation of Germany" or whatever name would be given to the newly united States.

Does this mean, however, that the unification of Germany has taken place regardless of international law? The process, of course, had many important aspects unrelated to international law; however, the questions to be examined here are: What exactly were the international legal parameters of the unification process, and to what extent have they been acknowledged and incorporated into the legal instruments effecting the unification?

It seems that in situations of an extremely political character, such as the one concerning the (re)unification⁸ of Germany, public international law cannot provide one final, simple solution. International law is essentially a *jus dispositivum*: States can only be bound if they so choose or have so chosen in the past. If, however, only explicit choices were considered to have binding effect in international law, too many gaps would exist to make it a useful system; acquiescence thus plays a prominent role. Furthermore, building upon acquiescence, cases of estoppel or preclusion may sometimes arise.⁹

With regard to the question of German unification, therefore, public international law could only provide the legal framework within which States had the freedom to opt for the various choices available to them; nevertheless, acting within this framework was a legal duty for all States concerned.

The principles of sovereignty and freedom of States, however, can go even further. By acting unanimously, affected States may set aside rules of international law (be they in the form of treaties or customary law), so long as no right of another State is infringed nor any peremptory norm of international law violated;¹⁰ this is the essence of the

7. Article 146, to be discussed *infra* Section III.

8. It is an interesting but rather straightforward question whether "unification" or "reunification" is the proper term for this coming together. Since the Eastern Territories were necessarily excluded from this unit (*see infra* Section II), a reunification of Germany encompassing its entire 1937 territory was impossible; thus, "unification" is the applicable term.

9. See, e.g., Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 BRIT. Y.B. INT'L L. 176 (1957).

10. See Vienna Convention, *supra* note 4, at arts. 43, 54(b).

notion of *jus dispositivum*. This means that if all parties with rights and obligations concerning the German unification — the four occupation powers, the two Germanies, the nine remaining Member States of the European Communities ("EC"), the EC themselves insofar as they can act as a subject of international law, and possibly others — were in agreement concerning the means, the modalities and all the implications of the realization of such unification, then they could set aside the existing legal framework. If this were to occur, these parties would, by their very acts, create a new legal framework. Such a course would not enhance the autonomous value of international law and the role it plays in politics, but it would be interesting to analyze the result as a new piece of law. Either way, an analysis of the international legal ramifications of a unified Germany will reveal ramifications beyond the more narrow issue.

As to the actual issue of unification, only if one of the parties mentioned had wished to postpone, modify or prevent a certain form of unification, contrary to the desires of other parties, would the existing international legal rights and obligations really have come into play.

What role these rights and obligations could have played is therefore the central theme of this article. However, in view of the enormous complexity of the problems involved, this article can do no more than provide a general overview. Sections II through VII will first sketch the outlines of the rights and obligations confronting the two German States before unification. Section VIII will compare those outlines to the actual political outcome of the unification process. The former six Sections will explore a number of different contexts in which legal rights and obligations could have been found.

The first context, discussed in Section II, concerns the power of the four victors of 1945 over the two German States as a consequence of, *inter alia*, the absence of a peace treaty.

The second context, discussed in Section III, is that of the relationship between the two German States *inter se*, which until very recently still consisted of confrontation with each other over the heritage of the war. This confrontation was legally entrenched in their Basic Laws and their claims with regard to each other, especially the claims of the FRG with regard to the GDR. And in this situation legal principles such as acquiescence and estoppel are relevant.

The third context, discussed in Section IV, is the incorporation of the two German States in the military blocs formed around the United States and the Soviet Union: NATO and the Warsaw Pact, respectively. Because of its close relationship with NATO, the role of the Western European Union will also be dealt with in this context.

Section V addresses the fourth context, that of the Conference on Security and Cooperation in Europe ("CSCE") and its aftermath, through the adoption of the Charter of Paris in November, 1990. Especially relevant here, of course, is the Final Act of Helsinki, 1975.¹¹

The fifth context, discussed in Section VI, is that of the European Communities, which have supranational powers in various fields and are on their way to further political integration, with the FRG as one of their most powerful and prominent members. It is especially necessary in this respect to investigate in what way unilateral West German actions could have affected the rights and duties of the other EC Member States or the EC as a whole.

As a sixth point of interest, the intricate legal ramifications of Berlin as an occupied and divided city will briefly be sketched, in Section VII, in their relation to the unification problem.

Finally, in Section VIII, the outlines of legal rights and obligations in these contexts will be compared to the actual political outcome. This analysis will provide a conclusion about the political relevance of international law in the unification of Germany: Was the unification an example of political factors overriding existing legal ones — an example which would detract from the general value of international law, while simultaneously creating new law — or was it, from the international law viewpoint, an auspicious beginning for a new State because its creation adhered to the existing legal framework (instead of creating a new one), thereby contributing to the strength thereof? Through this analysis, a preliminary answer may be formulated to the question: Can *Deutschland Einig Vaterland* (Germany, The Sole Fatherland) be regarded favorably from an international legal point of view, or does it present reasons to revive old fears? Did unification actually take place *Über Alles*, regardless of everything else?

II. THE TWO GERMANIES AND THE FOUR OCCUPATION POWERS

When Germany surrendered unconditionally in the summer of 1945 to the United States, the United Kingdom, and the Soviet Union, these three victors — later accompanied by France — together installed an occupation regime which was intended to last only until a peace treaty would define the final status and form post-war Germany would take.¹² One of the most prominent features expected of such a

11. Final Act of the Conference on Security and Co-operation in Europe, Aug. 1, 1975, reprinted in 14 I.L.M. 1292 (1975).

12. See Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany, June 5, 1945, 60 Stat. 1649, T.I.A.S. No. 1520, 68 U.N.T.S. 189, reprinted in 39 AM. J. INT'L L. 171 (Supp. 1945); Protocol of Proceedings of the Berlin (Potsdam) Conference of the Three Heads of Government of the United States, the Soviet Union

peace treaty was the final determination of the Western frontier of Poland. In Potsdam it was decided that such a peace settlement should be prepared "to be accepted by the Government of Germany."¹³

Due to the Cold War, in the years after 1945 the four occupation zones — originally intended as an interim solution to the problem of occupation pending final settlement — grew into what was to become the Federal Republic of Germany and the German Democratic Republic, both created in 1949. Neither of the two, however, immediately arrived at sovereign statehood. The three Western allies in the FRG, and the Soviet Union in the GDR, maintained their essential rights arising out of the occupation, which had not yet been formally ended.

For the FRG, this situation was not modified by the formal Proclamation on the Termination of the State of War with Germany by U.S. President Truman, on October 24, 1951, since the Proclamation made clear by its own terms that it was not a peace treaty.¹⁴ However, the 1952/54 Convention on Germany,¹⁵ which in article 1(2) granted the FRG sovereignty,¹⁶ did to a certain extent modify the situation. For example, from that time onward the three Western allies were represented in the FRG by Ambassadors instead of High Commissioners.¹⁷

However, some residual occupationary rights, namely the right to station troops in West German territory, were reserved in article 4 together with article 2, and were in fact still utilized until unification. This situation did not change substantially with the Emergency Law,¹⁸ which came into force on June 25, 1968, and referred to article 5(2) of

and the United Kingdom, Aug. 2, 1945 [hereinafter Potsdam Protocol], reprinted in DOCUMENTS ON BERLIN 1943-1963, at 15 (W. Heide Meyer & G. Hindrichs rev. 2d ed. 1963). For the texts of these documents, and in general for all documents concerning the German question, see E. ZIVIER, DER RECHTSSTATUS DES LANDES BERLIN (3d ed. 1977); I. HENDRY & M. WOOD, THE LEGAL STATUS OF BERLIN (1987); I. VON MÜNCH, 1 OSTVERTRÄGE (1971).

13. Potsdam Protocol, *supra* note 12, at § I(3)(i).

14. 46 AM. J. INT'L L. 12 (Supp. 1952).

15. Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952 (as amended on Oct. 23, 1954), 331 U.N.T.S. 327 [hereinafter Convention on Germany] (also known as *Deutschlandvertrag*).

16. Article 1(2) stated that the FRG should have the "full authority of a sovereign State over its internal and external affairs." 331 U.N.T.S. at 328. *But see* Piotrowicz, *The Status of Germany in International Law: Deutschland Über Deutschland?*, 38 INT'L & COMP. L.Q. 609, 615 (1989).

17. E. ZIVIER, *supra* note 12, at 32.

18. Emergency Law ("Notstandsverfassung"), June 24, 1968, reprinted in Holderbaum, *Völkerrechtliche Praxis der Bundesrepublik Deutschland in den Jahren 1967 und 1968*, 30 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT 650, 694-701 (1970) (promulgated by the West German parliament to substitute allied rights regarding the security of allied forces in the FRG, as contained in article 5(2)).

the Convention on Germany.¹⁹ In fact, the Western allies continued to reserve their rights as to Germany as a whole, for example, in the Quadripartite Agreement on Berlin of 1971;²⁰ and their acquiescence to the Emergency Law was necessary, since they could not be bound by federal laws of West Germany. The consent to the Emergency Law expressed in the Note of the three Western allies of December 13, 1967, was given only with regard to "the protection of the security of armed forces stationed in the Federal Republic," not with regard to "the stationing of armed forces," the right to which remained reserved under article 4(1).²¹ Thus, no acquiescence in the FRG's efforts toward unity existed to estop the Western allies from demanding certain conditions regarding the stationing of troops,²² conditions making the FRG slightly less than fully sovereign.

For the GDR, the Statement of 1954²³ and the 1955 Treaty with the Soviet Union²⁴ provided for essentially the same measure of sovereignty when compared with the FRG. This time, however, the residual occupational rights to station troops became Soviet rights under the bilateral treaty of 1955.²⁵ Although the USSR reserved the rights and obligations which stemmed from the existing agreements of the four powers concerning Germany as a whole, in view of the above this must be taken to apply no longer to the occupation as such, but, as was repeatedly stated, only to the final peace settlement.

The situation was complicated to some extent by the Decree of the Presidium of the Supreme Soviet of January 25, 1955, preceding the 1955 Treaty and declaring the "[e]nding [of] the State of War between the USSR and Germany." It was a phenomenon *sui generis*: a kind of peace "treaty" unilaterally declared by the Soviet Union as a substitute for a general peace treaty. Because of protests by the Western allies, this Decree could not create binding restrictions upon them

19. Article 5(2) refers to the security of Allied forces in the FRG, not to their presence as such. See Convention on Germany, *supra* note 15.

20. See *infra* note 147 and accompanying text.

21. See Holderbaum, *supra* note 18, at 696-700; Convention on Germany, *supra* note 15, at art. 4(1). See also Notification of the Declaration of the Three Powers, May 27, 1968, reprinted in 2 SARTORIUS, Doc. No. 604 (1988) (concerning the renunciation of the reserved rights of the allies in accordance with article 5(2) of the Convention on Germany).

22. See Piotrowicz, *supra* note 16, at 616-18.

23. Statement by the Government of the Soviet Union on the Relations between the Soviet Union and the GDR, Mar. 25, 1954, reprinted in DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 166. Two days later, this situation was acknowledged by the GDR. Statement by the Government of the DDR on their Sovereignty, Mar. 27, 1954, reprinted in *id.* at 167.

24. Treaty concerning Relations between the Union of Soviet Socialist Republics and the German Democratic Republic, Sept. 20, 1955, 226 U.N.T.S. 208 [hereinafter 1955 Treaty].

25. Article 4 states that Soviet forces "will remain for the time being in the German Democratic Republic agreement, with the agreement of its government." *Id.* at art. 4.

with regard to any future peace treaty; however, the Soviets' intent to consider the occupation regime ended coincided with the situation which resulted from the 1955 Treaty.

The legal situation before unification therefore seemed to be that the three Western occupying allies, by reserving some occupational rights up until unification occurred, still retained their rights regarding the FRG and any peace treaty with Germany.²⁶ Repeated pledges by the three Western occupiers toward peaceful (re)unification²⁷ and their acquiescence in German sovereignty, however, left them little leeway in their options concerning unification. The most important caveat that they could have put forward was that such peaceful unification could only take place within the borders of the FRG and GDR; the possibility of allowing for claims concerning the Eastern Territories (*Ostgebiete*) had been taken away by legal obligations emanating from the Conference on Security and Cooperation in Europe, the Helsinki Final Act and the international obligations contained therein,²⁸ and even more by the *nemo plus* rule,²⁹ making it impossible for the Western allies to give away more than they themselves had, *i.e.*, the competence to decide as to the Eastern Territories. Indeed, the Western occupying allies always took the position that they were not able to decide on inclusion of the Eastern Territories in a united Germany without agreement on the part of the Soviet Union; article 7(1)³⁰ of the Convention on Germany is but one example of this recognition. That decision was (and is) beyond the competence of the allies because even if the original annexation by the Soviet Union and, especially, by Poland — not a victor in the war against Germany, legally speaking — of those territories had been considered illegal at the time under contemporary international law, such illegality would have been taken away by prescription,³¹ since no Western State could claim not to have acquiesced since the 1970s.

As far as the Soviet Union was concerned, because its occupation-

26. See Convention on Germany, *supra* note 15, at art. 2.

27. *E.g.*, *id.* at art. 7.

28. See *infra* Section V.

29. *Nemo plus juris as alium transferre potest quam ipse habet*. "No one can transfer more right to another than he has himself." BLACK'S LAW DICTIONARY (6th ed.) 1038 (1990).

30. Convention on Germany, *supra* note 15, at art. 7 (stating, *inter alia*, that the borders of a united Germany could only become final after a peace agreement between such a Germany and its former enemies had been signed; consent of the latter, including the USSR, was therefore imperative).

31. *I.e.*, the "hardening" of an originally illegal occupation into a de facto irreversible one, and, when accompanied by acquiescence to this fact, thus a lawful one. See, *e.g.*, Island of Palmas Case, 1928 UNRIIA 829, 868; Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, 130 (Judgment of Dec. 18); Bowett, *supra* note 9, at 200-01 (on the intricate relationship between estoppel, prescription . . . and acquiescence).

any rights in the GDR were transformed into rights based on a treaty with a sovereign equal in 1955,³² those rights were no longer maintainable against the wishes of the GDR (within the rules of the treaty concerning renunciation or modification, of course).³³ The 1964 Treaty with the Soviet Union³⁴ was even more explicit, especially regarding (re)unification. Not only the Soviet Union but also the GDR obligated itself in article 7 to refrain from striving for unification of a peaceful Germany except by means of an agreement between the two sovereign German States. In addition, article 1 obliged both signatories not to interfere in the internal affairs of the other. The Soviet Union was further bound, not only by its pledged support for a peaceful united Germany,³⁵ but also by those CSCE principles which contained legal obligations.³⁶ In total, this meant the Soviet Union had an obligation to refrain, *inter alia*, from taking any but a peaceful position toward an East German wish for unification.

