THE POST-WAR SETTLEMENT IN CENTRAL EUROPE: LEGAL ASPECTS OF FRONTIERS AND CITIZENSHIP

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In memory of my parents

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TABLE OF ABBREVIATIONS

AFDI	- Annuaire Francais de Droit International
AJCL	- American Journal of Comparative Law
AJIL	- American Journal of International Law
AV	- Archiv des Volkerrechts
BGBL	- Bundesgesetzblatt
BYIL	- British Yearbook of International Law
CMD	- Command Paper (United Kingdom)
CMLR	- Common Market Law Review
CMND	- Command Paper (United Kingdom)
Dz.U	- Dziennik Ustaw
Dz. URP	- Dziennik Ustaw Rzeczpospolitej Polski
EA	- Europa Archiv
ECJ Reports	- European Court of Justice Law Reports
GA Res.	- General Assembly Resolution
HC Debates	- House of Commons Debates
HILJ	- Harvard International Law Journal
IA	- International Affairs
ICJ	- International Court of Justice
ICLQ	- International and Comparative Law Quarterly
ILC	- International Law Commission
ILM	- International Legal Materials
ILQ	- International Law Quarterly
ILR	- International Law Reports
JDI	- Journal de Droit International

JIR	-Jahrbuch fur Internationales Recht
JS	- Juristische Schulung
LNTS	- League of Nations Treaty Series
LQR	- Law Quarterly Review
Mich.LR	- Michigan Law Review
NJW	- Neue Juristische Wochenschrift
NYIL	- Netherlands Yearbook of International Law
NYUJILP	- New York University Journal of International Law and Politics
PCIJ	- Permanent Court of International Justice
PiP	- Panstwo i Prawo
PWA	- Polish Western Affairs
PYIL	- Polish Yearbook of International Law
PZ	- Przeglad Zachodni
Rec. des Cours	- Academe de Droit International. Recueil des Cours
REDI	- Revue Egyptienne de Droit International
RGDIP	- Revue Generale de Droit International Public
TILJ	- Texas International Law Journal
UKTS	- United Kingdom Treaty Series
UNTS	- United Nations Treaty Series
VCSSRT	- Vienna Convention on Succession of States in Respect of Treaties, 1978.
WPQ	- Western Political Quarterly
YILC	- Yearbook of the International Law Commission
YJWPO	- Yale Journal of World Public Order
Za o RV	- Zeitschrift fur auslandisches offentliches Recht und Volkerrecht

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TABLE OF TREATIES AND INTERNATIONAL AGREEMENTS

Entries are listed in chronological order. Where the instrument is bilateral, the parties are named. Also listed are agreements relating to the internal organisation of Germany concluded by two or more of the States responsible for Germany as a whole.

Hague Convention Concerning the Laws and Customs of War on Land. October 18, 1907. (Hague Conv. No. IV).
British and Foreign State Papers. Vol. 100, p. 338.

The Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Treaty).
28 June 1919.
UKTS No. 4 (1919).

The Treaty of Peace between the USA, British Empire, France, Italy and Japan, and Poland. 28 June 1919.
UKTS No. 8 (1919).

Convention on Certain Questions Relating to the Conflict of Nationality Laws.
12 April 1930.
179 LNTS 89.

Germany-USSR. Pact of Non-Aggression (including Protocol on the Spheres of Influence of Germany and the USSR in Poland). 23 August 1939.
In: Sonntag, Beddie (eds): Documents from the Archives of the German Foreign Office.
Washington, 1948.

Poland-USSR. Treaty on Mutual Relations.
30 July 1941.

Protocol on the Zones of Occupation in Germany and the Administration of Greater Berlin. 12 September 1944.
CMND 1552, Doc. No. 1, p. 27.

Agreement Regarding Amendments to the Protocol of 12 September 1944 on the Zones of Occupation in Germany and the Administration of Greater Berlin.
14 November 1944.
CMND 1552, Doc. No. 2, p. 29.

Yalta Agreement. Protocol of Proceedings of the Crimea Conference. 11 February 1945.
CMD 7088.

Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the UK, USA, USSR and France. 5 June 1945.
CMND 1552, Doc. No. 7, p. 38.

Charter of the United Nations. 26 June 1945.

Poland-USSR. Agreement Concerning the Right to Relinquish Soviet Citizenship on the Part of Persons of Polish and Jewish Nationality Living in the USSR and their Transfer to Poland, and the Right to Relinquish Polish Citizenship on the Part of Persons of Russian, Ukrainian, Byelorussian, Ruthenian and Lithuanian Nationality Living in Polish Territory and their Transfer to the USSR.
6 July 1945.

Agreement Regarding Amendments to the Protocol of 12 September 1944 on the Zones of Occupation in Germany and the Administration of Greater Berlin.
26 July 1945.
CMND 1552, Doc. No. 12, p. 45.

Potsdam Agreement. Protocol of Proceedings of the Berlin (Potsdam) Conference.
2 August 1945.
CMND 1552, Doc. No. 13, p. 57.

Poland-USSR. Treaty Concerning the State Frontier between Poland and the USSR.
16 August 1945.
10 UNTS 193.

Charter of the Allied High Commission for Germany.
20 June 1949.
CMND 1552, Doc. No. 36, p. 123.

Poland-GDR. Treaty Concerning the Demarcation of the Established and Existing Polish-German State Frontier. 6 July 1950.
319 UNTS 93.

Treaty Establishing the European Coal and Steel Community. 18 April 1951.
261 UNTS 140.

Protocol on the Termination of the Occupation Regime in the FRG. 23 October 1954.
331 UNTS 253.

Convention on Relations between the Three Powers and the FRG. 26 May 1952. (As amended by Schedule 1 to the Protocol on the Termination of the Occupation Regime in the FRG, signed at Paris on 23 October 1954).331 UNTS 327.

USSR-GDR. Treaty Concerning Relations.
20 September 1955.
226 UNTS 208.

Poland-USSR. Treaty on the Demarcation of the Existing Polish-Soviet State Frontier in the Sector Adjoining the Baltic Sea. 5 March 1957.
274 UNTS 133.

Poland-USSR. Agreement on the Time Limits and Procedure of Further Repatriation from the USSR of Persons of Polish Nationality. 25 March 1957.
281 UNTS 121.

Treaty of Rome, Establishing the European Economic Community. 25 March 1957.
298 UNTS 11.

Poland-USSR. Convention Regulating the Citizenship of Persons having Dual Citizenship. 21 January 1958.
319 UNTS 277.

Vienna Convention on Diplomatic Relations.
18 April 1961.
500 UNTS 95.

USSR-GDR. Treaty of Friendship, Mutual Assistance and Cooperation. 12 June 1964.
553 UNTS 249.

Poland-USSR. Convention Regarding Cases of Dual Citizenship. 31 March 1965.
571 UNTS 217.

Vienna Convention on the Law of Treaties. 23 May 1969.
CMND 4818; 1969 8 ILM 679.

USSR-FRG. Treaty. 12 August 1970.
1970 9 ILM 1026.

Poland-FRG. Treaty Concerning the Basis for Normalization of their Mutual Relations. 7 December 1970.
830 UNTS 328.

Berlin Quadripartite Agreement. 3 September 1971.
1971 10 ILM 895.

FRG-GDR. Treaty on Transit Traffic of Civilian Persons and Goods between the FRG and Berlin (West). 17 December 1971.
1972 11 ILM 5.

FRG-GDR. Treaty on Traffic Questions. 26 May 1972.
1972 11 ILM 726.

FRG-GDR. Treaty on the Basis of Relations. 21 December 1972.
1973 12 ILM 16.

Czechoslovakia-FRG. Treaty Establishing Normal Relations. 11 December 1973.
1974 13 ILM 19.

Conference on Security and Cooperation in Europe.
Final Act. 1 August 1975.
CMND 6198.

Poland-GDR. Convention on the Regulation of Cases of Dual Citizenship. 12 November 1975.
Dz. U. No. 15, Item 91.

Vienna Convention on Succession of States in Respect of Treaties. 23 August 1978.
1978 17 ILM 1488.

SUMMARY

The year 1945 saw the creation of a new territorial regime in central Europe. The UK, USA, USSR and France had assumed supreme authority over Germany, including the right to decide its status and frontiers. Germany was not annexed; it continued to exist.

The Potsdam Agreement of 2 August decreed that Poland, which had lost territories in the east to the USSR, should be accorded the right of "administration" over German territories to the east of the Oder and Western Neisse Rivers (including Stettin/Szczecin) plus the southern part of East Prussia. These areas were not treated as occupied territories. The final delimitation of the western frontier of Poland was to take place at the peace settlement with Germany. Such a settlement remains outstanding.

Germany became progressively more divided in the years 1945-1949. The States occupying the western zones of Germany (the UK, USA and France) gradually established greater unity within their zones and in Berlin (which was treated separately), while the USSR, occupying the eastern zone, set up a separate system. In 1949, this culminated in the creation of two States, the FRG in the west and the GDR in the east. Each at first claimed to act in the name of Germany, to the exclusion of the other, though neither was ever identical with Germany or entitled to act in its name.

Due to the division of Germany, the German Reich, which still existed, ceased actively to function. No peace settlement has been concluded; thus the western frontier of Poland has not, formally, been finally delimited, as provided for in the

Potsdam Agreement. This lack of formal delimitation has resulted in great controversy between Poland and the FRG with regard to the status of the relevant territories and the quality of Poland's tenure. No such disagreement exists between Poland and the GDR; in 1950 they concluded a treaty recognizing the Oder-Neisse line as the Polish-German frontier.

Shifting perceptions of the geopolitical situation in Europe eventually resulted in previously hostile States concluding bilateral treaties which have regulated, for the parties, hitherto contentious issues. Particularly significant are the Ostpolitik treaties of the FRG - with the USSR, Poland, the GDR and Czechoslovakia.

The treaty with Poland contained acceptance by the FRG of the Oder-Neisse line as the western State frontier of Poland: the FRG could no longer question Poland's tenure of these territories. The ratification dispute in the FRG with regard to this treaty, which apparently raised substantive questions about Poland's rights, has, actually, no legal effect on the relationship between the parties under international law, but is, nevertheless, important in understanding West German perceptions of the issue.

Germany continues to exist, at least according to the UK. The Soviet position seems to deny the existence of Germany, but is highly ambiguous. The USSR, however, does acknowledge the existence of joint rights and responsibilities with regard to Germany as a whole.

The Four Powers responsible for Germany are not bound by the Poland-FRG treaty; their rights and obligations are not affected by it. Thus they are not

obliged, as yet, to confirm the Oder-Neisse line as the Polish-German frontier at a peace settlement. However, a combination of political and legal factors would probably cause them to do so. The formal bar which seems to exist at present to Poland's unreserved tenure could be removed, without a peace settlement, by Four Power agreement. The failure to do so is due to a lack of collective political will (let sleeping Germans lie), rather than deficient legal capacity.

The rules of State succession indicate that a reunified Germany would be bound by the treaties of the FRG and the GDR to accept the Oder-Neisse line as the Polish-German frontier. Neither the FRG nor the GDR is identical with Germany; the State which they create by unification would also lack such identity. Thus the Germany for which the Four Powers are responsible would not immediately be bound by these treaties. However, unification could only take place with the approval of the Four Powers, and it must be assumed that, during the process of unification, they would make provision for the application of their own competence (which is the sole manifestation of the still-existing German State) to the new Germany.

The FRG-GDR frontier is a direct result of the unusual status of Germany. For the two States it is an inter-State frontier - this they have themselves confirmed in the 1972 Treaty on the basis of their mutual relations. For the Four Powers, acting in their capacity as States having residual responsibility for Germany as a whole, the frontier resembles, legally, an internal frontier, despite the physical barriers.

The Potsdam Agreement provided for the transfer of the German population

from the territories to be administered by Poland. The legality of the transfer has been questionned, particularly in the FRG, but was probably lawful, though the manner of execution may not have been.

Problems relating to citizenship have arisen, particularly with regard to Germans in the FRG. The citizenship law of that State is an amended version of the 1913 Reich citizenship law and, as such, its ambit covers citizens of the GDR. This has caused legal and political dispute between these States. Another consequence is that FRG citizenship may apply also to certain Polish citizens. Because Germany continues to exist, citizens of the FRG and the GDR, who come within the terms of the 1913 citizenship law as at 1949, probably possess German citizenship in addition to their FRG and GDR citizenships. This would not be accepted by Soviet-bloc States, which anyway do not recognize dual citizenship. Thus, the citizenship status of Polish citizens formerly resident in eastern Poland (that part which became part of the USSR) has been regulated on a bilateral basis.

The citizenship status of the Germans is a consequence of the status of Germany; outstanding issues may exist until a final settlement is achieved.

CHAPTER ONE

Introduction

The origins of this work lie in Berlin. The main international railway line from the Netherlands to Poland takes the traveller (apparently) through West Germany, East Germany, West Berlin and East Germany again before arriving at the Polish frontier. The journey is a scenic bore; the land is flat from Hoek van Holland to Warsaw and beyond. But this tedium is partly compensated for by the journey from West to East Berlin, entailing as it does a short transit over the Berlin Wall with the Reichstag dominant just beyond the Wall on the western side. This holds true for the first few journeys. Eventually it is replaced by no more than the compulsive contemplation of the mood of the East German border security and passport officials (at best, correct) as one approaches each checkpoint, whether it be Berlin (Hauptstadt der DDR) or the Polish frontier. Poland, by comparison, usually feels like the West.

It was the complexity of such journeys which prompted the writer to wonder why Greater Berlin should be as it is. From an interest in Berlin developed a curiosity about Germany itself and the existence of two German States. From that arose the question of its frontiers, in particular the frontier with Poland. It is not immediately apparent to one who has only known Berlin as a city with a wall running through it, Germany as being divided into two States and Poland as a country including Wroclaw and Gdansk but without Lwow and Wilno, why such a state of affairs should incite such deep feelings, amounting sometimes almost to hysteria, among not only politicians and historians but international lawyers too.

The present work is an attempt to come to objective conclusions with regard to what the writer considers the most important and controversial legal issues in this area. These are: the legal status of the Polish frontier on the Oder-Neisse, the legal status of the frontier between West and East Germany, the status of Germany itself, plus consequential issues of nationality and citizenship. None of these problems is unrelated to the others and it will be seen that conclusions reached with regard to one issue are of significance for the others.

The central question dealt with is the legal status of the present frontier between Poland and the GDR. Much of the available literature on this subject seems to follow one of two courses. The writer decides that he favours the proposition that the frontier question has already been decided, or should be decided, in favour of Poland (i.e., that the frontier should be formed by the Oder and Neisse rivers). The work is then devoted to an analysis of the legal situation designed to prove the preconceived political judgment. This method seems to form the basis of work for virtually every Polish lawyer working in this field in Poland (with one very notable exception), whose work has come to the attention of this writer.

The second course prevails in the Federal Republic of Germany. Those concerned seem to start from the standpoint that the frontier question remains open under existing conditions, and then set out to establish how this may be so according to the law. Again, there are exceptions, and the number of these seems to increase with the passage of time and, perhaps, changing perceptions. Nevertheless, if the reader is confronted with a cross-section of the available

literature by West German and Polish writers, the dominant and prevailing impression is that the West Germans all try to establish one set of legal conclusions, while the Poles try to establish quite another. Yet the same sources of law are referred to by both sides. In other words, each side seeks to establish the legal conclusions it deems desirable, from a particular political perspective, using the same law.

The proposition may be defended that international law is an instrument to be used in and for the conduct of foreign policy. This is, arguably, what many Polish and West German writers are in effect doing, since many of the more common analyses resemble the official policies of the Polish and West German States. However, it was precisely this apparent manipulation of the law for political purposes which led the present writer to decide that a legal analysis which would look at the issue from the perspective of international law, rather than that of Poland or the FRG, might justifiably be useful, necessary and undertaken.

This should not be taken as criticism of all those who have studied the Oder-Neisse line; nor is it intended as an outright condemnation of particular individuals. Much of the existing research has been of the highest standards regardless of the slant adopted by those actually doing the research. And there are some who seem to have presented the issues as problems of international law without allowing their own political opinions to affect their analysis. But that is not to say that the present writer found himself in agreement with these writers.

Genuine legal disputes do remain which are not dependent merely upon the differing views of those most actively involved in the study of the issues. The

problem is that no final and formal settlement has ever been concluded with regard to certain issues left outstanding after the defeat of Germany in 1945. The UK, USA and USSR concluded an agreement at the Potsdam conference in August 1945, one of the purposes of which was to regulate certain matters in the meantime until a peace settlement was actually reached with regard to Germany. For present purposes, the most important provision was that which outlined the decision to allow Poland the right to administer substantial areas of pre-war German territory while relegating the final decision on Poland's western frontier to a peace settlement.

Such a peace settlement was to involve Germany - it will be shown that Germany did, legally, survive as a State after 1945. Further controversy has arisen with regard to the legal status of the two German States (the Federal Republic of Germany and the German Democratic Republic) which were created in the years 1949-1955. Problems exist with regard to the relationship of these two States inter se, vis-a-vis Germany - if, indeed, Germany survives as a State - and the status of the frontier between the FRG and the GDR. The division of Germany is the principal legal impediment to the conclusion of a peace settlement and, therefore, the failure to decide upon a final delimitation of Poland's western frontier. This failure to conclude a peace settlement and, thereby, formally close the frontier issue forms the basis for the West German claim that the frontier has not been finally settled. The Polish view, generally stated, is that the frontier was decided at Potsdam and that, even if a peace settlement were to take place, its only purpose, as far as the Polish western frontier is concerned, would be to confirm the present territorial disposition. Furthermore, the view has been developed that, with the coming into existence of

the FRG and the GDR, Germany ceased to exist. Both the FRG and the GDR have recognised the Oder-Neisse line as the western State frontier of Poland and the issue is therefore closed.

There exists, therefore, a real dispute as to the status of the Oder-Neisse line, a dispute which is not always clarified or rendered more liable to settlement by the biased approach of many who study it. Related to this frontier issue is the status of Germany, the two presently active German States and their common frontier and millions of individuals, mostly of Polish and German ethnic origin, who found themselves being moved to new homes during and after 1945 as a result of these territorial adjustments.

This study aims to look at these issues as problems of international law, without favouring the claims of any State simply because it is that State. This writer does have his own views on the Polish-German frontier and where it should be situated. There is much to be said for the present borders of Poland, regardless of their origin, because they allow Poland a territory which in many ways is more valuable than that which it possessed prior to 1939: it is richer in terms of mineral wealth and agricultural potential; it is argued that its frontiers are strategically easier to defend (the value of this may be questioned in view of the present geopolitical disposition which means that the army of a foreign State regarded by many Poles with extreme hostility is already stationed on Polish territory); there is no question of a Polish corridor between two parts of Germany, though there is a question of a Polish corrider between the USSR and the GDR. Moreover, the minorities which, in pre-war Poland, constituted about one third of the population, no longer exist there. This is not necessarily a good

thing but it is often perceived as such. There is also the negative argument, which should not be underestimated, that the prospect of actually altering any frontiers now, and what that might entail, serves to add stability to the present situation. It is this negative argument - the undesirability of changing the existing state of affairs - which is, for the present writer, by far the most convincing. Other arguments made in favour of the Polish tenure might also be made on behalf of Germany - why should it not enjoy the benefits of these territories?

Another argument in Poland's favour is that it should have received territory at the expense of Germany because of the lands which it lost to the USSR. While there has been much sympathy for such a view, the neutral observer might still wonder why the defeated aggressor State should lose some of its territory. This writer is, then, strongly in favour of the proposition that the Polish frontiers are best situated where they are at present and that no attempts should be made to alter them. However, while acknowledging this, it is hoped that the study has been undertaken with an open mind as to the legal status of the border between Poland and Germany and that this is reflected in the final product.

It is appropriate to mention certain subjects which have been deliberately excluded from this study despite, perhaps, being prima facie relevant. Thus there is no study on the legal status of Berlin as such. The writer is quite aware that the GDR claims East Berlin as its capital city and treats it as part of its territory, enjoying substantial support in this policy from the USSR, while, in the view of the Western Powers, the whole of Berlin remains subject to Four Power occupation and East Berlin is not part of the GDR. Questions, and disagreement,

also exist with regard to the relationship between West Berlin and the Federal Republic. Another issue is: to what territory does the Quadripartite Agreement of 1971 apply (Berlin or West Berlin) and did this agreement bring about any change in the legal regime relating to Berlin despite the claims of the States involved that the legal status of Berlin was not affected by it? Each of these questions is of importance. Some are very closely related to the status of Germany, the FRG and the GDR. But none is crucial to the legal status of the Oder-Neisse line as the western State frontier of Poland. Furthermore, it is possible to reach conclusions about the status of Germany without becoming deeply involved in the legal status of Berlin and the citizenship of its inhabitants. Berlin is not avoided. It was felt, rather, that the frontier issues would not be affected by conclusions reached with regard to that city.

The Conference on Security and Cooperation in Europe (CSCE), which produced a Final Act at Helsinki in 1975, is also worthy of mention. The Final Act is discussed inasmuch as it may be regarded as part of a political process which included the signing and ratifying of several treaties by the FRG and the States to its East. While the Final Act's territorial provisions have sometimes been perceived as "confirming" the existing territorial and political situation in Europe, the view is not generally taken by international lawyers that the Final Act added anything, legally, to existing rights and duties, or altered them.

The Polish-German frontier is not the only border in Europe which has been adjusted since the Second World War. In particular, the Polish-Soviet frontier was moved substantially westwards and this matter is discussed. Nevertheless, it is far less controversial than the Polish-German frontier.

The research is, wherever possible, based upon English-language sources. This presents few problems where international agreements are concerned, because most of the relevant ones concluded prior to the Ostpolitik of the Federal Republic used English as an authoritative language. Reliable translations of other instruments have been freely available.

The writer has felt less constrained by linguistic considerations where the examination of the views of others has been concerned. Generally, English-language sources have been utilised when available - and much has been published in English on these topics. But much of the best work is available only in Polish or German. In such cases, these sources have been used and cited. Where quotations from German or Polish are given, these are accompanied by English-language translations. Much of the work which has been done by Polish specialists in this subject has been published by the Institute of Western Affairs in Poznan, in English, and these publications have been very useful in conveying what might be regarded as the Polish view as seen by the Polish Government, although not all of its work has been as limited in ambit.

Most of the work has been done at the University of Glasgow. However, it was possible to carry out some research in Poland and West Germany, which proved very useful in obtaining access to certain books and journals not so easily available in the UK. Nearly eight months were spent altogether in two research visits to Poland. This research was carried out mostly at the Polish Institute of International Affairs in Warsaw and the Institute of International Law at the University of Warsaw. These visits were also used for meetings with Poles who

have specialized knowledge of these subjects. In this context, visits to the Polish Academy of Sciences in Poznan were particularly profitable.

Two months were spent in West Germany, at the University of the Saar in Saarbrucken and the Max-Planck-Institute for Foreign Public Law and International Law in Heidelberg, allowed access both to some of the best libraries of German materials and some very distinguished West German specialists on the topics covered in this study.

While the primary purpose of these visits to Poland and West Germany was the undertaking of legal research, the opportunity to speak to others working in this field was of great importance in helping the writer to try to understand better Polish-German relations in general, and to appreciate the present state of relations between Poland and West Germany and the reasons for this.

It is hoped that the work presents a legal analysis of the issues covered without favouring either Poland or the German States. There are few definitive solutions presented; this is because of the writer's view that vital questions remain open. However, where particular issues remain undecided, suggestions are made for how they ought, finally, to be settled, based upon the existing law.

Pufendorf, it is said, referred to Germany as, constitutionally, something like a monster. From the perspective of international law since 1945, such a remark would lead one to describe Pufendorf as an optimist, or as one who is very economical with the truth. The problems which remain are not insoluble, but they do require further attention before they may be considered finally closed.

CHAPTER TWO

The Oder-Neisse Line: Preliminary Remarks

(i) The Problem

It has been necessary, in order to study the status of the border between Poland and Germany since 1945, to examine the history of the dispute over a longer period. The frontier of Poland in the west enjoyed substantial stability until the partitions of Poland in the second half of the 18th century, which brought about the destruction of Poland as a State. Poland's western frontier was altered during each of the three partitions until it ceased to exist altogether, only to be revived after World War I with the reemergence of an independent Poland. Germany was obliged to accept the frontier as established in the Versailles settlement, but disputed its validity in later years.

However, the frontier is no longer a matter of purely bilateral concern between Germany and Poland. Firstly, as a result of the assumption by the UK, USA, USSR and France of supreme authority with regard to Germany in 1945, these States have a role to play in the final delimitation of the border. Secondly, the debate over the status of this frontier, and the agreements which have been entered into with regard to it, are part of a process, that of detente. The frontier issue is only one element, albeit a very important one, of a process or concept that involves more States than the immediate protagonists.

It was decided to begin studying the issue from the date of the Treaty of Versailles of 1919, plus related instruments, such as the Upper Silesian plebiscite

and award of 1921, because Poland's reemergence as an independent State at that time seemed to bring about a resurrection of the Polish-German disagreement over sovereignty over territory, which because a casus belli for World War II - cf. Poland's refusal to permit German demands with regard to access between the main area of the Reich and East Prussia. It should be remembered that Poland did not deny the Reich access to East Prussia through Polish territory; the privileged German transit through Pomerania, established by the Versailles treaty, functioned very well. It was the refusal of Poland to accede to the illegitimate further demands of Germany with regard to access which gave rise to conflict. The dispute as it stands now is a direct consequence of the measures agreed by the UK, USA, USSR and, later, France, with regard to defeated and occupied Germany at the Potsdam conference, and in particular the following sentence:

> "The three Heads of Government reaffirm their opinion that the final delimitation of the western frontier of Poland should await the peace settlement."[1]

This was a reiteration of the view expressed at the Crimean conference at Yalta.[2] The present work will refer to these matters, but is primarily concerned with the controversy over the frontier between Poland and Germany, the Treaty of 7 December 1970, between Poland and the FRG, also known as the Warsaw Treaty, and the territory which, forming part of the territory of the German Reich within its borders on December 31 1937, was in 1945 placed under Polish "administration".[3] However, East Prussia, also affected by the Potsdam Protocol and by the Warsaw Treaty, will not be considered at this stage, except to note that the Soviet Union and Poland entered into a treaty concerning the demarcation of

the frontier between the two States in this area on March 5 1957.[4]

The Warsaw Treaty establishes, inter alia, that the FRG and Poland agree that:

> "...the existing frontier line, which, in accordance with chapter IX of the decisions of the Potsdam Conference of 2 August 1945, runs from the Baltic Sea immediately west of Swinoujscie, along the Odra (Oder) River to the point of junction with the Hysa Luzycka (Lausitzer Neisse) River and along the Nysa Luzycka (Lausitzer Neisse) River to the frontier with Cezechoslovakia, constitutes the western State frontier of the Polish People's Republic."[5]

Thus the frontier is known and referred to as the Oder-Neisse line. While the Warsaw Treaty is the main instrument under scrutiny here, it should be noted that the Oder-Neisse line is also referred to in the following instruments: the Final Act of the Conference on Security and Cooperation in Europe - the Helsinki Final Act - of 1975.[6] The Declaration on Principles Guiding Relations between Participating States provides, as one of ten principles, each of which is declared to be of "primary significance":

> "III. Inviolability of frontiers.
> The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers. Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part

or all of the territory of any participating State."[7]

The parties to the Helsinki Final Act, which is not binding in law, included all European States except for Albania, plus the USA and Canada. The point to note is that the participating States "regard" all European frontiers as "inviolable". This seems to mean that frontiers may be altered by peaceful means, but this would depend upon how "demand", in the second paragraph of the principle, is interpreted. According to the Final Act, the Oder-Neisse line, referred to indirectly, is free from violation.

The Oder-Neisse line is referred to by name in two agreements which preceded the Warsaw Treaty, to one of which Poland is a party. The Treaty of 12 August 1970,[8] between the FRG and the USSR - the Moscow Treaty - is one. The English translation provided by the Press and Information Office of the Federal Government in Bonn stipulates at Article 3 in part:

> "They (the parties) regard today and shall in future regard the frontiers of all States in Europe as inviolable such as they are on the date of signature of the present Treaty, including the Oder-Neisse line which forms the western frontier of the People's Republic of Poland ...."

If Article 3 is taken as a whole, then this part shows that the FRG will not attempt to bring about alteration of the Polish western frontier by non-peaceful means, at least, and it has even been argued that the FRG may not try to alter any European boundaries, even by peaceful means.[9] In view of the provisions of Article I of the

Warsaw Treaty, this dispute over interpretation, as far as that particular aspect of the legal position of the FRG is concerned, cannot be considered by itself, as the Federal Republic makes further declarations with regard to the frontier in Article I.

Poland concluded an agreement with the GDR, regarding the demarcation of their common border, on 6 July 1950 - the Zgorzelec Treaty,[10] Article 1 of which states:

> "The High Contracting Parties are agreed that the established and existing frontier running from the Baltic Sea along a line west of the locality of Swinoujscie [formerly Swinemunde] and then along the River Oder to the confluence of the Lusatian Neisse and along the Lusatian Neisse to the Czechoslovak frontier, constitutes the state frontier between Germany and Poland."