The questions, finally, of Soviet occupational rights as against West Germany³⁷ and of Western occupational rights against East Germany, were without substance, since the two States were acknowledged to be sovereign States in the early 1970s³⁸ — acknowledged without any reservation which could have been invoked other than with respect to a peace treaty or by means of general reservations emanating from international law, such as those mentioned above.

Because of that acceptance of the existence of two German States on the territory of the former *Reich*, the German *Reich* — which did not disappear in 1945 and whose existence was never formally ended

32. The Federal Social Court of the FRG acknowledged this in a judgment of November 6, 1985, stating furthermore that the FRG had acquiesced in the GDR's new status by signing the Basic Treaty, *infra* note 49.

33. See 1955 Treaty, *supra* note 24, at art. 6 (providing that the treaty was to "remain in force until Germany is reunited as a peaceful and democratic State, or until the Contracting Parties agree [otherwise]"). Even leaving aside questions concerning treaties imposed by force or threat, this clearly is a provision which could not prevent, if it did not indeed automatically lead to, renunciation of the treaty in case of a unification such as the one that has taken place. Specifically with regard to options for unification, the sovereignty of the GDR was complete as long as the conditions contained in the treaty were fulfilled, and the Soviet Union's occupational rights became void under the 1955 Treaty itself.

34. Treaty of Friendship, Mutual Assistance and Cooperation between the Union of Soviet Socialist Republics and the German Democratic Republic, June 12, 1964, 553 U.N.T.S. 249 [hereinafter 1964 Treaty].

35. See, e.g., 1955 Treaty, *supra* note 24, at art. 5; Statement by the Government of the Soviet Union on the Relations between the Soviet Union and the DDR, *supra* note 23.

36. See discussion *infra* Section V.

37. See Arndt, *Legal Problems of the German Eastern Treaties*, 74 AM. J. INT'L L. 122, 125 (1980).

38. Piotrowicz, *supra* note 16, at 629 (noting that all four occupying powers, having the right of veto in the Security Council, voted in favor of their admission to the United Nations).

by *debellatio*³⁹ — had finally to be deemed to have legally disappeared in its 1937 form. Following that disappearance, the notion of the *Reich* remained important only because of the reservations of certain occupationary rights⁴⁰ by the three Western allies, and because of the reservation of rights as to a peace treaty by all four occupation powers.⁴¹ Following the acquiescence in Polish and Soviet sovereignty over the former Eastern Territories,⁴² those reservations could only have become relevant with regard to the remainder of the *Reich*: namely, a Germany to come into being on a FRG+GDR-only formula.

Hence, only after both sovereign German States, following free and democratic elections, had opted for unification, would those rights and obligations of the four former occupation powers exist and become relevant.⁴³ This was acknowledged in an exchange of notes on the day of the conclusion of the Basic Treaty between the Ministers of the FRG and the GDR.⁴⁴

From all this, then, the conclusion must be: (1) By their pledges to a peaceful, democratic and free united Germany,⁴⁵ the Western allies were estopped from trying to prevent such a union by demanding that an occupationary regime be included in any peace treaty. Thus, the Western allies were barred from using their reservations, made with regard to the FRG, to impede unification. (2) Because a true unification of the entire pre-1937 Germany was out of the question, the rights of the four powers to a peace treaty pertained only to the Germany

39. *I.e.*, a decision by victors in a war to end the state of occupation by ending the legal existence of a State, for example by formal annexation. See Piotrowicz, *supra* note 16, at 609-29; E. ZIVIER, *supra* note 12, at 137-39.

40. See generally Letter from the Three High Commissioners to the Federal Chancellor Concerning the Exercise of the Reserved Rights Relating to Germany as a Whole, as amended by Letter No. X of Oct. 23, 1954, reprinted in DOCUMENTS ON BERLIN 1943-63, *supra* note 12, at 141; see also Convention on Germany, *supra* note 15, at art. 2.

41. See Decree of the Presidium of the Supreme Soviet Ending the State of War between the USSR and Germany, Jan. 25, 1955, reprinted in DOCUMENTS ON BERLIN 1943-63, *supra* note 12, at 141; 1964 Treaty, *supra* note 34, at art. 9.

42. For the problems regarding the FRG Constitution, see *infra* Section III.

43. See Piotrowicz, *supra* note 16, at 631-35. The rights and obligations of the four powers were not addressed by the Basic Treaty. See Treaty on the Basis of Intra-German Relations, *infra* note 49, at art. 9.

44. The Federal Minister for Special Affairs, Bahr, and the Secretary of State at the Council of Ministers, Kohl, respectively. See 2 SARTORIUS, Doc. No. 500, at 10-11 (1988). See *infra* Section III.

45. *E.g.*, Potsdam Protocol, *supra* note 12, at 15-23; Declaration on Berlin by the Three Foreign Ministers of the United States of America, the United Kingdom, and France at London, May 12, 1950, reprinted in DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 118-19; Communiqué of the New York Meeting of the Foreign Ministers of the United States of America, the United Kingdom, and France on the New Phase in the Relations between the Allies and the Federal Republic of Germany, Sept. 19, 1950, reprinted in *id.* at 78-79; Final Communiqué of the Meeting of the North Atlantic Council, Dec. 19, 1957, reprinted in *id.* at 157.

which would result from the FDR + GDR joinder — and only to the extent that such a peace treaty had not already been preempted by factual developments. (3) The Western allies, however, indeed retained the right to demand that the two German States unequivocally recognize, in such a peace treaty, the Polish-German border as it existed at unification. (4) Left open by this was the possibility of a treaty with the united Germany concerning the stationing of troops.

As to the Soviet Union, it was not only estopped from trying to prevent unification by its pledge for a peaceful, democratic and free united Germany, but was also more or less obliged to actively further such unification by its Decree Ending the State of War and the terms of the 1955 and 1964 Treaties.⁴⁶ Only after such a unification would the residual powers that existed with respect to the *Reich* of 1937 have been revived. Those residual powers revived would have included the right to conclude a peace treaty with the new Germany — that Germany not being territorially identical to the *Reich*. The most important feature of such a peace treaty in this respect would have been the confirmation of the finality of the loss of the Eastern Territories by and for the new German State. The Soviet Union, one of the victors over the old Germany, had derogated its rights to the Eastern Territories to Poland, and would have been thus obliged to uphold this confirmation in the process of concluding a peace treaty.

The only demand, therefore, that could legally have been made regarding a united Germany by any of the four occupying powers was for a peace treaty — or a substituting document — with a guarantee of abstention from any claims to the Eastern Territories. Furthermore, as long as both Germanies acted in conformity with their own repeated pledges (read: obligations) concerning the use of peaceful and democratic means, the sovereignty and territorial integrity of other States, and other relevant rules of international law, the four powers would have been estopped from obstructing the formation of such a peaceful, free and democratic united Germany. The form of the new Germany, *i.e.*, the modalities of unification, would have made little difference in this respect. This also meant that a refusal — for example, by the Soviet Union — to ratify the Two Plus Four Treaty would not have detracted from these conclusions as to the lawfulness of German unification and the impossibility of legally obstructing it to any significant extent.

46. See, e.g., 1955 Treaty, *supra* note 24, at art. 1; 1964 Treaty, *supra* note 34, at arts. 1, 7.

III. THE TWO GERMANIES, THEIR "DOMESTIC RIGHTS AND OBLIGATIONS" AND THIRD STATES

Another question arose before unification: What were the legal positions of the FRG and the GDR toward each other and toward unification, and what legal implications could these positions possibly have entailed on the international plane?

The GDR in its Basic Law⁴⁷ circumvented the question of a duty to strive for unification or, on the contrary, a duty to refrain therefrom, after it created a GDR-nationality by a law of February 20, 1967.⁴⁸ By this action, it implicitly claimed to be a State in its own right; German indeed, but without any legal ties to the former *Reich*, and on this basis without any urge for (re)unification. It even, in article 6(2), claimed to be "forever and irrevocably allied to the Soviet Union."

Thereafter, the moment of truth for the GDR was the Basic Treaty⁴⁹ with the FRG in 1972, which in the eyes of the GDR was akin to a recognition of its full and unequivocal statehood. The Helsinki CSCE framework served to strengthen this recognition.⁵⁰ The GDR's fear of unification — in the terms of official statements, "aggressive imperialist policies of the FRG" aiming at "annexation" — seems always to have provided an essential motivating factor for the stands the GDR took in international law. These stands consisted of stressing the importance of sovereignty, the duty of non-interference and the inviolability of frontiers — or even stronger, the legality of the status quo.⁵¹ Through its admission to the UN the sovereignty of the

47. DIE VERFASSUNG DER DDR [VERF] (Constitution of the German Democratic Republic, Apr. 6, 1968, in the Version of the Law in Regard of Addition to and Amendment of the Constitution of the German Democratic Republic, Oct. 7, 1974). See DDR-GESETZE, 5. ERG.-LFG. 1/80. A speech by the Chairman of the National Council of the GDR, Ulbricht, on December 31, 1966, was the last instance where (re)unification was mentioned as a goal of the GDR. See Zuleeg, *West Germany's Eastern Policy: Legal Claims and Political Realities*, 3 GA. J. INT'L & COMP. L. 124, 129 (1973). In the first version of its Constitution, that of October 9, 1949, the GDR had still tried to deny the partition of Germany in article 1: "Germany is an indivisible democratic republic formed by the German *Länder*"; the second version, of April 6, 1968, in its article 8, however, explicitly provided for a duty to strive for "reunification on the basis of democracy and socialism." It was only in the third version of October 7, 1974, *i.e.*, after the Basic Treaty had entered into force (see *infra*), that such claims could no longer be found. See Hess, *Verleden, heden en toekomst van de Duitse natie*, 36 INTERNATIONALE SPECTATOR 253, 255-56 (1982).

48. Reprinted in 6 I.L.M. 466 (1967).

49. Treaty on the Basis of Intra-German Relations, Dec. 21, 1972, FRG-GDR, 1973 Bundesgesetzblatt [BGBl.] 421 [hereinafter Basic Treaty], reprinted in 12 I.L.M. 16 (1973).

50. See, e.g., Howard, *Helsinki Reconsidered: East-West Relations Two Years After the Final Act*, 1977 COMMONWEALTH J. INT'L AFF. 241, 242.

51. See, e.g., Hänisch, *Probleme der internationalen Stellung der DDR*, 15 DEUTSCHE AUSSENPOLITIK 185, 186 (1970).

GDR was finally accepted,⁵² and its fears were abated to a large extent.

However, nothing in the Basic Law prevented the GDR from uniting with the FRG. And even if that had been the case, nothing would have prevented the GDR, after free and democratic elections, from changing its Basic Law,⁵³ severing the "alliance" with the Soviet Union as contained therein, if necessary, and opting for unification, in accordance with its right of self-determination.

The point then is that no other State could legally have denied the GDR such a reversion of position, so long as no rights of third States were infringed. A demand for unification, though, should not have led to violations of general customary rules of international law, such as those concerning the peaceful solution of international conflicts, the territorial integrity and sovereignty of other States, etc. For example, Poland could have demanded the continuing recognition of the German-Polish border, and as this was agreed upon between the GDR and Poland in 1950,⁵⁴ the GDR would have been obliged to uphold such recognition in the unification process until it was recognized by the united Germany-to-be. There the legal obligations and rights of the GDR under international law pertaining to this situation would have ended.

As to the FRG, the situation in the beginning, at least, was radically different. The FRG claimed to be the only legal successor to the German *Reich*, thereby confirming its claim to be the only legal representative of the German people as a whole (which was, of course, denied by the GDR),⁵⁵ although the FRG did admit that this representation could only partially be fulfilled because of the de facto situation. This legal position was embodied implicitly in the Basic Law of the FRG.⁵⁶ For example, article 23 announced a duty to keep

52. Even the United States, the United Kingdom and France entered into diplomatic relations with the GDR. See Piotrowicz, *supra* note 16, at 618-20, 626. See also Agreed Minute on Negotiations Concerning the Establishment of Diplomatic Relations between the United States of America and the German Democratic Republic, Sept. 4, 1974, reprinted in 13 I.L.M. 1436 (1974). Only the FRG continued to deny the GDR's sovereignty. See *infra*.

53. Compare DIE VERFASSUNG DER DDR [VERF.], *supra* note 47, art. 63(2) with *id.* at art. 108.

54. Agreement Concerning the Demarcation of the Established and Existing Polish-German State Frontier [Zgorzelec Agreement], July 6, 1950, Poland-GDR, art. 1, 319 U.N.T.S. 93. On the Oder-Neisse Line, see generally R. PIOTROWICZ, THE RELATIONSHIP BETWEEN THE ACT OF THE CONFERENCE ON SECURITY AND COOPERATION IN EUROPE — THE HELSINKI ACT AND THE ODER-NEISSE LINE LEGAL REGIME 897 (1985).

55. See Fischer, 20 Jahre Warschauer Vertrag, 20 DEUTSCHE AUSSENPOLITIK 645, 655 (1975), on the *Alleinvertretungsanmassung* (the insulting claim of sole representation).

56. GRUNDGESETZ [GG] preamble, arts. 16, 23, 116, 123, 140 (FRG) (entered into force May 23, 1949; last amended June 26, 1965); cf. Law in Regard of Questions of Nationality, Feb. 22, 1955, reprinted in 1 SARTORIUS, Doc. No. 22, at paras. 1, 6.

accession of "the other parts of Germany" open, though not a duty to arrive at such accession — if only because that was not within the FRG's sole competence to decide, seen from an international legal point of view.⁵⁷ The GDR implicitly accepted this succession of the FRG to the *Reich*, as it refused to accept any responsibility for the Second World War and refused to pay *Wiedergutmachung*.⁵⁸ The GDR's forced compensation to the Soviet Union was officially based on another footing, whereas the FRG did indeed pay such *Wiedergutmachung* for damages resulting from the Second World War.

It should be noted here that when it called for "accession," article 23 aimed at an absorption of the territories of the GDR either by way of the five former *Länder* or as a whole, in conformity with some implicit announcements in the preamble.⁵⁹ Article 146, in contrast, definitely pointed to a "new start." It bluntly stated that the Basic Law would automatically lose its validity on the day a Basic Law would be freely constituted by the German people. This *legal* lack of clarity was probably overlooked at the time, as the main aim of all those provisions was a *political* one. However, that very conclusion already derogated somewhat from any legal force and validity that could possibly have been invoked towards other States; if claims are implicit and vague, it becomes hard for other States to know in what to acquiesce or not to acquiesce.