Thus the GDR had taken it upon itself to recognize the Oder-Neisse line. One interesting assessment of this was the following:

> "Recognition by the GDR of the boundary on the Oder and Neisse Rivers established by the Potsdam Agreement constituted "the peace settlement" mentioned in that Agreement."[11]

While the Zgorzelec Treaty constitutes one element in the confused legal status of Poland's borders, it is definitely not a peace settlement as envisaged at Potsdam. If

it were, there would have been no need for any other agreement or treaties to regulate or define the legal stances of various States with regard to the Oder-Neisse line. They would be superfluous. It might be contended that the Warsaw and Moscow Treaties, the Treaty on the Basis of Relations between the FRG and GDR - the Basic Treaty, or Grundvertrag, - of 1972, the Treaty on Mutual Relations between the Federal Republic and Czechoslovakia of 11 December 1973 - the Prague Treaty, and the Berlin Quadripartite Agreement of 1971, taken together, constitute an attempt by the States involved to achieve a settlement of some of the issues which might have been incorporated in a peace treaty;[12] for example, agreements with regard to frontiers and undertakings of renunciation of the use of force. Why else would these agreements and treaties have been considered necessary, were it not for the very absence of a peace treaty? They are not intended as a complete substitute for a peace treaty. Some of the agreements contain provisions which, directly or indirectly, so specify, for example the Warsaw Treaty, Article IV. But they do attempt to achieve a settlement of sorts in the absence of a peace treaty. Nor do they necessarily constitute merely a modus vivendi, as has been asserted.[13] The necessity of a peace settlement was stipulated for in the Potsdam Agreement at a time when it was still believed that this could be achieved - in fact, no other possibility was envisaged. The situation in Europe altered so fundamentally and dramatically afterwards, that it has to be considered whether a peace settlement was a realistic option even in 1970, and whether the agreements and treaties mentioned are of a more permanent nature. If they were not so considered when they came into being, they may come to acquire that character, if they have not already done so. Of course, during the negotiations with Poland over the Warsaw Treaty, the FRG informed the Western Powers[14] that it had informed Poland that the rights and

responsibilities of the three Western Powers, and presumably those of the USSR, with regard to Germany as a whole remained unaffected. However, this may, in part, be accounted for by a fear on the part of the FRG, that the Warsaw Treaty might be construed as being inconsistent with the provisions of its Grundgesetz (Basic Law). This obliges the Federal Republic not to take action which would render impossible the reunification of divided Germany.

As events turned out, the Treaties were not automatically ratified, and the Bundestag did consider whether the Warsaw and Moscow Treaties were consistent with the Grundgesetz. On 17 May 1972, an All-Party Resolution on these two treaties was adopted by the Federal German Parliament,[15] according to which the Warsaw and Moscow Treaties constitute merely elements, albeit important, in the modus vivendi which the FRG seeks to establish with other States in Europe. This is reasonable in view of the ostensibly limited ambit of the treaties - they all include statements that they do not affect existing agreements. This includes the Potsdam Agreement, which provides for a peace settlement to be concluded with a united Germany. However, the actual situation of Germany as a whole is such that the agreements may come to be seen as permanent, since the status quo in Europe seems to be beyond change through peaceful means.

There is further authority which shows that the Zgorzelec Treaty is not a peace treaty as was envisaged at Potsdam. According to the Allied declaration of 5 June 1945,[16] the governments of the allied Powers assumed supreme authority with respect to Germany. This included the power to

"...hereafter determine the boundaries of Germany or any part

thereof and the status of Germany or of any area at present being part of German territory." (Preamble)

Apparently, then, only the three Powers - UK, USA and USSR, later joined by France, could determine the boundaries of Germany. It has already been noted that, according to the Potsdam Agreement, the heads of Government took the "opinion" that the final delimitation of the German-Polish border should take place at the peace settlement. It was also agreed that, until this event took place, the former German territories east of the Oder-Neisse line should be placed under Polish administration. It is interesting that, while this is apparently a temporary measure, and was undoubtedly seen as such at the time,[17] at least by the British and Americans, the relevant territory is referred to as "former" German territory. When the heads of Government said it was their "opinion" that the final delimitation of the frontier "should" await the peace settlement, this looked more like the expression of a hope or an intention, rather than the specifying of an essential procedure.

Leaving this aside, it suffices to note that, in 1950, the GDR was not recognized as a State by the UK, USA or France, the three States responsible, with the USSR, for Berlin and Germany as a whole. They are not parties to the Zgorzelec Agreement, nor have they given it their approval. Therefore, even if the GDR was competent as a State to conclude this agreement, it would be res inter alios acta as far as the Western Powers were concerned. The whole of Germany was under occupation then and remained so, in the case of the British, French and American zones, until the Paris Treaty of October, 1954, which ended the occupation status of the FRG, while the occupying Powers retained certain rights

and responsibilities with regard to Germany as a whole.[18] The Soviet Union granted sovereignty to the GDR on 25 March, 1954.[19] According to the Protocol of the Potsdam Conference, Part I A (3) (i), the Council of Foreign Ministers, established in Part I, shall be utilised:

> "...for the preparation of a peace settlement for Germany to be accepted by the Government of Germany when a Government adequate for the purpose is established."

Obviously, it was envisaged that there would be one government for the whole of Germany before a peace settlement could be concluded, which would deal with the matter of the German-Polish border. The government of the GDR did not possess that character.

While the Zgorzelec Treaty and the Warsaw Treaty deal with the same frontier, the character of these instruments is not the same. The former attaches permanency to the Potsdam Agreement. It states that a permanent, fixed frontier has been established (Preamble). The FRG, however, claims that this frontier cannot be permanently fixed until the peace settlement, and it says that this is the true meaning of the Potsdam Agreement. The then Federal Minister for Foreign Affairs, Walter Scheel, said:

> "The Article (Article I of the Warsaw Treaty) gives the Potsdam decisions no other nor added significance than results from the wording of the decisions and the circumstances under which they came about. Herein lies

> a vital distinction between this treaty and the Gorlitz treaty concluded by the German Democratic Republic in 1950."[20]

This reflects a fundamental difference of opinion between East and West as to the true nature of the Potsdam Agreement. The Soviet bloc States tend to regard it as setting down a settlement for Europe, despite the provisions contained therein with regard to a future peace settlement, while Western States tend to dispute this. If the words of the Potsdam Agreement are taken only by themselves - see p. 11, supra - then there would appear not to have been any final settlement, either of the issue of German unity or of Poland's western frontier. To this extent, the western States are correct in their view that the conditions set out at Potsdam have not been fulfilled. Having said this, more recent developments cannot be ignored. At Potsdam, a peace treaty was considered essential for returning Europe to normality. But the balance of power in Europe in 1945 and thereafter was such that "normality" could never be what was considered normal prior to 1939. A new, but nevertheless normal, situation has arisen in Europe since then. This includes a divided Germany (in the view of this writer, since Germany had only been a Reich since 1871, the idea of one German State being a "normal" condition was, to some extent, a fiction. Rather, it may be that the divisions of contemporary Germany are simply deeper than in the past). A peace settlement would appear to be out of the question. There have been no negotiations, or even suggestions for negotiations, between the relevant States for many years, either with regard to German reunification or with regard to a peace treaty. The early years of the 1970's were dominated by the talks which led eventually to the signing of the Helsinki Final Act. Proposals have been made with regard to peace treaties with

Germany,[21] but these have always been rejected sooner or later.[22] The present borders of Europe, at least where Poland and the two German States are concerned, appear to be fixed, with no prospect for any change. It is also possible that a unified German State would be obliged to accept the Oder-Neisse line as its border with Poland, even without this being sanctioned in any peace settlement. This will be discussed later.

(ii) The Warsaw Treaty

The full title of this instrument is: "Treaty between the Polish People's Republic and the Federal Republic of Germany concerning the Basis for Normalization of their Mutual Relations." The differing interpretations of this treaty adopted by each of its parties tend to give the impression that it is not one agreement, but two separate stances which happen, somehow, to take the same form. This is evident in two respects: first, the inability of the two States to reach a consensus as to the main purpose of the treaty; second, the exact meaning and consequences of Article I.

Article I (i) provides that the FRG and Poland agree that the existing boundary, the Oder-Neisse line, shall constitute Poland's western State frontier. For Poland, this was certainly the most significant aspect of the treaty. The then Prime Minister of Poland, Jozef Cyrankiewicz, made this clear in his speech given immediately after the signing of the Warsaw Treaty:

> "...only on this basis, the recognition of the inevitability and inviolability of Poland's western frontier along the Oder and Lausitz Neisse laid down in the Potsdam Conclusions,

> has it been possible to sign today this treaty which pioneers the way to the normalization of the relations between Poland and the second German State which arose out of the ashes of the third Reich - the Federal Republic of Germany."[23]

While Poland acknowledged that the treaty provided not only for an agreement with regard to the Oder-Neisse line, but had a more general purpose of normalizing relations between the two countries, as is stipulated in Article III (1) and the Preamble to the treaty, nevertheless it was emphasizing that the agreement on the Oder-Neisse line, contained in Article I, was a precondition for this normalization. Although the treaty is said, in its title, to be a basis for normalization of the two States' mutual relations, for Poland the whole process depended upon the accord reached in Article I, which was a sine qua non for any normalization.

On the other hand, the FRG sees Article I as only one aspect of the treaty: its main purpose was to start the procedure whereby normal relations with Poland would eventually be established. Nor was the treaty regarded by the FRG as an individual instrument. Rather, it was one consequence, for the FRG, of its Ostpolitik, and not simply a means of recognizing the Oder-Neisse line. Walter Scheel expressed the view of the FRG:

> "...the frontier article is not the only - and in a certain way not even the most important - article of the treaty. It merely creates the foundation for it. The German-Polish treaty is no frontier treaty, and even as an agreement on the renunciation of force

> it is only incompletely described. Its actual significance is depicted appositely as "treaty concerning the basis for normalizing relations.""[24]

One aspect of the Federal Republic's Ostpolitik was to increase contacts between Germans in the FRG and Germans, or persons of German ethnic origin, in socialist countries. These were by no means restricted to the GDR. Prior to World War II, there had been up to ten million inhabitants in that part of Germany which in 1945 came under Polish administration.[25] While most of these were expelled or left these territories of their own accord during the immediate post-war period or even prior to the unconditional surrender of Germany on 8 May 1945, hundreds of thousands did remain. The FRG had two objectives - to facilitate contacts between these persons and its own citizens already resident within the territory of the Federal Republic, and to enable families to be reunited through the emigration of these people from the socialist countries to the FRG. At the initialling of the Warsaw Treaty, on 18 November 1970, the Polish Government communicated an "Information on Measures for the Solution of Humanitarian Problems" to the Federal Republic.[26] This estimated that, under agreement between the Polish Red Cross and the Red Cross of the FRG, approximately four hundred thousand Polish citizens left Poland for the Federal Republic, in order that families might be reunited - Paragraph 1. Paragraph 2 says that Polish nationals resident in Poland, of "indisputable German nationality", may travel to either German state, Polish regulations permitting. The wording and timing of this communication together suggest that it was a concession on the part of Poland, to allow further contacts and emigration. Paragraph 3 shows the FRG has asserted that numbers of Germans greater than those to which Poland would admit

desired to leave Poland:

> "The competent Polish authorities do not dispose of any figures approaching those alleged by the FRG for applications for permission to travel to the Federal Republic."

However, the Polish Government then promised that all applications would be carefully examined, and that the work of the Red Cross organisations of Poland and the FRG with regard to this matter would be facilitated. This concession by Poland is very closely linked to the Warsaw Treaty by time - the communication being made at the initialling of the treaty. This was a practical achievement for the Federal Republic, facilitating the release of more Germans from Poland being one of the important objectives of its Ostpolitik. Both States appear to have gained from entering into the treaty. Poland obtained recognition by the FRG of the Oder-Neisse line, although it has been argued that subsequently the FRG unilaterally reinterpreted this recognition, in the All-Party Resolution of the Bundestag of 17 May 1972. In the meantime, thousands of Polish Citizens of German ethnic origin were leaving for the Federal Republic. The link between the Warsaw Treaty and the "Information" of the Polish Government concerning ethnic Germans was confirmed by the Foreign Minister of the Federal Republic, who said in 1970:

> "We would not have been able to conclude this treaty had we not had sufficient evidence that the Polish side was prepared to meet us halfway in the sphere of human reliefs for us decisive. (emphasis by this writer)

"From the outset, this complex of problems formed a main theme of the negotiations in Warsaw. In its successful mastering we see not only the crucial test of the normalisation but the fundamental complementation of the treaty as a whole. Even if this finds informal expression in the treaty itself, it nevertheless forms a vital part of the instruments concerned in the German-Polish negotiations ....

"The "Information" the Polish Government has given us touches on themes of fundamental importance. It lies in the very nature of things that in it the emphasis is on the relatively easily comprehensible sphere of family reunion.

"We know, however, that family reunion represents only one side of the problem and that the situation of the Germans remaining behind poses equally weighty questions. In the final analysis, both complexes are a matter of the normalization."[27]

(iii) Circumstances of the Warsaw Treaty

It is informative to view the Warsaw Treaty in its context. It is one of a series of treaties and agreements concluded by or involving the FRG, with regard to its condition as one part of a divided Germany. The Moscow Treaty, which concerns itself largely with the renunciation of the threat or use of force, was accompanied by the so-called Bahr-Papier, an agreement between both parties concerning common policies.[28] Paragraph 5 states that the Moscow Treaty and corresponding agreements to be concluded with the GDR, Poland and Czechoslovakia "form a homogeneous whole." While Paragraph 10 says:

> "The Governments of the Federal Republic and the Soviet Union welcome the plan for a conference on matters concerning the strengthening of security and cooperation in Europe and will do everything that depends on them for its preparation and successful prosecution."

The USSR and FRG here are tying in the Soviet desire for a European conference on security and cooperation with the Moscow Treaty, which preceded the other treaties concluded with socialist States by the FRG. It has been pointed out [29] that the measures incorporated in the Moscow Treaty forestalled parts of the Helsinki Final Act and may have helped to secure a favourable attitude on the part of the FRG to the initiative of the USSR with regard to the security conference. The Moscow Treaty is not simply an aspect of the Ostpolitik of West Germany. For the Soviet Union, one problem was that the FRG insisted that the Moscow Treaty - not then concluded - would not come into effect until a satisfactory conclusion to the negotiations then taking place with regard to Berlin had been achieved.[30] The Soviet Union was negotiating with regard to Berlin with the other occupying powers, though not about Berlin's status under international law; Paragraph 3 of Part I of the Quadripartite Agreement on Berlin of 1971 states:

> "The four Governments will mutually respect their individual and joint rights and responsibilities, which remain unchanged."[31]

According to the Preamble, the Four Powers had concluded the Agreement, "Guided by the desire to contribute to practical improvements of the situation." The Berlin talks had commenced on 26 March 1970, and the FRG made their

satisfactory conclusion - from the viewpoint of the Federal Republic, which meant securing easier and closer ties between FRG and West Berlin - a condition for ratifying the Moscow Treaty, on 7 June 1970.[32] Considering the tension which had existed with regard to Berlin, the FRG appears to have been extremely assertive in connecting ratification of the Moscow treaty with the successful conclusion of the negotiations over Berlin, less than three months after they had begun. This may be a reflection of the importance attached by the Soviet Union to the Moscow Treaty, and its aim of bringing about a conference on security and cooperation in Europe. While the Moscow Treaty contributed towards the removal of direct tensions between the two States, the Quadripartite Agreement also enabled relations between them to improve, in view of the close relationship of West Berlin to the Federal Republic. It should also be taken into account that, if the parties had failed to conclude the Moscow Treaty, the other treaties between West Germany and the socialist countries could not have come into existence, at least in the form which they took. The FRG had to consider the potential human and economic benefits which it, and its citizens, might receive after the successful conclusion of negotiations with the USSR, and compare them with possible amelioration of the position of West Berlin. This would be so, in that the FRG, by making what might be construed as a diplomatic ultimatum, attached priority to the Berlin negotiations. If they failed, the Moscow Treaty presumably would not have come into force. The result of this would have been, for the West Germans, failure in both cases, but it seems that this risk was considered worthwhile if it would contribute towards achieving a settlement for Berlin.

Therefore, in 1970, the position was that the Soviet Union, desirous of arranging a conference on security and cooperation in Europe, which it would

subsequently interpret as having confirmed the existing geopolitical situation, including the USSR's position and influence, in Europe,[33] negotiated the Moscow treaty on renunciation of force with the FRG. The latter State had an interest in entering into this treaty, which formed part of a whole to be made up of other treaties with other socialist countries. This enabled the FRG to commence the normalization of relations with Poland, Czechoslovakia and the GDR. The renunciation of the threat or use of force by the two States was supposed to remove one of the obstacles to the conference on security and cooperation. Why should this have been considered necessary? The two States had not concluded a peace treaty; although the Soviet Union had announced in 1955 that it regarded the state of war with Germany as ended. If there was to be a conference on security and cooperation, the signatories may have felt more secure in negotiating with a treaty basis amongst some of the participating states already in existence.

As has been seen, the FRG attached the highest priority to the practical, if not legal, alteration of the conditions of West Berlin. At one time, the whole series of treaties appears to have been dependent upon the successful conclusion of the Berlin negotiations. This process included the Warsaw Treaty (see p. 24 , supra). So while the Warsaw Treaty was negotiated separately, it might not have come about if the Moscow Treaty had failed, this being dependent upon the outcome of the negotiations with regard to Berlin. And as the Helsinki Final Act includes a provision whereby the signatory States recognized the inviolability of each other's frontiers and territory, it becomes doubtful whether the FRG could have become a party to the Final Act without first having reached an accommodation with Poland. After the conclusion of the Quadripartite Agreement, the Soviet

Union stated that it could only enter into force after the ratification by the FRG of the Moscow Treaty, and so it transpired that the whole collection of agreements might collapse if the West German parliament failed to vote for ratification of the Moscow and Warsaw Treaties. The treaties finally gained the approval of the Bundestag in May, 1972. However, a joint, all-Party Resolution was also passed by the Bundestag.[34] This was a declaration with regard to the two treaties. Its status and meaning have been the subjects of legal debate, to which reference will be made.

(iv) The Status of the Polish-German Frontier and Polish Western Territories after the Warsaw Treaty.

The Polish Supreme Court, in the Polish State Railways Case, stated in 1948 the following, which reflects the legal position adopted by the Polish State:

> "After surrender the German State lost its sovereignty, while the Recovered Territories were submitted to the sovereign possession and authority of the Polish State on the basis of the agreement concluded among the victorious Powers ...."[35]

The Potsdam Agreement actually said that the German eastern territories concerned should be placed under the "administration" of the Polish State. Whether, in 1945, this meant "sovereignty", is unlikely. If the USSR, USA and UK had intended at the time that Poland should definitely acquire sovereignty over the relevant territory, they possessed the vocabulary to say as much. However, the attitude of the Polish State is obviously different - but it should be

remembered that in 1948, Poland was already firmly allied to the Soviet Union, while in 1945, there was still hope, at least in the UK and USA, that it might be able to follow a more independent course; also, the attitudes of East and West had already polarized in 1948. Referring to the territories as "recovered", the Polish Court is saying that they had come back into Poland's possession, which means that at some time previously they had been taken away from Poland. But the territories in dispute, like other areas in Europe, had often changed hands and the fact that they had been Polish territory at some point previously did not necessarily strengthen Poland's title in 1948. The Polish view is confirmed in the Preamble of the Zgorzelec Treaty,[36] where it is stated that Poland and the GDR wish "to stabilize and consolidate mutual relations on the basis of the Potsdam Agreement which established the frontier on the Oder and the Lusatian Neisse." Thus Poland stated that its western frontier was "established" by the Potsdam Agreement. If this be accepted, it follows that the territory to the east of that border, within the Polish frontiers, is under Polish sovereignty.[37]

Poland recognized the German Democratic Republic as a State after its creation as such in 1949,[38] in response to the formation on 20 September 1949, of a separate government for the western sectors of Germany.[39] The western occupying powers held the opinion that there was only one German State, the FRG, plus a Soviet zone of occupation in east Germany. The Polish position, that there are two German States, has been consistent since the early 1950's, though Poland at first recognized only one German State - the GDR - and seemed then to reject the construction of two German States. The GDR at first also regarded itself as the only German State.[40] This is evident in that Poland has entered into agreements with both the GDR and FRG as to the position and status of its western

frontier: the Zgorzelec Treaty of 1950, and the Warsaw Treaty of 1970. The two German States have therefore recognized the Oder-Neisse line. In Article I (3) of the Warsaw Treaty, the parties state that:

> "They declare that they have no territorial claims against each other and will advance none in the future."

If the two States declare that they have no territorial claims against each other (present tense), presumably this would imply a renunciation of any previous claims which either party had made against the other with regard to territory. But the present Polish-German frontier did not come into existence in 1970, when the Warsaw Treaty was signed; nor when the treaty was ratified in 1972. In fact, it existed since 1945. In law may be another matter. The GDR recognized the Oder-Neisse line in 1950, before most States had recognized the GDR. For purposes of administration, at least, according to the Potsdam Agreement, the Oder-Neisse line was to constitute the western border of Polish territory. But by 1974, the UK, USA and France had all recognized the GDR to the extent that they had entered into, or were preparing to enter into, diplomatic relations with that State.[41] The territorial divisions which took place in central Europe between 1945 and 1950, apart from the withdrawal from Austria in 1955 of the occupying powers, had in reality taken on the character of permanency. There is no cession of territory under the Warsaw Treaty, nor under the Zgorzelec Treaty. Poland's title to the territory, such as it may be, was not established by the treaty with the Federal Republic. In that sense, the Warsaw Treaty, not being a treaty of cession, of itself, gives Poland no title to the western areas. But it does contribute to the legal regime of Polish borders. It should not be read in isolation, and may be important

in its consequences for a future, unified Germany, which may be bound by this treaty and others not to context the Oder-Neisse line.

The official stance of the FRG - and that of the UK, USA and France in their capacities as occupying powers of Berlin, and having responsibility for Germany as a whole with the USSR - has always been based upon a different interpretation of the Potsdam Agreement. First, the FRG contends that the Agreement did not permanently establish the Polish western frontier. It is true that Part VIII of the Protocol provides, inter alia, that the final delimitation of the western frontier of Poland should await the peace settlement. This part of the Agreement has already been considered. If this was merely the "opinion" of the Heads of Government, it may be argued that no permanent commitment was made with regard to the frontier issue, in which case, any of the three might be free to change its "opinion" in favour of the Oder-Neisse line becoming the permanent border between Poland and Germany, if it has not aready acquired that character, whether Germany be divided or as one State, and without awaiting the peace settlement, as apparently envisaged at Potsdam.

Second, the FRG has consistently expressed its opinion that, as far as its frontiers are concerned, or the frontiers of Germany, it can negotiate only on its own behalf; the consequence being, according to the Federal Republic, that a unified Germany would not be bound by such agreements regarding frontiers as had been entered into by the FRG and GDR. On the other hand, nor would Germany be obliged to contest such agreements and treaties. Thus, Article IV of the Warsaw Treaty stipulates:

> "This Agreement shall be without prejudice to any bilateral or multilateral international agreements which the Parties have previously concluded or which affect them."

This is accepted as including the Potsdam Agreement. So, according to the West German interpretation, the Warsaw Treaty would not alter the effect of its provisions, which include the permanent delimitation of Poland's western frontier. However, the inclusion in the treaty of Article IV was insufficient to convince the Federal Parliament that the Warsaw Treaty should be ratified. An All-Party Resolution, purporting to interpret the Moscow and Warsaw Treaties, was adopted by the Bundestag on 17 May 1972.[42] This states, at Paragraph 2:

> "The Treaties do not ... create any legal foundation for the frontiers existing today."

This may be true, in that the Oder-Neisse line existed prior to the Warsaw Treaty and did not depend upon the kind permission or assent of the Bundestag for its actual existence. However, while the Warsaw Treaty may not by itself have established a legal frontier, its consequences for the FRG and, perhaps, a unified Germany, may be greater.

(v) The Bundestag Resolution

It has been said that this Resolution was presented to the Government of Poland without any express objection on its part,[43] and that, according to Article 31, paragraph 2 (b) of the Vienna Convention on the Law of Treaties, 1969,[44] the Resolution constitutes part of the context of the treaty for the purpose of

interpreting it, if it be accepted by the other party or parties to the treaty. The same writer stated that, although the Vienna Convention was not in force between the parties in 1972 - nor does it have retroactive effect, according to Article 4 - still it was "generally regarded in this respect as declaratory of existing law." However, statements by representatives of Poland indicate that the Resolution was not accepted. Much depends upon the extent to which the provision is actually declaratory of international law. Is acceptance constituted by non-rejection alone, or does it require positive action? Must actual approval be communicated? It has been pointed out[45] that the Polish Minister for Foreign Affairs emphasized that "... the Treaty [was] the only acceptable basis for our relations with the Federal Republic of Germany" and added that "... for Poland the text of the agreement alone [could] be binding". This would appear to exclude the Resolution from consideration as part of the context for purposes of interpretation. Yet this instrument plays a controversial role in Polish-FRG relations: its applicability, denied, apparently, by Poland, is supported by some in the FRG. The actual text of the Resolution is also controversial.

The importance attached by the FRG to the normalization of relations with Poland was discussed above. Paragraph 1 of the Resolution describes the Warsaw and Moscow treaties as elements of a modus vivendi which the FRG seeks to establish with its Eastern neighbours. But normal relations between States have an element of permanency not implied by the term modus vivendi. The FRG may argue that in such matters, nothing can be permanent until the peace settlement. In this case, it should describe its relations with all States, including the UK and the USA, as parts of a modus vivendi.[46] In fact, the territorial status quo basically has remained unchanged since 1949, a substantial period by European standards.

It is possible that the apparent permanency and settled quality of central European frontiers is, in part, due to the absence of a peace settlement, which might serve as a catalyst, if it existed, for revanchist trends in States which felt they had suffered at the peace settlement. This might be conducive to further conflict. Seen in this perspective, the situation in Europe with regard to frontiers is unlikely to alter, and normalization of relations between the FRG and Poland should not be looked upon as an element of a modus vivendi but rather as a permanent settlement between the two countries of the frontier issue. In this respect, it is worth recalling the paramount importance attached by Poland to the recognition by the FRG of the Oder-Neisse line, during the negotiations prior to the signing of the Warsaw Treaty.

The Resolution states, at Paragraph 2, that the treaties do not establish a legal foundation for existing frontiers. The opinion of the Bundestag, that the Warsaw Treaty created no legal foundation at all for the present frontiers, is unlikely to have been acceptable to Poland if presented during the negotiations in 1970. Of course, it is true that the Oder-Neisse line does not depend upon the Warsaw Treaty for its legality, but that treaty does contribute towards it. For the Federal Republic, Article I of the Warsaw Treaty was a concession in its strategy of normalizing relations with Poland. Perhaps, for Poland, normalization of relations was a means to achieving Article I. It is therefore unlikely to have accepted many statements made in the Bundestag Resolution.

There is also the question, whether by unilaterally interpreting a treaty already signed with another State, the FRG was in danger of breaking a fundamental rule of the law of treaties, pacta sunt servanda - that a treaty is

binding upon the parties to it and should be performed by them in good faith. If Poland has accepted the Resolution, then there would be no problem. If it did not, then there may be, considering that the Resolution was adopted nearly one and a half years after the treaty had been signed and, apparently, sealed - though not yet ratified.

If Article 27 of the Vienna Convention on the Law of Treaties were applicable, the Bundestag Resolution would be affected so that, if it were established that Poland rejected the Resolution as being interpretive of the treaty, the FRG would be precluded from invoking the provisions of the Resolution in support of its own interpretation. Article 27 states:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46."

Article 46 provides that a State cannot prevent itself being bound by a treaty by virtue of a provision of its internal law regarding its competence to conclude treaties unless it entered into the treaty making a violation which was manifest and concerned a rule of its internal law of fundamental importance. The Federal Republic would be precluded from invoking Article 46 as an escape clause, assuming it wanted to do so, because, according to its own argument, the Resolution is consistent with the Warsaw Treaty, which is consistent with its Grundgesetz and the fundamental provisions of that basic law with regard to the unification of Germany, the future establishment of its frontiers and the competence of the FRG to conclude treaties with regard to these matters.

(vi) Unified Germany.

The Federal Republic insists that it cannot bind a future German State to accept the Oder-Neisse line as its eastern frontier. This is also the view taken by the UK, USA and France - that the final delimitation under international law of Poland's western frontier must take place at the peace settlement, when a single German State with its own government, freely elected, has come into existence. See, for example, the Note delivered to the Soviet Government from the UK in 1952, after consultation with France and the USA. This provides, in part:

> "The conclusion of a just and lasting peace treaty which would end the division of Germany has always been and remains an essential objective of Her Majesty's Government ..... the conclusion of such a treaty requires the formation of an all-German Government, expressing the will of the German people. Such a Government can only be set up on the basis of free elections in the Federal Republic, the Soviet Zone of occupation, and Berlin ...
> "Her Majesty's Government would recall that in fact no definitive German frontiers were laid down by the Potsdam decisions, which clearly provided that the final determination of territorial questions must await the peace settlement."[47]

In 1970, after the intialling of the Warsaw Treaty, the UK's position was the same; this can be seen from part of the text of a Note from the UK to the FRG - similar Notes were sent by the USA and France:

> "Her Majesty's Government note with approval the initialling of the Treaty. They share the position that the Treaty does not and cannot affect the rights and responsibilities of the the Four Powers as reflected in the known Treaties and Agreements."[48]

The attitude of the Federal Republic is summarized in Paragraph 2 of the Bundestag Resolution:[49]

> "The FRG has assumed on its own behalf the obligations it undertook in the Treaties. The Treaties proceed from the frontiers as actually existing today, the unilateral alteration of which they exclude. The treaties do not anticipate a peace settlement for Germany by treaty and do not create any legal foundation for the frontiers existing today."

This is apparently very clear. However, there exist a number of legal and positive factors which suggest irregularities in the position of the FRG.

(vii) The Theory of Identity.

Prior to 1970, the FRG had insisted that it was identical with the German Reich as it existed within its frontiers of 31 December 1937.[50] This includes the territory of both German States, Berlin, plus substantial areas of present day Western Poland, and East Prussia - now divided between Poland and the Soviet Union. The Western Powers adopted the following position:

> "Pending the unification of Germany, the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs."[51]

The same position has been adopted on other occasions.[52] The Federal Republic claims that it undertook the obligations of the Moscow and Warsaw Treaties on its own behalf. In the Notes sent to the three Western Powers on 19 November, 1970, with regard to the Warsaw Treaty, it was stated that the FRG "pointed out [to Poland] that it can act only in the name of the Federal Republic of Germany." However, if the FRG is identical with the German Reich or at least entitled to speak as the representative of the German people in international affairs, then its treaty obligations and rights ought to apply to the Reich when it is reconstituted. It has been written:

> "If the Federal Republic is identical with the all-German state .... how can it reserve that government's freedom of action?"[53]

A similar thought has been expressed elsewhere:

> "Ein wiedervereinigtes Deutschland ist an die Vertrage zunachst dann gebunden, wenn es rechtlich mit der Bundesrepublik Deutschland identisch ist."[54]

My translation:

> "First of all, a reunified Germany is bound by the treaties,
> if it is legally identical with the Federal Republic of Germany."