In this regard, however, it would seem that the acceptance — initially by the three Western allies⁶⁰ and later by a larger number of States⁶¹ — of the Basic Law and the resulting West German reservations to all kinds of treaties,⁶² created some degree of estoppel for those States, whatever the precise ramifications. This acceptance arose

57. See 2 GRUNDGESETZ KOMMENTAR 67-68, 90 (I. von Münch ed. 1975). The Federal Constitutional Court of the FRG interpreted the Constitution as indeed providing for such a duty; however, this interpretation can be of no international legal relevance by itself: see *infra* note 64.

58. War reparations principally for physical damage, but also for moral and psychological damage, inflicted by Germany during World War II.

59. The preamble mentioned all the *Länder* forming the FRG by name, and then referred to "the other Germans, for whom involvement in the creation of the Basic Law was impossible."

60. See, e.g., Communiqué of the New York Meeting of the Foreign Ministers of the Western Allies on the New Phase in the Relations between the Allies and the Federal Republic, Sept. 19, 1950, reprinted in DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 124-25; Statement by the Allied High Commission in Germany on the Sovereignty of the DDR, Apr. 8, 1954, reprinted in *id.* at 169; Statement by the Three Western Foreign Ministers on the Soviet Treaty with the DDR, Sept. 28, 1955, reprinted in *id.* at 175.

61. See Czaplinski, *International Legal Aspects of Relations between the GDR and the EEC — A Polish View*, 22 COMMON MKT. L. REV. 69, 72-73 (1985).

62. In essence, these reservations sought to prevent the FRG's claim to sole representation from being impaired by the respective treaties.

mainly because of another argument put forward by the FRG: that the GDR's government had not been chosen by way of free and democratic elections and that, therefore, the FRG's government was the only legitimate representative of the German nation.⁶³ The point had become academic, however, after the FRG itself concluded the Basic Treaty of 1972 with the GDR — even though afterwards the FRG still tried, with increasing difficulty, to uphold its claim concerning exclusive representation of the German people.⁶⁴ One example of this difficulty is the development by the Federal Constitutional Court of its "roof theory." This theory allowed for two States existing under the roof of one, which existed in law only and remained "dormant" as long as the political status quo did not change.⁶⁵

For the FRG, this claim had meant that it was not only entitled to strive for unity but was even under a duty to do so, a duty the acceptance of which was considered to be incumbent upon other States and which should have prevented them from blocking West German drives for unity. However, by recognizing the GDR (insofar as they had not already recognized it)⁶⁶ other States ceased to acquiesce in this claim. So for all practical purposes the FRG could no longer legally claim, in respect of third States, to be the sole representative of the German people.⁶⁷

63. See, e.g., Zuleeg, *Grundvertrag und EWG-Protokoll über den innerdeutschen Handel*, 8 EUROPARECHT 209, 216 (1973).

64. It did so even in the preamble of the Basic Treaty, but it had to admit in article 4 that neither of the two German States could represent the other internationally, and in article 6 that the sovereignty of both was limited to its own *Staatsgebiet* (State Territory). See Basic Treaty, *supra* note 49. On March 14, 1974, a Protocol was even signed by the FRG and the GDR to enter into diplomatic relations. Protocol on the Exchange of Permanent Missions, Mar. 14, 1974, GDR-FRG, *reprinted in* 13 I.L.M. 879 (1974). On the other hand, the Federal Minister for Special Tasks of the FRG in a letter written on the same day of the conclusion of the Basic Treaty claimed that the Treaty did not prejudice the political goal of the FRG, the unification of Germany in free self-determination. E. ZIVIER, *supra* note 12, at 378. See also Judgment of May 4, 1955, Bundesverfassungsgericht (Constitutional Court), FRG., 4 BVerfGE 157 (Saar Case); Judgment of July 31, 1973, Bundesverfassungsgericht, FRG, 36 BVerfGE 1 (dealing with the Basic Treaty); Evans, *Judicial Decisions*, 70 AM. J. INT'L L. 132, 147 (1976). For a discussion of the legal problems, see 30-48 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES RECHT UND VÖLKERRECHT (1970-88); 2 GRUNDGESETZ KOMMENTAR, *supra* note 57, at 76-77; Wengler, *Anerkennung und Umdeutung der DDR-Staatsbürgerschaft in die Deutsche Staatsangehörigkeit des Rechtes der Bundesrepublik als grundgesetzlich gebotene Folgerung aus dem Wiedervereinigungsgebot?*, 32 RECHT IN OST UND WEST 145, 146 (1988); Zuleeg, *supra* note 47, at 126.

65. See Bleckmann, *German Nationality within the Meaning of the EEC Treaty*, 15 COMMON MKT. L. REV. 435, 436 (1978); Hobson, *The European Community and East-West German Relations*, 19 VA. J. INT'L L. 45, 48 (1978); Piotrowicz, *supra* note 16, at 621, 622, 631.

66. See Chernenko, *The Conference in Helsinki and International Security*, 11 INT'L AFFAIRS, Nov. 1975, at 3, 8 (for the Soviet view).

67. *Contra* Morawitz, *Der innerdeutsche Handel und die EWG nach dem Grundvertrag*, 28 EUROPA ARCHIV 353, 358 (1973) (comparing "Germany" to the "Commonwealth," but apparently forgetting that the latter consists of fully sovereign States, free to choose whether to remain in or secede from the Commonwealth); Zuleeg, *supra* note 47, at 130.

This being said, it remained true that as long as the FRG and the GDR were in agreement about (the modalities of) unification, no other State was legally entitled to prevent it. Both States were sovereign and could, between themselves, legally agree on anything as long as no peremptory norms or rights of third States were violated. This lack of a legal right to obstruct a peaceful unification stemmed from an essential rule of international law — namely, the right of peoples to self-determination in freedom and without interference from outside,⁶⁸ including cases in which self-determination would lead to the unification of two States.

The framework was set, furthermore, by the repeated pledges, which must be considered binding unilateral statements,⁶⁹ of peaceful and unaggressive behavior by both German States, which thus obliged them to adhere to the general rules of international law when striving for unification.

To conclude, the legal situation surrounding unification, as sketched out with respect to the four occupying powers, would not have changed after having taken into account the legal rights and obligations of the Germanies toward all other States, and vice versa.

The GDR and the FRG were both recognized as sovereign States, at least since the early 1970s, and nothing could have obstructed their unification, in regard of which they were bound only by their general obligations relating to the general rules of international law, including freedom, democracy and the inviolability of existing frontiers. This last point is very clear with respect to the GDR, though perhaps somewhat less so with respect to the FRG because of its continuing claim to represent the entire German people. However, no other State had continued to acquiesce in the FRG's sole representation claim, and in any case, by acquiescence in the actual frontiers of Poland and the Soviet Union through treaties with both States,⁷⁰ the Federal Republic was legally barred from calling those frontiers into question during the process of unification. Likewise, the GDR was barred by its 1950 treaty with Poland.

The claim that only a united Germany could definitively obligate itself to respect the territorial inviolability of Poland, was a legal sophistication that perhaps remained true, but which could not be used

68. See, e.g., UN CHARTER arts. 1(2) and 2(7).

69. Nuclear Test Cases (Austl. v. Fr., N.Z. v. Fr.), 1974 I.C.J. 253, 267.

70. Warsaw Treaty, Dec. 7, 1970, Poland-FRG, 830 U.N.T.S. 327 (entered into force June 3, 1972); Moscow Treaty, Aug. 12, 1970, FRG-USSR, 1972 BGBl. 353, reprinted in 9 I.L.M. 1026 (1970) (entered into force June 3, 1972). See generally Zuleeg, *supra* note 47, at 140; Byrnes, *United States Policy towards Eastern Europe: Before and After Helsinki*, 37 REV. OF POLITICS 425, 448, 459, 460 (1975).

to dodge the relevant obligation. Since the two unifying States had each acknowledged this inviolability, they were both bound to strive for the same acknowledgement by a united Germany-to-be — which by logic could not do anything else but once and for all acknowledge such inviolability, the more so because otherwise Poland's rights as a third State would have been encroached upon. The Federal Republic claim that it alone could not acknowledge this on behalf of a Germany-to-be was inconsistent with its duty to publicly accept its obligation to strive for such an acknowledgement by a united Germany during unification. As well, such a claim illustrated the necessity of a peace treaty in which this obligation could obtain its final character. At the least, a similar agreement was necessary because most problems usually dealt with in peace treaties could hardly be dealt with in the framework of the German unification process due to the existence of almost full sovereignty for both Germanies.

IV. THE TWO GERMANIES, NATO AND THE WARSAW PACT

Next, it remains to be determined whether the incorporation of the two Germanies into NATO⁷¹ and the Warsaw Pact,⁷² respectively, produced any legal ramifications concerning the unification issue by providing rights or duties for third States. In other words, the issue is whether those treaties, or the structures they created, could have legally impacted upon a possible wish of the two Germanies to unite.

Two related aspects must be analyzed here. One question is whether the treaties constituting NATO and the Warsaw Pact contained express rights and/or obligations of the States parties with respect to German unification. A second question is whether the two Germanies could have escaped such potential obstacles by leaving the respective blocs.

In this context, the two treaties constituting the two blocs are essential because the fact remains that two sovereign States by their own choice, and officially by their own free will, adhered to two different military alliances with a number of other sovereign States. This was certainly the case with the GDR, which became a member of the Warsaw Pact in 1955 only after peace had been declared unilaterally by the Soviet Union.

The unification problem was not expressly mentioned in the treaty

71. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243; Protocol on the Accession of West Germany, Oct. 23, 1954, 243 U.N.T.S. 308.

72. Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact), May 14, 1955, 219 U.N.T.S. 3 (with the GDR as an original party). As of March 31, 1991, the Warsaw Pact has altogether ceased to exist as a legal entity. See NRC Handelsblad, Mar. 30, 1991.

constituting the Warsaw Pact. Furthermore, the objectives of the Treaty, as mentioned in the preamble and several articles,⁷³ seemed not only to avoid the obstruction of a peaceful unification, but to actually urge parties to pursue such a unification if it would stabilize the security situation in Europe. The pledge the parties made to themselves in the preamble, however, formed a legal protest toward "a remilitarized Western Germany and the integration of the latter in the North Atlantic Bloc." This pledge could have become a problem — if the GDR had applied for membership in NATO and if such membership had been seen by the Warsaw Pact States as incompatible with the Treaty — because article 7 obliged the parties not to adhere to any coalition or alliance whose aims conflicted with the aims of the Treaty.

The GDR's position when it signed the treaty constituting the Warsaw Pact combined the two approaches by claiming to strive for a peaceful and democratic reunited Germany that was, however, to remain outside military alliances in those parts of Germany that had been integrated before such reunification.⁷⁴ All this, taken together, formed the legal framework of the Warsaw Pact relevant to the GDR's unification positioning.

Practically speaking, withdrawal from the Warsaw Pact by the GDR would not have been much of a problem. The structure arising out of the Warsaw Pact remained, up until its demise in February and March 1991, an organization with perhaps *de facto* control over military action on the one hand, but at any rate *de jure* without an integrated military system.⁷⁵ The *de facto* control stemmed mainly from separate bilateral treaties between the Soviet Union and its (former) satellites within the Warsaw Pact system. As such, these treaties were renegotiable, as recent developments of course have shown. Thus, as to the GDR, its duty to allow Soviet troops on its territory rested solely on bilateral treaties and those treaties might have been renounced or renegotiated according to their terms.

The situation concerning the Warsaw Pact treaty itself was somewhat less clear because it did not contain a withdrawal or renunciation

73. *Id.* art. 1 ("refrain . . . from the threat or use of force", "international peace and security are not endangered"), art. 2 ("participate . . . in all international action for ensuring international peace and security"), art. 8 ("act in accordance with the principles of respect for each other's independence and sovereignty and of non-intervention in each other's domestic affairs") and art. 11 ("In the event of the establishment of a system of collective security in Europe").

74. See Seiffert, *Völkerrechtliche Aspekte der Verlängerung des Warschauer Paktes*, 28 GERM. Y.B. INT'L L. 409, 416-17 (1985).

75. See *id.* at 412-16, 420-22. It must be noted, however, that pursuant to article 5 of the Warsaw Pact, a "joint command" was established on the same day that the treaty was concluded. See INTERNATIONAL ORGANIZATION AND INTEGRATION, Doc. No. II.C.1.b (2d ed. 1981).

mechanism. Lack of such a mechanism could imply, according to the Vienna Convention on the Law of Treaties ("VCLT"), that it could not have been renounced unless certain circumstances had been found to apply: namely, the parties must have intended to admit the possibility of renunciation, or such a possibility must have been implied by the nature of the treaty.⁷⁶

However, the withdrawal of Albania in 1968, in accordance with its own national laws, did not meet with any official protest capable of nullifying the withdrawal, thus pointing toward acquiescence on the part of the other Warsaw Pact members as to the possibility of withdrawals, and thereby precluding them from later preventing such withdrawals.⁷⁷ From this it may be concluded that nothing legally could have prevented the GDR from withdrawing from the Warsaw Pact if its membership therein were to obstruct unification. The only caveats to this seemed to be the repeated statements from official GDR sources as to their peaceful aims and their intent to comply with international law.⁷⁸

On the other side, the FRG was integrated into NATO shortly after it gained its sovereignty in 1954. The situation here, however, differed in several aspects from the situation concerning the GDR.

To begin with, as mentioned above, the FRG had to allow for some residual occupationary rights to remain in existence, a legal difference when compared to the GDR. When they allowed the admission of the FRG into NATO, the three Western occupation powers pledged themselves to terminate the occupation regime "as soon as possible," but nevertheless retained "certain responsibilities incumbent upon them in Germany deriving from the international situation."⁷⁹ At the same time, in reaction to a common declaration by the three Western allies, the FRG made a unilateral declaration whereby it obligated itself never to use force "in order to obtain the reunification of Germany or the change of the existing borders of the FRG."⁸⁰

Likewise, on the occasion of the FRG's joining the Western European Union (which was a prerequisite for joining NATO), the (bind-

76. See Vienna Convention, *supra* note 4, at art. 56(1). In its comment on the draft of this article, the ILC expressly mentioned treaties constituting military alliances as falling within the scope of the second condition.

77. Washburn, *The Current Legal Status of Warsaw Pact Membership*, 5 INT'L LAW. 129, 131-33 (1971).

78. Fischer, *supra* note 55 (author was the Minister of External Affairs of the GDR at the time).

79. Final Act of the Conference of Nine Powers, London, Oct. 3, 1954, 31 DEP'T ST. BULL. 515 (Oct. 1954).

80. *Id.* at Annex A.

ing) declaration of the Chancellor of the FRG of October 23, 1954,⁸¹ that the FRG would not make its own weapons of mass-destruction, would have prevented it from dodging such an obligation through unification, and probably would even have become binding upon a united Germany as a successor State.⁸²

Finally, in a Declaration⁸³ accepted by the three Western allies, the FRG obligated itself not to use force to obtain the unification of Germany or the modification of the existing borders of the FRG, and to solve all disputes arising between the FRG and other States by peaceful means. This perhaps did not so much definitively bind Germany, once united, as it bound the FRG to provide guarantees during the unification process that the Germany-to-be would maintain the same position.

For all these reasons, the fact that the NATO Treaty contained a clause in article 8 similar to that of article 7 of the Treaty of Friendship, Co-operation and Mutual Assistance, which obliged parties not to enter into international obligations conflicting with the NATO Treaty, is of much more legal relevance here than was the case with the GDR.

Next, as to the withdrawal question, it is important to note that at the time of the FRG's admission to NATO, the integrated military structure of NATO was created under the unified command of the Supreme Allied Command, Europe ("SACEUR").⁸⁴ Decisions of the Council of NATO can become binding on their member States by various means, such as the development of customary law by acquiescence (e.g., to actual military integration) or by estoppel based on such acquiescence.⁸⁵ This could have meant that, in contrast to the Warsaw Pact system, reunification would not have been so easy to accom-

81. Protocol No. III to the Brussels Treaty, Oct. 23, 1954, 2 EUR. Y.B. 321, 323 (1956). Annexed to Protocol No. III on the Control of Armaments by virtue of article I of the Protocol. See 49 AM. J. INT'L L. 134 (Supp. 1955).

82. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978 [hereinafter Convention on Succession]; 17 I.L.M. 1488 (1978) (not yet in force). Its articles relevant to the subject are accorded a great deal of acceptance by the world's States, if not considered to have customary binding force. See, e.g., with regard to the "moving treaty frontiers" doctrine, the discussions and reports in the ILC Yearbooks from 1974 through 1978, and in particular [1974] 2 (1) Y.B. INT'L L. COMM'N 174, 174-269, U.N. Doc. A/CN.4/Ser.A/1974/Add.1 (Part 1). See also Kearney, *The Twenty-Sixth Session of the International Law Commission*, 69 AM. J. INT'L L. 591, 591-602 (1975); I. BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 665-71 (3d ed. 1979).

83. See Final Act London *supra* note 79, pt. V.

84. See Final Act London, *supra* note 79, pt. IV; Resolution of the Council of NATO, Oct. 22, 1954, reprinted in *INTERNATIONAL ORGANIZATION AND INTEGRATION*, *supra* note 75, Doc. No. II.B.2.a.

85. See Bouter, *Volkenrechtelijke binding van Nederland aan de inhoud van NAVO-besluiten*, *INTERNATIONALE SPECTATOR* 292 (1980).

plish when it would have meant inclusion of GDR territory in NATO's scope.⁸⁶

However, the problem would have been almost academic, because the North Atlantic Treaty did contain a renunciation clause in article 13, enabling every State party after 1969 (*i.e.*, after the Treaty had been in force for twenty years) to renounce the Treaty on one year's notice.

The only obstacles in the way of German unification to be found in the North Atlantic Treaty were, therefore, more or less similar to those found in the Warsaw Pact: the general obligation to refrain from the use of force and to act in accordance with the Charter of the United Nations.⁸⁷ In the preamble of the Treaty, the parties even solemnly stated their determination to "reaffirm their faith in the purposes and principles of the Charter of the United Nations" — which of course encompasses the sovereign right of States to define their own policies and the right to self-determination — and in article 7 explicitly stated that the North Atlantic Treaty could not derogate from such rights under the Charter. Thus, the FRG would seem to have had a legal right, with some restrictions only, to leave NATO if membership became an obstruction to unification. And as long as unification was in conformity with the aims of NATO as stated in the preamble and elsewhere, the legal obstacle of article 8 would not have been applicable.

In conclusion, it must be said that if both Germanies agreed on the military alliance aspect of unification, neither NATO nor the Warsaw Pact could have legally prevented their respective members from becoming part of a unified Germany. This would have remained true, of course, as long as unification took place within the framework of the principles of the UN Charter and without infringing upon the rights of third States, *e.g.*, Poland, and as long as the FRG and the GDR kept within the bounds of the goals stated by both alliances: stability and security, freedom and self-determination, and a peaceful settlement of disputes as much as a peaceful unification. It might even be said that the members of both alliances, especially the members of NATO, taking into account their repeated pledges, had at least morally committed themselves to arrive at such a unification.

As to the second aspect considered, the Warsaw Pact could not have prevented a member from lawfully renouncing the Treaty constituting it. Within NATO the situation was slightly different: renuncia-

86. See, *e.g.*, Vienna Convention, *supra* note 4, at arts. 54(B), 56(1)(a).

87. See North Atlantic Treaty, *supra* note 71, at art. 1. This obligation was acknowledged by the FRG again and again through the years, in many different situations and in many fora.

tion was possible, on one year's notice (at least from 1969 on), though there would have been de facto difficulties. The FRG furthermore had vowed not to make atomic weapons, a vow that could not be unilaterally revoked, because it had been sustained through the years and thereby created an estoppel the FRG could not have dodged through unification. Even more important, though not provided for by the NATO or Western European Union treaties, is the status of the FRG as a "non-nuclear weapon State" pursuant to the Non-Proliferation Treaty.⁸⁸ These restraints, however, applied more to the modalities of unification than to unification as such.

It would have been quite another problem, and a mainly political one at that, whether parts of a unified Germany could have "remained" in the Warsaw Pact system or in the NATO-alliance with regard to the respective territories within those blocs before unification.⁸⁹ Because only States can become parties to either bloc, and not "territories" or parts of States, new agreements or reservations would have been required if a unified Germany had opted for such an arrangement. Thus, it would have been a legal issue between NATO and such a Germany only, if the new Germany had opted to maintain or create a German membership while excluding certain German territories from NATO control.

Likewise, if the GDR had refused unification because it would not accept the severance of all ties with the Warsaw Pact as a precondition for such a unification, a new Germany and the Pact itself could have opted for a de facto "partial" membership. And although such a result would have been practically and politically highly unrealistic, and in light of the FRG's solemn wish to maintain its ties with NATO even utopian, in law it could have been combined very well with a NATO membership of (a part of) Germany. The only legal prerequisite would have been an agreement between a unified Germany (after such an agreement had been reached by the two parts during unification) and the two alliances. According to its own terms (and contrary, of course, to actual political reality), NATO was not specifically directed against the Warsaw Pact, and vice versa. Only the preamble of the Warsaw Pact as quoted earlier seems to point to legal irreconcilability of double membership.

In any case, the actual modalities would have depended on the form unification was to take. If a new State "Germany" were to have

88. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, arts. II, III, 729 U.N.T.S. 161, 171-72 [hereinafter Non-Proliferation Treaty] (entered into force Mar. 5, 1970).

89. The same would have applied to a neutral Germany.

replaced the two former Germanies, then that new State would have had to apply for accession to either treaty anew because the conditions of operation of those treaties would have been radically changed in terms of their military and strategic contents in view of the nature of the NATO and Warsaw Pact treaties.⁹⁰ On the other hand, if the FRG had legally absorbed the GDR, then East German membership in the Warsaw Pact automatically would have ceased. For the "new" FRG, membership in NATO would not have ceased, though it would have automatically covered only the former West German territories. For extension to former GDR territories, the consent of the other NATO members would have been necessary.⁹¹

V. THE TWO GERMANIES AND THE CSCE PROCESS

As to the fourth context relevant to German unification, the process of the Conference on Security and Cooperation in Europe,⁹² only those aspects relevant to the German question will be highlighted.

First it must be stated that the CSCE process, of which the Final Act of Helsinki, 1975, still the most prominent result as far as our problem here is concerned, is *sui generis* in international law. It is unique because on the one hand express legal obligations were avoided and reference was made to all kinds of purposes and principles, but on the other hand some of those principles were only applications of pre-existing general legal principles in a European context, and therefore were legally binding.

The Final Act clearly was no treaty, at least not in the ordinary sense, hence no legal obligations could have been derived from it as such.⁹³ That was made clear by the wording and various provisions of the Act, the various declarations as to its value made by participating

90. See Convention on Succession, *supra* note 82, at arts. 17(3), 31(1).

91. See Convention on Succession, *supra* note 82, at art. 15(b) or 31(3), depending on the precise interpretation of the respective applications. See, e.g., the discussion within the ILC, *infra*, at note 118.

92. On the other hand, see von der Dunk, *Challenges and Opportunities: The European Communities and the Conference on Security and Cooperation in Europe*, 3 LEIDEN J. INT'L L. 247 (1990). Further, on the CSCE in general, see Fawcett, *The Helsinki Act and International Law*, 13 REVUE BELGE DE DROIT INTERNATIONAL 5 (1977); Doernberg, *Gipfeltreffen für den Frieden*, 25 DEUTSCHE AUSSENPOLITIK 5 (1980); Dominick, *La Conférence sur la Sécurité et la Coopération en Europe: Un Cadre pour la Solution du Conflit Est-Ouest?*, 1983 REVUE DU MARCHÉ COMMUN 549; Gasteyger, *Europa zwischen Helsinki und Belgrad*, 32 EUROPA ARCHIV 1 (1977); Mates, *Von Helsinki nach Madrid und zurück*, 38 EUROPA ARCHIV 659 (1983); Wettig, *Die Warschauer-Pakt-Staaten auf der Belgrader KSZE-Folgekonferenz*, 28 OSTEUPARECHT 473 (1978).

93. It is interesting to note that the GDR claimed it to be a binding document because of the final recognition of the territorial status quo contained therein. See Meier, *Die Auswirkungen der Konferenz von Helsinki im Gesamteuropäischen Rahmen*, 1975-76 DIE INTERNATIONALE POLITIK 91, 93-94 (1981). Poland also tried to derive "hard" international law from the CSCE in order to gain recognition for the finality of the Oder-Neisse line. Polish Institute of International

States, and especially the provision expressly preventing registration under article 102 of the UN Charter with the Secretary General of the UN — a procedure specifically concerning treaties.

On the other hand, several of the principles — such as those reaffirming the right to territorial integrity, the inviolability of frontiers, the renunciation of force, the duty to solve disputes by peaceful means, the prohibition of intervention in domestic affairs and, last but not least, the right to self-determination⁹⁴ — can clearly be found in other instruments binding upon the thirty-five “parties” to the CSCE, most notably in the UN Charter⁹⁵ and the authoritative elaboration of the aforementioned Charter principles in Resolution 2625(XXV).⁹⁶ Based on this, the fact that the “parties” expressly wished to avoid hard and fast legal obligations flowing from the Act did not diminish their obligation under international law to uphold those principles.

None of the principles mentioned above would have seemed to prevent a possible German unification as long as it were accomplished peacefully and without violating the frontiers of other States; “violating” means that frontiers could not be changed against the will of the parties concerned (even peaceful coercion is forbidden, according to principle VI).⁹⁷ Poland, therefore, could and can unilaterally prevent the Oder-Neisse frontier from being changed or renounced against its will.

The frontiers, however, were not absolutely frozen. Inviolability is not immutability, and if the FRG and the GDR in their sovereign use of their right of self-determination wished to abolish the frontier dividing them, no CSCE “party” would have been legally able to prevent this. This is in accord with principle I of the Final Act which explicitly states that “frontiers can be changed, in accordance with international law, by peaceful means and by agreement.”

Affairs, Poland and the Implementation of the CSCE Final Act, 15 STUDIES IN INT'L RELATIONS 20-21 (1980).

94. As contained in principles I, II, III, IV, VI and VIII of the Final Act. Regarding the last principle, the crucial question becomes in what sense “self-determination,” a peremptory norm of international law when applied in a colonial context, is to be applied in the case of the two Germanies. In view of the fact that “the Germans” are a people in almost every sense of the word, despite the fact that they were as a nation divided into two States (just like the two former Vietnams, the two Koreas), the right is applicable indeed.

95. See U.N. CHARTER, arts. 1(1), 1(2), 2(3), 2(4), 2(7).

96. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28), at 121, U.N. Doc. A/8082 (1970). This resolution in effect is binding because, as is shown by its approval by near unanimity, it contains customary law. See *Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 99-102, 106, 108, 133. See also von der Dunk, *supra* note 92.

97. Poland even claims this to rule out “the question of any State’s frontiers,” Polish Institute of International Affairs, *supra* note 93, at 20. See Blech, *Die KSZE als Schritt im Entspannungsprozess: Bemerkungen zu allgemeinen Aspekten der Konferenz*, 30 EUROPA ARCHIV 681, 688 (1975) for the opposite point of view of the FRG.

This held true formally as well, precisely because of the *sui generis* character of the CSCE. Since the Act was not a treaty, the 35 signatory States were not parties to it in the legal sense and therefore could not legally invoke breaches of obligations and duties under it — unless these obligations were already binding under general international law and invocable in other contexts.

The conclusion, then, must be that the CSCE system could not have been used to prevent German unification outside of the framework explained above, because no independent obligations derived from it for States “parties.” The CSCE Final Act merely reiterated pre-existing rules of international law, thereby only providing additional support for the framework developed above, within which unification was to be allowed and perhaps even aimed at. The obligation as to the inviolability of frontiers was perhaps the most relevant one here as a *conditio sine qua non* for unification, whereas the other principles — such as non-intervention in internal affairs of another State, the sovereign equality of States and the right to self-determination — were examples of principles barring interference with unification and effectively promoting it.

Finally, even if some of the rules contained pre-existing obligations, they could not have been invoked under the CSCE system, but only before bodies in other systems of dispute settlement — if applicable — or they could have been put on the agenda of follow-up conferences.

The new CSCE Charter, signed in Paris on November 21, 1990,⁹⁸ could, therefore, do nothing but confirm the principles of the Helsinki Act, such as those concerning friendly relations among participating States, confirm thereby *inter alia* German unification, and thus confirm the above conclusions. The Two Plus Four Treaty thus was noted with great satisfaction, and German unification was sincerely welcomed, being “in accordance with the principles of the Final Act of the Conference on Security and Co-operation in Europe and in full accord with [its] neighbors.” German unification finally was considered as “an important contribution to a just and lasting order of peace for a united, democratic Europe.”

VI. THE TWO GERMANIES AND THE EUROPEAN COMMUNITIES

The next problem to be analyzed concerns the role of the European Communities in the process of German unification. The FRG had

98. Charter of Paris for a New Europe, Nov. 21, 1990, *reprinted in* 30 I.L.M. 190 (1991). Like the Helsinki Act, the Charter was “not eligible for registration under Article 102 of the Charter of the United Nations.”

been a Member of the EC from the very beginning and the crucial question is how this could or should have legally influenced its unification options.