In the Convention on Relations Between the Three Western Powers and the Federal Republic of 1952 as amended by the Paris Protocol of 1954 - in which form it finally entered into force - Article 7, paragraph 2 says:

> "Pending the peace settlement, the Signatory States will
> cooperate to achieve, by peaceful means, their common
> aim of a reunified Germany enjoying a liberal-democratic
> constitution, like that of the Federal Republic, and
> integrated within the European Community."[55]

This does not refer only to the ill-fated European Defence Community. After the signature of the original conventions with the FRG in 1952, the UK, USA and France declared:

> "These conventions, as well as the treaties for a European
> Defence Community and a European Coal and Steel Community,
> of which France is a signatory, provide a new basis for uniting
> Europe and for the realization of Germany's partnership in
> the European Community."[56]

If the FRG cannot commit a reunified Germany to accept the Oder-Neisse line,

a frontier to which it has given its consent in the Warsaw Treaty, how could it commit a reunified Germany to integration within the European Community? It may be that a future, unified Germany, in theory, would not be obliged to remain a Member State of the Community. This is not consistent with the behaviour of the FRG in the Community. It is one of the founder Member States. Its commitment, if measured by its financial contribution, has been the greatest of any Member State. In view of this commitment - and the FRG, in terms of territory, population and economic strength, would, after all, constitute the biggest and strongest element in a reunited Germany - it is difficult to envisage how Germany could, in fact, break away from the Community. The FRG appears to have preempted any future withdrawal of Germany. The Preamble to the Treaty establishing the European Coal and Steel Community says, inter alia:

> "Resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and to lay the foundations of institutions which will give direction to a destiny henceforward shared....."

While the Preamble to the Treaty of Rome, establishing the EEC, contains these words:

> "Determined to lay the foundations of an ever closer union among the peoples of Europe,
> Resolved to ensure the economic and social progress of their

countries by common action to eliminate the barriers which divide Europe."

Both of these treaties, to which the FRG is an original signatory, provide for progressive integration of the States parties by economic means - but the purpose, at the time, was to increase political ties between the States involved. Would this mean that, in the event of complete integration of the Member States into one State, the FRG would withdraw from the Community, with all the political and economic consequences which this would entail, because by remaining in the Community, it would be permitting the alteration of its frontiers, an act from which it claimed it was precluded, as the alteration of German frontiers should await the peace settlement? The FRG even promises, in Paragraph 8 of the Bundestag Resolution,[57] to "unwaveringly pursue the policy of European unification with the aim of developing the Community progressively into a political union." Ultimately, this could affect the borders of Germany as much as the Warsaw Treaty did. But no reservation is made with regard to European unification, that the FRG can act only in its own name. A situation may be foreseen where the eastern part of Germany, united with the western areas, would be compelled to become a part of the greater community. In that sense, the Federal Republic will have acted, in allowing itself to become integrated into the European Community, in the name of the whole of Germany, contrary to its assertion that in matters concerning Germany as a whole it is not competent to act.

(viii) Succession of States

While it may be the case that final settlement of the western frontier of

Poland must await the peace settlement, it may be that, because of the actions of the FRG and GDR, the only settlement possible would be one which confirms the Oder-Neisse line as the border. The Potsdam Protocol provides (Part XII):

> "The three Governments, having considered the question in all its aspects, recognize that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken."

This was because problems were foreseen if German minorities remained in these States. Since Poland already had parts of eastern Germany - "former German territories" - placed under its administration, it seems reasonable to assume that the transfer of the Germans in these areas was also considered desirable. It is not possible to calculate how Poland, if part or all of the "former German territories" were taken from it at a peace settlement, could absorb the seven million or so Poles living in these areas - and it is unlikely that Germany would want to have a large Polish minority within its frontiers. It should be recalled that, according to Chapter VI of the Yalta Agreement, the three Heads of Government said that Poland "should receive substantial accessions of territory in the north and west." This was stipulated immediately after the statement that the eastern frontier of Poland should be, more or less, the Curzon Line. This has been regarded as an attempt to compensate Poland for the territory which it lost in the east, although it is far from certain that such a link was intended to provide legal rights to compensation. It has been argued that the Potsdam Agreement separated the questions of the eastern and western frontiers of Poland.[58] They have been

regulated in separate documents, at different times and by different parties. The Heads of Government also said, as they would at Potsdam, that the final delimitation of the western frontier of Poland "should" await the Peace settlement. The word "should" is used with regard to the peace conference and with regard to the territory which Poland is to receive to its west and north. If the FRG interprets "should" as "must" for the purposes of the peace conference, perhaps it ought also to adopt the same attitude to the accessions of territory which are to be made in favour of Poland. This means that, wherever Poland's western frontier would be after the peace settlement, it would definitely be substantially further west than its border of 1 September 1939. The Federal Republic has always held that the western frontier of Poland should be decided in accordance with the terms of the Potsdam Agreement.

This would have to be taken into account in the negotiations for any future peace treaty, and the successor German State would have its territory restricted as a consequence, since, if it is desired to act according to the provisions of the Potsdam Agreement - which accepts the decision at Yalta, that Poland should receive territory in the north and west - it must also accept that Poland shall receive territory at the expense of Germany as it existed prior to World War II. It has been pointed out that, even if the Warsaw treaty were concluded by the FRG on its own behalf only, a successor State could, if it chose, adopt the obligations of the treaty.[59] Indeed, since the peace settlement cannot take place under present conditions until there is one government for the whole of Germany, and since such a unified Germany presumably would consist of the territory of Berlin, plus the former GDR and FRG, both of which have recognized the Oder-Neisse line as the western frontier of Poland, such a German State could participate in the

settlement having already recognised that border. This would make the work of the peace conference easier, assuming that it would give effect to the previously expressed intentions of Germany and Poland in recognizing the frontier. Skubiszewski argues that Poland did not accept any reservation from the Federal Republic limiting the duration or effect of the Warsaw Treaty.[60] Even if so, however, it does not defeat the interpretation by the FRG of the Potsdam Agreement, which is accepted by both States as being valid in Article IV of the Warsaw Treaty, while passing over the differing interpretations of the Agreement by each of the States. But there is still no reason why, as the FRG claims, the treaty must have only a temporary existence. For reasons already stated, it may come to be seen as the instrument which permanently has settled the issue. According to Brownlie, "the change of sovereignty does not as such affect boundaries."[61] If the Federal Republic is not, for the purposes of the Warsaw treaty, identical with the German Reich, and since it has held that a future, unified German State would not be bound by the treaty, then that State would be identical neither with the FRG nor the GDR. Consequently, if it should come into existence, a change of sovereignty would occur. If Brownlie's view is accepted, then the boundaries of Germany would not necessarily be affected.

In fact, it is difficult to see how the existing state of affairs could possibly be altered by any peace treaty. It is unlikely that Poland would accept willingly any award which entailed the loss to Germany, without territorial compensation, of its western territories or any part of them. The purpose of the Warsaw Treaty was to begin the normalization of relations between Poland and the FRG, based upon the acceptance by the latter State of the Oder-Neisse line as the western frontier of Poland. Even if a reunified Germany were not bound by the 1970 Treaty, Poland

would still be in existence as a State, presumably within the same borders. The Federal Republic states that it accepts the Oder-Neisse line. It has asserted - in the Bundestag Resolution, for example - that a united Germany would not be bound to accept it. But nor would it be obliged to reject it. Nevertheless, the FRG perpetuates doubts amongst other States with regard to this issue, causing the suspicion that the Oder-Neisse line is not accepted.

Footnotes

1. Protocol of the Potsdam Conference. 2 August 1945. Part VIII.
   CMND 1552, Doc. No. 13, p. 57.

2. Yalta Agreement, 11 February 1945. Chapter VII. CMD 7088.

3. Potsdam Protocol. Part VIII. Note 1, supra.

4. 274 UNTS 133, 138-140.

5. Warsaw Treaty, Article I (1)
   830 UNTS 328 - Polish text; 830 UNTS 332 - English text.

6. CMND 6198.

7. CMND 6198, at 3.

8. 1970 9 ILM 1026.

9. Rauch: The Treaty of August 12, 1970 Between the FRG and the USSR: A Textual Analysis.
   1971 4 NYUJILP 173, at 177:
   "The official German position is that the Treaty, while precluding changes in existing European boundaries by force, does not prevent changes which are brought about by peaceful means. However, the German and Russian verbs which have been translated in English as "disturb" in the translation of the German text and "encroach on" in the English translation of the Russian text, both encompass a broad range of meanings. These connotations include both violent and non-violent activities. Thus it cannot be said that the Treaty specifically permits peaceful change."

10. 319 UNTS 93.

11. Gelberg: The Warsaw Treaty of 1970 and the Western Boundary of Poland.
    1982 76 AJIL 119, at 123.

12. This is a view taken by Skubiszewski:
    "Il est, bien sur,juridiquement toujours possible, bien que se soit peu probable, au moins dans l'avenir previsible, que les anciens belligerants concluent un traite de paix. Mais ses sujets habituels, comme la terminaison de l'etat de guerre et le retablissement de la paix, les frontieres, les reparations, le reglement des problemes touchant la propriete, les droits et les interets prives, etc. - tout cela, ou presque, a deja abouti a une solution conventionnelle, bilaterale ou multilaterale."
    Les traites sur les frontieres en Europe centrale (1970-1973) (The Treaties on Frontiers in Central Europe). (1970-1973).
    1974 6 PYIL 7, at 24-25.

13. Arndt: Legal Problems of the German Eastern Treaties.
1980 74 AJIL 122, at 127:
"...the entire system of agreements produces not a final settlement for Central Europe but rather only a modus vivendi which retains validity until a definitive settlement becomes effective."

14. Exchange of Notes between UK and FRG, 19 November, 1970.
CMND 6201, Doc. No. 130, p. 229.

15. CMND 6201, Doc. No. 150, p. 256.

16. Declaration Regarding Unconditional Surrender of Germany.
CMND 1552 Doc. No. 7, p. 38; CMD 6648.

17. See, for example, the speech by US President Truman after the Potsdam Conference at Washington, 9 August, 1945:
"They [the Polish Provisional Government of National Unity] agreed, as did we all, that the final determination of the borders could not be accomplished at Berlin, but must await the peace settlement. However, a considerable portion of what was the Russian zone of occupation in Germany was turned over to Poland at the Berlin Conference for administrative purposes until the final determination of the peace settlement."
1946 Zbior Dokumentow 254, at 267.

18. Protocol on Termination of the Occupation Regime, October, 1954.
Schedule 1, Articles 1 and 2. 331 UNTS 253.

19. Statement on Relations Between USSR and GDR, by the Soviet Government.
CMND 1552, Doc. No. 66, pp. 186-187.

20. Scheel: The German-Polish Treaty, in - The Treaty between the Federal Republic of Germany and the People's Republic of Poland.
Bonn, 1971, p. 41, at p.44.

21. Soviet Draft Peace Treaty with Germany, submitted to UK Government, 10 March, 1952.
CMND 1552, Doc. No. 54, p. 144.
Aide-Memoire of the Soviet Government to the UK Government concerning the conclusion of a peace Treaty with Germany, 18 September 1958.
CMND 1552, Doc. No. 125, p. 308.

22. Note of UK Government to the Soviet Government concerning the conclusion of a Peace Treaty with Germany, 30 September, 1958.
CMND 1552, Doc. No. 127, p. 311.

23. Speech by the Polish Prime Minister, 7 December 1970.
Note 20, supra p. 24, at p. 26.

24. Scheel, Note 20, supra, at p. 45.

25. Figures vary about the population of these areas. One estimate suggests a figure of 8,382,000.
E. Wiskemann: Germany's Eastern Neighbours.
London, New York, Toronto, 1956, at p. 226, Note 1.

26. CMND 6201, Doc. No. 129, p. 227.

27. Scheel, Note 20, supra, at pp. 46-47.

28. The Treaty of August 12, 1970 between the Federal Republic of Germany and the Union of Soviet Socialist Republics. Bonn, 1970, at p. 15.

29. Wettig: East Berlin and the Moscow Treaty.
1971 Aussenpolitik 256, at 259-260.

30. CMND 6201, Doc. No. 121, pp 218-219.

31. 1972 11 ILM 5.

32. "It is assumed that the four power negotiations will lead to securing close ties between the FRG and West Berlin and to unimpeded access to West Berlin. Without such security, a Treaty on the Renunciation of Force will not come into effect."
1970 Bulletin des Presse und Informationsamtes der Bundesregierung, 1061. Quoted at:
Doeker, Melsheimer, Schroder: Berlin and the Quadripartite Agreement of 1971.
1973 67 AJIL 44, at 52.

33. This entails recognition by Western States of the principle of peaceful coexistence for relations between States with different social and political systems. The Western States have not recognized the fundamental character of this principle claimed for it by the Soviet Union; such recognition would mean acceptance of the prevailing geopolitical realities.
Alting von Geusau: From Yalta to Helsinki: Developments in International Law.
1977 8 NYIL 35, at 44.

A Soviet specialist in this field regards the CSCE Final Act as having settled, or summarized already-settled, issues which had not been closed because of the failure to conclude a peace treaty, and as having acknowledged the division of Europe:
Kasian: The Helsinki Final Act and International Law.
In: W.E. Butler, V.N. Kudriatsev (eds): Comparative Law and Legal System: Historical and Socio-Legal Perspectives.
New York, 1985, p. 59 at pp. 64-65.

Western acceptance of existing European frontiers has been described as a principal, perhaps the main, objective of the USSR at CSCE:
Russell: The Helsinki Declaration: Brobdingnag or Lilliput?
1976 70 AJIL 242, at 249.

A leading Polish expert on CSCE regards the Final Act also as having

finally closed the post-war period and sanctioned the present state of affairs as "the peaceful order in Europe."
Rotfeld: The Conference on Security and Cooperation in Europe (its Conception, Realization and Significance).
1977 18 PWA 26, at 60-61.

34. Note 15, supra.

35. L. and J.J. v Polish State Railways, 11 June, 1948.
ILR 24, 77, at 78.
Originally in Polish: Panstwo i Prawo, 1948 (No. 9-10), at 144.

36. Note 10, supra.

37. On the significance, for the characterization of a State's tenure over territory, of the use of the term "State frontier" (which appears in both the Zgorzelec and Warsaw Treaties), see Chapter Six, p 307 ff.

38. The two States entered into diplomatic relations on 18 October 1949.
J. Skibinski: Problemy normalizacji stosunkow NRD-RFN (Problems Relating to the Normalization of Relations between the GDR and the FRG). Warszawa, 1982, at p. 309.

39. Statement by the Soviet Military Governor on the Entry into Force of the Constitution of the GDR.
CMND 1552, Doc. No. 37, pp. 124-125.

40. Skubiszewski: The Western Frontier of Poland and the Treaties with Federal Germany.
1970 3 PYIL 53, at 60.

41. Skibinski, Note 38, supra, at pp. 311-312.

42. Note 15, supra.

43. Arndt: Note 13, supra, at 126.

44. CMND 4818, Misc. 19 (1971); UN Doc. A/CONF. 39/27; UKTS No. 58 (1980).

45. Skubiszewski: Poland's Western Frontier and the 1970 Treaties
1973 67 AJIL 23, at 34-35.
- Quoting statement made on 14 May, 1972; 1972 Polish Facts and Figures, No. 899, 5.

46. This term did not find favour among the Federal Republic's treaty partners:
"Der Begriff "Modus vivendi" konnte von der Sowjetunion nur muhsam toleriert werden, in Warschau rief er offiziosen Widerspruch hervor, da er nicht in das Konzept von der Endgultigkeit der Grenzregelung passt. Damit wurde er zu einem Reizwort, auf das die Opposition auch kunftig die Bundesregierung, etwa hinsichtlich des Grundlagenvertrages festzulegen sich bemuhte, und das in Warschau und Ostberlin immer zurickgewiesen wurde.

- "The term "Modus vivendi" could only with difficulty be tolerated by the Soviet Union; in Warsaw it aroused informal/semi-official opposition, as it did not fit into the concept of the finality of the frontier settlement. In that way it became an irritating word to which the Opposition tried to commit the Federal Government in future, for instance, in connection with the Basic Treaty, and which in Warsaw and East Berlin was constantly rejected."
B. Zundorf: Die Ostvertrage (The Eastern Treaties), Munchen, 1979, at p.93.

47. Note of the UK Government to the Soviet Government, 25 March 1952.
CMND 1552, Doc. No. 54, p. 146.

48. Note of the UK Government to the Federal German Government, 19 November 1970.
CMND 6201, Doc. No. 131, p. 229.

49. Note 15, supra.

50. Frowein: Die Rechtslage Deutschlands und der Status Berlins (The Legal Position of Germany and the Status of Berlin).
In: Benda, Maihofer, Vogel (eds): Handbuch des Verfassungsrechts (1983), p. 29, at pp. 34-35.

51. Communique issued by the Western Foreign Ministers following the Meeting at New York, 19 September,1950.
CMND 1552, Doc. No. 49, p. 137.

52. Declaration by Governments of the UK, USA and France: Final Act of the Nine-Power Conference, London, 1954, Paragraph 1.
CMND 1552, Doc. No. 68, p. 189.

53. Skubiszewski, Note 45, supra, at 26.

54. Frowein: Die Grenzbestimmungen der Ostvertrage und ihre volkerrechtliche Bedeutung. (The Frontier Provisions of the Eastern Treaties and their Meaning in International Law).
Ostvertrage 27, at 31 (Quoted by Skubiszewski, Note 45, supra, at Footnote 16).

55. 331 UNTS 327.

56. CMND 1552, Doc. No. 59, p. 161.

57. Note 15, supra.

58. K. Skubiszewski: Zachodnia granica Polski (The Western Frontier of Poland). Gdansk, 1969, at pp. 413-414.

59. Skubiszewski, Note 45, supra, at 27.

60. Ibid , at 27-28.

61. I. Brownlie: Principles of Public International Law (3rd ed.), Oxford 1979,at p.667.

CHAPTER THREE

The Applicability and Effect of the Bundestag Resolution of 17 May 1972. The Commitment of Interested States to the Oder-Neisse Line

(1) Origins of the Resolution

The Bundestag Resolution[1] has already been mentioned and a few of the issues raised by it were briefly discussed. Here it is intended to discuss the applicability and effect of this Resolution in detail.

The Resolution served one obvious and immediate purpose, which was to obtain ratification by the FRG of the Warsaw and Moscow Treaties, approximately one and one half years after they had been signed. The Resolution was adopted on 17 May 1972, but that was not all. The Federal Government, apparently attempting to forestall criticisms, published a "clarification" of the Resolution on 19 May 1972.[2] That is, it published a clarification of an interpretation of the Moscow and Warsaw Treaties. The Federal Government intended the Resolution to be adopted in connection with the ratification of these treaties, so it is reasonable to characterise the action of the Federal Government in this way, regardless of whether or not the Resolution does in effect interpret the treaties. It is an indication of the controversy of these measures, that it was even considered necessary to clarify the Resolution.

The treaties were finally ratified by the FRG on 23 May 1972. The Soviet

Union ratified the Moscow Treaty on 31 May 1972; Poland ratified its treaty on 26 May 1972. On the Soviet and Polish sides, there were no problems in obtaining ratification; however, the problems of achieving it in the FRG caused a great deal of debate in Poland, particularly with regard to the Bundestag Resolution, to which reference will be made later.

The Resolution was necessary to secure ratification for two reasons: first, the ruling SPD-Free Democrat coalition wanted to obtain not just majority support for the treaties, but the backing of as much of parliament as possible. This was because of the nature of the treaties, which dealt with issues fundamental to the existence of the FRG and its people, millions of whom had spent large parts of their lives in former German territories which had been incorporated into Poland and the Soviet Union. The Federal Government did not wish to alienate large segments of its population by being seen to "sign away" enormous areas of "German territory". It is irrelevant in this particular context whether the territory concerned was German, and it was irrelevant to consider for these purposes whether the FRG had any capacity to "sign away" anything other than the territory of the FRG (and even that is a matter of debate in view of the residual powers of UK, USA, France and USSR with regard to Germany as a whole); the point is that there were many Germans in the FRG, whose opinions were also voiced by Bundestag members, who did, or might, believe that by ratifying the treaties the FRG was disposing of German territory. In other words, a large part of the population could envisage, whether or not this was the position legally, the loss of their original homes and lands, to which many still had hopes of returning - there were many organisations of "refugees" from

Pomerania, Silesia and East Prussia in the Federal Republic, which served to keep such people in contact with one another, act as pressure groups - often to great effect - in various spheres of public life, including the lobbying of Bundestag members, and also to keep alive a peculiar German nationalism bearing many similarities to the Drang Nach Osten mentality. These organisations have lost much of their impetus and influence, as the original "refugees" have died, usually to be succeeded by children born in the territory of the FRG, and therefore having a much weaker emotional connection, if any at all, to the "homeland". In the years 1970-1972, however, these organisations still possessed much influence, and of course, the question of recognising a Polish frontier on the Oder-Neisse line was just the kind of issue to inspire them in their work.

The second reason that the Resolution was necessary to secure ratification of the treaties was perhaps simpler - the evaporation of the Government's majority in the Bundestag. This had always been slender, but a number of SPD Deputies resigned from the Party on the grounds that they could not accept the provisions of the treaties. The CDU/CSU was also opposed to the treaties,[3] and so the Government had to make compromises in order to achieve the consensus it desired. One consequence of this was the adoption of the Bundestag Resolution. Even so, the CDU/CSU did not vote for ratification of the treaties; its Members generally abstained, despite having been involved in the composition of the Resolution.[4] The treaties were ratified, but rather than appearing to act with the genuine support of the electorate, it was obvious that, although there was substantial support for the treaties, they had been ratified because the

opposition, in the form of the CDU/CSU, had been persuaded not to oppose the treaties, which was something much less than the desired national consensus.

It is evident, therefore, that the Bundestag Resolution is an instrument which came into existence, not by agreement of the FRG and Poland, or the FRG and the Soviet Union, during the negotiations prior to the signing of the Moscow and Warsaw Treaties; rather it is the product of West german political manouvering, not discussed on equal terms with the other States which would be most directly affected by it.[5] The fact that the Soviet Ambassador was present at the meeting of 9 May 1972, when agreement was reached on the text of the Resolution, does not mean that he took an active part in the formulation of the Resolution. Although given the official Soviet international legal viewpoint, which is that "Germany" does not exist, that there are two German States - the GDR and FRG, and that the Oder-Neisse line was established by the Potsdam Agreement, it is surprising that agreement could be reached with regard to certain statements:

> "The rights and responsibilities of the Four Powers with regard to Berlin and Germany as a whole are not affected by the treaties."[6]
>
> "The treaties...do not create any legal foundation for the frontiers existing today."[7]

But it is even possible that the Soviet Union and the FRG would have been in complete agreement about these statements. The USSR could accept them because they are general enough in scope to accommodate the differing legal views of both sides. The FRG could make the latter statement because it has

consistently taken the opinion, along with the UK, USA and France, that the final settlement of the frontier between Poland and Germany must await the peace settlement.[8] The Soviet Union could agree to it, because it has generally - and always during the previous thirty years - taken the view that the issue of Poland's western frontier, the Oder-Neisse line, was actually settled at Potsdam in such a way that, were there to be any peace settlement, its only purpose as far as the frontiers of Poland are concerned would be to confirm what was, in the view of the USSR, decided at Potsdam, i.e., it envisages simply a "rubber stamp" procedure in this instance. It would therefore follow that the Moscow and Warsaw treaties would not be establishing a legal foundation for any frontier. Rather, they are regarded simply as confirming the status quo. As for Poland's attitude, the following statement by one Polish writer shows that, officially at least, the issue was regarded as settled, as a non-issue in fact:

> "Poland's alliance with the Soviet Union and other Socialist countries is a sufficient guarantee of the lasting character of the frontier .... and the security of this frontier raises no fear. Consequently, prior to the conclusion of the Treaty there was no "unsolved" or "controversial" frontier problem in Polish-West German relations. There was only the problem of the attitude of the West German government to the established and existing western frontier of Poland ..."[9]

This statement is unconvincing. If it is indeed true that the only problem was the attitude to Poland's western frontier of the Federal Government, then Poland seems to have shown very little faith in its "alliance with the Soviet

Union and other Socialist countries", since it was prepared to enter into a treaty in which it would make concessions to the Federal Republic,[10] simply in order to remove that problem of the attitude of the Federal Government. If this problem of attitude was the only factor which caused concern to Poland, then the ratification procedure on the German side can only have strengthened any Polish misgivings about the way in which the frontier issue was regarded in the FRG. For, although Poland could indeed show to the world that the matter of its western frontier had been incorporated in a treaty with the FRG, the reality was that that treaty almost failed to get beyond the signature stage. Indeed, the problem with regard to the Oder-Neisse line was not the attitude of the West Germany Government, which in fact had been the driving force behind the campaign for ratification in the FRG. The real problem was that the Opposition, with the support of large segments of the population, was not prepared to give its approval to the ratification. It is therefore clear that, although ratification of the Warsaw and Moscow Treaties was finally achieved, this did not dispose of the problem of attitude in the FRG towards the Oder-Neisse line. If Sulek is correct in saying that Poland's frontiers were secured by virtue of its alliance, and that the only outstanding issue was that of attitude, then in fact the ratification of the Warsaw Treaty achieved nothing except to show that in the FRG there still existed hostility towards the post 1945 territorial status quo. Contrary to the expressed opinions of both FRG and USSR, that the Moscow and Warsaw Treaties do not create any legal foundation for the frontiers existing today, rather these instruments do have a legal effect on the Oder-Neisse line and therefore form part of the legal regime with regard to that border. If the only purpose for Poland in concluding the Warsaw Treaty was to deal with the

opposition to the border of elements of West German society, then it failed in its task and made needless concessions to the FRG in agreeing to the emigration to Germany of Polish citizens of German origin.

The Bundestag Resolution was an instrument drawn up in order to placate West German opposition to the Warsaw and Moscow Treaties, thereby securing their ratification. However, while the Resolution solved that problem, it has unfortunately caused a number of legal controversies which might not otherwise have arisen. There is debate over whether the Resolution is a matter of internal importance only, i.e., for the FRG, or if it has any influence on the Warsaw and Moscow Treaties as envisaged in Article 31(2) (b) of the Vienna Convention on the Law of Treaties of 1969 (hereinafter referred to as the "Vienna Convention"). A number of Polish and West German writers have expressed predictably opposite views with regard to this issue, and these will be discussed in so far as they are relevant to clarifying the matter.

Related to the above issue is the necessity of considering official statements by Polish representatives with regard to the Warsaw Treaty and the extent to which, if at all, the Resolution must be considered along with the treaty. Many statements have been made, rejecting the Resolution as an instrument related to the treaty and as a factor of importance in Polish-West German relations, in seemingly unequivocal language. However, these statements, to which, due to their status as official remarks made by senior Polish Government officials, importance must be attached, are seen to be equivocal in substance in that, while it is repeatedly stated that only the treaty itself can govern the relations

between Poland and FRG, there is little evidence of the Bundestag Resolution being negated specifically by name. In light of the controversy related to the status of the Resolution, this lack of unequivocal negation perhaps detracts from the statements made by the Polish side, since a clear denunciation of the Resolution, which was never forthcoming, would appear to have been desirable. These statements will be examined in order to see whether or not they actually exclude the Resolution from the sphere of Polish-West German relations.

There is one further possibility, which is that the Bundestag Resolution, in so far as it is concerned with the Warsaw Treaty (it also makes statements with regard to other issues, such as the membership of the FRG in NATO,[11] relations between FRG and GDR,[12] and the relationship between the FRG and West Berlin),[13] does not add anything to the treaty, nor does it detract from it. Indeed, the Federal Government made this very point in its clarification of the Preamble of the Resolution, when it said:

> "It alters nothing of the rights and duties resulting from the treaties and stands in conformity with the spirit and letter of the treaties."[14]

If the Federal Republic was simply emphasising in the Resolution that it is always possible to alter state frontiers by peaceful means, involving the freely given consent of the States concerned, which is a manifestation of the exercise of their soverign power, then other States could not reasonably object to such an innocuous expression of one of the rights of States. Indeed the FRG, USSR

and Poland all expressed the same opinions, only three years later, in the Helsinki Final Act:

> "They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement."[15]

However, this statement was made simultaneously by virtually every other European State, plus the USA and Canada, as one of a series of common statements concerning security in Europe. The Bundestag Resolution, on the other hand, was a unilateral statement. It does not specifically provide that peaceful alteration of frontiers by common consent is possible, but this is implicit in such statements as:

> "The treaties proceed from the frontiers as actually existing today, the unilateral alteration of which they exclude."

(Paragraph 2 of the Resolution) and:

> "In view of the fact that the final settlement of the German question as a whole is still outstanding ..."

(paragraph 5).