The EC were constituted as economic communities;⁹⁹ however, the ultimate goal was from conception a political community or even a political union.¹⁰⁰ Despite various, and sometimes lasting, setbacks in the tightening of economic integration, small careful steps were taken in the political field as well. An informal and legally non-committing consultation process ensued in matters of foreign policy, a process which grew into the European Political Cooperation ("EPC") and finally was given a legal basis by the Single European Act of 1986.¹⁰¹

At the moment of German unification, the EC found themselves in a vastly accelerated process of reaching a true internal market by 1992, thereby almost completing the EC in a narrow economic sense. Pressure towards further integration both in a broader economic sense, as in the plans for a European Monetary Union, and in a political sense, as in the EPC, intensified every day, and plans for a European Political Union abounded.

Thus, within the context of the EC as a whole, when considering FRG membership in the EC and possible unification, two legal factors had to be taken into consideration: the economic aspects of the EC's integration, with their basis in the EC Treaties of 1951 and 1957 (in their amended versions), and the political aspects, with their basis in chapter III of the Single European Act, which formally fell outside the EC Treaties' regime as such.

From the perspective of the EC Treaties themselves, *i.e.*, the internal market, it was clear that a unification of Germany would have important practical consequences for the EC's economic integration process. This meant, keeping in mind the *rebus sic stantibus* rule of the Vienna Convention on the Law of Treaties,¹⁰² that the legal obligations which the signatory States undertook when signing and ratifying the Treaties would be altered to an appreciable extent. One only

99. See, e.g., Treaty Establishing the European Coal and Steel Community, *opened for signature* Apr. 18, 1951, preamble, arts. 1, 2, 3, 126 U.N.T.S. 140, 143, 145, 147 [hereinafter ECSC Treaty]; Treaty Establishing the European Economic Community, *opened for signature* Mar. 25, 1957, preamble, arts. 1, 2, 3, 298 U.N.T.S. 11, 14-16 [hereinafter EEC Treaty]; Treaty Establishing the European Atomic Energy Community, *opened for signature* Mar. 25, 1957, preamble, arts. 1, 2, 298 U.N.T.S. 167, 171-73 [hereinafter EAEC Treaty].

100. See, e.g., EEC Treaty, *supra* note 99, at preamble (paras. 1, 2); Single European Act, Feb. 28, 1986, BULL. EC, Supp. 2/86 (1986). See also P. KAPTEYN & P. VERLOREN VAN THEMATAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 21-28 (L. Gormley 2d ed. 1989).

101. See Single European Act, *supra* note 100, at art. 1 (last sentence).

102. See *supra* note 10 and accompanying text. See also Vienna Convention, *supra* note 4, at art. 62.

needed to think of the possible impact of unification on the composition of the European Parliament, the voting procedures in the Council of Ministers, the Social Fund and the regional and structural support system embedded in the EC,¹⁰³ or even more basically, the inevitable impact on competition in certain sectors of the economy. The influence on the West German economy of "only" hundreds of thousands of East Germans flocking into the FRG in the previous two years had already provided some idea of the influence on the Common Market's economy when it would have suddenly found some 16 million new producers and consumers within its "territories."

Due to these and similar reasons, unanimity within the European Communities was considered necessary¹⁰⁴ before a new Member State could be admitted — as was the case with Ireland with some 3 million inhabitants at the time, Greece (some 9 million) and Portugal (some 10 million). In the actual treaties providing for admission of a State, elaborate transition regimes were provided to ease integration, and in these treaties the EC insisted on certain conditions considered essential.¹⁰⁵

Therefore, if the GDR had wanted to become a thirteenth Member of the EC, as an intermediary step to unification, the EC could have fixed their own terms. Apart from potential political problems regarding possible applications for accession by other formerly communist states or even neutral Austria,¹⁰⁶ such an option never seemed realistic in view of the rapid pace at which German unification took place. Indeed, German unification preempted the possibility of GDR membership in the EC.

The result would then seemingly have been to allow the FRG, because it was for its own reasons running down the path leading to unification, instead of moving step by step, to "dodge" the formal admission procedures by economically "annexing" the GDR and thus saddling the EC with a *fait accompli*.

However, the question remains: would such a *fait accompli* have been admissible considering that it would have fundamentally affected the obligations which all signatory States had undertaken when they became bound by the EC Treaties? The rules regarding treaties —

103. See EEC Treaty, *supra* note 99, at arts. 92(2), 92(3).

104. EEC Treaty, *supra* note 99, at art. 237. See also ECSC Treaty, *supra* note 99, at art. 98; EAEC Treaty, *supra* note 99, at art. 205 (embedding the same provisions).

105. See P. KAPTEYN & P. VERLOREN VAN THEMATAAT, *supra* note 100, at 17-21, 54-55.

106. See Binswanger & Mayrzedt, *Was wird aus den Neutralen bei der Erweiterung der EWG?*, 25 *EUROPA ARCHIV* 347 (1970); Schulz, *Moskau und das Problem der Integration in Westeuropa*, 30 *EUROPA ARCHIV* 383 (1975); Basler & Smettan, *NATO, EWG und Spanien*, 21 *DEUTSCHE AUSSENPOLITIK* 1181 (1976); Wallace, *Europäische Gemeinschaft grösser, aber Schwächer?*, 31 *EUROPA ARCHIV* 181 (1976).

codified later in the VCLT — granted States the right to renounce a treaty and the obligations encompassed in it if circumstances surrounding its conclusion or entry into force had undergone unforeseen fundamental changes, provided that those circumstances constituted an essential basis of the consent of the parties to be bound and that the effect of the changes was to radically transform the extent of obligations still to be performed under the treaty.¹⁰⁷ Apart from the complicating factor of the EC Treaties not providing for any renunciation procedure (discussed *infra*), it appears that EC Member States could have threatened to leave the EC if certain demands to mitigate the consequences of unification would not have been met. They would thus have had an option other than simply swallowing such *faits accomplis*.

At any rate, all EC Member States would have had the legal right to be involved in the process of determination of the modalities of German unification, although not to obstruct German unification since that was a political question not covered by the EC Treaties. This right could also have been based on article 5 of the EEC Treaty, encompassing the duty of Member States (such as the FRG) to abstain from any measures (such as those achieving unification) possibly jeopardizing attainment of the objectives of the EEC Treaty (such as the harmonious development of economic activities, mentioned in article 2).

The next question arising concerns the renunciation issue. In view of the fact that a renunciation clause had been totally omitted from the Treaties,¹⁰⁸ it could be concluded that the EEC Treaty (and likewise the ECSC and EAEC Treaties) was of such a character as to fall within those treaties not being prone to renunciation, in the terms of the VCLT.¹⁰⁹ The EC system as a whole was characterized by an important element of independence — independence existing because a great measure of sovereignty had been permanently transferred from the individual Member States to the EC. Because this competence, *i.e.*, a part of their sovereignty, now belonged to the EC in their own right, unilateral renunciation seemed legally out of the question. This might have effectively prevented the other Member States from unilaterally renouncing the EC Treaties because they refused to allow German unification to change their obligations under the treaties, as much

107. Vienna Convention, *supra* note 4, at art. 62.

108. The ECSC Treaty only provided for a date of termination (50 years after its entry into force) in article 97. See von Lieris, *Der EGKS-Vertrag und das Jahr 2002*, 25 *EUROPARECHT* 305 (1990). The EEC and EAEC Treaties were concluded for unlimited duration. See EEC Treaty *supra* note 99, at art. 240; EAEC Treaty, *supra* note 99, at art. 208.

109. See Vienna Convention, *supra* note 4, at arts. 56(1)(a), 56(1)(b).

as it legally prevented the FRG from denunciation precisely in order to circumvent such a refusal. Withdrawal by the FRG was also precluded, it must be stated, by the repeated pledges of the FRG that its future lay with integration in the EC, as laid down for instance in article 7(2) of the Convention on Germany.¹¹⁰

If, however, the *rebus sic stantibus* clause of VCLT article 62 would not have allowed individual Member States to renounce the EC Treaties (because of their supranational character not allowing renunciation)¹¹¹ where essential obligations of Member States were to be transformed by an inclusion of the GDR in the scope of the Treaties, it could have meant only one thing: that the power to prevent such essential obligations from being transformed by one Member State unilaterally had accrued to the EC as a whole. Therefore, unanimity in the Council plus consent by the Commission would have seemed mandatory for the transformations in question!

This would have been analogous to the question of amendments to the EEC Treaty — for example, a redefinition of article 227(1)¹¹² to include a new Germany replacing the FRG — which could only have been made unanimously. It would not have been proper to dodge article 236¹¹³ — or article 237 — by a mere redefinition. In addition, care would have been required to deal with existing agreements between the GDR and the EC. Revision or renunciation of those existing agreements would have been necessary, otherwise they would, in principle, automatically have remained in force.¹¹⁴ At the same time, the EC Treaties could not extend to former GDR territories without unanimous agreement of the EC Members, because “application of the treat[ies] in respect of the entire territory of the successor State would [have been] incompatible with the object and purpose of the treat[ies]

110. *Supra* note 15. See also Corterier, *L'Europe et les Relations Est-Ouest: Problèmes Actuels et Perspectives*, 47 POLITIQUE ÉTRANGÈRE 21, 22, 29-30 (1982).

111. See Bleckmann, *Zur Funktion des Gewohnheitsrecht im Europäischen Gemeinschaftsrecht*, 16 EUROPARECHT 101, 102 (1981); H. IPSSEN, *EUROPÄISCHES GEMEINSCHAFTSRECHT* 100-01(1972); A. BLECKMANN, *EUROPARECHT* 99-100, 138 (4th ed. 1985).

112. Article 227(1) EEC Treaty stated: “This Treaty shall apply to . . . the Federal Republic of Germany”

113. This article provided for the possibility of amending the Treaty after the consultation, if appropriate, of the Commission, and ratification by all Member States. The provision regarding consultation of the Commission should be considered outdated and superseded by the factual developments within the Community (the Commission negotiating with possibly acceding States), and the changes resulting from the Single European Act, *supra* note 100, at arts. 8, 30(5), especially when read in combination with article 237 of the EEC Treaty, *supra* note 99 (requiring the assent of the European Parliament for the State accession after the entry into force of the Single European Act); see P. KAPTEYN & P. VERLOREN VAN THEMATAAT, *supra* note 100, at 55.

114. See Convention on Succession, *supra* note 82, at arts. 4, 31(1), 31(2). Article 4 makes the Convention applicable to treaties constituting international organizations and treaties adopted within such organizations as well.

or would [have] radically change[d] the conditions for [their] operation."¹¹⁵ Looking back, it seems that both these conditions would have been fulfilled in such a case.

If, instead, only a new interpretation had been given to the term "Federal Republic of Germany,"¹¹⁶ article 155¹¹⁷ seemingly would have granted the European Commission the competency to control, accept or reject such an interpretation and its application within the EC. At any rate, the possible existence of binding force upon others arising out of a unilateral interpretation would have been subject to this competency.

Such a case probably would not have come within the rule as laid down in article 31(3) of the Vienna Convention on Succession of States in Respect of Treaties¹¹⁸ (although that is partly a political judgment); however, it then would have come within the scope of the doctrine of "moving treaty frontiers" as codified in article 15(b). Again, it appeared from the Treaties "that the application of the treat[ies] to that territory [*i.e.*, the absorbed territory] would be incompatible with the object and purpose of the treat[ies] or would radically change the conditions for [their] operation," thus preventing automatic extension of the EC Treaties to former GDR territory.

For the time being, then, the conclusion as to the EC Treaties and the economic side of German unification must be that the FRG could not have proceeded toward unification without the consent of the EC Members to all modalities of such a unification that by their nature fell within the scope of the treaties: free traffic of goods, services, capital and persons, special regimes for certain areas and various forms of centralized economic, trade and financial policies, to name but a few. Insofar as the competencies of the individual Member States over these issues and others had already been transferred to the EC and therefore could not have been invoked by individual Member States, logically it would have been the European Communities' organs which could have legally invoked such competencies to influence at least the modalities of German unification.

The foregoing did not derogate from the fact that the unification as such, which was in essence a political decision of a Member State of

115. *Id.* at arts. 4, 31(3).

116. *I.e.*, when a new Germany would have come into existence under such a name, not really by a unification of two States, but by absorption of the various *Länder* of the GDR.

117. It provides that "the Commission shall: ensure that the provisions of this Treaty . . . are applied;" and shall "have its own power of decision . . . in the manner provided for. . . ." EEC Treaty, *supra* note 99, at art. 155.

118. See *Succession of States in Respect of Treaties*, [1974] 1 Y.B. INT'L L. COMM'N 176-80, 280, U.N. Doc. A/CN.4/275 and Add.1 and 2, A/CN.4/278 and Add. 1-6, A/8710/Rev.1, A/CN.4/L.217/Add.10 (the discussion on this point within the ILC).

the EC (to be taken together with a non-Member), clearly fell outside the scope of the treaties. The treaties did not encompass politics in the normal sense of the word.

Thus, it is time to turn to the European Political Cooperation ("EPC"), which by its very definition encompassed all questions concerning politics. The EPC, however, as formalized in the Single European Act,¹¹⁹ operated outside the Treaty system, and for all practical purposes is merely a consultation mechanism.

Like all Member States, the FRG had a duty under article 30(2) of the Single European Act to inform and consult the other Member States regarding questions of foreign policy of general interest (regardless of whether the FRG had the right to claim that intra-German relations were not foreign policy) prior to taking a definitive stand. This held even with respect to conferences, such as the "two plus four" conferences, in which not all Community Members participated.¹²⁰

However, no binding force could have resulted from such consultation. In the last instance each party would have remained free to take its own stand on certain issues — as is illustrated, for example, by the British stand towards sanctions against South Africa and the divergent stands taken by EC Members with regard to the recent Gulf War. The duty arising from the EPC is only one to consult, not one to accept a "centralized" view from the Council of Ministers or the Commission, whose official legal role would have been restricted here to the right to be present. In such a consultation, the Commission would have been the organ most directly defending the EC's interests, and the most the Commission could have done on the basis of the EPC would have been to persuade at least three Member States to call a ministerial meeting in accordance with article 30(10)(d) and then to try to formulate a common viewpoint on the purely political aspects concerning unification.

Therefore, it seems the EPC could not have functioned as a framework for influencing in a legally binding way the FRG's policies towards unification.

But before finally providing an answer to the question of the legal rights, arising out of the EC Treaties and EPC, of individual Member States or the EC as a whole regarding unification, another problem has to be analyzed: namely, the effect of the reservations made by the

119. See Single European Act, *supra* note 100, at art. 30. For its operation outside the Treaty system, see the distinction made in arts. 3(1) and 3(2) of the Single European Act.

120. See *id.* at art. 30(7)(b).

FRG concerning application of the EC Treaties to the German problem.

The FRG had from the beginning reserved certain rights in the form of a Protocol¹²¹ and a Declaration.¹²² The Declaration on the Definition of "German National" simply announced, with an eye toward the application of the EC Treaties, that all Germans as defined in the Basic Law of the FRG¹²³ were to be considered nationals of the FRG. This meant de facto that GDR nationals (or even inhabitants of the former Eastern Territories) might at any time become subject to the same obligations and be accorded the same rights under the EC Treaties as nationals of the EC Member States. In view of the relevant legal positions of the FRG, this declaration was a necessary corollary of the FRG's claim to represent the "German nation" (by representing "its nationals"), as long as there was no arrival at a definitive peace settlement.¹²⁴ The Declaration was accepted by the five other EC Members and thus was binding upon them.¹²⁵

Only a small number of "Germans" from outside the FRG, however, were actually able to use a right to acquire or enjoy a "German nationality," and any effect on both the FRG and the EC as a whole was infinitesimal. The problem this raises is that after the Basic Treaty of 1972, a conclusion of acquiescence by the EC Members would have conflicted with their recognition of the GDR as a State, with its concurring right of exclusive diplomatic protection of its own nationals. The EC resolved the conflict by confining this bestowal of EC rights to those GDR nationals who actually transferred their domicile to the FRG, thereby affording it only to those actually acquiring FRG nationality.¹²⁶ With this change the legal solution once more reflected the factual situation to everyone's satisfaction.

The Protocol on German Internal Trade was likewise adopted

121. The Protocol on German Internal Trade and Connected Problems, Mar. 25, 1957, 298 U.N.T.S. 131, *reprinted in* INTERGOVERNMENTAL CONFERENCE ON THE COMMON MARKET AND EURATOM, TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY AND CONNECTED DOCUMENTS 261 (1959). The protocol was adopted by the Conference concluding the EEC and EAEC Treaties. It was adopted on the same date as the conclusion of those Treaties. *See* Final Act of the Intergovernmental Conference on the Common Market and Euratom, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Final Act].

122. The Declaration by the Government of the Federal Republic of Germany on the Definition of the Expression "German National," Mar. 25, 1957, *reprinted in* Bleckmann, *supra* note 65, at 435; taken note of by the Conference concluding the EEC and EAEC Treaties on the same date and annexed to the Convention on Certain Institutions Common to the European Communities, Mar. 25, 1957, 298 U.N.T.S. 269, by the Final Act, *supra* note 121.

123. GRUNDGESETZ [GG] preamble, Art. 116 (FRG).

124. *See id.* at preamble, arts. 23, 116.

125. *See* Bleckmann, *supra* note 65, at 435-36.

126. *See id.* at 443-46; Czaplinski, *supra* note 61, at 83-85.

both by the FRG and by the other five signatories of the EC Treaties at the time, and thus could be deemed binding upon the latter. The Protocol stated in its first paragraph that commercial exchanges between the two German "territories" were to be considered as internal trade, thereby excluding EC jurisdiction as to such trade and creating a sort of exception to the EC's common external economic competencies. However, the practical consequences again were very small — in the FRG the portion of intra-German trade seemed to be of negligible quantity when compared to total FRG trade, and even less of it spilled over into the other EC countries. Thus, the possibility that this intra-German trade infringed upon their legal interests, which would have necessitated that they react to those *de facto* reservations to the Treaties, was small indeed.

Moreover, the Protocol was not exclusively one-sided, as it did not fully acquiesce in the FRG's rights to consider intra-German trade as its own business. All Member States were obliged to avoid harm to the Common Market's principles and each other's economies by their trade relations with the GDR. All Member States equally in the same Protocol reserved their right to take measures against possible serious and harmful consequences resulting from this intra-German trade.¹²⁷ Furthermore, they did not refrain from applying EC rules regarding external relations to interaction with the GDR; apparently they did not see the GDR as part of EC territory at all. Even the European Commission was granted a role, namely to be informed about agreements of Member States with the GDR, thereby potentially activating the Commission's powers to guard application and interpretation of the EC Treaties under article 169 of the EEC Treaty. Nevertheless, for all practical purposes neither the FRG claims arising out of the Protocol nor those arising out of the Declaration were challenged by the other five Member States during the first years of the EC.

This all changed, however, in the early 1970s when the FRG and the GDR concluded the Basic Treaty. Although the FRG itself tried to maintain its claims of sole representation and non-acquiescence in the status quo, in view of its recognition of the GDR as a State in its own right the arguments brought forward seemed a little artificial. Among the States that accepted the status quo and recognized the two Germanies as Members of the UN were the five other EC Members of that time.¹²⁸ Later, those other EC Members were to contest dynamic interpretation of the Protocol with a view to 1992. They furthermore

127. See Protocol on German Internal Trade, *supra* note 121, at paras. 2 and 3 (aimed at the FRG and the other five Member States respectively; later the latter States actually protested).

128. See Hobson, *supra* note 65, at 45-46.

concluded their own agreements with the GDR, thereby indicating that they regarded the GDR as an independent third State with no special Community ties authorizing some sort of special treatment by the Communities as a whole.¹²⁹

The Commission, representing the Communities as a whole in this field, seemed to hold the same position as the other EC Members, and included the GDR from then on in the Community regulations pertaining to State-trade countries.¹³⁰ As a matter of fact, in 1988 "diplomatic relations" were entered into between the EC as an organization and the GDR,¹³¹ and not long before actual unification the Commission was still negotiating a trade agreement with the GDR.¹³² And even the Supreme Court of the FRG acknowledged that the Protocol could have no effect outside the FRG-GDR relation — which meant that for all practical purposes the FRG was the sole receiver of all the advantages and disadvantages that intra-German trade might entail.¹³³ Hence, there was no way the FRG could have dodged the legal consequences of bringing the GDR within the EC; the consent of the other Member States would have to have been obtained.

The conclusion then, in the context of FRG membership in the EC, is clearly that the EC could not have prevented a political unification, since it was a political question and since the EPC, the only body competent to deal with such questions, could never have provided binding solutions. The only duty that could have been derived from the EPC for the FRG would have been one to consult with the other Members and with the Commission prior to taking stands on conferences. On the other hand, the implications of German unification were so far-reaching with respect to the EC and their economic regime that the EC, which had already obtained a considerable measure of

129. Hobson comes to the conclusion that, acquiescence being absent, Member States may suspend the Protocol. *Id.* at 53. It must be added, however, that the Council of Ministers of the EC saw no reason to try to change the Protocol or renounce it. See 16 O.J. EUR. COMM. (No. C 57) 3 (1973) (where it answered a question (485/72) from the European Parliament on this question). For these reasons, the Protocol even found its place in the First State Treaty (*see infra*). See Protocol Declarations, May 18, 1990; *see also* BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr.63/S. 544, para. 2. Cf. Beise, *Die DDR und die Europäische Gemeinschaft*, 45 EUROPA ARCHIV 149, 150-51 (1990).

130. *E.g.*, Council Regulation (EEC) No. 1765/82, 25 O.J. EUR. COMM. (No. L 195) 1 (1982); *see* P. KAPTEYN & P. VERLOREN VAN THEMAAT, *supra* note 100, at 803. For the GDR-EC relation, *see also*, Tomuschat, *EWG und DDR: Völkerrechtliche Überlegungen zum Sonderstatus des Aussenseiters einer Wirtschaftsunion*, 4 EUROPARECHT 298 (1969). *See also* de Puifferrat, *La CEE et les Pays de L'Est*, 1984 REVUE DU MARCHÉ COMMUN 25; Flaesch-Mougin, *Les accords externes de la C.E.E.*, 23 REVUE TRIMESTRIELLE DE DROIT EUROPEËN 55 (1987).

131. *See, e.g.*, NCR Handelsblad Aug. 16, 1988, at 5, col. 1.

132. *See* Beise, *supra* note 129, at 152-53 (regarding discussions in January and February 1990); NRC Handelsblad, Mar. 13, 1990, at 5, col. 1. (on March 13, the agreement even seems to have been initialled).

133. *See* Bleckmann, *supra* note 65, at 442-46.

independent international legal personality, had an essential right to shape the modalities of integrating the East German economic system into the West German one — an integration without which “political unification” would have been both meaningless and useless. The reservations the FRG made with respect to GDR trade and GDR nationals were no longer of relevance, since the other EC Members¹³⁴ and the Commission had ceased to acquiesce in the FRG’s claim to afford a special status to the GDR, let alone to acquiesce in a possible claim of the FRG to strive for unification without EC interference. All in all, the EC, through both the Commission and the Member States, including those nine not entitled to participate on the basis of occupationary rights, had a legal interest in German unification and therefore had the concomitant right to co-determine its modalities.

VII. THE TWO GERMANIES AND THE TWO BERLINS

Finally, the status of Berlin and the legal implications thereof, as far as they concerned the unification of Germany, should be dealt with. Just as Germany as a whole, after the unconditional surrender of 1945, was divided into three, later four, zones of occupation pending a final settlement, so too Berlin, capital of the former *Reich*, was divided into three and later four occupation zones.

The Berlin question took a somewhat different turn when compared to the general German question. In the first years after 1945 the whole of Berlin was jointly governed by an Allied Kommandatura of the four respective military commanders. The Cold War, however, soon took its toll. The introduction of currency reform in the Western zones of Berlin in June 1948, concurrently with such reform in the three zones that were to become the FRG, precipitated the Soviet blockade of that summer and the end of the four-power administration of Berlin.

The three Western zones elected a City Government in December 1948, in accordance with article 2(1) of the Temporary Constitution for Berlin of August 1946 (which had been approved by the Soviet Union as well), whereas the Soviet Union refused to allow for such elections in the Eastern zone. Thereafter, West Berlin, the result of the fusion of the three Western zones, was granted, and retained up until unification, a special status.

It was not a *Land* of the FRG — despite repeated claims of the

134. The six States that later acceded were and are bound by the same regime, by virtue of articles 2 and 3 of the Act Concerning the Condition of Accession and the Adjustments to the Treaties, Jan. 22, 1972, 15 J.O. COMM. EUR. (No. 1 73) 14 (1972), for Great Britain, Ireland and Denmark (similar measures applied for Greece, Spain and Portugal). Those states did not significantly differ in their attitude towards the GDR.

FRG to the contrary;¹³⁵ it was a "German Land" at most. The FRG's claims referred to were rejected not only by the Soviet Union, but by the three Western allies as well.¹³⁶ The latter did allow, in contrast to the former, the external representation of West Berlin by the FRG¹³⁷ and the factual incorporation of West Berlin into West German society. The three powers, however, retained their rights of occupation in a much stronger fashion than with regard to West Germany. They retained the right not only to station troops, but also to prevent application of West German laws, including the Basic Law,¹³⁸ to the area of (West) Berlin. Because of this right, there was no automatic application of West German laws to Berlin; a separate Berlin law was necessary for each piece of domestic legislation, by way of a *Mantelgesetz*,¹³⁹ usually with the same wording as the respective FRG law. Such a *Mantelgesetz* provided only for semi-automatic application, since the Western allies retained power to reject such application.

Such a right would certainly have enabled the Western allies to prevent in law the unilateral ending by a united Germany of the occupation status and/or to prevent any unilateral decision by such a Germany to make West Berlin part of its capital.

Regarding East Berlin, the situation was somewhat different. Again, the occupant in power here did not let go of occupational rights to Berlin as easily as it relinquished those rights in its respective zone in Germany. Nevertheless, as much with regard to "its part" of Berlin as with regard to "its part" of Germany, the Soviet Union went

135. See GRUNDGESETZ [GG] art. 23 (FRG); see also Resolution A of the City Parliament of Greater Berlin on the Inclusion of Berlin into the Federal Republic, June 21, 1949, *reprinted in* DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 116. VERFASSUNG VON BERLIN [VvB] (Constitution of Berlin) (1950) arts. 1(1), 1(2). See 2 GRUNDGESETZ KOMMENTAR, *supra* note 57, at 70-72.

136. See, e.g., Letter from the Three Western Military Governors to the President of the Parliamentary Council Approving the Basic Law, May 12, 1949, *reprinted in* DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 107; Allied Kommandatura Berlin BK/O (49) 139 (1949) (Decisions of the Stadtverordnetenversammlung Concerning the Representation of Berlin in the Bundestag), *reprinted in id.* at 117; Allied Kommandatura Berlin BK/O (50) 75 (1950); see Wengler, *Berlin-Ouest et les Communautés Européennes*, 24 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 217, 219 n.5 (1978); Letter of the Allied Kommandatura of May 24, 1967, on the Decision of the Federal Constitutional Court of January 22, 1966, May 24, 1967, *reprinted in* E. ZIVIER, *supra* note 12, at 305; Convention on Relations Between the Three Powers and the Federal Republic of Germany, Oct. 23, 1954, art. 2, 6 U.S.T. 4251, 4254, T.I.A.S. No. 3425, at 138, 331 U.N.T.S. 327, 328; Petrenkow, *Über einige völkerrechtliche Aspekte des Status von West-Berlin*, in 14 DEUTSCHE AUSSENPOLITIK 152 (1969) (Soviet view).

137. See Allied Kommandatura Berlin BKC/L (52) 6 (1952) (Extension of International Treaties of the Federal Republic to Berlin), *reprinted in* DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 130.

138. See BK/O (50) 75, *supra* note 136.

139. See Allied Kommandatura Berlin BK/O (51) 56 (1951), as amended by BK/O (55) 10 (1955) (Possibility of a "Mantelgesetz"), *reprinted in* DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 128.

further in ending the occupationary regime than the Western allies.¹⁴⁰ In November 1958, the Soviet Union declared that the London Protocol of 1944, which had been the basis for the four-power occupation of the Berlin area, had been violated by the Western powers and therefore was no longer in force.¹⁴¹ Thereby the exclusive Soviet power over East Berlin was proclaimed — although, at that time, the Western allies did not acquiesce in it.

Then, in 1962, seven years after the GDR had become an independent State (although recognition of the fact by Western States was to come ten years later still), the occupation of East Berlin was ended (except for some rights to station troops),¹⁴² the sovereignty over it transferred to the GDR, and its status as *de facto* capital of the GDR transformed into a *de jure* status.¹⁴³ Finally in 1977, with the promulgation of two GDR acts and the removal of the check points between the GDR and East Berlin, the integration of the latter into the former was completed. Since then, the Soviet Union has had no rights pertaining to East Berlin,¹⁴⁴ as was already the case with regard to the GDR. The Western powers, by not claiming jurisdiction in the Eastern sector as apart from their general reservations concerning the final status of Berlin and by seating their embassies to the GDR in East Berlin, acquiesced in this situation.¹⁴⁵

An ending to the occupation did not occur for West Berlin, though, because of repeated Soviet claims to that part of the city and because of basic agreement to such claims by the Western occupants.¹⁴⁶ This differing status was made especially clear by the Quadripartite Agreement of September 3, 1971,¹⁴⁷ its essential provisions relating to West Berlin only.¹⁴⁸ The Soviet Union declared in article II(A) that civil transit through the GDR to West Berlin should encounter no hindrances, in accordance with a concurrent USSR-GDR

140. It is the irony of history that politically the situation was, of course, the other way around. Furthermore, for similar political reasons, namely propaganda, the legal situation was used as a cover thereto. This worked in fact as a legal boomerang by giving the Soviets less legal control over unification than the three Western allies. This forms a surprising example of the potential political advantages that derive from taking international law seriously and from adhering to it, both in spirit and in fact.