As regards the first quotation, the exclusion of unilateral alteration of frontiers only indicates that bilateral or multilateral alteration would be permissible. As for the second, the consistently expressed view of the FRG has been that the German question can only be settled when there is one Government

representing the whole German people, i.e., when the present existing inner-German frontier has ceased to exist. As unilateral alteration of frontiers is excluded, this could only mean that the inner-German frontier may be removed by peaceful means, i.e., by consensus. Here, "alteration" is taken as including the total removal of a frontier. The German question also includes the issue of the Polish-German border. According to the FRG, this can only be settled finally in a "peace settlement" - which has always been taken to mean, among the Western Powers responsible for Germany as a whole, a peace treaty concluded between the coalition of the United Nations, on the one hand, and Germany on the other. This means therefore that the Polish frontier issue is still outstanding, being part of the "German question", and may conceivably be altered from its present course at a peace settlement - which would constitute a change by peaceful means. Why should the FRG have gone to such lengths to express the obvious, which is that States may alter their frontiers by agreement and by peaceful means? It has already been pointed out that one purpose of the Bundestag Resolution was simply to secure ratification of the Warsaw and Moscow Treaties. But that does not mean that in the Resolution it should be necessary to include statements of the obvious. An alternative explanation is that the statements concerned may have constituted a substantive alteration of the provisions of the treaties with Poland and the USSR or, even if they did not amount to such a change, may have been regarded by the FRG as having such effect. Why did the Resolution provoke such a strong reaction in Poland? It would seem that, even if Poland did not consider the Resolution to have made any substantive alteration to the legal regime which had been established, it may have been concerned that if it were seen to agree to the Resolution, this

might be construed as an admission on its part that the Resolution added or subtracted something from the terms of the Warsaw Treaty. In any case, Poland found it necessary to emphasise that it attached prime importance to the treaty itself. However, there remains the problem that most denials of the relevance of the Resolution are at best implicit, which results as a consequence in the need to examine statements made with regard to the treaty itself, which is the context in which most of these statements were made.

There is no question of a lack of support for the Resolution in West Germany. When voting on the ratification Bills and the Resolution took place on 17 May, 513 Members voted to adopt the Resolution. No votes were cast against it and there were only 5 abstentions.[16]

(ii) Applicability of the Resolution

The wording of the Resolution is such that it could have been regarded by Poland as a direct challenge to the apparent success it had scored in obtaining recognition by the FRG of the Oder-Neisse line as Poland's western frontier. In particular, Paragraph 2 would have caused concern, as it provides:

> "The treaties do not anticipate a settlement for Germany by peace treaty and do not create any legal foundation for the present existing frontiers."[17]

It has already been observed that the USSR could agree that the Moscow and Warsaw treaties did not "establish" any frontier. In common with Poland, the

USSR held that the Oder-Neisse line was established legally at Potsdam. However, for Poland it was of importance that the FRG recognized the frontier. This was not simply a matter of attitude on the part of West Germany. Poland regarded this recognition as having legal effects. Therefore, if Poland's interpretation of the action of the FRG was the correct one, it meant that the Warsaw Treaty would form part of the legal regime of the Oder-Neisse line, and would do so independently of whether or not this border was established, for the purposes of international law, in the Potsdam Agreement.

The clarification of Paragraph 2 of the Bundestag Resolution did not offer comfort to Poland. While specifying that the FRG made no claim to alter borders, it ends with the ominous warning that, on the other hand, a reunified Germany would not be bound by the treaties with Poland and USSR. The Federal Chancellor, Herr Brandt, had attempted earlier to sweeten the pill during a Bundestag debate when he "assured the Soviet and Polish Governments that the passage in the Resolution in which it was stated that the treaties created no legal basis for existing frontiers did not devalue the recognition of the Oder-Neisse frontier by the Federal Republic contained in the Moscow Treaty."[18]

Therefore, there is the problem of evaluating conflicting opinions as to the effect of two very important treaties, and the possible influence of a unilateral instrument, asserted by one side to have a direct connection with the treaties, while the other disputes its relevance to any part of the treaties. What relevance can the Resolution have for the Moscow and Warsaw Treaties? Here it is intended to consider mainly the Warsaw Treaty and any possible effect on the

status of the Oder-Neisse frontier.

There are two levels at which the issue should be considered: first, the general question, which involves the general law of treaties; to what extent may an instrument such as the Bundestag Resolution be considered along with the treaty to which it is supposed to be related, and what effect will it have on the treaty? Secondly, there is the specific issue of the applicability of this Resolution to the Warsaw Treaty.

As for the general problem of interpretation of treaties, this was discussed at great length and in detail by the International Law Commission (ILC) , which during the 1960's prepared draft articles for a convention on the law of treaties. These articles formed the basis of the work of the United Nations Conference on the Law of Treaties, held in two sessions in Vienna in 1968 and 1969. In the Vienna Convention as it finally emerged, the interpretation of treaties is dealt with in Articles 31-33, including, in Article 31 (2) (b), provision for just the type of instrument as is the Bundestag Resolution. The treaty came into force in January, 1980. However, it does not have retroactive effect (Article 4). Nor are Poland and FRG as yet parties to the treaty, although the FRG is a signatory State. On the other hand, parts of the treaty are definitely to be regarded as constituting customary international law. Some are even mentioned by name in the Preamble,[19] while further on it is pointed out that the Convention has achieved both a "codification and progressive development of the law of treaties". Do the articles on interpretation of treaties, and in particular Article 31(2)(b), come under the heading of codification - and hence binding as

customary international law on both Poland and FRG - or are they part of the progressive development of the law of treaties?

If the West German, Arndt, is correct, the answer is clear. He claims, with regard to the Bundestag Resolution, that it is an "instrument related to the treaty" in the sense of Article 31(2)(b). He adds that, while neither of the signatories was a party to the Convention at the time, still "it was generally regarded in this respect as declaratory of existing law."[20] However, there are weaknesses in his argument. The first one is that he cites no authority whatsoever in support or justification of what is a very serious claim, i.e., that Article 31(2)(b) was generally regarded as declaratory of pre-existing law. Arndt has been quoted because his statement highlights the problem of establishing the status of the articles on interpretation. This was indeed a contentious issue; some even expressed doubts as to whether any legal rules of interpretation existed at all, while others, though not questioning their actual existence, expressed doubts as to the extent of their legal effect. One member of the ILC who was most vehemently opposed to the theory that there were any legal rules of interpretation at all was Ruda (Argentina):

> "He (Ruda) agreed with the Special Rapporteur (Waldock) that, for the time being, the subject of the interpretation of treaties should find its place in the draft ... He considered that, at the present stage of development of international law, there did not as yet exist for States any obligatory rules on the subject of interpretation... At least, if any rules existed, they were subject

> to considerable doubt, except for the rule in claris non fit interpretatio..."[21]

He then characterized as "progressive development" the inclusion of any rules on interpretation in the convention:

> "Although he did not wish to imply that the Commission could not formulate any rules in the matter, he stressed that these rules would not constitute a codification of existing law; they would represent proposals for the progressive development of international law."[22]

Ago (Italy) was much more enthusiastic about the inclusion in the convention of rules of interpretation. While not expressing an opinion as to whether any obligatory rules already existed, he strongly advocated the inclusion of certain rules in any convention on the law of treaties:

> "The interpretation of treaties, however, was of capital importance for the Commission's work and for the law of treaties in general ... certainty of the law of treaties depended mainly on certainty of the rules of interpretation."[23]

Waldock, the Special Rapporteur, deals with the question of the existence of rules of interpretation in his Report no. III, Section III.[24] He also discusses the debate over whether any rules of interpretation even exist and what purpose

any such rules might serve. Waldock in the end also comes to conclusions about the general nature of the rules of interpretation. These do not support the view that there are any rules of interpretation with the exalted status of customary international law. He says (Paragraph 6):

> "In short, it would be possible to find sufficient evidence of recourse to these principles and maxims in international practice to justify their inclusion in a codification of the law of treaties, if the question were simply one of their relevance on the international plane. But ...the question posed by many jurists is rather as to the non-obligatory character of many of these principles and maxims; and it is a question which arises in national systems of law no less than in international law. They are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions which they employed in a document.
> ...recourse to many of these principles is discretionary rather than obligatory, and the interpretation of documents is to some extent an art, not an exact science."[25]

This passage is very important. It was adopted by the ILC as part of its commentary on the Draft Articles on interpretation (and other treaty related issues) at its 18th Session, and may also be found in the Official Records - Documents of the Vienna Conference. Waldock clearly dispels the notion that there are precise, definite rules to which reference may be made when

interpreting treaties. Even if the type of instrument referred to in Article 31(2)(b) - an instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty - could be regarded as "a principle of logic and good sense", that is not enough to accord it the status of international law. It has never been a requirement of any rule that, to constitute part of the body of international law, it must be logical and make good sense. If this were the case, the existing body of public international law might substantially be reduced.

There is jurisprudence of the International Court of Justice dealing with agreed statements and understandings as to the meaning of provisions reached prior to the conclusion of a treaty. Waldock discusses this in Paragraph 19 of the same Report, in order to decide whether such statements and understandings are to be considered as part of the context for the purpose of interpreting a treaty, or as part of the travaux preparatoires, in which case according to the Vienna Convention they would be relegated to the status of supplementary means of interpretation. Waldock quoted two cases in which opposite views were taken by the Court: the Conditions of Admission to Membership Case[26] and the Ambatielos Case,[27] and took the view that the latter case, in so far as it was relevant to the rules of interpretation, should be preferred to the former. In the Admissions Case, the Court said (p.63) that it considered the text of the actual treaty in question - the Charter of the United Nations - to be sufficiently clear and that therefore there was no need for resort to any preparatory work. Since the Court distinguished between the actual text of the treaty and travaux preparatoires, it must be assumed that any instrument

preceding the conclusion of the treaty and not actually part of the treaty text would be considered simply as travaux preparatoires, to which the Court in that case was not prepared to make reference.

However, in a joint dissenting opinion, Judges McNair, Read, Winiarski and Basdevant declared:

> "Without wishing to embark upon a general examination and assessment of the value of resorting to travaux preparatoires in the interpretation of treaties, it must be admitted that if ever there is a case in which this practice is justified it is when those who negotiated the treaty have embodied in an interpretative resolution or some similar provision their precise intentions regarding the meaning attached by them to a particular article of the treaty."[28]

The Vienna Convention distinguishes between travaux preparatoires, which according to Article 32 are merely supplementary means of interpretation, and agreements or instruments related to the treaty, which have a higher status, while in the above extract no such distinction is made. However, in the Admissions Case, the Court had defined everything as travaux preparatoires which was not part of the actual text of the treaty, and the dissenting opinion should be read in this context. So, while an interpretative resolution could be regarded in 1948 as part of the travaux preparatoires in light of the opinion given by the Court, the views of the dissenting judges are still of relevance because they show that an instrument such as the Bundestag Resolution may

have an important effect on the treaty with which it is connected.

The Ambatielos Case[29] in effect follows the joint dissenting opinion as quoted above, but goes further, to the point where the judgment resembles, as regards interpretation, the provisions of the Vienna Convention. The joint dissenting opinion in the Admissions Case refers to an interpretative resolution with regard to a particular part of a treaty as being still part of the travaux preparatoires. The Court in the Ambatielos Case, discussing a declaration agreed upon by the UK and Greece with regard to a treaty entered into by the two States, said:

> "...the provisions of the Declaration are in the nature of an interpretation clause, and, as such, should be regarded as an integral part of the Treaty, even if this was not stated in terms."[30]

Here there is clear expression in favour of regarding as integral to the treaty instruments such as the Bundestag Resolution, always assuming that these have been agreed upon by the parties. This is of course not necessarily the case with regard to that Resolution. However, while this ruling is clear, it should be remembered that, as Waldock said, it was contrary to the views expressed in the Advisory Opinion on Admission to the United Nations. So the legal position was not clear, though Article 31(2) of the Vienna Convention does follow the Ambatielos Case in including in the context of a treaty for purposes of interpretation agreements related to the treaty and drawn up in connection with its conclusion, and therefore it is clear that the States participating in the

Conference were in favour of the provision. Article 31, on the general rule of interpretation, which had been Draft Article 27, was adopted at the Conference by 91 votes to none.[31]

The States participants were clearly in favour of including Article 31(2) -type instruments in the context of the treaty, but it must be emphasized that, as far as unilateral instruments were concerned, these would have, in a bilateral treaty, to be accepted by the other party before they could have any effect. This was also discussed by the ILC; both with regard to the general concept of the provision and its actual wording. Tunkin (USSR), referring to the provision which became Article 31(2)(b), said he agreed about the relevance of any instrument annexed to the treaty, but wondered what was meant by a "related instrument":

> "A party to a treaty might draw up a document in connection with the conclusion of the treaty. Surely, if such a document was purely unilateral it should not be taken into account in the interpretation of the treaty."[32]

Waldock explained his reference to related instruments. He said that when a treaty was concluded, certain documents were frequently drawn up which, for the purposes of interpretation, were regarded as part of the treaty.[33] The Bundestag Resolution would conform to Waldock's description and therefore form part of the treaty with regard to interpretation, if the provision was applicable between the FRG and Poland, and if Poland accepted the Resolution.

Rosenne (Israel) made much the same point as Tunkin, but drew attention also to the problem of confusion of the domestic and international aspects of treaty making. He said a situation might arise where there could be a unilateral understanding on the meaning of a treaty by the United States Senate that was not always accepted by the other side.

> "A purely unilateral interpretative statement of that kind made in connection with the conclusion of a treaty could not bind the parties."[34]

All of those who commented on instruments related to the treaty emphasized the non-binding character of any unilateral statement not accepted by the other party or parties to the treaty. Waldock gave the best explanation of future Article 31(2). He repeats that the instrument must be made in connection with the conclusion of the treaty and be thus accepted by the other parties to the treaty. Waldock gave the best explanation of future Article 31(2). He repeats that the instrument must be made in connection with the conclusion of the treaty and be thus accepted by the other parties. He then adds:

> "...the fact that these two classes of documents are recognized in para.2 as forming part of the "context" does not mean that they are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case. What is proposed in para.2 is that, for purposes of interpreting the treaty, these categories of documents should not be

> interpreted as mere evidence to which recourse may be had for the purpose of resolving an ambiguity or obscurity, but as part of the context for the purpose of arriving at the ordinary meaning of the terms of the treaty."[35]

Waldock maintains the possibility of separating the related instrument from the treaty itself, while admitting the value of such instruments where agreed upon by all the parties. Nevertheless, the fact that such instruments should not necessarily be considered as integral parts of the treaty indicates that the treaty is still the main element in relations between States, although this may be altered by the different intentions of States involved in a particular treaty.

The conclusion to be drawn with regard to the legal status of instruments related to treaties as envisaged in Article 31(2)(b) of the Vienna Convention, according to the attitudes of States participating in the Vienna Conference, the work of the ILC in this area, and especially the relevant work of Waldock (who had examined the relevant jurisprudence), and the opinion of the Court in the Ambatielos Case, is that though rules of interpretation do exist, their status as rules of general (customary) law is debatable. Once incorporated into a treaty, their binding force for the contracting parties is beyond doubt.[36] Apart from this, and to the extent that any rules of interpretation may have legal validity, one of these rules is that an instrument related to a treaty may be referred to by the parties in order to interpret that treaty, as long as the instrument has been accepted by all of the parties to the treaty. Given the debate in the ILC over the status of all rules of interpretation and the conflicting case law, the "rule" about

related instruments cannot be regarded as having the force of customary international law. This means that, even if Poland is found to have accepted it, the Resolution will not necessarily have the effect which is described in the Vienna Convention, since, even if Poland was a party to it, it does not have retroactive effect.

Neither Poland nor FRG are parties to the Convention, and so at the most it can act as a guide in any attempt to establish the status of the Resolution with regard to the Warsaw Treaty. While a large majority of States participated in the Vienna Conference, most are not yet parties to the Convention.[37] They can therefore be bound by it only to the extent that it represents a codification of customary international law, that is, where States, prior to the adoption of the Convention, had habitually acted or refrained from acting in their international relations in the same way in similar situations because they felt that they were under a legal obligation so to act or refrain from acting, in an area which would be covered by the Vienna Convention.[38] The Preamble of the Convention itself declares that certain principles with regard to the law of treaties are universally recognized, and it is often written that in many respects the convention was declaratory of customary international law,[39] but it is clear from the travaux preparatoires - the work of the ILC and the Reports of Waldock - that the same status was not attributed to the articles on interpretation of treaties. It is not sufficient to say that these articles, and in particular Article 31(2)(b), are bound to govern the treaty relations between States. This provision cannot automatically govern relations between Poland and the Federal Republic of Germany. This particular question is of course separate

from the issue of whether or not Poland did actually accept the Bundestag Resolution for any purpose at all. But it has been necessary, because of the existence of contrary opinions,[40] to analyse the status of the articles on interpretation.

The Resolution is not automatically excluded from the treaty relationship between Poland and FRG, but it is necessary to examine the attitude of Poland in order to see what significance, if any, it attached to the Resolution. If Article 31(2)(b) did apply, and Poland had accepted the Resolution, it would of course have legal effect and the attitude of Poland as a consequence would not have so much importance. As this provision is not applicable, a close examination of Poland's actions with regard to the Resolution is crucial.

Those parts of the Vienna Convention dealing with interpretation were acceptable to most States. They were adopted by unanimous vote,[41] but this does not imply that the States participants regarded these articles as declaratory of customary international law. They could have been voting for development of the rules as prescribed in the convention, so that they would acquire through the treaty binding authority with regard to interpretation of future treaties, an authority which until then had been lacking. This would be in accordance with the evidence as already discussed.

(iii) State Practice with regard to the Bundestag Resolution.

The FRG supposedly adopted the Bundestag Resolution as a measure related to

its bilateral treaties with the Soviet Union and Poland. It could be expected that those two States, being most directly affected, would have been presented with the Resolution as quickly as possible in view of the desire of all three Governments to obtain ratification of the treaties. The Soviet Ambassador to the FRG did participate in some of the negotiations which took place among the main political parties in the FRG prior to final agreement being reached with regard to the text of the Resolution. To that extent, it may be presumed that the Soviet Union was also informed about developments. In fact, the Soviet Union received a copy of the Resolution from the FRG, as did the UK, USA and France,[42] but there is no record of Poland having been notified officially by the FRG about the existence of this document and its relationship to the Warsaw and Moscow Treaties. It seems that the FRG was more concerned, although it was acting fully within its authority, to keep the Four Powers fully informed about its treaty practice, than to keep its treaty partners informed. It has been asserted that the Resolution was presented to Poland, but the writer cited no authority in support of his claim.[43] There do exist, on the other hand, various statements made by representatives of Poland which are relevant to this issue. These were made both prior to and after the adoption of the Resolution. The Polish Foreign Minister, in a speech to the Polish Parliament on 27 April 1972, said:

> "I should like to stress that the treaty constitutes the only acceptable platform for our relations with the German Federal Republic. We are interested in its entry into force, and are prepared to carry out its provisions in good faith. In consistence with Article III of the treaty,

we will take further steps aimed at expanding cooperation and full normalization of relations with the German Federal Republic.

But we shall never agree to take up any negotiations, with anybody, which would aim at weakening or undermining the provisions of this treaty."[44]

The most important part of this extract is the statement that the treaty constitutes the only acceptable platform for Polish-West German relations, a clear warning that any attempt by the FRG to base the relationship of the two States on any other foundation would be rejected. Although Olszowski spoke in very general terms, it is unlikely that he would have known almost one month in advance that a Resolution of the kind adopted would come into existence. Nevertheless, he stated the Polish position and this would have been drawn to the attention of the Federal German Government. The extract should also be considered in the context of the whole speech, which was a summary of the stand of the Polish Government with regard to the Treaty[45] and an estimation by the Foreign Minister of the significance of the Treaty, both for the two States and for the general situation in Europe. The speech was made in view of the impending ratification of the Warsaw and Moscow Treaties and this ratification was considered to be crucial. The history of Polish-German relations - as interpreted by the Polish Government - was briefly summarised, and, regardless of the approach any individual takes to the history of Poland, it is clear that one of the most significant factors has been the status and position of that country's borders. Thus Poland wanted to have secure frontiers, at least nominally. It had already entered into agreements with the USSR and GDR with regard to its

frontiers, and the treaty with the FRG meant the recognition by that State of the Oder-Neisse line as the western frontier of Poland.

A measure of the insecurity felt in Poland with regard to its possession of the territories which it gained, or recovered, in 1945, is the frequency with which the leitmotif of "security" (bezpieczenstwo) recurs in the speech. It is emphasized that Poland demands recognition by the FRG of the Oder-Neisse line - not because of any threat to the security of the frontier - as usual we are informed that these frontiers are sufficiently protected by the might of the USSR and the Socialist community[46] (whether they are sufficiently protected from the might of the USSR the Minister made no comment). Rather, only such recognition by the FRG could, in Poland's view, provide a genuine basis for the normalisation. In this context, mention is also made of the occasions when Poland's borders have been under attack, even when Poland has ceased to exist as a State. It is emphasized that the treaty will contribute also to a more generally secure system in Europe. Yet, had Poland genuinely felt so secure due to the protection of the Soviet Union, it would not have needed to enter into a Treaty with the FRG for the reasons stated, as such recognition by the FRG had no practical effect on Poland's control over the disputed territories. It had possessed at least de facto control since 1945 and there had been no attempt by any of the Western Powers or the FRG to alter this state of affairs , except for regular reiterations of the view that a final decision with regard to Poland's western frontier should be made at a peace settlement involving the participation of one government for a united Germany. There had also been threats against the Oder-Neisse line by Poland's allies. In particular, there was

some pressure for the return to the Germans (i.e. to the GDR) of Szczecin(Stettin). By reaching an agreement with the FRG, Poland also made it more difficult for the USSR to exploit Polish feelings of insecurity, in the event of Poland becoming less dependent upon the USSR, by pointing out the potential danger from the Federal Republic were Poland to loosen its connections with the East. As Poland had its own bilateral treaty with the FRG, it reduced the scope of the USSR for independent discussions with the FRG (since Poland was dependent on the USSR for the security of its frontier, the USSR could always threaten to open negotiations with regard to Germany as a whole with the FRG, GDR or the Western Powers, which could obviously be detrimental to Poland). Although it was not in a position to say as much, it is nevertheless true that by entering into the Warsaw Treaty, Poland reduced the scope for the exertion of such pressures.

The recognition of the Oder-Neisse line was seen as eliminating another possible source of future conflicts and consolidating peace in Europe. But if Poland genuinely felt that the USSR protected its frontiers, it would have had little to fear in the 1970's, from even the most militaristic West German Government. On the other hand, if any State is desirous of altering the frontiers of Poland, and it possesses the military capacity to do so, it is unlikely that Poland's treaties with the USSR, GDR and FRG, the only States with a direct interest in the western and eastern Polish borders, would protect it from them. This does not constitute a denial of the possibility that Poland demanded recognition of the Oder-Neisse line in order to obtain a real basis for normalisation of relations with the FRG. However, contrary to the impression

which Olszowski sought to communicate, the matter of Poland's security with regard to the FRG was a consideration taken into account by the Polish side, though it claimed to enjoy full security through its alliance with the Socialist countries. Indeed, the claim which subsequently appeared in the Bundestag Resolution, that a reunified Germany would not be bound by the treaty, could certainly have been interpreted in Poland as a threat to the security of the State.

Another aspect of this speech is relevant with regard to the Bundestag Resolution. Poland demanded the recognition of the Oder-Neisse line by the FRG in unambiguous terms and this is to be found in Article 1 of the Warsaw Treaty. However, the Resolution of 17th May then purports to attach a specific interpretation to the treaty. If it does not alter in any way the effect of the treaty, why was the Resolution adopted? If it was adopted purely in order to placate the Opposition and obtain ratification of the treaties, then it means that, at least in the FRG, the Resolution was seen as effecting substantive alterations to the treaties - if not, there would have been no reason to adopt it. Why else would it have almost universal support in the Bundestag? The speech by Olszowski emphasized the importance of the treaty as it stood, in particular the provisions of Article I. The consequence of this is that, taking into account the compromises made by both sides with regard to the treaty[47] and the complicated negotiations which were required in order to reach a consensus, there was very little likelihood of the Resolution being acceptable to Poland.

Two days after the Resolution was adopted, further official Polish comment

with regard to the Warsaw Treaty and its ratification was forthcoming. The Politburo issued a communique which reiterated the Polish stance, i.e., that only the text of the treaty itself could be binding on the parties.[48] It was further stated that:

> "The fundamental obligations contained in the treaty between Poland and the FRG conform to the provisions of the Potsdam Agreement, in that they deal with the recognition of the western frontier of Poland on the Oder and Lusatian Neisse as inviolable and final. Only on such a basis was the normalisation of relations between Poland and the FRG possible."[49]

This remark contains two elements: a statement of the Polish evaluation of the effect of the Potsdam Agreement, which is not generally accepted by the Federal Republic and the three Western Powers; and the fact that Poland could only agree to normalisation of relations based upon the Warsaw Treaty. That is, any other instrument purporting to affect the normalisation would not be relevant.

Therefore, there is clear evidence that Poland did not accept the Resolution as having any legal effect on Polish-West German relations. There are repeated statements that in this respect only the Warsaw Treaty itself can be of binding force; if this is the correct position, then any debate as to the legal status of the provisions of the Vienna Convention with regard to the interpretation of treaties is of less significance; if the Resolution is not applicable, then it is not necessary to consider its influence upon the Treaty, since it can have none.

However, any potential effect of the Resolution will be considered, in order to foresee whether Polish-West German relations would be altered substantively in the legal sense. This is of importance because, even if the Resolution is not a valid instrument, i.e. part of the legal relationship between Poland and the FRG, the fact that it is considered in the FRG as an instrument relevant to Polish-West German relations means that that State will act as if the Resolution is valid.

There is one element of doubt in the attitude of the Polish side. While the Treaty is repeatedly regarded as the only valid basis for the relations between the two States, the Bundestag Resolution is not rejected unequivocally. This would have been impossible prior to the adoption of the Resolution; it is not feasible to deny the validity of a specific instrument before it has even come into existence, and therefore the statement by Olszowski of 27 April 1972 is the most that could have been expected in the circumstances. However, the Communique of 19 May, issued only two days subsequent to the adoption of the Resolution, is also silent with regard to it. There is at best only an implicit denial, which is nevertheless a denial. In these circumstances, however, it would have made the issue clear were Poland to have made an unambiguous rejection of the terms of the Resolution, yet such a statement was not immediately forthcoming. However, there are two factors which justify the failure of Poland to reject in unequivocal terms the applicability of the Resolution. First, Poland had not been informed officially of its existence (see p.75), and there was no reason for it to comment on something which, for Poland, possessed no official existence. Second, given that Poland was not officially informed about the adoption of the Resolution, it might have appeared

that Poland was attributing greater value to the instrument than it cared to admit, were it to have issued a condemnation of the actions of the Bundestag and a clear rejection of the Resolution. Thus, Poland was in the position of wishing to emphasize the legal state of relations between itself and the FRG, while avoiding any implication that it accepted the Resolution, which for Poland did not even possess any official existence. In this situation, an emphasis on the relevance of the Warsaw Treaty alone, which simultaneously denied by implication the applicability of any other factor, was perhaps the most effective way for Poland to reiterate its position while reserving its rights. The Bundestag Resolution is mentioned by name in yet another speech by Foreign Minister Olszowski:

> "...no reservation contained in the unilateral Bundestag Resolution - from the point of view of international law and the obligations resulting from the treaty - has any force under international law."[50]

However, even this statement is not an explicit denial of the effect of the Resolution, but rather a denial of any reservations in the Resolution. Olszowski does not mention which parts he considers to be reservations - but he does not describe the Polish attitude with regard to those elements in the Resolution which are not regarded as reservations; but the Resolution is also described as "unilateral" - a clear indication that it was not accepted by Poland, regardless of whether it was even presented to that State, since, if Poland had accepted it, the Resolution would no longer by unilateral in character, but part of the legal relationship between Poland and the FRG, i.e., bilateral.

On the evidence of official Polish statements, the clear conclusion is that in fact Poland did not regard the Resolution as having any legal effect on its relations with the FRG. Nor is there evidence that the Resolution was actually presented to Poland and, if it had been, that Poland accepted it. Poland did not totally reject the Resolution in unequivocal terms, but it would appear that, while such rejection might have been desirable in order to remove all doubts, had such a manner of rejection been employed, Poland may have appeared to be attributing greater significance to the Resolution than it was in fact prepared to concede. The Bundestag Resolution "...expresses the political opinions of leading representatives of West Germany and is a matter internal to that country. It has, of course, no legal standing, either as regards interpretation of legal sources or auxiliary legal sources, without any links with international law."[51] Furthermore, this writer shares the view of Professor Skubiszewski, that "the resolution is neither an authoritative (binding) interpretation of the Bonn-Warsaw Treaty nor does it constitute part of the context for its interpretation. For Poland rejected the idea of an interpretative instrument that would supplement the Treaty and she declared that the Treaty was the only acceptable basis for her relations with the Federal Republic of Germany."[52] The interpretation of the Warsaw Treaty given in the Bundestag Resolution is not the authentic interpretation agreed upon by the two sides; it is the unilateral interpretation of the FRG.[53]

In any case, the actual text of the Resolution will be examined in order to see if it would have any effect on the legal status of Polish-West German relations or

the legal status of the Oder-Neisse line, were it applicable to them; since, if it should be established that the Resolution actually would alter nothing, i.e., that it would have no legal effects, then even the question of Poland's acceptance or rejection would be of less importance. Poland could not formally intimate to the FRG its rejection of the Resolution, since it did not receive it, though it did make its position clear in its statements at the time, as discussed above. For a unilateral document proposed by one party in a bilateral treaty to have effect, it must be accepted by the second party.[54] The Warsaw Treaty is not a boundary treaty, but it does deal with boundaries. One of the main purposes of regulating boundaries in treaties is to establish finality and stability,[55] and if the Warsaw Treaty is read alone, it is clear that the FRG has recognized the Oder-Neisse line as the western frontier of Poland - though it does not stipulate that it is the border between Poland and Germany. The assertion in Paragraph 2 of the Resolution, that the treaties with Poland and the USSR do not create any legal foundation for the existing frontiers, does not add in any way to the finality and stability of the Oder-Neisse line and was one of the most unacceptable aspects of the Resolution for the Polish side.