141. See E. ZIVIER, *supra* note 12, at 34, 63.

142. Cf. I. HENDRY & M. WOOD, *supra* note 12, at 66-67; Zuleeg, *supra* note 47, at 134.

143. DIE VERFASSUNG DER DDR [VERF] art. 1 (GDR); E. ZIVIER, *supra* note 12, at 40-41.

144. Cf. the Soviet point of view as quoted in E. ZIVIER, *supra* note 12, at 392.

145. *Id.* at 88-89.

146. J. GROUX & P. MANIN, *DE EUROPESE GEMEENSCHAPPEN IN DE INTERNATIONALE RECHTSORDE* 144 (1985).

147. Quadripartite Agreement, Sept. 3, 1971, 24 U.S.T. 283, 287-88, T.I.A.S. No. 7551, at 2-3, 880 U.N.T.S. 115, 124-25; I. HENDRY & M. WOOD, *supra* note 12, at 335.

148. See Zuleeg, *supra* note 47, at 134. *But see* E. ZIVIER, *supra* note 12, at 47-48, 59, 198.

agreement. The United States, the United Kingdom and France declared in article II(B) that the ties between West Berlin and the FRG would be sustained and developed further, but explicitly without allowing for constitutional integration in, and government by, the FRG. All four powers reserved their existing rights and obligations in article I(3) ("as to the whole of the area" — perhaps East as much as West Berlin, but if so only regarding the residual rights as to the Germany of 1937 (see *supra*)), obligated themselves to recognize the rights of the other three, and furthermore obligated themselves (in article I(4)) not to unilaterally change the existing situation.

The admission of the FRG to the United Nations in 1973 did not alter the status of Berlin. The FRG again claimed Berlin to be a *Land*;¹⁴⁹ however, the occupation powers reserved their rights as to Berlin — both the four of them together¹⁵⁰ and the three Western powers alone¹⁵¹ — and the FRG accepted those claims even up to the First State Treaty of July 1, 1990!¹⁵²

The conclusion regarding the four occupying powers, therefore, is that they could have prevented a united Germany from changing the West Berlin situation. This, of course, was a formidable political lever with regard to the unification of Germany as a whole. On the other hand, the pledges by the Western allies to "see the reunification of the city in free elections in order that Berlin may take its due place in a free and united Germany,"¹⁵³ and similar pledges by the Soviet Union, may well have narrowed the framework within which they could have legally used this lever. This narrowing probably left them with only as much leverage over Berlin as they had over the general unification. As to East Berlin, though, the residual occupationary rights that were reserved by the four powers in relation to the Germany of 1937 seemed to be too weak to have any meaningful effect, and perhaps were lost following the acquiescence in the sovereignty of the GDR, including sovereignty over its capital.

Neither the North Atlantic Treaty nor the treaty which created the Warsaw Pact contained clauses relevant to the question of Berlin,

149. Law relating to the Accession of the Federal Republic of Germany to the Charter of the United Nations, June 6, 1973, art. 2, *reprinted in* E. ZIVIER, *supra* note 12, at 379.

150. Declaration on the Question of U.N. Membership for the Two Germanies, Nov. 9, 1972, *reprinted in* 12 I.L.M. 217, E. ZIVIER, *supra* note 12, at 371.

151. Allied Kommandatura Berlin BKC/L (73) 1 (1973), *reprinted in* E. ZIVIER, *supra* note 12, at 378.

152. First State Treaty, *supra* note 2, at art. 37, states: "In compliance with the Four Powers Agreement of September 3, 1971, this treaty will be extended to West Berlin in accordance with fixed procedures." (authors' translation).

153. Declaration on Berlin by the Three Ministers of the USA, the UK, and France, May 12, 1950, *reprinted in* DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 118.

apart from those pertaining to the German question as a whole. The same held true for the CSCE system. It is worthwhile, however, to look into the relation between West Berlin and the European Communities.

When the FRG signed the Treaties of Rome in 1957, it appended a Declaration on the Application of the Treaties to Berlin, of which the conference "took note." The fact that the declaration was annexed to the Convention on Certain Institutions Common to the European Communities of March 25, 1957,¹⁵⁴ and adopted in the Final Act of the conference, must be taken to have meant acquiescence. At the same time, a Joint Declaration on Berlin was adopted by the conference. The importance of the Joint Declaration did not lie so much in its legal contents (in effect it contained only the wish for peaceful and ever closer cooperation while being aware of the special circumstances), as in what it did not contain: namely, it did not contain a refutation of the FRG's claim that the Treaties of Rome were also to be applied in the *Land Berlin*. Such a refutation might have been necessary to prevent acquiescence in Berlin's status as a *Land* of the FRG. The formulation of the EEC Treaty was better chosen in this respect; that Treaty was to apply to the "European territories for whose external relations a Member State is responsible."¹⁵⁵

However, possible EC Member States' acquiescence to the FRG's claim by way of the formulation of the EEC Treaty could not alter the legal status of Berlin. That status derived from the occupationary regime, and could not even have been changed unilaterally by the acquiescence of EC Member States (and occupationary powers) France and Great Britain.

The fact of application of the EC Treaties to West Berlin did not create any indirect inclusion of West Berlin into the FRG, because the *Mantelgesetz* which implemented the Treaties and their regime¹⁵⁶ was consented to by the three Western allies¹⁵⁷ (if not exactly by the Soviet Union)¹⁵⁸ without prejudice to their rights deriving from the occupa-

154. See *supra* note 122.

155. EEC Treaty, *supra* note 99, at art. 227(4).

156. See Wengler, *supra* note 136, at 218.

157. Letter from Allied Kommandatura Berlin on the extension to Berlin of the European Economic Community, Nov. 18, 1957, BK/L (57) 44 (1957), reprinted in DOCUMENTS ON BERLIN 1943-1963, *supra* note 12, at 156.

158. E. ZIVIER, DER RECHTSSTATUS DES LANDES BERLIN 257-58 (4th ed. 1987); I. HENDRY & M. WOOD, *supra* note 12, at 222-23 (describing the Soviet attitude and the Allied response in which the Western allies refuted Soviet claims as to the illegality of the application of the EC Treaties by noting that this application did not touch upon questions of security or status).

tion regime.¹⁵⁹ As it were, the EC Treaties applied outside the legal sphere of the FRG (and not through it) directly to Berlin.¹⁶⁰ The occupation powers had at the time allowed the FRG to represent West Berlin externally in the signing of treaties such as the EEC Treaty. Immediately after the signing, however, the area of West Berlin once more was to be considered as lying outside the FRG, even if it were to be considered for most practical purposes as lying within "EC territory."

Finally, as to East Berlin, no special EC relation existed distinct from the relation applicable to the GDR as a whole.

The conclusion regarding the Berlins could thus only be the following: the Soviet Union could not have legally prevented the inclusion of East Berlin in a united Germany any more than it could have prevented East Germany from becoming included—the Soviet Union had, in effect, completely relinquished its occupationary rights in East Berlin to the GDR. The Western powers had slightly more to say regarding West Berlin, since they never had acquiesced in the FRG's attempts to make it a "normal" part of the FRG and always had reserved their rights as to a peace treaty. Only their repeated pledges to strive for a united Berlin and free elections therein restricted their legal competency to obstruct inclusion of Berlin as a whole in a united Germany.

Because of (1) their acquiescence¹⁶¹ to the FRG's claims concerning West Berlin, (2) the ensuing direct application of the whole of the EC Treaties' regime to West Berlin, and more importantly, (3) the occupationary status of the city, the EC could not have disturbed a German decision to make West Berlin part of the capital of a united Germany. This is so despite the clear legal relevance such an inclusion has for the EC. On the other hand, East Berlin's inclusion in such a Berlin provided no right for the EC distinct from their rights in relation to the GDR as a third State.

VIII. EVALUATION AND CONCLUSIONS: ONE GERMANY!

In answering the question as to the relevant international legal arguments and parameters controlling the unification of Germany —

159. See generally Jahn, *Die Europäische Wirtschaftsgemeinschaft und Berlin*, 7 *EUROPARECHT* 232, 250 (1972) (regarding security questions and the status of Berlin as a whole).

160. See I. HENRY & M. WOOD, *supra* note 12, at 218-20; Jahn, *supra* note 159, at 247.

161. If the EC are not yet enjoying such international legal personality as to be able to "acquiesce" (or "not acquiesce"), such a possibility then is at least open to every Member State based on their actions within EC bodies, such as the Council; thus, the conclusion on this point would not change.

which finally took place on October 3, 1990 — the following conclusions can be drawn from the foregoing discussion.

Within the framework of the obligations of peaceful action, respect for other States' sovereignty and frontiers, and other relevant rules of international law, no other State seemed to have been legally able to prevent German unification. Even the four former occupational powers seemed to have been obliged to grant unification, so long as it was arrived at democratically and so long as a peace treaty or similar document, guaranteeing the status quo, e.g., in regard to the Oder-Neisse frontier, would ensue (or perhaps even without such a peace treaty becoming a fact). Only the EC seemed to have had essential competence to co-define the modalities and effects of such a unification.

Such was the legal framework that existed at the moment when German unification began to be a real, political issue. It began to be such an issue in November 1989, when the Berlin Wall came down, the Honecker regime followed suit, and thorough and far-reaching reforms were promised — when, in the FRG, Chancellor Kohl proposed his short-lived ten points plan, as a step-by-step approach with the potential to lead to a unified Germany after a number of years.

It is submitted that the actual path to German unification adhered to in the year that followed the peaceful "revolution" in the GDR has kept itself within this legal framework, and more often than not has even been guided by it. A few well-chosen examples, concerning the crucial and central issues, will be sufficient proof in this respect.

For the reasons explained above, German unification, as far as it concerned the two Germanies only, was hardly legally interfered with by third States, and was allowed to be implemented by way of the two *Staatsverträge*.¹⁶² Of course, in those State treaties neither partners were allowed to violate rules of *jus cogens*; it is assumed as self-evident that no such norms were violated. Of more relevance here is the general international legal rule that required that the rights of third States not be violated or encroached upon by unification. It was here of course where international law provided the relevant framework.

The framework did not preclude one or more ways of German unification as such: the choice of Berlin as a capital,¹⁶³ for instance, was, once the last remnants of the occupation regime had been cleared away, an entirely German matter. The use of those occupational rights to prevent or influence such decisions within the framework would not have been allowed legally and therefore would have been

162. See *supra* notes 2-3.

163. Second State Treaty, *supra* note 3, at art. 2(1).

highly hazardous in political terms. Thus, the Allied *Kommandatura* finished its work in Berlin on October 2, one day before the actual unification took place.

Likewise, the Second State Treaty's provision for the joining of the five *Länder* formerly composing the GDR plus East Berlin, in accordance with article 23 of the FRG's constitution,¹⁶⁴ resulted from the free choice of the FRG and the GDR. The rather sharp disapproval of the use of article 23 voiced by the Soviet Union at the start of the "two plus four" talks¹⁶⁵ therefore had no legal basis, and consequently was later omitted. Thus, the choice by the Germanies to unite via article 23 rather than article 146 — article 146 having long been seen as an alternative road to unification¹⁶⁶ — was fully within their power in light of the framework.

Once their choice for the article 23 option was established, certain binding international legal effects existed distinct from those that would have obtained if a new subject of international law had been created.¹⁶⁷ As was shown, it was here that the rules of the Vienna Convention on Succession of States in Respect of Treaties, in as far as they were a codification of customary law, became relevant. It meant, for instance, that all treaties to which the FRG was a party remained in force and automatically entered into force for the newly acquired territories, with the exception of special cases such as NATO and the EC.¹⁶⁸

Hence, the Soviet Union never had a legal lever to prevent the new

164. *Id.* at art. 1(1), 1(2).

165. Declaration of the Soviet Ministry of Foreign Affairs, Mar. 14, 1990, reprinted in 45 EUROPA ARCHIV D492, D493 (1990).

166. Choosing article 23 ensured that legally the new Germany would simply be an enlarged FRG, not a successor State to the two disappeared States.

167. Of course, this was one of the reasons for choosing the article 23 option instead of article 146. The almost unchanged "survival" of article 146 (compare article 4(6) of the Second State Treaty, *supra* note 3) keeps open the option to later create a real successor State, Germany. Cf. Second State Treaty, *supra* note 3, at art. 5. Realization of the possibility of article 146, however, does not automatically lead to creation of a new State, a new subject of international law. See, e.g., Frowein, *Rechtliche Probleme der Einigung Deutschlands*, 45 EUROPA ARCHIV 233, 234-35 (1990); Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, 43 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1065, 1072 (1990). *Contra* Grabitz & von Bogdandy, *Deutsche Einheit und Europäische Integration*, 43 NJW 1073, 1077 (1990). It should be stated, moreover, that whatever treaties would automatically cease to apply in that case, those duties contained in them which exist independently will remain in force as customary law. Likewise, principles of good faith and estoppel, and those concerning the rights of third States in general, will legally prevent such a new Germany from dodging obligations undertaken solely by means of treaties, as long as not all other parties to those treaties respectively agree.

168. This was acknowledged by article 11 and annex I of the Second State Treaty with respect to NATO. The new State's relation with the EC is considered *infra*. Relations with other States are covered under article 12, which provides for a case-by-case approach with regard to treaties to which the GDR was a party, and allows for the EC to intervene if within their competence.

Germany from remaining in NATO, nor did it have any legal power to prevent the extension of NATO to the former GDR territory. The Soviet Union had only one tool at its disposal to influence such a result: political leverage. And the Soviets used that leverage to extract commitments from the FRG for money and to allow Soviet troops to stay in the former GDR for several more years, while keeping more than a symbolic number of German troops out.¹⁶⁹

As to the EC, in principle the relevant treaties also applied to the newly acquired territories after October 3. However, the European Communities, meaning the combination of the European Commission and the twelve Member States, had the sole power to determine whether the GDR would automatically become "EC territory" or would instead be subject to a transitional regime — hence the early announcement in March 1990 by President Delors of the Commission that two officials of the Commission would be present at all negotiations concerning unification. Delors made clear that this presence was to prevent the legal interests of the EC from being harmed without their concurrence.¹⁷⁰

Thus, the two Germanies took care of those concerns of the Communities in their First State Treaty¹⁷¹ and the Common Protocol¹⁷² by obligating the GDR to accommodate step-by-step the EC Treaties' regime and aims.¹⁷³ Further, the Protocol declarations of May 18¹⁷⁴ provided for reciprocal and non-discriminatory treatment of EC Member States' nationals and companies in the territories of the former GDR. The Protocol on Intra-German Trade, however, remained unaffected under the First State Treaty.¹⁷⁵

Likewise, in the Second State Treaty, the EC's competencies were reiterated time and again;¹⁷⁶ and in general, the provisions of the First State Treaty remained applicable.¹⁷⁷ Furthermore, article 29(2) explicitly provided that with respect to foreign trade issues, the FRG

169. See *infra* note 205 and accompanying text.

170. NRC Handelsblad, Mar. 31, 1990, at 5, col. 8.

171. First State Treaty, *supra* note 2, at arts. 11(3) and 13(3). These Principles are binding in accordance with article 4(1) of the First State Treaty.