(iv) The Substantive Provisions of the Bundestag Resolution

Although the Resolution was drawn up in connection with the Warsaw and Moscow Treaties, it would be wrong to assume that its provisions are concerned only with the relationship between FRG, on the one hand, and Poland and the Soviet Union on the other - although the development of these relationships was the cause of the Resolution coming into existence. Rather, it resembles a

general statement of the foreign policy of the Federal Republic with regard to a number of States and it includes general declarations about the membership of the FRG in various international organisations. There are ten paragraphs, and only in the first six is mention made of the treaties with Poland and the USSR. The Resolution should be read in conjunction with the clarification of it issued by the Federal Government on 19th May.[56] This takes the form of specific and separate statements with regard to the preamble and each of the ten paragraphs. The commentary on the preamble is the longest single section, and provides, in part:

> "The joint Resolution...services the object of dispelling any still-existing doubts with regard to the treaties with Moscow and Warsaw; and through this to ensure for these important treaties a wide parliamentary approval. It alters nothing of the rights and duties resulting from the treaties and stands in conformity with the spirit and letter of the treaties."[57]

The Federal Government is admitting that the purpose of the Resolution is to obtain support from parliament. In fact, it failed in this objective, as most members of the CDU/CSU abstained in the ratification vote on the treaties. What actually occurred, was that by adopting the Resolution, widespread disapproval was avoided. So, although the treaties were ratified, the Resolution may be said to have achieved at most one of the two objects which it was intended to have - ratification without the comprehensive support that was envisaged. Nor can it have been sufficient to dispel all doubts, since, if this had occurred the treaties'

wider support would have been reflected in the vote, with a much higher count in favour.

If the Resolution alters nothing of the rights and duties resulting from the Warsaw Treaty, as is asserted, then it is unclear why Poland should have insisted that only the Treaty itself was valid. It is suggested that this position was taken by Poland, not only to maintain its position that it had not even been notified of the Resolution's existence - as Poland did not acknowledge the official validity of the document, it could not do so by implication as this would have weakened its position - but Poland was still aware of the document, and may also have regarded it as altering substantively its treaty with FRG. If the Resolution had really been seen as altering nothing of the treaties, then it might have been simpler for the Federal Government to make it clear that the Resolution was purely for domestic political purposes and to emphasize that only the treaties were relevant in terms of international law. If the Resolution was not considered in the FRG as having any legal effect on the treaties, why was it acceptable to almost all members of the Bundestag? After all, all of the contents of the Resolution, in so far as they were relevant to the treaties, would have been implied in the treaties, and in particular in Article IV of the Warsaw Treaty:

> "The present Treaty shall not affect any bilateral or multi-lateral international agreements previously concluded by either Contracting Party or concerning them."[58]

This means that instruments such as the Potsdam Agreement, to which neither Poland nor FRG was a party, would still apply in their entirety and that either side could maintain its own interpretation of the legal effects resulting from them.

The corresponding provision of the Moscow Treaty, also Article 4 is almost identical, except that there is no mention of treaties or arrangements "concerning" the two States, as opposed to those to which they are parties. This means that the terms of the Warsaw Treaty itself, as far as relations between Poland and West Germany were concerned, did not require further elaboration, unless this was to indicate something not apparent in the Text. For example, Paragraphs 4 and 7 of the Resolution, which deal, first, with relations between the FRG and the Four Powers as defined in the conventions of 1954 and 1955, and second, the membership of FRG in NATO, are both clearly included in the ambit of Article IV. Paragraph 10, on the other hand, is simply a statement of policy with regard to the GDR and has no legal effect on the relationship with Poland.

However, it is possible that the Resolution, had it been accepted by Poland, might have altered the legal effect of the treaty, and this would explain why it was acceptable to the Bundestag. Thus in Paragraph 2, it is stated that the treaties do not create any legal foundation for the frontiers existing today. It is already established that Poland would not have agreed to enter into a treaty on the normalisation of its relations with FRG without the recognition by the latter State of the Oder-Neisse line. To claim that the Warsaw Treaty establishes no legal foundation for the western frontier of Poland is to introduce an element of

doubt into an apparently clear text, because, although that border is not dependent upon the 1970 Treaty for its legality, nevertheless that treaty does have legal effects, including Article I, which deals with the frontier issue. At the very least, the treaty creates the legal foundation for the recognition by the FRG of the Oder-Neisse line. If this appears to be a statement of the obvious, it might also be argued that in Paragraph 2, the FRG is seeking to deny the obvious; despite its assertions to the contrary, the Resolution would cause a change in the legal effect of the Warsaw Treaty. The FRG cannot claim that in recognizing the frontier, no legal consequences occurred for the legal foundation of that frontier, given that the FRG had disputed the validity of that frontier consistently in conjunction with the Western Powers, and arguably had an interest, albeit of a tenuous nature, in territory which had been German and which, if the West German interpretation of the Potsdam Agreement were accepted, could potentially revert to a reunified Germany at a peace settlement. Poland could also have accepted the Resolution, had it regarded that instrument as in no way weakening its position; the fact that Poland considered only the treaty to be valid shows its attitude, although even if Poland had regarded the Resolution as innocuous, it might still have refused to consider it as relevant, taking the view that the will of the parties had already been expressed jointly in the treaty.

Another aspect of the Resolution which would have caused many doubts about the motives of the FRG is the use of the term modus vivendi in Paragraph I. This was discussed earlier (Chapter Two, pp. 33-34). Normalization of relations, if regarded merely as a modus vivendi is not in fact normalization, it

is a temporary change in one aspect of the foreign policy of the FRG. That State does not describe its relations with its western allies as part of a modus vivendi, yet if there were to be alteration in the legal and political status of the two German States, the relationship between the FRG and those States with which in theory it is on the best terms (and in fact with all States) would be affected in the same ways. In Paragraphs 7 and 8, the FRG reaffirms its commitment to two international organisations - NATO and the EEC - yet its membership of these organisations could also be described as part of a modus vivendi for West Germany, though it is not.

However, as far as Poland is concerned, taking into account its insistence on reaching agreement on the Oder-Neisse line as an essential step towards placing mutual relations with the FRG on a treaty basis, Paragraph 2 is the most important. The clarification of this paragraph says that the frontiers may be altered only with the agreement of the other side; it envisages the possibility of peaceful change of frontiers, that is, with the consent of the States involved. Any State may in such circumstances alter its frontiers. The crucial element is that any alteration must be peaceful, rather an unlikely eventuality in central Europe. The Warsaw and Moscow Treaties say that the existing frontiers in Europe are inviolable,[59] although one view is that they exclude even peaceful change of frontiers:

> "The provisions on the inviolability of the frontier and territorial integrity are supplemented by the declaration of the Federal Republic that she has "no territorial claims against anybody nor will assert such

claims in the future" (Treaty with the Soviet Union, Art. 3). Thus no modification of the frontier comes into account by any method, including peaceful change."[60]

But it is possible that States may agree to alter their frontiers without one making any claim against the other, since a claim implies a belief that there exists an entitlement to the thing claimed. Any alteration in frontiers may be regarded as an exchange of territory - and here only land borders are under consideration. Thus, under the Berlin Quadripartite Agreement of 1971, provision was made for minor exchanges of territory between West Berlin and the GDR.[61] One such exchange involved Steinstucken, an enclave of Western occupied territory which was separated by the territory of the GDR from West Berlin proper. This exchange took place without either side making any claims against the other, apart from the usual differences in opinion with regard to the question of Berlin, or West Berlin. Therefore, it is respectfully suggested that it is not entirely accurate to say that all possibility of peaceful change of frontiers is excluded by the Moscow and Warsaw Treaties. Certainly all claims are excluded as far as the FRG is concerned, since it admits that it has none, but it would still be possible, legally for the FRG to be involved in a peaceful change of frontiers, through exchange of territories, though not without at least the consent of the three Western Powers and perhaps also the Soviet Union. In practice, this is unlikely; any "offer" in the context of Polish-German history would be based upon a feeling that there was some entitlement to the territory at stake. Thus, it is theoretically possible for the FRG to be involved in peaceful changes in the frontiers in central Europe.

In view of the conclusion that Paragraph 2 of the Resolution would alter the effect of the Warsaw Treaty with regard to the legal status of the Oder-Neisse line, the statement in the clarification of the Preamble of the Resolution, that it "stands in conformity with the spirit and letter of the treaties", is incorrect. The conclusion is that, had Poland accepted the Resolution, it would by its acceptance have brought about a substantive legal change in the effect of the treaty, meaning that the recognition accorded to the western frontier of Poland by the Federal Republic would have been, at least, highly dubious and certainly not conducive to making Poland feel that it had secure frontiers. The Federal Republic may indeed consider the Resolution to reflect its legal attitude towards the Oder-Neisse line. However, as the Resolution is not applicable in its legal relationship with Poland, it can have effect only in the Federal Republic. At the international level, the only relevant instrument is the Warsaw Treaty, which is perfectly clear in stating that the Oder-Neisse line constitutes the western frontier of Poland. And while there was much debate about the status of rules of interpretation of treaties when the ILC was doing the groundwork for the Vienna Convention, even the most doubting member accepted that there could be no question of interpretation where the sense was clear and there was nothing to interpret - in claris non fit interpretatio.[62]

(v) The Western Frontier of Poland: Actions of the Four Powers.

The Bundestag Resolution is effectively discounted as an instrument having any international legal effect, and is of importance only in assessing attitudes in the FRG at the time of ratification.

The Warsaw Treaty established for Poland the final recognition of its frontiers which it had sought since 1945, and Poland clearly saw this recognition as a contribution not only to its own security but as an influence upon the general situation in Europe. This was pointed out by the Foreign Minister one month prior to ratification:

> "The Treaty has been recognized as an important step towards the consolidation of European peace and security and as an augury of normalisation of relations between the German Federal Republic and Poland."[63]

The formal links between the Moscow and Warsaw Treaties, the Quadripartite Agreement on Berlin and CSCE were discussed above (Chapter Two, pp. 24-28). CSCE was of special importance to the Eastern-bloc States because they saw it as a means of obtaining Western recognition of the principle of inviolability of frontiers, an essential element for peace and security as they are seen in the socialist States. This is evident from the declaration of the head of the Polish delegation at the negotiations of 1974 which preceded the Helsinki Final Act:

> "...the prime importance we attach to this principle (of inviolability of frontiers) results not only from Polish reasons. Poland's frontiers today are finally fixed and universally recognized. The problem of our frontiers has been resolved once and for all. We attach so much importance to this principle out of a concern for Europe's security

and its peaceful development, out of our concern for each European state and nation."[64]

This belief that Poland's frontiers were universally recognized and finally fixed is relevant to the Bundestag Resolution, since if Poland had actually accepted it, it could not claim that its frontiers were finally fixed. In fact, there is some doubt as to the extent of the recognition which the Oder-Neisse line has received among interested States, i.e., USSR, GDR, FRG, UK, USA and France. The original intention had of course been that the Four Powers would not recognize the frontiers of Germany, but that they would themselves determine them,[65] and in the Potsdam Agreement the western frontier of Poland, and hence the eastern frontier of Germany, was to be delimitated or determined finally at the peace settlement.

The Soviet Union, in a draft peace treaty with Germany, regarded the Oder-Neisse line as the western frontier of Poland.[66] The GDR recognized the Oder-Neisse line in 1950.[67] These two States have consistently maintained that the present German-Polish border is valid. It has already been established that the FRG recognizes the border, though it has indicated in a Note Verbale to the UK, that it considered that the rights and responsibilities of the Four Powers with regard to Germany as a whole, and this includes the borders of Germany, were unaffected, a statement agreed upon by the UK.[68] It was also stated that the treaty enjoyed the full support of the British Government, that its provisions were welcomed, and particular mention was given in this context to the western frontier of Poland.[69] But careful attention should be paid to these

statements. The British Government did not say that it approved of the Oder-Neisse line as the western frontier of Poland. It merely gave its approval to such recognition by the Federal Republic. Therefore, it cannot be said that in these statements following the initialling of the Warsaw Treaty the UK expressed its own approval of the Oder-Neisse line.

Winston Churchill, no longer Prime Minister, but having been deeply involved in the Polish question, gave a summary of what he saw as having been the attitude of the British Government towards the question of Poland's borders, prior to the Potsdam Agreement:

> "...the provisional western frontier agreed upon for Poland... is not a good augury for the future map of Europe. We always had in the coalition Government a desire that Poland should receive ample compensation in the West for the territory ceded to Russia East of the Curzon Line. But here I think a mistake has been made, in which the Provisional Government of Poland have been an ardent partner, by going far beyond what necessity or equity required..."[70]

The statement shows that the UK did not favour Poland being allowed to administer territory as far as the Western Neisse, which is the present position. The UK had felt that it would be enough to allow accessions in Poland's favour only as far as the Eastern Neisse river. Poland in fact received less territory from Germany than it lost to the USSR, so it is not clear what kind of equity Churchill had in mind. It is true that large areas of the territory lost to the

USSR were of poorer quality in agricultural terms than those parts of Pomerania which fell under Polish administration, while the mineral reserves of Silesia also went to Poland (though part of Silesia had been Polish prior to 1939), but such considerations are unlikely to have been of much significance for those evicted from their homes and lands by the Soviets. Poland also lost two of its greatest cities, Lwow and Wilno (now Lvov and Vilnius). Although the population of the lands around those cities was more Ukrainian and Lithuanian, in the cities themselves, the majority of the population was Polish. If Churchill was genuinely interested in necessity and equity, he might not have agreed so readily that the USSR should extend its territory as far as the Curzon Line. It is quite possible that the USSR would have taken what it wanted without the blessing of the British, but it was not necessary for the UK to be so cooperative in extending its hegemony. The British attitude towards Poland and the Polish Government in exile, which was the lawful Government of Poland at least until 1944, was generally less sympathetic than that of France and the USA. Of course, for most of the war the Polish Government was exiled in London and therefore the British were more closely involved with it than any other of the allies, particularly with regard to negotiations between the Soviets and the Polish Government in the last two years of the war, when the USSR insisted more and more strongly that it would extend its border westwards, while the Polish Government demanded that Poland should retain all of its territory, and the British had to try to achieve a consensus, which in the end meant the Polish side being forced to agree to virtually all of the Soviet Union's demands with regard to their common border and the composition of the future Polish Government, as a result of the decisions taken at the Yalta Conference.[71]

France and the USA received Notes identical to that communicated to the UK by FRG, and both States expressed their approval. However, all three Western Powers had stated in the Deutschlandvertrag,[72] the treaty which ended the occupation regime in the Federal Republic, that the final determination of Germany's borders must still await a peace settlement. This view was reiterated by the UK in the Exchange of Notes with the FRG following the initialling of the Warsaw Treaty. This same position is consistently taken by the Western Powers. One Nato Communique said:

> "Ministers noted the clarifications made in the context of the Treaties, and reflected in the Exchanges of Notes between the FRG and the Three Powers, to the effect that quadripartite rights and responsibilities for Berlin and Germany as a whole remain unaffected pending a peace settlement..."[73]

While the same wording is not always used, nevertheless the same idea is conveyed on every appropriate occasion, in order that there may be no ambiguity about the attitude adopted, such as the following comment on the Eastern Treaties:

> "...the existing Treaties and Agreements to which the FRG is a party and the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole remain unaffected."[74]

The acceptance by FRG of the territorial status quo in Article I of the Warsaw

Treaty was approved by all Four Powers bearing responsibility for Germany as a whole, including the ultimate determination or delimitation of its frontiers. However, this does not mean that the three Western Powers did themselves agree to the Oder-Neisse line, and these States have consistently maintained that their rights and responsibilities remain unaffected. The Soviet Union also claims that its position with regard to Germany as a whole has not changed. This can be explained by the different interpretations of the existing treaties and agreements. Thus each side is actually stating that its position, as it evaluates it, is unaltered, and in this way it is possible for the Four Powers to make joint statements with regard to Germany, so long as these are kept at a general level.

It is not realistic to state that the three Western Powers committed themselves to giving their approval to the Oder-Neisse line at a future peace treaty by virtue of their having approved the 1970 Treaties. Nor does this mean that they would be opposed to it. Certainly the approval accorded the Moscow and Warsaw Treaties, while not bringing any further commitment on the Four Powers (the USSR of course incurred rights and obligations as a result of the Moscow Treaty, but this is separate from the treaties involving the Western Powers, and the USSR did not enter into this treaty in its capacity as an Occupying Power), shows that their attitudes had been modified somewhat. It is likely that the Western Powers, acknowledging that the relevant terrtitories are firmly established as Polish (in the practical, as opposed to the legal sense), do now favour the Oder-Neisse line, but they are prevented by the terms of the Potsdam Agreement from making prior legal commitments to this end. As long ago as 1959, the UK

may have taken a more sympathetic position, when it said that "the final delimitation of the frontier between Germany and Poland cannot be formalised until there is a peace settlement."[75] The use of the term "delimitation" as opposed to "determination" is probably of no significance. Although delimitation may mean the final implementation of something already decided, for example the Oder-Neisse frontier, while determination may be broader, such as the general decision as to where a border should be, the two terms were used interchangeably in the Potsdam Agreement at least in so far as it is concerned with Poland's western frontier, and in the absence of explanatory circumstances, it cannot be assumed that a different meaning was intended. However, as has been suggested,[76] the term "formalisation" could mean that a final approval would be given at the peace settlement to a pre-existing situation, and this may have been the intention of the UK in 1959. But all such declarations must be taken in light of the constant reiteration of the view that the rights and responsibilities of the Four Powers with regard to Berlin and Germany as a whole remain unaffected, which means that the significance of the 1959 statement is at best limited. The effect of the repeated insistence on the maintenance of rights based upon the unconditional surrender of Germany and the assumption by the Four Powers of supreme authority with regard to that State, is that any treaties and agreements relating to Germany, insofar as these deal with matters in connection with which the Powers have retained competence, have to be read in light of that authority and the instruments in which that authority is contained and exercised, including the Potsdam Agreement.

The alternative is that the rights and responsibilities contained in that instrument should be considered in the light of future developments, such as the Warsaw and Moscow Treaties and the positions adopted by the Western Powers with regard to these treaties. The Moscow and Warsaw Treaties, after they came into force, did affect the legal position, in particular by binding the FRG to acceptance of the Oder-Neisse line as the western State frontier of Poland. The three Western Powers gave their approval to this new situation, and any assessment of the position of these States with regard to the Oder-Neisse line would have to take account of the fact that they were prepared to approve the acceptance by West Germany of this frontier, while maintaining their own rights and responsibilities. It may justifiably be asked why they were prepared to approve such an obligation for the Federal Republic, yet perhaps to deny it for themselves, considering that the Ostpolitik of the FRG was so closely related to their own role in Germany.

The express reservation of their own capacity with regard to Germany indicates a willingness to accept the bilateral regulation of particular issues while insisting that such regulation, formally, remains to be considered in light of a peace settlement. The Western Powers have kept open the possibility of territorial changes at a future settlement; in practice, it is difficult to anticipate any adjustment of the present territorial disposition, and the Allies would be exercising their rights and obligations in light of post-war developments. Nevertheless, the rights which they retain are real; this means that, along with the USSR, they may decide upon the course of the Polish-German frontier. The significance of their approval of the Warsaw Treaty is that it makes any real

change in the frontier in future all the less likely, but does not limit the legal right to demand such change. The view of this writer is, therefore, that the first approach is the correct one, i.e., primary importance should be attached to the Potsdam Agreement; the reason for this is the constant insistence that the rights and responsibilities contained therein are unaffected. It is relevant that such statements are also made at crucial times, e.g. when the Warsaw Treaty was initialled and ratified. On the other hand, it is argued that the Powers modified their future role and also that of the peace settlement, by giving their consent to the shifting of territorial arrangements onto the bilateral plane, as a manifestation of their competence.[77] But if this is accepted, the practical result is that, as Skubiszewski suggests, the Powers would still be able to make the final determination of Poland's western frontier at the peace settlement,[78] but as this determination would amount to no more than a "rubber stamp" approval of the existing situation, there would be no real determination as such, and it would be clear that in fact the rights and responsibilities of the Powers had been affected, contrary to their repeated statements otherwise, in which case, the determination of the western frontier of Poland, at least as the Western Powers see it, would not be that process which was envisaged at Potsdam. Of course, this solution would probably be acceptable to the USSR, not because it considers that the Warsaw and Moscow Treaties restrict the competences of the Powers, but because it has maintained since 1946 that the western frontier of Poland was actually established at Potsdam and that all that remained for the Powers to do at the peace settlement was to give it their approval.

All three western Powers approved of the treaties concluded by the FRG with

Poland and the Soviet Union, including the recognition by the FRG of the Oder-Neisse line. The USSR also favours it. But is this enough to have a substantive effect on any of the rights and obligations contained in the Potsdam Agreement, and in particular that part dealing with the Polish-German border? Indeed, do the Four Powers have any legal authority to take any action or make any statement which would restrict their freedom of action at a peace settlement? The approval, such as it was, that was given to the treaties was in each case a unilateral act of the State concerned. The Western Powers may have agreed upon a common attitude towards these treaties, in their capacity as States having responsibility for Germany as a whole, but without the cooperation of the Soviet Union, their scope for action is very limited. The Potsdam Agreement involved only UK, USA, and USSR, but France was accepted before the Conference as an equal partner in the occupation and control of Germany, and it accepted most decisions already taken with regard to Germany; in matters relating to Berlin and Germany as a whole, and the external borders of a unified Germany would come within the ambit of this authority, the Four Powers exercise their control jointly. Unilateral action in this field is not permitted and has met with protests when it appeared to be taking place. Thus in 1955, after the USSR and GDR concluded a treaty concerning their mutual relations,[79] and a letter had been sent to the USSR by the GDR with regard to certain agreements as to the control and guarding of lines of communication between FRG and West Berlin,[80] there quickly followed a joint statement[81] by the UK, USA and France. This was because the GDR had stated in the letter that the Soviet troops in the GDR were stationed there temporarily and would, it was implied, be removed pending the conclusion of an appropriate agreement,[82] whence the control of

troops and materials for their garrisons from the UK, USA and France would presumably, be controlled by the GDR. The statement of the Western Powers made their views known with regard to these agreements between the GDR and USSR:

> "They wish.... to emphasize that these agreements cannot affect the obligations or responsibilities of the Soviet Union under agreements and arrangements between the three Powers and the Soviet Union on the subject of Germany and Berlin. The Soviet Union remains responsible for the carrying out of these obligations."

It was being made clear to the USSR that, in the view of the other Powers, it had no authority to make unilateral alterations in its relationship to Germany or any part thereof, in so far as it was dealing with Berlin or Germany as a whole.

The approval by the Western Powers of the 1970 Treaties must be seen from this perspective. They had no authority to make declarations with regard to the Oder-Neisse line, where such declarations would alter their commitments with the Soviet Union under the various treaties and agreements. The view of the Western Powers has been that the western frontier of Poland may be settled finally at the peace settlement, and therefore their declarations, made independently of the Soviet Union, must be seen in this context. These declarations cannot constitute any substantive alteration in the commitments made with regard to Germany. The fact that, if these declarations could make alterations to the situation, it would be to strengthen the chances of final

agreement being reached on the validity of the Oder-Neisse line, which also, is favoured by the USSR, is not relevant, as that State took no part in the statements made by the UK, USA and France. For the statements of approval of the Warsaw Treaty to be regarded as committing these States to the Oder-Neisse line, there would have to be a breach of the Potsdam Agreement and the idea of joint Four Power control of Germany as the Western Powers see it, because in their interpretation of that Agreement, which they have maintained consistently, the final decision with regard to the border must await the reunification of Germany. This is not to say that the Powers would demand a revision of existing frontiers at any such settlement. The development of the concept of inviolability of frontiers, which appears in each of the treaties concluded by the FRG with USSR, Poland, GDR and Czechoslovakia, as well as in the Helsinki Final Act, and to which each of the concerned States has committed itself, and the general prohibition on the threat or use of force as a means of settling disputes contained in the Charter of the United Nations, means that the Oder-Neisse line is more secure now than ever. It is unlikely that Poland would agree to any alteration of its borders which would result in the loss to Germany of part or all of the territories which it had administered since 1945. Of course, the USA, UK and France, while agreeing to the concept of inviolability of frontiers at CSCE, maintained their existing rights and obligations.

The most that can be said is that one or more of the Four Powers may bind itself or themselves to follow a particular course in the future - that is, it/they will, in agreeing upon joint action, be bound by earlier commitments. This is what is claimed, in effect, by some writers, for the three Western Powers as a

result of their approval of the signature by the FRG of the Warsaw Treaty. One does not have to look far to see the difficulties in such a situation: where one State undertakes to follow a particular course and a second State adopts a course legally inconsistent with the first, there would appear to be little scope remaining for joint action.

The maintenance of existing joint rights and duties appears to require a construction that obligations or commitments accepted by fewer than all Four Powers together must, where inconsistent with the joint capacity, be deemed to be subject to that capacity. However, where all of the Four Powers have undertaken, but not jointly, the same commitments with regard to the future exercise of their joint capacity in Germany, a situation may be foreseen where they could, indeed, find themselves bound not to adopt measures contrary to such commitments.

Thus, if each of the Four Powers undertook not to demand any alteration of the present western frontier of Poland, this could bind them when acting jointly, since each would be obliged to support such a course vis-a-vis the others. For separate undertakings by the Four Powers to affect their joint rights and duties, it would have to be made clear by each State that it intended its joint rights and duties to be affected. This would require acceptance by each of the other Four Powers.

If, on the other hand, the Four Powers were to agree jointly, in advance of a peace settlement, to support the Oder-Neisse line, this would surely bind them

when the time came to effect the final and formal delimitation of the frontier.

While they have successfully retained their privileges assumed after the defeat of Germany in 1945, it is expected that the Western Powers would be inclined to approve the Oder-Neisse line at a peace settlement. The reasons for this are practical as well as legal.[83] There is now an established Polish-German border. It was decided at Yalta that Poland should receive an unspecified amount of territory in the west at the expense of Germany. If it were desired to make any changes in this frontier, a new border would have to be agreed upon, which would mean Poland either receiving more German territory or else losing some of what it now possesses to the united German State. There is no reason to assume that any alteration of the frontier would necessarily be to the detriment of Poland. The best evidence for considering this is the statements of the Powers. During the immediate post-war years, there was strong opposition to the Oder-Neisse line as the border[84](by UK and USA), but these attitudes have been modified somewhat, although the French were from the beginning more sympathetic.[85]

The most significant practical reason for maintaining the present external German frontiers is that to attempt any alteration now would require massive movements of population. This proposition takes for granted that whichever State lost territory as a result of changes in frontiers would be expected to absorb its own citizens living in those territories. In this context, the following statement by Bevin, the British Foreign Secretary, is of interest:

> "The question of where the final delimitation of the frontier will rest will depend to a large extent on what the population is that returns to to Poland...There had been agreement, at least by inference, that the Poles should go up to the Oder and the Eastern Neisse. The population of the territories to the west of this latter river, even on a pre-war basis, amounted to a little over 3,000,000, most of whom were said to be already gone... On the other side, as I understand it, there are 4,000,000 Poles in the territory that has been ceded to Russia. Will they return to Poland, or will they remain in Russia?... it depends on what happens."[86]

What happened was that most of the Germans in those territories left for Germany proper, i.e., that part which was divided into four zones of occupation. Some did remain but many of these left during the 1970's as a result of the improvement in relations with Poland. Most of the Poles in that part of Poland which in 1945 fell under Soviet sovereignty left for Poland and, naturally, those places where they could be absorbed most easily were that part of East Prussia and German Eastern territories which had fallen under Polish administration. The only practical way to avoid massive upheaval is to approve the existing frontier between Germany and Poland. It must also be taken into account that many of the Poles living in these territories have been born there and consider these places as their homes, while those Germans who had been born there are now of the older generation. In other words, by mere passage of time, a situation will be arrived at in which there will be no Germans alive who had been born in these areas. Those who have been born there may also consider that they have a right to regard it as their home and to live there.

The Potsdam Agreement also provided for the orderly transfers of German populations to Germany from Poland, Czechoslovakia and Hungary.[87] There is one problem here; what was meant by Poland? There are three possibilities: Poland as it existed immediately prior to World War II; Poland as it existed after part of its territory had been lost to the Soviet Union, but without those territories which, prior to 1937, had been part of Germany; and Poland within its present frontiers. It is suggested that the third possibility is the correct one; although the Potsdam Agreement did not stipulate that the territories placed under Polish administration would definitely become permanent Polish territory, nevertheless it was certain that at least part of that territory, perhaps as far as the Oder and Eastern Neisse, would become Polish, and the whole of the territory could become so. This was decided at Yalta and endorsed at Potsdam. It can be assumed that the UK, USA and USSR, when they spoke about Poland, agreed that at least part of that Poland would include former German territory - this had already been decided. Therefore, it is most likely that the Poland referred to in Paragraph XII of the Potsdam Protocol is that Poland which includes former German territories. This is certain, if we consider the number of Germans agreed by the Allied Control Council in Berlin in the Resolution of 20 November 1945, who were intended for resettlement to the British and Soviet zones (approximately three and a half million), while in pre-war Poland, there were about 741,000 (census of 1931).

(vi) The Western Frontier of Poland: Actions of the FRG and the GDR

In the Zgorzelec Treaty of 1950,[88] the GDR recognized the Oder-Neisse line as the State frontier between Germany and Poland, while the FRG, in the Warsaw Treaty,[89] accepted it as the western State frontier of Poland, but this treaty makes no mention of any frontier between Germany and Poland. According to the FRG, it could not treat this border as the border between Germany and Poland, because it was not entitled to speak for Germany. As a result of these treaties, neither of the two German states may demand any alteration in the frontier, because having recognized it, the only course open to them would be to propose a change by peaceful means, to which Poland would be free either to agree or to disagree.

This recognition by FRG and GDR is separate from, but not unrelated to, the question of whether a united Germany would be obliged to give its consent to the frontier, though again there are limits to the power of negotiation of a united Germany at the peace settlement. The Potsdam Agreement stipulates that the Council of Foreign Ministers "shall be utilised for the preparation of a peace settlement for Germany to be accepted by the Government of Germany when a Government adequate for the purpose is established."[90] From this wording, it seems that the German Government's role would be to accept the decisions arrived at by the Four Powers. This does not mean that Germany would have no voice,[91] it simply means that the Four Powers would not have to listen.

At present, the chances for the establishment of a united German State and government are so remote that the attitudes, as expressed in legal form, of the

two German States towards the Oder-Neisse line are of great importance for the actual issue today, and many writers have pointed out that, as long as a peace settlement is pending, neither German State could question Poland's frontiers.[92] However, this begs the question of the attitude of any united German state with its own government. The Four Powers would not be obliged to act according to the wishes of Germany at a peace settlement. On the other hand, were Germany to support or advocate the adoption of the Oder-Neisse line as the German-Polish frontier, which presumably would have the support of Poland, it is difficult to foresee a situation in which the Four Powers would then oppose it. It is even possible that a unified Germany would be obliged to give its consent to the Oder-Neisse line, as a result of the actions of the GDR and FRG. It certainly would not have to oppose the existing border.

With regard to German acceptance of the Oder-Neisse line, as opposed to acceptance by GDR and FRG, it is relevant to consider the extent to which either of these two States is identical with Germany. Being identical, presumably their rights and obligations would apply also to Germany.

In 1949, both the GDR and FRG claimed to be the sole representatives of the German people. The first constitution of the GDR referred to "Germany" and "one German citizenship."[93] This was never accepted by the Western Powers, which objected both jointly[94] and individually[95]. However, the FRG was also making dubious claims. It too asserted that only it was entitled to speak for all Germans. This had the political support of all three Western Powers which at one point regarded the Federal Government as the only one entitled to speak for

Germany in international affairs.[96]

Despite the claims of both German States that they were the true Germany, neither in fact could claim to represent the German people in the sense that, prior to World War II, this function was carried out by one German government. The FRG gave up this approach as its Ostpolitik developed in the late 1960's.[97] By 1969, the GDR was already accepted, albeit for certain limited purposes only, as a State in its own right.[98] Having accepted that two German States actually did exist, the FRG could not represent all of the German people. In the Treaty on the Basis of Relations between the FRG and the GDR of 21 December 1972 the two States together renounced all claims to represent one another:

> "The FRG and GDR proceed on the assumption that neither of the two States can represent the other internationally or act in its name."[99]

The extent of the jurisdiction of each State was described by the Treaty, each State proceeding on the principle that its jurisdiction is confined to its own territory, and undertaking to respect the other's independence and autonomy in internal and external affairs.[100]

The Federal Republic has claimed to be identical with the German Reich, particularly during the earlier period of its existence.[101] Had it maintained that claim, then any rights and duties of the FRG would also be rights and duties of an all-German State. Thus recognition of the Oder-Neisse line by the FRG would

be recognition by Germany. But the FRG made it clear in the negotiations with Poland with regard to the Warsaw Treaty, that it was acting only in its own name. This must be interpreted as an admission by the FRG that it no longer considered itself identical with Germany - a crucial shift in policy. If there is real identity of States, that condition or status cannot, as a matter of convenience, be cast aside, depending upon the circumstances.

This renunciation is also not without its own consequences. It has rightly been said that, if the Federal Republic is not competent to speak for an all-German State, it will also be without authority to reserve the freedom of action of that State in the event of its being able to act.[102] The Federal Republic gave up any outstanding claims to represent the Germans of the GDR, in their capacity as citizens of the GDR, when the Grundvertrag entered into force.

It may be that "Germany" still exists, but without any present form. In the event of it assuming tangible form once again, if it is not identical with either of the two present-existing German States, it will be a successor State, in which case all of the treaties concluded by either German State would have to be considered in order to ascertain whether, according to the law of State succession, they would pass on to Germany; or else it will be a continuity of the old State, but within different boundaries.

The attitude of the FRG towards the Oder-Neisse line, as expressed through its actions, has been discussed in the context of the Bundestag Resolution. Clearly, recognition of the Oder-Neisse line was a trauma for the West Germans.

Perhaps this was in contrast to the recognition by the GDR, which may have been a policy imposed upon that State.[103] In one sense, this would be easier to accept for the East Germans, because genuine consent or agreement was absent, whereas the process which took place in FRG was a genuine attempt to come to terms with the Polish-German border as it existed. There was opposition in East Germany to the Oder-Neisse line, but this was muted. While the ratification process of the Warsaw Treaty may have revealed much opposition, this only emphasises that the actual recognition, as confirmed by the ratification, was bsed upon genuine, if not unanimous, consent.

While the Zgorzelec Treaty is fulsome in its description of affairs ("....recognizing the fixed and existing frontier as the inviolable frontier of peace and friendship which does not divide, but unites the two nations...."), the Warsaw Treaty by contrast is muted and rhetoric-free. The Preamble contains a brief mention of World War II, then in measured terms outlines the aims of the two States. At no point does the FRG claim to represent the whole of Germany, or the GDR - the first line of the Preamble expressly refers to the Polish People's Republic and the Federal Republic of Germany. The Zgorzelec Treaty, however, refers to the German "nation" - though the GDR alone was a partner in this agreement with Poland, nevertheless it claims to act on behalf of the German nation (whatever that is, it certainly implies something greater than the GDR).[104]

The GDR has subsequently ceased to claim that it represents any part of Germany, apart from that part of Germany which is within the borders of the

GDR, and it no longer claims to speak for Germans unless they are East German citizens according to the GDR law on citizenship. There is one anomaly (depending on the position one adopts) in this case. This is with regard to Berlin, and in particular, East Berlin. According to conventional western opinion (at least in the public statements of USA, UK and France), Berlin remains under occupation by the Four Powers and has a status different from that of the other parts of Germany. If one accepts this view, then the GDR claim that East Berlin, and the citizens of East Berlin, are within its jurisdiction de jure, as opposed to de facto (a state of affairs which cannot seriously be disputed), is legally incorrect. Thus when the GDR claims to represent only itself as a separate State, it is including within that claim East Berlin and its inhabitants, although the Soviet zone of occupation in Germany, in which the GDR was founded, did not of course include Berlin. Therefore even now, according to the Western allied Powers, the GDR exceeds its legitimate authority and sovereignty. This has not prevented these countries from acknowledging de facto that East Berlin is the capital of the GDR.[105] Effectively, East Berlin is part of the GDR, even though there remains evidence of the city's status as an area occupied by the Four Powers.[106] West Berlin is very closely associated with the Federal Republic, but it is always clear that it is a separate legal entity from that State. This separation has been emphasised by all Four Powers, and any connections between the two are links which exist despite the fact that they do not possess the same legal status.[107]

The Warsaw Treaty in its scope differs greatly from the Zgorzelec Treaty. Whereas the latter is concerned specifically with the Polish-German frontier,

that issue is only one of many which are regulated by the former instrument. The treaty with the FRG contains the statement that it does not affect any international agreements concluded by the two parties or concerning them (Article IV). The GDR treaty contains no such statement. This can be taken as a reflection of the differing attitudes of the two German states. Through Article IV, the FRG could maintain that its previous legal viewpoints had not changed - thus preempting any attempt to establish that the FRG had altered its position with regard to, inter alia, the statement in the Potsdam Agreement that the final delimitation of the Polish-German frontier should await the peace settlement. The absence of any disagreement between Poland and the GDR as to the conclusions reached at Potsdam and their effect meant that the parties did not require any expression of maintenance of existing legal positions. The Preamble makes clear their consensus as to what had occurred at Potsdam a matter beyond question:

> "...desiring to stabilise and consolidate mutual relations on the basis of the Potsdam Agreement which established the frontier on the Oder and the Lusatian Neisse ...."[108]

Officially at least, this reapprochement between the two States took place partly as a consequence of the Potsdam Agreement, while the improvement in relations between Poland and the FRG occurred in spite of the Potsdam Agreement.

The effort which was required on the part of the FRG and its citizens to be

able to accept the Oder-Neisse line as the western State frontier of Poland should not be underestimated. It was not simply the case that only the Eastern Germans in the Federal Republic and sympathisers in the CDU/CSU maintained hopes of the Polish-German border being adjusted to the detriment of Poland. Even Willy Brandt, in the immediate post-war years, had maintained such hopes, but was prepared by 1970 to acknowledge in treaty form a reality with which he and his compatriots had had to come to terms.[109] Nor on the other hand should it be imagined that for the Poles the normalization of relations with West Germany was an easy process. When Chancellor Brandt arrived in Warsaw for the signing of the Warsaw Treaty the national attitude was more ambivalent than would be reflected by an apparently unanimous approval of the normalization of relations. Brandt himself has alluded to this in his memoirs.[110]

The legal position since 1972 is that both German States have recognized the Oder-Neisse line. The questions remain: is there a State of Germany and is the border between that State and Poland constituted by the Oder-Neisse line? If there is no such State, would a new German State be bound to accept the present Polish-GDR border? These issues are not specifically answered by either the Warsaw Treaty or the Zgorzelec Agreement. As long as the two German States continue to exist there can be no question that they have accepted the new borders, and are bound not to question them.

In such a situation, the Polish western frontier enjoys greater legal and political stability than at any time since 1945, but there remains the possibility that a united German State would not be bound to recognize it, unless it can be

shown that the existing treaties and agreements also apply to it. West Germany, prior to signature and ratification of the Warsaw Treaty, insisted that it cvould not by that treaty bind a future unified Germany not to question its provisions. The GDR in 1950 claimed to represent the whole of Germany.[111] This meant that it considered itself to be acting on behalf of the whole of Germany, but definitely excluding those territories newly-administered by Poland, since the treaty was designed to show where Germany and Poland met. Since the treaty stipulated that they met at the Oder-Neisse line, it cannot then be asserted that Germany includes territories to the east of that frontier. While the GDR later modified this position to the extent that it regarded itself and FRG as successor States to Germany, it nevertheless began by regarding itself as entitled to represent the whole of Germany in 1950. This is important in assessing the actions and attitudes of the GDR as it shows that both German States were prepared to be treated as "Germany", and not for what they really were. This attitude of the GDR has been described as having political rather than legal significance:

> "...in the early stage of its existence that State (the GDR) considered itself authorized to represent the entire German nation in the sense of representing the political interests of Germany taken as a whole. In this period, emphasis was laid on the Republic's political representation of the entire German nation, divided as it was into four occupation zones. The interpretation given in those early years of the German Democratic Republic to the legal problems of succession after the former German Reich was such that the East German Government was

not responsible for these obligations of the Reich which had been assumed against the interests of the German nation."[112]

According to the writer, the GDR considered that it could represent all of Germany for certain political purposes while disclaiming, where this proved convenient, any legal responsibility for the actions of the Reich. In other words, it was proposing that, should the Second World War be deemed to have been contrary to the interests of the German nation, the GDR would not be responsible for any obligations of the Reich resulting from it. This might include the reparations provisions in the Potsdam Agreement:

"1. Reparations claims of the USSR shall be met by removals from the zone of Germany occupied by theUSSR, and from appropriate German external assets."[113]

Reparations were still being taken by the USSR from the Soviet zone of occupation when the GDR was established in 1949. The cost to the GDR was such that it could be regarded as an obligation assumed against the interests of the German nation (regardless of whether or not they were justified). However, the GDR continued the payment of reparations in accordance with the decision at Potsdam. It had no control over this, other than unilaterally to declare an end to payments, but the interests of the German people were definitely adversely affected by the obligation to make reparations which was imposed upon Germany. This is the first inconsistency in the attitude of the GDR - it would, despite everything, observe certain obligations. The second inconsistency is

more important; that is, the general view that, where it chose, the GDR regarded itself as representing the whole of Germany. It is not defensible to assert that one is not liable for certain consequences of being the representative of the German people, while claiming the right to represent them. If they are genuinely represented, then this would include the disadvantageous aspects as well as the advantageous. The same writer observes critically that the German Lander wanted to act in certain respects as successors to the Reich, while denying any burdens which went with such benefit:

> "...individual German Lander were in fact ready at the time to act as successors to the former Reich to the extent to which this was of benefit to them, whereas they were in no hurry to act so in the matter of discharging the Reich's obligations. Whenever it was a question of assuming any burdens consequent on succession after the former German Reich, the German Lander showed themselves to be highly reluctant."[114]

There is no substantive difference between the attitude of the Lander and that of the GDR, and even if this comment on the Lander is justified, it does not characterise their behaviour as being any worse than that of the GDR. In order for the GDR to make a credible claim to represent the whole of Germany, it would have to be prepared in that context to accept the legal responsibility too. In such a situation, the terminology may be such as to give the impression that the GDR denies such responsibility. However, if the actual meaning of what is being claimed is that the GDR represented the whole of Germany, then there are

certain legal consequences which flow from such representation and any denial of liability ought to be regarded in that context.

As far as the GDR and Poland were concerned, the 1950 treaty between the two States settled the issue of the frontier in specific terms, the general decision having been taken at the Potsdam Conference. Thus the statement that the final determination of the western frontier of Poland would take place at the peace settlement, really meant a detailed delimitation of what had been decided, without any substantial alteration. The 1950 treaty was seen as a formal recognition by the GDR of a pre-existing frontier. One month prior to the signing of the treaty, the two States had issued a communique in which they made it clear that the proposed treaty would not, in their joint view, create any new frontier, since it was to make provision for "the demarcation of the established and existing frontier along the Oder-Neisse."[115] All of these factors leave no doubt that the GDR, at a very early stage of its existence, accepted that large areas of pre-war German territory, which had at one time been part of the proposed Soviet Zone of occupation, were to become part of Poland with no prospect for them to be returned to Germany.

Footnotes

1. Bundestag Resolution.
   Bulletin des Presse und Informationsamtes der Bundesregierung
   Nr. 72, 18 May 1972 (German version, authentic).
   CMND 6201, Doc. No. 150, p. 256, at p. 257 (English translation)

2. Bulletin des Presse und Informationsamtes der Bundesregierung
   Nr. 74, 20 May, 1972.
   Zbior Dokumentow 1972, No. 109, p. 858.

3. Keesings Archives, 1972. 25349-25353.

4. Draft Resolution agreed upon on 9 May at a meeting of Brandt, Scheel, Barzel and Stucklen - the latter two representing the CDU/CSU; plus the Soviet Ambassador to to the FRG. Final details of the Joint Resolution were agreed upon by four members of the Government and Opposition, including Hans Dietrich Genscher and Franz Josef Strauss.
   Keesings Archives, 1972. 25349-25353.

5. The role of the Resolution in achieving the support of the Opposition for ratification of the Warsaw and Moscow Treaties has been noted elsewhere:
   "Es ist die bisher kaum gewurdigte Leistung des Oppositionsfuhrers Dr.Barzel und einiger Mitstreiter wie Prof. Mikat, ihre Fraktion fur das Passierenlassen der Vertrage gewonnen zu haben. Dies erforderte einen volligen Wechsel des zuvor gegenuber dem Wahler vertretenen Kurses ...
   Der kurswechsel der Opposition wurde durch eine "Gemeinsame Entschliessung" von Bundestag und Bundesrat erleichert."
   -"it is the hitherto hardly acknowledged achievement of the leader of the Opposition, Dr. Barzel, and a few allies, such as Prof. Mikat, to have won over their parliamentary group to allowing the treaties to pass. This required a total change in the position previously represented to the voters ...
   The change of course by the Opposition was eased by the joint Resolution of the Bundestag and the Bundesrat."
   B. Zundorf: Die Ostvertrage (The Eastern Treaties).
   Munchen, 1979, at p. 93.

   A similar view has been expressed by Professor Skubiszewski, who writes that the Resolution's genesis and meaning are primarily a matter of domestic politics, that it is connected with a particular political crisis long past - the effect being that the interpretational role of the Resolution has been diminished rapidly:
   "Jej geneza i znaczenie przede wszystkim wewnatrzpolityczne, jej zwiazek z konkretnym kryzysem politycznym juz dawno usunietym, sprawiaja, ze rola interpretacyjna rezolucji szybko ulegla redukcji."
   K. Skubiszewski: Zachoduia granica Polski w swietle traktatow (The Western Frontier of Poland in the Light of Treaties). Poznan, 1975, at p.245.

6. Note 1, supra. Paragraph 5.

7. Note 1, supra. Paragraph 2.

8. See, for example, the Clarification to Paragraph 4 of the Bundestag Resolution. This provides:
"Die Ostvertrage andern nichts an der Tatsache, daB wir, gemeinsam mit unseren westlichen Verbundeten, auf eine friedensvertragliche Regelung fur Deutschland als Ganzes hinarbeiten."
"The Eastern Treaties do not alter the fact that we, in common with our western allies, shall work for a settlement for Germany as a whole by peace treaty."
(Writer's translation)
Clarification of Bundestag Resolu tion, 19 May 1972. Note 2, supra.

9. Sulek: The Normalisation Agreements of 1970-72 and European Security. 1972 13 PWA 219, at 235-236.

10. See Chapter Two, pp. 21-23.

11. Note 1, supra, Paragraph 7.

12. Note 1, supra. Paragraph 10.

13. Note 1, supra. Paragraph 9.

14. See Note 2, supra. Preamble:
"Sie andert nichts an den sich aus den Vertragen ergebenden Rechten und Pflichten und steht in Ubereinstimmung mit Geist und Buchstaben der Vertrage."

15. Conference on Security and Cooperation in Europe (CSCE). Declaration on Principles guiding Relations between Participating States. Paragraph 1. CMND 6198

16. Keesings Archives, 1972. 25352.

The voting was as follows:	For	Against	Abstained
Treaty with USSR	248	10	238
Treaty with Poland	248	17	231
Joint Resolution	513	--	--5

17. Note 1, supra. Original German text:
"Die Vertrage nehmen eine friedensvertragliche Regelung fur Deutschland nicht vorweg und schaffen keine Rechtsgrundlage fur die heute bestehenden Grenzen."

18. Bundestag Debate. 10 May 1972.

19. "Noting the principles of free consent and of good faith and the pacta sunt servanda rule are universally recognized."

20. Arndt: Legal Problems of the German Eastern Treaties. 1980 74 AJIL 122, at 127.

21. 1964 YILC . Vol. 1. Summary Records.
765th Meeting, Paragraph 33.

22. Note 21, supra. Paragraph 35.

23. 1964 YILC. 726th Meeting, Paragraph 34.

24. 1964 YILC. Vol. 2.
Waldock, Report III (A/CN4/167/Add.3).

25. Note 24, supra. p. 54.

26. Admission of a State to the United Nations (Charter, Art. 4),
Advisory Opinion:ICJ Reports 1948, p. 57.

27. Ambatielos Case (Preliminary Objection).
ICJ Reports 1952, p. 28.

28 . Note 26, supra. Joint Dissenting Opinion, Paragraph 12.

29. Note 27, supra.

30. Note 27, supra. p. 44.

31. UN Conference on the Law of Treaties, Second Session.
13th Plenary Meeting, 6 May 1969.

32. 1964 YILC. Vol. 1. 769th Meeting, Paragraph 8.

33. Note 32, supra. Paragraph 23.

34. Note 32 supra. Paragraph 52.

35. 1966 YILC. Vol. 2.
P. 221, Paragraph 13 (Commentary to Article 27).

36. Note 24, supra. p. 54

37. Vienna Convention on the Law of Treaties. Art. 84, Paragraph 1:
"The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession."

38. Definition of customary international law. See, for example, North Sea Continental Shelf Cases (FRG v Denmark, FRG v Netherlands) ICJ Reports 1969, p. 3. Paragraphs 73-78.

39. See, for example:
Arndt, Note 20, supra.
Akehurst: Custom as a Source of Public International Law.
1974-75 47 BYIL 1,at 47:
"...it is common knowledge that most of the provisions of the treaties cited (including the Vienna Convention on the Law of Treaties)... were declaratory of customary law."

40. See, for example: Arndt, Note 20, supra.

41. Sinclair: Vienna Conference on the Law of Treaties.
1970 19 ICLQ 47, at 65. The writer was a member of the UK delegation at the Vienna Conference.

42. Keesings Archives, 1972. 25353.
The FRG handed the Resolution to the USSR, USA,UK and France on 19 May 1972.

43. Arndt, Note 20, supra, at 126.

44. Zbior Dokumentow, 1972, No. 78, p. 678, at 694-695:
"Chcialbym z cala moca podkreslic, ze uklad stanowi jedyna mozliwa do przyjecia platforme dla naszych stosunkow z Niemiecka Republika Federalna. Jestesmy zainteresowani wejsciem w zycie tego ukladu i gotowi jestesmy wykonywac w dobrej wierze jego postanowienia. Zgodnie z artykulem III ukladu bedziemy podejmowac dalsze kroki w celu rozszerzenia wspolpracy i pelnej normalizacji stosunkow z Niemiecka Republika Federalna.
Natomiast nie zgodzimy sie nigdy na podjecie jakichkolwiek i z kimkolwiek rokowan , ktore by zmierzaly do oslabienia lub podwazenia postanowien ukladu."
Also in : Trybuna Ludu, 28/4/72.

45. Note 44, supra. 678-702.

46. Note 44, supra, at 689.

47. Poland demanded that Article I of the Treaty should contain a recognition by the FRG of the Oder-Neisse line as the western frontier of Poland. The FRG, on the other hand, persuaded Poland to accept Article IV of the Treaty, dealing with international agreements concluded by the parties or concerning them.
See Skubiszewski: The Great Powers and the Settlement in Central Europe.
1975 18 JIR 92, at 107.

48. Zbior Dokumentow, 1972, No. 98, p. 807, at 808:
"Zgodnie z wczesniejszymi oswiadczeniami, Polska Rzeczpospolita Ludowa, ktora za jedynie i wylacznie wiazacy uwaza tekst ukladu z dnia 7 grudnia 1970 roku, bedzie dzialac zgodnie z litera i duchem ukladu."
"In accordance with previous declarations, the People's Republic of Poland, which considers the text of the agreement of 7 December 1970 only as binding, will act in accordance with the letter and spirit of the treaty."
Also in : Trybuna Ludu, 20/5/72.

49. Note 48, supra, at 809:
"Podstawowe zobowiazania zawarte w ukladzie miedzy Polska a RFN dotycza uznania, zgodnie z postanowieniami umowy poczdamskiej, za nienaruszalna i ostateczna zachodniej granicy Polski na Odrze i Nysie Luzyckiej. Tylko na takiej podstawie mozliwa jest normalizacja stosunkow miedzy PRL i NRF."

50. Zbior Dokumentow, 1972, No. 99, p. 812, at 813:
"...zadne zastrzezenia zawarte w jednostronnej rezolucji Bundestagu, z punktu widzenia prawa miedzynarodowego i zobowiazan wynikajacych z ukladu nie maja zadnej mocy prawnomiedzynarodowej."
Speech of 25 May 1972.
Also in: Trybuna Ludu, 26/5/72.

51. Janicki: Legal Problems involved in the Realization by the FRG of the Treaty with Poland dated 7th December, 1970.
1977 18 PWA 76, at 84.

52. Skubiszewski, Note 47, supra, at 124 (Footnote no. 122).

53. Skubiszewski, Note 5, supra, at p. 244.

54. ILC Commentary on Draft Articles on the Law of Treaties, Paragraph 13.
1966 YILC, Vol. 2.

55. Case Concerning the Temple of Preah Vihear (Cambodia v Thailand).
ICJ Reports 1962, p. 34.

56. Note 2, supra.

57. "Die...eingebrachte Entschliessung...dient dem Ziel, noch vorhandene Bedenken zu den Vertragen mit Moskau und Warschau zu zerstreuen und damit diesen wichtigen vertragswerken eine breitere parlamentarische Zustimmung zu sichern. Sie andert nichts an den sich aus den Vertragen ergebenden Rechten und Pflichten und steht in Ubereinstimmung mit Geist und Buchstaben der Vertrage."

58. 830 UNTS 332.

59. Warsaw Treaty: Preamble; Article I(2); Article II(2).
Moscow Treaty: Article 2; Article 3.

60. Skubiszewski: The Western Frontier of Poland and the Treaties with Federal Germany.
1970 3 PYIL 53, at 58.

61. Quadripartite Agreement signed at Berlin on 3 September 1971.
Annex 3, Part 3
CMND 6201, Doc. No. 136, p. 240.

62. Note 21, supra.

63. Note 44, supra, at 696:
"Uklad uznany zostal za wazny krok ku umocnieniu pokoji i bezpieczenstwa w Europie i zapowiedz normalizacji stosunkow miedzy Niemiecka Republika Federalna a Polska."

64. Trybuna Ludu, 15/3/74.
Quoted in: From Helsinki to Madrid. CSCE Documents.
Rotfeld (Ed.), Warsaw, 1983, at p. 28.

65. Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Four Powers.
CMND 1552, No. 7, p. 38:

"The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."
5 June 1945.

66. Soviet Draft Peace Treaty, Articles 8 and 9.
CMND 1552, Doc. No. 134, p. 361.

67. Zgorzelec Agreement.
319 UNTS 93.

68. Exchange of Notes between the Federal German Government and the United Kingdom Government of 19 November 1970.
CMND 6201, Doc.No. 130, p. 229.

69. Statement by FCO Spokesman on the Warsaw Treaty. 20 November 1970.
CMND 6201, Doc. No. 131, p. 229.

70. Extract from Speech by Churchill, House of Commons, 16 August 1945.
CMND 1552, Doc. No. 14, p. 59.

71 D.S. Clemens: Yalta.
New York, 1970, Chapter 5.

72. 331 UNTS 253. Article 7(1).

73. Final Communique issued after the NATO Ministerial Meeting on 4 December 1969.
Paragraph 6.
CMND 6201, Doc. No. 134, p. 233.

74. Final Communique issued after the NATO Ministerial Meeting on 31 May 1972.
CMND 6201, Doc. No. 152, p. 258.

75. Answer by Minister of State for Foreign Affairs. Extract from House of Commons Debates, 11 November 1959.
CMND 1552, Doc. No. 157, p. 426.

76. Skubiszewski, Note 60, supra, at 66.

77. Skubiszewski, Note 47, supra, at 121.

78. Skubiszewski: Poland's Western Frontier and the 1970 Treaties.
1973 67 AJIL 23, at 30-31:
"The frontier remains a proper matter for the peace settlement. Such a settlement however, could not go beyond confirming the present regime resulting from various treaties and acts of recognition, for those who would otherwise have had the right to demand a revision divested themselves of it..."

79. Treaty Concerning Relations between the USSR and the GDR.
20 September 1955.
226 UNTS 208.

80. Letter of 20 September 1955, from GDR Foreign Minister to Soviet Deputy Foreign Minister.
CMND. 1552, Doc. No. 86, p. 228.

81. Statement by USA, UK and French Foreign Ministers with regard to the USSR-GDR Agreements.
28 September 1955.
CMND 1552, Doc. No. 87, p. 229.

82. Note 80, supra, Paragraph 2.

83. Chapter Two, pp. 41-45.

84. Speech by US Secretary of State Byrnes.
Stuttgart, 6 September 1946.
"With regard to Silesia and other Eastern German areas, the assignment to Poland by Russia for administrative purposes had taken place before the Potsdam meeting. The heads of government agreed that, pending the final determination of Poland's western frontier, Silesia and other Eastern German areas should be under the administration of the Polish State and, for such purposes, should not be considered as a part of the Soviet zone of occupation in Germany. However, as the Protocol of the Potsdam Conference makes clear, the heads of government did not agree to support at the peace settlement the cession of this particular area.
...As a result of the agreement at Yalta, Poland ceded to the Soviet Union territory east of the Curzon Line. Because of this, Poland asked for revision of her northern and western frontiers. The United States will support a revision of these frontiers in Poland's favour. However, the extent of the area ceded to Poland must be determined when the final settlement is agreed upon."
Zbior Dokumentow, 1946, p. 335, at 353-355.
Documents on American Foreign Relations, Vol. 8, p. 210 at 216-217.

85. Speech by French Foreign Minister Bidault.
Moscow, 9 April 1947.
"Les changements territoriaux au profit de l'Union sovietique et de la Pologne auxquels la Conference de Potsdam a procede en Allemagne orientale, bien qu'ils aient, en principe, un caractere provisoire, ont marque, d'une maniere malaisement reversible, l'orientation du reglement de paix.
Le gouvernement francais est dispose, pour sa part, a ne pas contrarier ces decisions, encore que prises en son absence. Il s'est constamment abstenu de les contester, en egard aux pertes immenses qui eut ete endures par ses allies sovietiques et polonais au cours de la guerre; il considere aussi que la probleme des frontieres de l'Allamagne forme un tout et qu'il ne saurait recevoir de solution definitive sans avoir ete examine dans toute son ampleur."
Zbior Dokumentow, 1948, p. 4.

86. House of Commons Debates, 20 August 1945.
CMND 1552, Doc. No.15, p.60.

87. Potsdam Agreement; Protocol of Proceedings. Part XII.
CMND 1552, Doc. No. 13, p. 57.

88. Note 67, supra.

89. Note 58, supra.

90. Part I A (3)(i). Note 87, supra, at p. 49.

91. Potsdam Agreement; Protocol of Proceedings. Part I A (4)(1).
"Whenever the Council is considering a question of direct interest to a State not represented thereon, such State should be invited to send representatives to participate in the discussion and study of that question."
Note 87, supra, at p. 49.

92. Janicki, Note 51, supra, at 88.
"In the light of Article 1, parts 2 and 3 of the 1970 Treaty, the Polish Western frontier on the Odra and Lusatian Nysa, delineated by the Potsdam Agreement, ceased to be a debatable problem between the FRG and Poland."
This statement is in itself accurate, but it ignores the real problem, which is the question of whether or not a future unified Germany would be bound, which according to the Federal Republic would not be the case.

Arndt, Note 20, supra, at 128-129:
"Article 1 of the Warsaw Treaty contains a broader commitment than the mere renunciation of a change in this border by force or threat of force. The Federal Republic committed itself not to raise the issue of this boundary for the duration of its existence, in keeping with its concept of its identity. In other words, the FRG has voluntarily done everything it could do, in compliance with its Constitution and its concept of its identity, to give Poland secure frontiers."