172. See, *esp.*, General Principle One, Common Protocol of Oct. 3, 1990, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 63/S.526 (1990).

173. See First State Treaty, *supra* note 2, at arts. 15(1), 26(3) and 30(1) (on customs tariffs). Article 35, moreover, states that international treaties in force, whether for the FRG or for the GDR, will remain unaffected.

174. BULLETIN (Presse und Informationsamt der Bundesregierung) Nr. 63/S.544 (1990), at point 2.

175. However, the uniting which occurred under the Second State Treaty made the Protocol without object, thereby withdrawing it. See Second State Treaty, *supra* note 3, at art 40(1).

176. See, *e.g.*, *id.* at arts. 9(1), 9(2), 12(1), 12(2), 12(3), 28(1) and 29(1).

177. Cf. *id.* at art. 40(1).

and the EC were to agree to temporary exception-clauses regarding the GDR in its relation to its former co-members of the Council for Mutual Economic Assistance ("COMECON").

More importantly, article 10 provided for the application not only of primary EC law — *i.e.*, the Treaties of Paris and Rome and the additional treaties and agreements such as the Single European Act — but also secondary EC law¹⁷⁸ — *i.e.*, the whole legal structure built upon those treaties, including regulations and directives. This application of secondary EC law, though, was subjected to the caveat that the competent EC organs could provide "exceptional regulations" as necessary, where such exceptional regulations are intended to "reckon with governmental requirements and serve to avoid economic difficulties."¹⁷⁹ This general clause clearly takes care of all remaining EC competence over the economic consequences of unification.

Apart from NATO and the EC, however, the doctrine of moving treaty frontiers applied in accordance with customary law on State succession.¹⁸⁰ For example, the FRG's membership in the United Nations now covered former GDR territory as well, substituting for the latter's membership as of October 3, 1990. Likewise, following unification the FRG obligations emanating from the CSCE process were extended to include the five new *Länder* and East Berlin.

Apart from the rights emanating from treaties, customary obligation existed not to violate or encroach upon the rights of third States. As argued above, however, that duty remained limited to a few general obligations codified in the framework of the UN and the CSCE. The most important problems here concerned the Polish border and the military power of Germany itself.

The right of Poland to a guaranteed western border along the famous Oder-Neisse line did not arise from the occupation of Germany, as might have seemed the case at first view. Poland was not one of the victors over Germany in a legal sense, since Germany had surrendered unconditionally as a State to the four allied powers only. Thus, Poland's legal rights to the former German Eastern Territories depended on subrogation by the Soviet Union, which was one of the victors, and it was only logical that Poland was refused a seat at the "two plus four" conferences.¹⁸¹ Also logical in the result is the fact that the Soviet Union exerted the most pressure on the Germanies to acknowl-

178. *Id.* at art. 10(2).

179. *Id.* (translation from German by F.G. von der Dunk).

180. As codified in the Convention on Succession, *supra* note 82.

181. The last preambular paragraph of the Second State Treaty, drawing attention to the five meetings of the "two plus four," only mentioned that the fourth meeting was "with participation by the Minister of Foreign Affairs of Poland." See Frowein, *supra* note 167, at 236.

edge the Oder-Neisse line,¹⁸² since it was the most concerned of the four with the Eastern border of Germany and the territorial security of its (former) ally Poland.

This, however, did not mean that Poland had no sovereign rights of its own to the former Eastern Territories. Rather, as seen before, it had rights stemming from acquiescence, by the whole international community after 1970/1973, and the resultant estoppel.

Those legal obligations were duly taken care of, to begin with, in the Second State Treaty. With certain reservations, this Treaty made the Constitution of the old FRG applicable to the whole territory of the new FRG,¹⁸³ and article 4 thereof stressed that the preamble of the Constitution was thereby changed to the effect that the German people had thus granted themselves this Constitution. The article reads: "[We hereby] have in free self-determination completed the unity and freedom of Germany. Thereby this Constitution applies for the whole of the German people." This meant that the (united) FRG no longer maintained any claim to the former Eastern Territories.

This conclusion was confirmed by the Soviet-German treaty of September 18, 1990,¹⁸⁴ which specifically prohibited any pressure for changes of European borders,¹⁸⁵ including of course pressure by military means. Moreover, that treaty referred to more general international legal obligations and the CSCE agreements.¹⁸⁶ Thus, to the degree that international law affects politics, Poland can now rest assured of its western border.

In this light, the German-Polish treaty¹⁸⁷ was no more than another legal reiteration and seal to an already existing German obligation.¹⁸⁸ Thus, not even a refusal by the new Germany to sign such a treaty would have negated the conclusion as to the sanctity of the border.

182. For the resultant recognition, see the German-Soviet treaty of September 18, *supra* note 5, at arts. 1-3 (especially art. 2).

183. Second State Treaty, *supra* note 3, at art. 3.

184. Treaty on Good Neighborly Relations, Partnership and Cooperation, *supra* note 5.

185. *Id.* at arts. 2-3.

186. *Id.* at arts. 1, 5 and 21.

187. Treaty on Boundaries and Friendly Relations, *supra* note 6 (of which article 1 confirmed the GDR-Poland border agreement of 1950 and confirmed Polish possession of the former Eastern Territories).

188. This can be deduced also from numerous official statements made by both the FRG and the GDR governments, both before and after unification. See, e.g., Foreign Minister Genscher of the FRG, on Sept. 21, 1990, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 113/S. 1187 (1990); Prime Minister de Maiziere of the GDR, on Oct. 2, 1990, BULLETIN, (Presse- und Informationsamt der Bundesregierung) Nr. 118/S. 1226 (1990); Chancellor Kohl of the FRG, on Oct. 3, 1990, BULLETIN (Presse- und Informationsamt der Bundesregierung) Nr. 118/S. 1227 (1990).

A similar conclusion can be drawn regarding the question of military power. General German obligations towards the peaceful resolution of conflicts, the refraining from the use of violence, the respect for other States' territorial integrity, and the like, have been included in the UN Charter, the CSCE Final Act, the North Atlantic Treaty and the Warsaw Pact treaties. Furthermore, specific treaty obligations apply requiring the German State to refrain from the development of atomic, bacteriological and chemical weapons — such as those obligations contained in the Non-Proliferation Treaty.¹⁸⁹ Apart from those treaty obligations applicable to the FRG, there were other obligations which arose from customary rules, such as those incorporated into the CSCE Final Act.¹⁹⁰

The Second State Treaty¹⁹¹ in its preamble and article 4 reiterated those principles, as did the First State Treaty in its preamble. Likewise, in its recent treaty with the Soviet Union the new FRG has repeated those pledges in general ways.¹⁹² Article 11 of the Second State Treaty, applying the “moving treaty frontiers” rule to the FRG, was once more an official legal seal to the application of customary and conventional law to the united Germany.

Apart from this legal framework, there were no more legal parameters regarding the intra-German aspects of unification; the other elements, contained, for instance, in the Second State Treaty, are simply not relevant from an *international* legal point of view.

All that remains to be analyzed then is the political outcome in the legal context of the former occupation powers. This essentially was the question of a peace treaty or some kind of substitution thereto — aside from the questions of military power and weapons of mass-destruction as dealt with before — and it was to be dealt with in the framework of the “two plus four” conferences, which ultimately resulted in the Two Plus Four Treaty.¹⁹³

In its preamble, the Two Plus Four Treaty pointed to the UN and the CSCE as providing the relevant principles for German unification. Furthermore, the preamble made clear that the Two Plus Four Treaty in essence was the substitute of an official peace treaty: It was concluded “in the consciousness that their peoples had lived in peace with each other since 1945,”¹⁹⁴ “mindful of the rights and duties of the

189. *Supra* note 88.

190. *Supra* note 11 and Section V.

191. *Supra* note 3.

192. Treaty on Good Neighbourly Relations, Partnership and Cooperation, *supra* note 5, at arts. 1-5.

193. *Supra* note 4.

194. *Id.* at first preambular para. (translation from German by F.G. von der Dunk).

Four Powers with respect to Berlin and Germany as a whole and the corresponding agreements and decisions of the Four Powers from the times of the war and after,"¹⁹⁵ "in the conviction that the unification of Germany as a State with irrevocable borders is an important contribution to peace and stability in Europe,"¹⁹⁶ "with the goal of agreeing on a final settlement regarding Germany,"¹⁹⁷ and "in recognition of the fact that by and with the unification of Germany as a democratic and peace-loving State the rights and duties of the Four Powers with respect to Berlin and Germany as a whole lose their importance."¹⁹⁸

Article 1 then confirmed German unification, encompassing the territory of the FRG, the GDR and both parts of Berlin. Paragraph 1 provided for the finality of those borders from the day the Treaty entered into force;¹⁹⁹ paragraph 2 obligated Germany to specifically confirm the Oder-Neisse border by way of a treaty with Poland; paragraph 3 reiterated the territorial finality;²⁰⁰ and paragraph 4 confirmed this once more by obligating the FRG and the GDR to ensure that no contrary provisions would be contained in the Constitution of the unified Germany.

All this is, to an astonishing extent, in conformity with the legal framework as it existed, and therefore the above-mentioned paragraphs form an official legal seal, recognizing the territorial integrity of other States and their inviolable borders. In the final paragraph of article 1 the Four Powers declared that with the fulfillment of the various obligations undertaken by the FRG and the GDR, the final character of the borders would be confirmed.²⁰¹

Article 2 of the Two Plus Four Treaty harked back to the German State's general obligation of peacefulness, the prohibition to start a war of aggression and the prohibition on the use of weapons in cases other than those sanctioned by the UN Charter framework. Thus, it is clear that care was taken to properly deal with general customary law obligations, such as those codified in the CSCE Final Act.

Article 3 repeated²⁰² the obligation not to produce atomic, biologi-

195. *Id.* at third preambular para.

196. *Id.* at eleventh preambular para.

197. *Id.* at twelfth preambular para.

198. *Id.* at thirteenth preambular para.

199. Entry into force occurred after the 5th ratification. See Two Plus Four Treaty, *supra* note 4, at art. 9 and discussion therein.

200. Specifically, it states: "The unified Germany has no territorial claims against other States whatsoever and will not lodge such claims in the future."

201. Two Plus Four Treaty, *supra* note 4, at art. 1(5). See also Frowein, *supra* note 167, at 235-36.

202. It was originally contained in the 1954 Protocol No. III between the FRG and the three Western allies. See *supra* note 81.

cal or chemical weapons. In addition, it prohibited ownership of such weapons and declared the obligation of the *unified* Germany to adhere to those obligations.²⁰³ Specific mention was also made of the Non-Proliferation Treaty of 1968,²⁰⁴ which in accordance with the moving treaty frontiers doctrine now applies to the whole of Germany.

Paragraph 2 of article 3 served to diminish fears of a remilitarizing Germany by providing that within three or four years the unified Germany would have a maximum of 370,000 men under arms, with a sub-ceiling of 345,000 for army and air-force taken together. The Germans were satisfied with the return promise they received from the other treaty partners to contribute to further disarmament measures in Europe.

The harvest reaped by the Soviets from their political leverage is found in article 4 and article 5(1). Article 4 provides that the departure of Soviet forces from former GDR territory will be dealt with in a treaty between Germany and the Soviet Union.²⁰⁵ And article 5(1) provides that only local German troops (that is, those not falling under an integrated NATO command) may be stationed on former GDR territory until the Soviet troops have completely departed in accordance with article 4. Likewise, for the same period of time, article 5(2) allows the three Western allies to keep some forces in (West) Berlin.

Finally, the central remaining issue concerning NATO membership was dealt with and solved in conformity with the legal framework developed above. Namely, article 5(3) stated: "After the completed departure of Soviet forces . . . in this part of Germany German forces can become stationed, which were subordinated to military alliance structures in the same way as those in the remaining parts of German territory, albeit without nuclear capability." Article 6 then added: "The right of the unified Germany, to belong to alliances with all rights and obligations arising therefrom, remains unaffected by this Treaty." In other words, Germany had complete freedom to continue to be a member of NATO; however, any integration of former GDR territory into the alliance's structure was to be arrived at only after an intermediary period, and more importantly, after the "denuclearization" of the former East Germany.

Next, article 7 was crucial, taken together with the preamble, in substituting this treaty for a formal peace treaty. In this article, the Four Powers terminate their "rights and responsibilities in respect of

203. Two Plus Four Treaty, *supra* note 4, at art. 3(1).

204. Non-proliferation Treaty, *supra* note 88.

205. This means that Soviet forces may stay, as long as no such treaty is concluded!

Berlin and Germany as a whole," — terminating thereby also all agreements, decisions and practices in this regard.²⁰⁶ Thus, "the unified Germany has thereby full sovereignty over its internal and external affairs."²⁰⁷

Regarding the entry into force of the Two Plus Four Treaty, article 8(1) provided that the united Germany would ratify the treaty, and article 9 provided that the fifth ratification would bring the treaty into force. This makes clear that no one, not even the four former victors, could have legally obstructed the unification of Germany. Upon unification, and only upon unification, did the issue of a peace treaty or similar document again arise, along with the revival of the certain related rights of the four powers, to be "emptied" however by the Two Plus Four Treaty. But even if this Treaty had never entered into force, the core of the rights and obligations contained therein would still stand because they are based on other treaties or rules of customary law.

The unification could therefore only have been confronted within certain legal parameters, as discussed above. All those parameters were duly taken into consideration because they reflected the basic political parameters to a great extent. Most of them were reiterated, codified and made more express in the legal documents effecting unification, notably the two State Treaties and the Two Plus Four Treaty. It is our final conclusion that the unification has been, so far, an excellent example of how international law has defined certain political issues and thereby influenced the relevant political developments to a considerable extent. At least the unification of *Deutschland* was not arrived at *Über Alles* — this to the benefit not only of *Deutschland Einig Vaterland* and all other States concerned, but also of international law in general.

206. Two Plus Four Treaty, *supra* note 4, at art. 7(1).

207. *Id.* at art. 7(2).