Skubiszewski, Note 47, supra, at 123, footnote no. 122:
"....none of the two German States can demand a revision of the frontier. The GDR is estopped from doing so by the Zgorzelec Agreement, while the FRG has limited its freedom of action by its consent to the frontier in the Treaty of 1970 ...."

93. A.J. Peaslee: Constitutions of Nations (Revised 3rd ed.).
The Hague, 1968, Vol. III, at p. 334.

94. Allied High Commission Press Release with regard to the Establishment in the Soviet Zone of the GDR. 10 October 1949.
"This so-called Government, which is devoid of any legal basis, and has determined to evade an appeal to the electorate, has no title to represent Eastern Germany. It has an even smaller claim to speak in the name of Germany as a whole."
CMND 1552, Doc. No. 38, p. 126.

95. "Such a government cannot claim by any democratic standard to speak for the German people of the Soviet Zone: much less can it claim to speak in the name of Germany as a whole."
Statement by U.S. Secy. of State, Dean Acheson.
12 October 1949. CMND 1552, Doc. No. 39, p. 127.

96. Communique issued by Western Foreign Ministers.
New York, 19 September 1950.
CMND 1552, Doc. No. 49, p. 137.

97. N.E. Moreton: East Germany and the Warsaw Alliance: the Politics of Detente. Boulder, Colorado, 1978, at pp. 103-105.

98. "International recognition of the GDR by the Federal Republic is out of the question. Even if there exist two States in Germany, they are not foreign countries to each other; their relations with each other can only be of a special nature."
Extract from a Policy Statement made by Federal Chancellor Brandt to the Bundestag. 28 October 1969.
CMND 6201, Doc. No. 104, pp. 204-205.

99. Basic Treaty, Article 4.
1972 II ILM 726-730.

100. Ibid, Article 6.

101. Skubiszewski, Note 78, supra, at 25.

102. Ibid, at 26.

103. This opinion is held by at least one UK specialist on the GDR.
D. Childs: The GDR: Moscow's German Ally.
London, 1983, at p.25.

104. The Zgorzelec Agreement, in the authentic Polish text, uses the term Narod (nation), as opposed to Panstwo (State), so there is no doubt about the meaning. The German text is also authentic.

105. The British, French and US Embassies in the GDR are all situated in Berlin, though this is described, not as possessing any legal signifiance as far as the relationship between East Berlin and the GDR is concerned, but rather as recognition of the fact that East Berlin is the seat of Government in the GDR. That is, for convenience, the actual situation is taken into account, though existing legal stances are maintained. The Federal Republic also has its main diplomatic establishment in the GDR situated in East Berlin.

106. For example, the regular military patrols carried out by Soviet forces in West Berlin, and by American, British and French forces in the eastern sector.

107. The Quadripartite Agreement of 1971 served to increase the facility and quantity of contacts between West Berlin and the Federal Republic. Nevertheless it was made clear that the two were separate entities.

108. "... pragnac ustabilizowac i umocnic wzajemne stosunki w oparciu o porozumienie poczdamskie, ustalajace granice na Odrze i Nysie luzyckiej..."
Dz.U. 1951 nr. 14, Item 106, pp. 117-119.

109. "Although I myself had hoped that it might be possible to modify the Oder-Neisse frontier, at least in places, chances of this dwindled as the end of the war became more remote."
W. Brandt: People and Politics. The Years 1960-1978.
London, 1978, at p. 401.

110. Ibid, at p. 398.

111. See Note 104, supra.

112. A. Klafkowski: The Legal Effects of the Second World War and the German Problem.
Warsaw, 1968, at p. 228.

113. Part III (1)
Note 87, supra, at p. 53.

114. Klafkowski, Note 111 supra, at pp. 227-228.

115. Communique issued by the Governments of the GDR and Poland at the end of talks on June 5 and 6 1950.
CMND 1552, Doc. No. 46, p. 134.

CHAPTER FOUR

The FRG-GDR Frontier

(i) Origins

The GDR-FRG frontier differs in character from the Polish-German frontier. The latter border certainly exists and is accepted as, in principle, having legal validity. The problem since 1945 has been in establishing where, in law, it ought to be situated. The former border, on the other hand, has a very definite existence but doubts exist as to whether or not it ought legally to be there at all. In other words, the practical whereabouts of a valid frontier have been questioned, and the validity of the other, clearly-situated frontier is open to discussion. This in turn depends upon whether or not the FRG and GDR actually exist as States since, if they are not separate legal entities but rather possess some link which joins them as one legal entity, then the present division would not be a legally valid frontier. By this is meant that line at which the sovereignty of one State is superceded by that of another State.[1] Although the GDR and FRG control the territories up to their common frontier, at which point the authority of each one ceases ,if they possess any link which prevents them being two separate States, then while authority over the territory is passed from one to the other, it will be a change of character less than that of sovereignty.[2] Their link would involve some connection between the two which means that they are not foreign to one another.

If, however, the GDR and FRG are considered to be two separate States, then the line which divides them is a frontier, just as the line dividing the GDR and Poland is a frontier. The line of the present border was established, although this was probably not intended at the time, by allied agreements of 1944 and 1945. The main agreement was the Protocol of September 12, 1944,[3] which was subsequently amended to include France as an Occupying Power. The 1944 Protocol on the Zones of Occupation in Germany was not designed to create a state frontier running through the heart of that country; its function was, as stated in the title, to divide the country into zones of occupation. Thus there was a North-Western Zone, to be occupied by the UK; a South-Western Zone, to be occupied by the USA, and the USSR obtained the Eastern Zone. There had been a suggestion[4] that Germany could be divided into a number of smaller states, so as to weaken it (along the same lines, it was suggested that the country's industries could be dismantled so that it would become an agricultural and, hence, militarily weak, state), but this was not the intention of the Allies[5], at least as a matter of deliberate policy. Stalin also spoke in favour of maintaining German unity. In the Protocol of the Potsdam Conference[6], it is provided that:

"...for the time being, no central German Government shall be established."[7]

However, the language used makes it clear that this was regarded as a temporary state of affairs until a decision would be made whether or not to establish such a government. And while the country was clearly divided into different zones of occupation, there was from the beginning of the occupation a limited joint governmental structure:

> "In accordance with the Agreement on Control Machinery in Germany, supreme authority in Germany is exercised, on instructions from their respective Governments, by the Commanders-in-Chief of the armed forces of the USA, the UK, the USSR and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole, in their capacity as members of the Control Council."[8]

A number of amendments were made to the Protocol on the zones of occupation,[9] in particular, the agreement of 26 July 1945 on practical aspects of France's obtaining its own zone in Germany.[10]

The zones belonging to France, the UK and USA became the territory for the Federal Republic, while the Soviet zone became the Democratic Republic, although the actual situation could have been much different, as the American and British armies had, while the war was still in progress, advanced into what was to be the Soviet zone. Only later did they agree to withdraw to behind the lines of the pre-arranged zones. Germany was divided into four zones though still subject to some centralised administration, though not by Germans, so it is at this stage too early to speak of two Germanies coming into existence; even if the exercise of control was different in the Soviet zone from the three western zones in character, the western zones were also separate from one another. But in 1946, the UK maintained the view officially that Germany still existed as one entity and this can be seen in R.v. Bottrill, ex parte Kuechcenmeister[11] in which a certificate was produced from the Secretary of State for Foreign Affairs which stated, inter alia:

"(1) Under para. 5 of the preamble to the declaration dated June 5, 1945, of the unconditional surrender of Germany, the Governments of the United Kingdom, USA, USSR and France, assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority. The assumption for the purposes stated of the said authority and powers does not effect the annexation of Germany."

(2) That in consequence of this declaration Germany still exists as a state and German nationality as a nationality, but the Allied Control Commission are the agency through which the government of Germany is carried on."

Thus spoke the UK in 1946. Along with France and the USA, it was to maintain that a peace settlement between Germany and the Allies was outstanding, while "Germany" even in comparison with the disjointed entity which was occupied by the Allies from 1945, became steadily more divided. Even if the view were held that Germany still existed as a State, by 1949, there was already a division between the Soviet zone on the one hand, and the other zones. In that year, the FRG and GDR were created, though not as fully independent States, yet nevertheless each one under separate government, with separate policing systems.

It is evident that the legal status of the FRG-GDR border is inextricably linked with the legal status of the two German States and the question of the continued existence of Germany. Until the creation of FRG and GDR, there was in theory

no State frontier within Germany. For a very long period, the FRG refused to recognise the GDR as a State, and refused to conduct diplomatic relations with any State which had entered into diplomatic relations with the GDR[12] (with the exception of the Soviet Union). In furtherance of this policy, the FRG broke off diplomatic relations with some States, including Yugoslavia and Cuba. Eventually, through the exercise of its Ostpolitik, the FRG recognized that the GDR existed as a State and has entered into many treaties with it, but maintains the view, expressed by Chancellor Brandt, that "Even if there exist two States in Germany, they are not foreign countries to each other; their relations with each other can only be of a special nature."[13] The GDR has maintained since soon after its inception in 1949, that the GDR and FRG are two separate German States. A study of the nature of the frontier therefore entails some analysis of the legal status of the two existing German States, the putative unitary German State - whether or not it exists insofar as this can clarify the legal status of the relevant borders. This is also relevant in the final analysis of the status of the Oder-Neisse line.

(ii) Developments from 1949 to 1972

In 1949, the position was that two German States had been set up in Germany, the GDR not being recognized by the Western allies, while the FRG did not obtain recognition by the USSR. The line which delimited the eastern from the western zone became a frontier between the two German States, at least de facto, and exists now, though in a much stronger physical sense, due to the barriers erected there. While the FRG eventually recognised the GDR, albeit, it claimed,

as another but not foreign State, both prior to and since this act it has carried out certain practical measures designed to support its view that the border is not an inter-State border in the full legal sense. This is also related to the question of the status of FRG and GDR as States. With regard to the European Community, when West Germany became a party to the Treaty of Rome,[14] certain provision was made with regard to trade between the two German territories, in the Protocol on German Internal Trade and connected problems.[15] This Protocol was signed by all six Member States, and, "by common accord of the Member States shall form an integral part ...." of the EEC Treaty.[16]

This Protocol indicates that the inner-German border, for the purposes of the EEC, was considered as having a character different from other borders of Member States. It states:

> "Since trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territory in which the Basic Law does not apply is a part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade."[17]

The effect of this is to create a substantive difference, for certain trade purposes, between the FRG-GDR border, and the FRG's borders with other States which are or were not part of the EEC, for example, Austria, Switzerland and Czechoslovakia.[18] The provisions of the Protocol have the effect of attributing to internal-German trade the status of non-inter-State trade, with the resulting economic repercussions. If the GDR ("the German territories in which the Basic

Law does not apply") were, for the purposes of the Treaty of Rome, to be regarded as a non-Member State, without its possible link with the FRG, then trade between the FRG and GDR would be subject to the same regulations as trade between other Member and Non-Member States. Goods produced by the GDR and exported to the FRG are thereby given an advantage over goods exported to the FRG from other non-EEC territories.

The Protocol is evidence that the FRG considered its common border with the GDR to be different from its other borders, that there is some connection between the two German States which would permit an agreement to give special treatment to German goods crossing that frontier. In addition, the Protocol itself makes the frontier different, since it attempts to modify the effects of the Treaty; albeit for very limited purposes. Therefore, for purposes of European Community law, the inner-German border, while still definitely a frontier, has a different status from all other frontiers. The GDR is not part of the EEC, so the inner-German frontier is not the same as, for example, that between France and West Germany. On the other hand, the border is, for purposes of certain EEC trade, less divisive than the border between the FRG and its other neighbours which are not Member States.

Why was this particular frontier accorded this particular status? The answer is that West Germany maintained in 1957 that there was still only one Germany and that it (the FRG) was representing that Germany. While effect could not be given to its laws, including its Basic Law, throughout "Germany", provision could be made in certain fields for maintenance of the concept of one Germany.

Thus, inner-German trade was not to be regarded as affected by the EEC Treaty such as to render it liable to the duties levied on other trade with non-EEC territories.[19]

The significance of the Protocol should not be over-estimated. It shows that the border was treated in a unique fashion; nevertheless the differences are limited and the meaning of the Protocol has been discussed in the case law of the European Court of Justice. In the Swine Bellies Case[20], the Plantiffs had contended that the Protocol had the effect of attributing to goods imported from the GDR into FRG the character of goods originating in an EEC country. This view was challenged, both by the Federal German Government and the European Commission. The Court held, inter alia, that the Protocol did not treat the GDR as part of the EEC or give goods produced therein the status of EEC products. It merely permitted the FRG to continue to allow goods from the GDR to circulate freely in the FRG without payment of customs duties.

Thus, it was made very clear that the inner-German frontier exists with regard to the European Community, but that the normal restrictions which would otherwise apply had been partially amended by the Protocol. According to the judgment in the Swine Bellies Case, "a special system was applied to the GDR which was treated neither as a Member State nor a third country." The fact that European Community law accords this unusual status to the GDR, and that the inner-German border is accorded a separate status for limited purposes, is a symptom of the policy of the West Germans, that the GDR is not a foreign State. Even in 1972, when the FRG had already recognized the GDR as a separate State,

this theory was maintained,[21] and the FRG continues to refuse to establish full diplomatic relations with the GDR. The opinion of Judge Reischl supports the notion that the Protocol is a consequence of FRG policy with regard to the German question:

> "Its sole function is - and this leads certainly to a restrictive interpretation - to provide for the special relationship between the FRG and the GDR, that is, to avoid the division of Germany being deepened by the application of Community law to German internal trade."[22]

The inner-German border, which initially had been a demarcation line between the zones of occupation in Germany, has acquired in practice the attributes of a frontier between States. In fact, it is extraordinarily well defined and demarcated, at least on the GDR side. This is because, first of all, the GDR having striven for nearly twenty five years to obtain recognition by the international community (other than the Soviet-bloc States), seemed to go to exaggerated lengths to display its separate statehood. Secondly, while the GDR strived to achieve legitimacy, the FRG sought to encourage the maintenance of a sense of national unity in both German States. This was done through political means and legal. For example, maps would depict Germany as one State, including East Prussia.[23] As for legal means, the Grundgesetz obliged the Federal Government to adopt policies which would not harm the chances of bringing about German unity.

In Article 116, the Grundgesetz defines as German for the purposes of the Constitution inter alia all those who possess German citizenship. This

particular law has caused friction between the two German States, since it had the effect that citizens of the GDR and FRG are German citizens alike,[24] and possess the same rights and duties. This is one of the main reasons for the strong fortification on the GDR side of the border, and may be regarded as recognition by the GDR (though not for purposes of public international law) of the unique nature of its border with the FRG. It is just because its citizens enjoy so many rights in the Federal Republic (in particular, as German citizens, the right of permanent residence there), that the GDR has sought to exercise complete control over movement between the two States. By this is not meant legal controls - since GDR citizens have the right to a passport, theoretically they may travel in the West. In any case, the GDR uses other justifications to refuse permission for official travel to the West. The type of control considered here is physical control, since persons living in the GDR are liable to ignore laws with regard to foreign travel if not physically restrained. Thus the border is protected from violation by fences, walls, armed guards, minefields, automatic firing devices, guard dogs, trip wires and electric fences, a protection the efficacy of which is being steadily improved.[25] The desire to prevent violation from within of its border with West Germany is practical acknowledgement that a special situation exists.

It has been seen that the FRG-GDR border emerged despite the expressed intentions of the Occupying Powers to maintain one German State. As joint control over Germany and Berlin ceased, the two German States came into existence and, with them, the de facto border, which has gradually come to acquire the character of permanence with the acceptance of two German States

and the reference in international agreements to the border, both specifically and in more general terms. Until the Federal Republic embarked on its Ostpolitik in the late 1960's, there was no question of any West German recognition of the GDR and therefore the inner-German border was not a subject for discussion. However, as the two States drew nearer to contacts at State level, it was clear that for the Ostpolitik to achieve its aims, there would have to be some concession towards the GDR. For that State, its primary aim was to achieve international legitimacy through recognition by States which hitherto had withheld it, in particular the Federal Republic. This involved recognition, not only of the GDR, but of the GDR within its present existing borders. Thus, the GDR suggested as Article II of its Draft Treaty on the Establishment of Equal Relations Between the GDR and the FRG of 17 December 1969:

> "The parties to the treaty mutually recognise their present territorial holding within the existing borders and the invidability thereof. They recognise the borders in Europe fixed as a result of World War II, in particular those between the German Democratic Republic and the Federal Republic of Germany as well as the frontier on the Oder and Neisse between the German Democratic Republic and the People's Republic of Poland."[26]

The treaty which was eventually ratified by the FRG and GDR with regard to their mutual relations, which will be discussed later, differed substantially from the Draft submitted by the East Germans. Article II, quoted above, as well as the

rest of the treaty, amount to a summary of GDR foreign policy with regard to the German question as a whole (including Berlin, or rather, West Berlin), and as such was bound to be unacceptable to the Federal Republic. However, the Draft Treaty is worthy of attention, simply because it allows us to see the priorities of the GDR in the conduct of its relations with the FRG.

The frontier did finally appear in a treaty with a Western State when the FRG and the Soviet Union signed the Moscow Treaty on 12 August 1970.[27] It had been mentioned in earlier valid international documents, as opposed to draft treaties and agreements, but these involved only the socialist States, which had already recognized the GDR within its existing frontiers. Thus the GDR and the Soviet Union in 1964 could "solemnly declare that the integrity of the state frontiers of the GDR is one of the basic factors of European security. They confirm their firm determination jointly to guarantee the inviolability of these frontiers in accordance with the Warsaw Treaty of friendship, co-operation and mutual assistance."[28] Furthermore, in 1967, the Communist Declaration on European Peace and Security called for "recognition of the inviolability of the present European frontiers especially those on the Oder and the Neisse, as well as the frontiers between the two German States ...."[29] This Declaration could only have been directed at Western States, given that the socialist States had already recognized the inviolability of the frontiers in question. It should be noted that these instruments did not actually refer to recognition of frontiers, but rather the guarantee of their inviolability, which in eastern Europe however has been interpreted as the prohibition also of peaceful change of frontiers.

The FRG-Soviet Treaty was the first one involving a Western State, in which

the inner-German frontier was accorded the same status as other European frontiers. In Article 3, the parties declare that they regard the frontiers of all States in Europe as inviolable, "including the Oder-Neisse line which forms the Western frontier of the People's Republic of Poland and the frontier between the FRG and the GDR." These two frontiers were deliberately named, so removing any doubts that they are included within the ambit of the Article. The inner-German border is referred to here in a section dealing with all States in Europe. The FRG ratified this treaty. Therefore, it not only recognized that the GDR was one of the States in Europe, it made a declaration that the GDR's frontiers actually exist. This might seem to be obvious to anyone who has ever travelled from one German State to the other; nevertheless it was significant that the Federal Republic now stated that the GDR actually existed within its frontiers - a substantial shift from the times when it insisted that there was only one Germany. This Treaty is relevant to an evaluation of the legal status of the border. Apart from showing a change in the policy of the Federal Republic, the frontier is classed along with all other European frontiers as being subject to certain conditions - that is, they are inviolable. The parties also declared that they have no territorial claims against anybody, nor would they assert such claims in future. (Article 3). If this is taken along with the commitment to inviolability of frontiers, then it makes the GDR's frontiers more secure, in that they are being guaranteed in treaty form by its "protector", the USSR, and the main source of its insecurity, the Federal Republic. Nevertheless, the treaty does not limit the ability of the parties to alter their frontiers by peaceful means and therefore, peaceful alteration of the inner-German border, even to the extent of its total removal, is not thereby prohibited. This was made clear by the Federal Republic in a Letter[30] to the USSR, which stated:

"this Treaty does not conflict with the political objective of the FRG to work for a state of peace in Europe in which the German nation will recover its unity in free self-determination."

Thus by 1970, although it had still not achieved recognition by the non-communist world, the GDR, within the borders which had always surrounded it, was slowly but surely coming to be accepted as a German State.

(iii) The Basic Treaty

It has been said that "The Treaty, by which the Parties agree to develop normal, good-neighbourly relations, shows the complete singularity and abnormality of the German situation in every provision."[31] In fact, relations between the two States are hardly normal, either in the practical or the legal sense; with their common border being one of the most heavily fortified in the world, with private contacts between the two States being on the whole one-way from West to East Germany (this in itself being a reflection of the unique legal situation). In the legal sense, one party, the Federal Republic, claims that the other is not even a foreign State.[32] It is difficult to conceive of a more abnormal theory in the post-colonial era. If intra-German relations are "normal", what consequences does this have for the relationship between the Federal Republic and all other States which are definitely foreign to it?[33] Perhaps they are supranormal. From the GDR perspective, relations with the FRG are normal, in that it regards West Germany as a foreign State, like any other State.

However, the Basic Treaty (Grundvertrag)[34] can be seen as an attempt by the

two German States to put their mutual relations on as normal a basis as possible, given their differing stances towards many legal issues, which are reflected in the text of the treaty.

In the treaty itself, there is a general statement about inviolability of frontiers and respect for the territorial integrity and sovereignty of all States in Europe within their present frontiers being a basic condition for peace (Preamble). This is interesting for the fact that inviolability of frontiers and respect for territorial integrity and sovereignty are treated as part of one condition, rather than as separate elements. In Article 3, paragraph 2:

> "They reaffirm the inviolability now and in the future of the frontier existing between them and undertake fully to respect each other's territorial integrity."

This is the only place in the Treaty where the inner-German border is actually mentioned.[35] In fact, the Federal Republic agreed to no more in Article 3, paragraph 2 of the Grundvertrag than it did in Article 3 of the Moscow Treaty,[36] in which it also promised that it regarded its border with the GDR as inviolable. The GDR-FRG Basic Treaty was signed at a time[37] when the Moscow Treaty was already ratified - thus there can be no doubt about the formal commitment of West Germany to the inviolability of its border with the GDR. The Basic Treaty is not the first treaty to have been concluded directly between the two German States - bilateral agreements at State level had already been concluded with regard to traffic questions[38] - but it is the first treaty between the two States which attempted to establish the basis of a practical relationship between the two States on a general level.

Thus far, it has been seen that, in comparison with the Oder-Neisse frontier, there has been little controversy as to where the inner-German frontier ought to be situated. Where the frontier is mentioned, it has been in terms of its inviolability - but not in terms of recognition of the frontier as it exists, which characterizes the discussion of the Oder-Neisse line. As stated at the beginning of this chapter, there is no doubt about the situation on the ground of the GDR-FRG border, but the legal problem arises in connection with the question whether the border should exist at all, and this in turn depends upon the legal status of the GDR and FRG. In contrast, while doubts were discussed about the geography of the Polish-German border, it has not been seriously suggested that it should not exist at all. However, it is precisely such doubts which have been raised about the inner-German border, usually in the context of debate on the status of the two German States. Much of the discussion is to be found within the West German legal system, and is therefore of limited value to a discussion about the international legal status of the border. But the practice of the Four Powers, which ultimately have the retained authority to decide on the frontiers of "Germany", and the practice of the two German States, both with regard to their own status and that of "Germany", do enable the drawing of conclusions about the legal status of the GDR-FRG border. The study so far has revealed more about certain characteristics of this border than its actual legal nature, which can only be ascertained by a study of the status of the two German States and Germany, if it exists.

As far as the Four Powers are concerned, the origin of their authority with regard to Germany as a whole is to be found in the instruments drawn up by

them in 1944 and 1945. The actual assumption of authority is in the declaration of the Allies with regard to the defeat of Germany[39], while the methods of exercise of that authority exist in various documents, perhaps most notably, and of greatest significance, the Potsdam Agreement.[40]

When the two German States came into being in 1949, and when they gained their full independence (subject to certain reserved rights of the Occupying Powers) in the mid-1950's, a number of statements of policy were made by the Four Powers, and treaties were entered into with the German States, which purported to define the relations inter se of the States concerned and, to some extent, to address themselves to the German question. These instruments are still in existence, and there have been no further Four-Power agreements with regard to Germany's legal status since. The States concerned have issued statements of policy and have concluded bilateral treaties, and these are of some value (for example, the Moscow Treaty between USSR and FRG) in any evaluation of Germany's present legal status. However, the two German States (relatively) recently concluded the Grundvertrag, which is in force, and events surrounding the conclusion of this treaty give a clear picture of the West German position with regard to the status of Germany and the inner-German frontier. We shall therefore analyse the legal positions of the two German States and compare these with the policies of the Four Powers. From this study, it is hoped to establish to what extent, if any, "Germany" still exists and, if so, within which borders. Second, the meaning of "Germany" will be clarified - is it simply two German States, the GDR and FRG, or is there another entity?

(iv) The Ruling of the Federal Constitutional Court

Prior to the ratification by the Federal Republic of the Grundvertrag, the

Bavarian State Government applied to the Federal Constitutional Court for a declaration that the Federal law concerning the Treaty was not compatible with the Grundgesetz and was consequently void.[41] The Federal Government applied to the same court for a declaration that the law in question was compatible with the Grundgesetz. This was an attempt to halt the process of entering into force of the treaty and was not apparently without precedent in the Federal Republic.[42] The Court decided that the law, and therefore the treaty itself, was compatible with the Grundgesetz. Its decision was unanimous. However, the Court also held that the treaty could only be compatible with the Basic law, in the context of that case, if the interpretation given by the Court to the treaty was accepted. This is of importance because the Court's decisions are binding for all federal and State authorities[43]; and therefore the decision, which finds the Grundvertrag and the Grundgesetz compatible, but only according to the Court's interpretation, may bind the Federal Government and may therefore be taken as a statement of West German policy with regard to the legal status of the two German States, and the other related issues discussed by the Court.

The particular interpretation to which the Court resorted in order to achieve consistency in the various aspects of its decision is not on the face of it easily acceptable, except perhaps for the Federal Government, which must have been relieved to have overcome yet another hurdle in the development and advancement of its Ostpolitik. The Court addressed itself directly to the border between the two States, and concluded that there are borders of different legal quality[44] - a statement with which this writer agrees. Had the Court left it at that, it would not have revealed as much of its reasoning with regard to the Basic Treaty, but neither would the Court have developed its theory to this fascinating conclusion:

> "For the question whether recognition of the border between the two states as a state border is compatible with the Basic Law, it is decisive to qualify it as a constitutional border between two states whose "peculiarity" it is that they exist on the foundation of the still existing state "Germany as a whole", hence to treat it as a constitutional border similar to those running between the Lander of the FRG."[45]

From the wording used, it is clear that the Court was treating the inner-German border as similar to a border running between West German Lander in the legal, as opposed to factual sense. Whether it is permissible simply to distinguish between the legal and practical circumstances of a border, in order to ignore one or the other, when this happens to be necessary to make a theory applicable, was not discussed by the Court. In this instance, to compare the inner-German frontier with an inner-West German Land frontier as they exist in reality would not be credible. It is not possible for the inner-German border to be crossed without formality, as it is within West Germany - this is a factual difference which highlights the dissimilarities of the frontiers concerned. Moreover, this factual difference has its origin in law - now, according to the GDR, it is an inter-State frontier, in common with the frontiers between, on the one hand, the GDR, and on the other, Poland and Czechoslovakia. However, prior to the existence of East and West Germany, the line dividing the Soviet zone of occupation from the other zones was an inter-zonal frontier, and as such was still different from the inter-Land border.

In other words, the comparison made by the Federal Constitutional Court

cannot be intended to apply to the manner in which the frontiers operate in fact. The Court refers to a "constitutional border", similar to those running between the Lander of the FRG. The first problem with this is the word similar. Does it mean that the border is the same? Presumably not, as it would be much less ambiguous to say so. It can mean that the two types of frontier have some characteristics in common - but if this be the case, how are the frontiers similar to each other, and in which ways do they differ? According to the Basic Treaty, Article 3, the two States:

> "....reaffirm the inviolability now and in the future of the frontier existing between them and undertake fully to respect each other's territorial integrity."

Here the Federal Republic has clearly recognized that its border with the GDR is "inviolable" - a word found generally only in treaties dealing with international frontiers.[46] Yet there is no suggestion that the West German land frontiers are inviolable. Who is to violate them (for the purposes of international law)? If a foreign army is to invade the FRG, any violation will occur when the national frontier of that State has been crossed, and any advance across a Land as opposed to State, border will be a continuation of the violation of the State frontier. This may be viewed from another perspective. If the West German army holds manoeuvres within West Germany, and during that event that army should deliberately cross the Land border from Baden-Wurttemburg into Bavaria, this will be a lawful act under international law. If, without the permission of the GDR authorities, the same army crosses

the State frontier from Bavaria in the Federal Republic to the GDR, a violation of the GDR frontier will have occurred in contravention, not only of the Grundvertrag, but also the Helsinki Final Act and Article 2 (4) of the Charter of the United Nations.[47] This shows how the similarity of the frontiers claimed by the Court can be strained. However, the Court attempted to answer just this type of criticism by maintaining that the border may be regarded as similar to a Land frontier, because the two States "exist on the foundation of the still existing State "Germany as a whole"..."[48] In other words, the Court considered that, despite the differences between the two kinds of frontier which it claimed to be similar, they could be regarded as possessing common characteristics as a consequence of what the Court saw as their joint, single foundation - the still-existing all German State. Indeed, if the two States have so much to connect them, can they declare their common frontier to be inviolable? The Court seems to say that, for some purposes, it will attribute international characteristics to the inner-German frontier in the Treaty with the GDR; on the other hand, this may cause difficulties in maintaining consistency between certain obligations, as undertaken in the Grundvertrag, to the GDR, and the FRG Grundgesetz, which restricts the freedom of action of the Federal Government in the aims which it must or may pursue with regard to the whole of Germany. In order therefore to maintain its legal position with regard to the whole of Germany, it chooses to attribute a peculiar legal status to the border which the FRG shares with its treaty partner, being aware that the partner will not agree with this interpretation of status.

The Court's interpretation is clever, if only because it is difficult to dispute

this interpretation in terms purely of the Grundvertrag. If one criticizes the Court for accepting the provisions of the treaty, including the inviolability of the inner-German frontier, while simultaneously it describes the frontier as being similar to a West German Land frontier, the Court can simply retort that everything is consistent if its interpretation is accepted. Thus it is immediately necessary to consider whether Germany as a whole still exists (as the Court maintains), and if it does so, whether the GDR stands in the relationship to West Germany through its assumed connection with the all-German State. But where is this all-German State? What is its population; where are its borders; where does its government have its seat of power? One more problem, of course, is that the GDR totally rejects any possibility of its having some constitutional connection with the Federal Republic and, for that matter, with the all-German State. One of the peculiar features of the Basic Treaty is the statement by the parties that, failing to agree on certain questions, they nevertheless agree to disagree:[49]

> "Proceeding from the historical facts and without prejudice to the different views of the Federal Republic of Germany and the German Democratic Republic on fundamental questions, including the national question ...." (Preamble).

The judgment of the Court, in order to make sense, must be read as a whole, and this means accepting the interpretation of the Court of the legal status of the FRG-GDR border. For purposes of West German municipal law alone, this may be feasible. However, this does not mean that the border must be regarded under international law as similar in status to a West German Land border. The

Court itself admitted that the GDR and FRG are States under international law, yet declined to recognize their common border as a State border in the normal sense. Does international law recognize, even if only with regard to the inner-German border, the concept of a frontier between two States which may in law have a status similar to that of a West German Land frontier?

One weakness of the arguments put forward by the Court as its judgment is that, should certain elements of the judgment be shown to be erroneous for the purposes of international law then the whole judgment will be open to question. If the conclusion is reached that the frontier separating the GDR from FRG is not, in law, similar to a Land frontier within the latter State, due to the non-existence of the all-German State, then the Court's views will be without foundation. Indeed, in the view of this writer, a great weakness of the judgment is this equation of the Land and State border; even ignoring the factual differences which demean the credibility of such a comparison, the agreement by the Parties that the border is inviolable is evidence that there are legal dissimilarities in status. It is no answer to show that the Court only judged these borders to be "similar", on the particular basis of the still existing German State; the Court was putting forward a theory, while the concept of inviolability, applying to the same border (in the Grundvertrag), and to that border plus other borders of an indisputably international character (in the Moscow Treaty), is no mere theory. It is found in the above-mentioned treaties, ratified by, inter alia, the Federal Republic of Germany.

Is the FRG-GDR border an inter-State border? The Court classified it as a border between States.[50] Why should the wording have been so cumbersome?

The Court may have used this peculiar wording in order to imply that there was some difference between this frontier and others. It described the difference of this border by qualifying its classification, with the evaluation that the border exists on the all-German foundation. If it is a border between States, or an inter-State border (if that is something else), how can it be similar to a Land border? According to the Court, the unique circumstances of "Germany", from the legal perspective, can permit such apparent contradictions and inconsistencies. In the view of this writer, to claim for the purposes of international law that any inconsistency or contradiction in this field can be explained by resorting to the "unique circumstances" justification, is to avoid the issue. This may have been, albeit regrettably, permissible on the part of the FRG and GDR when, in the Basic Treaty, they agreed to disagree.[51] This was after all the only apparent means of achieving substantive progress in their mutual relations. It is not acceptable that a national Court should seek to square circles and deflect criticism by attributing its constitutional (in terms of the West German constitution) gymnastics to the, sic, special circumstances of Germany. If this be accepted, it is a tacit admission that the situation in central Europe is tantamount to a legal impasse, and that all the treaties of the early 1970's discussed in this thesis are of minor significance for the permanent situation in Europe. In addition, it would constitute a denial of potential for the international legal development of the territorial question in Europe and a block to further efforts in this area. The alternative is to establish, according to international law, the status of the two German States and their frontiers and the extent to which, if at all, "Germany" exists. This does not constitute an assertion that the unique circumstances of Germany should be ignored: where

relevant, the peculiar legal characteristics must be taken into account; otherwise, the problems which exist will not avail themselves of any solutions; but nor must these unique circumstances be invoked as a justification for avoiding a legal conslusion which for some may, politically, be inconvenient. International law is not restricted in its scope by the Grundgesetz.

(v) The Position of the GDR

The GDR it must be stressed does not accept the judgment of the Federal Constitutional Court concerning the status of its western frontier. The position of the GDR was that the two German States were separate States with no more in common, legally, than with any other States. In the 1969 Draft Treaty on the Establishment of Equal Relations between the GDR and FRG, proposed by the GDR, Article I provided, in part:

> "The parties to the treaty agree to the establishment of normal equal relations ..... Their mutual relations are based in particular on the principles of sovereign equality, territorial integrity, inviolability of state frontiers ...." [52]

This was perhaps an expression of the GDR's ideal position vis-a-vis the German question (i.e. that basically, there is no German question), but it gives an indication of that country's attitude towards its western border, showing its belief that the border was no different legally from other borders, given that the two entities separated by the disputed line were, if the treaty be adopted, typical State subjects of international law being bound by the same principles as other States.

The attitude of the GDR was repeated, in foreign policy terms, by Erich Honecker in a speech given in 1971:

> "3. The GDR declares its readiness to establish normal diplomatic relations with all States. We proceed in this from the basis of equal rights for all States and are guided by the natural principle that every State respects the sovereignty of the GDR in the same way as the GDR for its part fully respects the sovereignty of other States.
> 4. The GDR further advocates the establishment of normal relations in conformity with the rules of international law with the FRG also..."[53]

The fact that the Federal Republic is here singled out might lead the reader to conclude that that country was actually being accorded special attention, perhaps inconsistent with the claim that the GDR regards it simply as another State. However, it is suggested that a more accurate interpretation is that Honecker was simply emphasizing that the Federal Republic was included in the ambit of those States with which the GDR was prepared to establish normal relations. The implications behind having normal relations with West Germany included attaching to their common border the label "inter-State frontier".

The Federal Republic does seem to recognize the GDR's western frontier in the Grundvertrag. In Article 3, para 2, it is provided that the parties

> "...affirm the inviolability now and in the future of the border existing between them and undertake fully to respect their territorial integrity."[54]

The concept of inviolability of frontiers has long been regarded by the socialist States and socialist international lawyers[55] as one of the principles of international law, applying in relations between States and has appeared in treaties involving Western States (such as the German eastern treaties) and in international agreements (for example, the Helsinki Final Act). Respect for territorial integrity[56] is sufficiently important to be one of the obligations in Article 2 (4) of the United Nations Charter:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity ... of any state."

This provision is binding upon almost every State due to the fact that most States are members of the United Nations. Moreover, the prohibition of the threat or use of force, and, insofar as it is protected by this prohibition, the associated protection of territorial integrity, is probably one example of jus cogens.[57] More recently, the respect for territorial integrity has been declared a principle of international law by the General Assembly.[58]

Given the clear expression of these concepts in the Grundvertrag and therefore their endorsement by the parties as rules governing their mutual relations, and taking into account the established nature of these rules as rules of international law and their use with regard to State frontiers and territory, it must be concluded that the Federal Republic regards and accepts the GDR territory, and the frontier of that territory where it meets the Federal Republic,

as being governed by the same rules of international law as other territories and frontiers and, despite its reservations, treats it as an inter-State frontier.

(vi) Assessment of the FRG-GDR Frontier after 1973.

There would appear to be a widely held view that the border is to be regarded as being governed by international law, and therefore in this sense the GDR has been successful in attempting to gain recognition of the international character of the frontier by the Federal Republic. Among West Germans, however, opinions vary. Geck, for example, in summarizing the provisions of the Grundvertrag, notes that it includes "a recognition of territorial frontiers"[59] and describes this as "a success of the German Democratic Republic."[60] Frowein writes that even if the border with the GDR is marked as the inner-German border, nevertheless it should be clear that it possesses an international law quality;[61] although legal relations may continue to exist between the two German States and there may be some special relationship, yet the border is still an international one. Frowein concludes that the international legal position concerning the frontier is that it is an international legal frontier between two independent subjects of international law.[62] But it should be noted that even in saying this, he also points out the peculiarities of the problem.

Blumenwitz adopted a different stance. He describes the Basic Treaty as the most controversial of the Eastern treaties concluded by the Federal Republic.[63] He mentions the border provisions contained in Article 3, paragraph 2 of the treaty, but concludes that, for the GDR, the most important aim in the context of

the detente and normalisation process was to become a member of the United Nations.[64] Another view, while by no means denying the special importance to the GDR of acquiring membership of the U.N., nevertheless accords at least equal status to the policy of obtaining international recognition by the Federal Republic of its sovereign statehood and all of the consequences flowing therefrom, with regard for example to borders, citizenship and reunification.[65] This gives some indication of the diverse opinion in the Federal Republic on all aspects of the East-West German legal relationship. Blumenwitz goes on to claim that the Eastern treaties and the CSCE Final Act contain no guarantee (Garantie) for the frontiers in central Europe and, in particular, that for the two German States, there exists no prohibition of addition or accession (Anschlussverbot).[66] Yet one has to question the intention behind such an assertion. Few would disagree that all States have a right to alter their common borders by mutual consent using peaceful means. This right is expressly mentioned in the CSCE Final Act, as part of the first of ten principles guiding the relations between the participating States;[67] therefore, regardless of the legal status of that instrument, it may safety be assumed that none of the participating States would argue against the validity under international law of such a right - given that it is classed as one of the main principles guiding the inter-State relations and quite separately from the right of States under international law to alter their frontiers, if they desire, as a manifestation of sovereignty. It must be taken into consideration that one of the most important aspects of the Eastern treaties, for the USSR, Poland and the GDR, was the agreement of the Federal Republic that the western frontiers of Poland and the GDR were subject to the rules of international law (even if not recognised by the FRG as international

frontiers). This agreement of the FRG was intended to contribute to the stability of these frontiers, and the comment that the treaties and the CSCE Final Act contain no guarantee, taking into consideration both the terms of these instruments and the conditions in which they were negotiated and finally agreed upon, suggests either a failure to apply appropriate weight to the relevant provisions or else an attempt to disregard the true nature of the treaties. Both the treaties and the Final Act are concerned with establishing some basis or foundation for the future relations between the participating States. One of the essential components of that foundation is the acceptance of frontiers and the strengthening of their security. Thus to assert that they contain no guarantee for the existing frontiers is to undermine the whole basis of these instruments: while they explicitly or implicitly acknowledge the right of all States to change their borders, they nevertheless at the same time attempt to establish a sound basis - a guarantee, perhaps - for the present and future stability. It is accordingly the view of this writer that the Eastern treaties and the CSCE Final Act do provide, subject to the right to alter borders by peaceful means and under mutual agreement, some guaranee for the present borders in central Europe, since they contain expressions of consent to certain frontiers by States which previously had withheld their agreement or approval; and because to say that they contain no guarantee, is to undermine these agreements as a whole. This need for stability and security has been acknowledged and recognized even by Chancellors of the Federal Republic. In 1966, Kiesinger, while stressing the necessity to achieve a final settlement of boundaries with a reunified Germany, still felt able to mention the Polish need for greater security:

> "Large sectors of the German people very much want reconciliation with Poland whose sorrowful history we have not forgotten and whose desire ultimately to live in a territory with secure boundaries we now, in view of the present lot of our own divided people, understand better than in former times ....."[68]

Chancellor Kohl has also emphasized, in the context of a debate on the Federal Republic's relations with its neighbouring States to the east, that the borders of all States in Europe are inviolable. Concerning in particular the Warsaw Treaty, Kohl stressed that the Federal Republic remained committed to the treaty in its full sense.[69] It is difficult to find in Kiesinger's statement the sentiment which would serve to deny from the future treaties, as Blumenwitz seeks to do, the security sought; while Kohl makes it clear that the Federal Republic does adhere to the Warsaw Treaty in full, including therefore those parts which attempt to give stability to the Oder-Neisse line.

In the context of the Grundvertrag, the phrase "of all States in Europe" (aller Staaten in Europa), which is taken from the Preamble of the treaty, may also have some special significance for the status of the inner-German border. Ress notes that the question whether or not the common border of the two German States can be equated with those of all States in Europe in their legal quality, appears debatable (and not only in light of the judgment of the Federal Constitutional Court, which begins from the assumption that this border is subject to municipal law).[70] Ress continues, however, by saying that the equation of the FRG -GDR border with those of all other States in Europe, which

occurs in the Preamble, implies the interpretation that this particular border, and not only those of both States with third States, is to be regarded as a matter of international law.[71] By including this clause in the Preamble, the Parties, it is argued, showed their will to regard the existing demarcation line as a State frontier.[72] Thus, despite the differing legal positions with regard to the German question, provision for which is made in the Treaty, the two States have recognized their common border as a State frontier. This writer agrees with the analysis of Ress with regard to the effect of the Grundvertrag on the status of the inner-German frontier. It is consistent with the view expressed above, that any characterization of the border as similar to one between two Lander of the Federal Republic, regardless of its validity under the law of West Germany, cannot apply to the border for purposes of international law. In so far as the Grundvertrag concerns itself with the frontier between West and East Germany, it may be regarded as a success for the GDR, in that it amounts to an achievement of one of its primary policy objectives - the acceptance by the Federal Republic that the frontier is a matter of international law, like other inter-State frontiers, is evidence that the two German States are separate entities in the same way that any two other States are, usually, separate legal entities. In other words, the separateness of the two States, which is a foundation of the GDR's foreign policy, is highlighted by the border provisions. On the other hand, the treaty in some way also reflects the policy of the Federal Republic, of emphasizing the unique nature of the relationship - that, despite the acknowledged differences, there remain links, even legal ones, between the two parts of one German nation. Thus, in the Preamble the Parties are described as:

"Proceeding from the historical facts and without prejudice to the differing views of the FRG and the GDR on questions of principle, including the national question ..."[73]

Related to this is Article 9 of the Treaty, in which the Parties agree that the Treaty does not affect any treaties or agreements previously concluded by them or concerning them. Thus the full validity of the Potsdam Agreement is maintained, according to the West German interpretation of which there must still take place a peace settlement involving a reunified Germany, before the regime in Europe may be regarded as finally settled. It is in this context that the treaties concluded by the Federal Republic with its eastern neighbours have been described as a "regime intermediaire."[74] Such an analysis would not find a sympathetic hearing in the GDR. Although it is true that the Eastern treaties, whether individually or collectively, do not form a substitute for a peace settlement, they do serve to give nevertheless a settled character to the existing situation in central Europe. While according to the Federal Republic and the Western Powers a peace settlement remains outstanding, the requisite precondition for such a settlement (an all-German Government) does not exist nor is expected to exist in the foreseeable future (i.e., as long as Europe is divided into two blocs). The Eastern treaties, which take account of the existing geopolitical realities of central Europe, do serve to establish or to relaunch relations between the Parties on a new basis, taking account of the war (in the FRG treaties with Czechoslovakia and Poland) or events which occurred as a result of the war (in the treaties of the FRG with the Soviet Union and the GDR). The treaties all have a fundamental character, in that in each case they serve either as the basis for normalization of relations, the basis for establishment of

any formal relationship at all, or the redefinition of an existing one. Thus the treaties are not self-executory; they form part of a regime for existing States and frontiers which are as permanent and firmly-established as many "normal" States. The only difference is that, with regard to central Europe, the Potsdam Agreement remains in force and, potentially, may play a role in the future alteration of the existing frontiers and States. It has already been noted that, generally, States may alter their own frontiers or even their status as States, as an expression of their sovereignty. The Potsdam Agreement provides for a specific framework in which such events might occur. Certainly, the sovereignty of the two German States may be limited for certain purposes; it is also true that the Potsdam Agreement does not constitute an expression of the sovereign will of Germany. But it does express the will of the UK, USA and USSR, which at that time had the right under international law to make the decisions which were taken with regard to Germany.

In taking account of the existing situation in Europe, the Eastern treaties form a permanent regime for the parties involved. There does remain a formal possibility of fundamental change (through the realization of certain provisions of the Potsdam Agreement), which is formally separate from and independent of these treaties. However, a realistic assessment of the situation shows consistent development away from the aims of the Potsdam Agreement towards a regime which was then unforeseen. In the absence of genuine possibility of their realization, the relevant provisions of the Potsdam Agreement, despite persistent and consistent reservation of rights and obligations, seem to exist only formally. Just as there exists under general

international law the right to alter frontiers or status, so for the States involved there remain these additional specific possibilities. But an assessment of the reality of the situation and observation of how it has evolved indicates a steady movement towards the present regime. Nominally, there might always remain the possibility of change under the conditions specified at Potsdam, while the "regime intermediaire" becomes ever more firmly entrenched. It will be just as permanent as other border regimes or States. Is it to be regarded as fatal, that there exists a specific instrument which may serve ultimately to weaken the viability of the existing system? In other words, this writer does not dispute that the Potsdam Agreement remains in force and that it may lawfully alter the regime established or confirmed by the Eastern treaties, and in this case one is perhaps justified in calling it a "regime intermediaire"; but despite this characterization as intermediate, the regime in reality is as permanent as most others and should be regarded as capable of such a degree of permanency and to be sufficiently normal as to render the term "intermediaire" misleading. The regime may be intermediate, but it could be permanent, in which case it would be incorrect to define it in this way. Either course may be permanent and definitive (whether reunifying Germany and organising a peace settlement or maintaining the existing regime). The difference is that the latter seems to be subject to the existence or not of the former. This would seem to weaken the assertion that the present regime actually is not "intermediaire". Against this should be considered the strength of the present regime of frontiers and States in central Europe and the likelihood of it continuing. Moreover, in this context, one may find the attitude of the USSR to be of value. That State is a Party to the Potsdam Agreement; it is also a Party to one of the Eastern Treaties and,

although the continuing unaffected validity of all treaties or arrangements previously concluded by the Parties is explicitly provided for,[75] the fact that the Soviet Union was prepared to enter into such an agreement with the Federal Republic hardly indicates a desire on the part of the former State to speed up the performance in full of the Potsdam Agreement.

Clearly it has to be acknowledged that there do exist fundamental disagreements between concerned States with regard to how the situation in central Europe ought to evolve. The status of the FRG-GDR border in this context is one of the most confused elements: it may be a normal international frontier; it may be a frontier between States which are not foreign to one another; it may form part of a regime intermediaire: these are some of the views expressed on this matter. Then there is the conclusion of the Federal Constitutional Court, and this ruling may be of greater value to the international lawyer in arriving at a definition of this frontier for purposes of international law than at first anticipated.

(vii) The Dual Status of the FRG-GDR Frontier

Although this characterisation by the Federal Constitutional Court of the inner German frontier as similar to a Land frontier cannot be regarded as authoritative for purposes of international law, it is nevertheless instructive. In fact, it is necessary to classify the border twice. Firstly, as the line between two States, it is prima facie an international frontier, in so far as one does not look beyond the existence of the two States to the basis of their presence in central Europe. However, if one then looks at the border in the German context

- in light of the continued existence, for certain purposes at least, of Germany - then its character appears to change. In 1945 the line divided the Western occupation zones from that of the Soviet Union. But eventually, the occupation regimes were dismantled and so the line could no longer be classified as an internal division of occupation zones. However, it is in this rather artificial context that some similarity to the Land frontier must be acknowledged. In so far as Germany continues to exist - in the eyes of the Western Powers - then, with regard to rights and responsibilities relating to Berlin and Germany as a whole, the "border" is, arguably, comparable with a Land border. But the significance of this classification lies not in the relationship between West and East Germany, but in the relationship between the UK, USA and France, on the one hand, and the Soviet Union on the other, as the Four Powers responsible for Germany. For these States, acting in this capacity, the frontier is not an international frontier. The Soviet Union, despite maintaining that Germany does not exist, nevertheless enjoys certain rights and accepts some responsibilities in this respect, that is, as one of the Four Powers, and takes advantage of its status in certain situations.[76] The border serves to show the Four Powers where their respective authorities extended to during the period of occupation; since the occupation regimes no longer operate, its remaining function is to delimit the former occupation zones for the purposes of the residual power possessed by the four States. Since the residual power is concerned with Germany as a whole, the border in this all-German context is for the UK, USA and France, simply that point at which the USSR could lawfully exercise supreme authority in Germany, where only that part of the country was concerned, and where as a consequence their own authority ceases, except

for all-German matters. The opposite position of course holds true for the Soviet Union.

In this limited sense, in the context of the still-existing German State only, the dividing line loses its character as a border and reverts to being an internal division. This definition is to be distinguished from that of the Federal Constitutional Court, since that tribunal held that the border could be compared to a "Land" border - i.e., an internal as opposed to international frontier - in its role as the frontier between the Federal Republic and the Democratic Republic. It is suggested that in fact the opposite holds true: the border is indeed an international one in so far as it separates West from East Germany. Nevertheless, as the dividing line in the still-existing German State, it cannot be an international frontier; in such a situation it may validly be compared to a Land frontier, in that both constitute internal divisions of States (it is yet another matter whether or not these States actually exist).

FOOTNOTES

1. This definition is subject to various exceptions and modifications. Thus, certain aspects of State sovereignty may be lawfully exercised outside the national territory, with lawful consequences. A State's diplomatic missions abroad have certain privileges which mean that the host State is limited in the actions which may be taken with regard to the Embassy. Article 22 of the Vienna Convention on Diplomatic Relations of 1961 provides, in Paragraph One:

> "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission."

Most European States agreed in the Helsinki Final Act that their frontiers are inviolable. In addition, all States have rules or laws governing immigration by foreigners, so that they may not enter the State lawfully without permission. The analogy should not, however, be extended too far. Had Iran carried out any unauthorized incursions into the territory of the USA, it is likely that the USA would have responded militarily. The Iranian invasion and subsequent occupation of the US Embassy compound in Tehran brought no military response from the USA, other than the use of its armed forces in the failed attempt to rescue the American hostages.

The ILC, commenting on its Draft Articles with regard to the Vienna Convention, said:

> "Among the theories that have exercised an influence on the development of diplomatic privileges and immunities, the Commission will mention the "extraterritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State."
> 1958 YILC, Vol. II, p. 94.

But this is very much a limited extension. The above-quoted theory is only one mentioned by the Commission, and the Convention itself provides that its Articles offer "priveleges and immunities" (Preamble). A State does not possess its sovereignty by privelege but by right. Whether by custom or convention, the position of diplomatic missions and their staffs is one of privilege and immunity which allows certain sovereign aspects or functions to exist outside the national territory - but in a very limited manner for restricted purposes.

Another restriction upon the definition is that the effective sovereignty of a State may be reduced by the actual control over part of its territory by another power, such as an internal opposition group or a foreign army. While the effective sovereignty does not reach to the State frontier, the

frontier may, and probably does, continue to exist. An example of this is the situation of Angola, where large areas of territory, controlled by UNITA, are outside the effective control of the government. That country's borders are not regarded as thereby altered.

In addition, the definition may not fit all situations - the frontier may not be clearly established in the sense of exercise of sovereignty, and it may be necessary to establish who has sovereignty where a dispute exists; Max Huber's views, as expressed in the Island of Palmas Case (Permanent Court of Arbitration, 2 R.I.A.A. 829) are of great importance:

> "If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt, or if .... the question arises whether a title is valid erga omnes, the actual continuous and peaceful display of State functions is in case of dispute the sound and natural criterion of territorial sovereignty."

Brownlie (Principles of Public International Law, Oxford, (3rd ed.) 1979, at pp. 127-128) expresses a further modification of the idea of frontiers limiting sovereignty, in the sense that the frontier may carry out this function, even though it is not accepted by all relevant States as the frontier:

> "Frontiers which are "de facto", either because of the absence of demarcation or because of the presence of an unsettled territorial dispute, may nevertheless be accepted as the legal limit of sovereignty for some purposes, for example those of civil or criminal jurisdiction, nationality law, and the prohibition of unpermitted intrusion with or without the use of arms."
> (Footnotes omitted).

2. Sovereignty: "By and large the term denotes the legal competence which a state enjoys in respect of its territory."
Brownlie, Note 1, supra, at p. 126.

> "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."
> - Max Huber in his arbitration in the Island of Palmas Case

In view of the powers retained by the UK, USA, USSR and France with regard to"Germany as a whole" and the delimitation of its external frontier at afuture peace conference, there may be questions as to the extent of their independence. It might be argued that most Warsaw Pact and NATO States are also less independent because of their commitments to these groups (or to the Soviet Union and USA); or that Member States of COMECON and the European Community are, through their commitments to these organisations, less free in their scope for unilateral action. But there is an important substantive difference: all commitments assumed or undertakings made by States with regard to these organisations were, at least

nominally, voluntary. The States involved may withdraw, should they wish (cf loosening of ties between France and NATO). The GDR and FRG (and Germany, should it exist) are on the other hand involved in a relationship with the Four Powers which is not based on treaty or agreement, but rather finds its origin in the assumption by the Powers of supreme authority with regard to Germany. The GDR and FRG cannot unilaterally suspend the applicability of this authority. While in 1954 the three Western Powers handed over most of their authority with regard to the western zones of Germany to the Federal Republic, certain rights of the Powers were retained in the relevant treaty. The FRG cannot, by denouncing the treaty, suspend the rights of the Powers. This is because, while they are given expression in the treaty, they do not derive their validity from the treaty, but from the assumption by the Allies of supreme authority with regard to Germany in 1945.

3. CMND 1552, Doc. No. 1, p. 27.

4. The Morgenthau Plan of 6 September 1944 provided, inter alia, for the conversion of defeated Germany into an agrarian State, and proposed the division of Germany.

5. H.C. Debates. Vol. 467. col. 1597-1598 (21 July 1949).
Churchill: ".... the Morgenthau Agreement .... it was initiated by President Roosevelt and by me, and it undoubtedly proposed treatment of Germany which was a harsh treatment, in respect of largely limiting her to being an agricultural country. But that was not a decision taken over the heads of the Cabinet. It was not one that ever reached the Cabinet. It never reached the Cabinet because it was only ad referendum; it was disapproved by the State Department on the one hand and by my right hon. Friend and the Foreign Office Committee on the other, and it just dropped on one side. I must say that it never required a Cabinet negative; it never had any validity of any sort or kind.

Nevertheless I must say that I do not agree with this paper, for which I none the less bear a responsibility. I do not agree with it, but I can only say that when fighting for life in a fierce struggle with an enemy I feel quite differently towards him than when that enemy is beaten to the ground and is suing for mercy."

Churchill had initialled the agreement but changed his mind later, to the extent of criticizing the Poles for wanting so much of Germany, while if the Morgenthau Plan had been put into operation, it would have caused enormous changes in the character of Germany.

Further, it has been suggested* that the Morgenthau Plan could be seen in many of its aspects in the Directive of the United States Joint Chiefs of Staff to the Commander-in-Chief of the US Forces of Occupation regarding the Military Government of Germany (JCS 1067, Documents on Germany under Occupation 1945-1954, p. 13).
*Hubatsch (ed.): The German Question, New York, 1967 at p.19.

6. Documents on British Policy Overseas. (1984).
Series 1, Vol. 1, 1945, Doc. No. 603.

7. Part II, A.9 (iv).

8. Potsdam Protocol, Part II, A.1.

9. CMND 1552, Doc.No. 2, p. 29.
CMND 1552, No. 4, p. 34 - The Yalta Agreement, where it was agreed that a zone of occupation be allotted to France.

10. CMND 1552, Doc. No. 12, p. 45.

11. R. v. Bottrill, ex parte Kuechenmeister
(1946) 1 All ER 635.

12. This was the policy known as the Hallstein Doctrine.

13. Extract from Policy Statement by Brandt to the Bundestag.
28 October 1969
CMND 6201. Doc. No. 104, p. 204.

14. The Treaty of Rome, creating the European Economic Community, was signed in 1957. The FRG is one of the original six Member States.

15. Treaties establishing the European Communities, pp.429-431.
Office for Official Publications of the European Communities (1973).

16. EEC Treaty, Article 239.

17. Protocol on German Internal Trade, Paragraph 1.

18. It is necessary to distinguish here between common borders of EEC Member States, which were for purposes of EEC trade, especially in the form of free movement of goods and persons, modified by the Treaty of Rome, and borders between Member States and Non-Member States. It is in the context of treatment of borders with regard to Non-Member States that the GDR-FRG border is considered.

19. The FRG legislation includes many cases of provision for GDR citizens as if they were not foreigners, such as the FRG law on citizenship.

20. Norddeutsches Vieh-Und Vleischkontor GMBH v Hauptzollamt-Ausfuhrer-stattung, Hamburg-Jonas.
(Swine Bellies Case), No. 14/74.
1974 E.C.J. Reports 899.

21. During the ratification procedure of the GDR-FRG Basic Treaty, the Federal Government insisted that the two states were not foreign to each other. This view is not shared by the GDR.

22. Note 20, supra. at p. 913.

23. This policy was developed to the extent of weather forecasts for "East Prussia" being broadcast.

24. The citizenship law in force in the Federal Republic is the citizenship law of 1913. Thus, reference is not made as such to FRG and GDR. The law has been much amended, especially during and after the Hitler dictatorship, but has the effect of creating one German citizenship, which applies to Germans born in GDR as well as FRG.

25. ".....a new border fence (is) being erected behind the old one which experts say is virtually impossible to scale.
The 10 ft. high electrically charged barricade is set back some 500 yards from the main fence and consists of metal railings with razor-sharp edges designed to cut the hands of anyone attempting to climb it ...."
The Times, 28/3/84 - "E. Germans build electric fence."

26. Doeker, Bruckner: The Federal Republic of Germany and the German Democratic Republic in International Relations, Vol. I, Dobbs Ferry, N.Y. (1979), at p. 371.

27. 1970 9 ILM 1026-1027.

28. Treaty of Friendship, Mutual Assistance and Cooperation between the USSR and GDR, 12 June 1964, Article 4, CMND 6201, Doc. No. 46, p. 107.

29. Declaration on European Peace and Security issued at the Karlovy Vary Communist Conference, 26 April 1967.

30. Letter concerning German Reunification from the West German Foreign Minister to the Soviet Foreign Minister, 12 August 1970.
CMND 6201, No. 125.
"...dieser Vertrag nicht im Widerspruch zu dem politischen Ziel der Bundesrepublik Deutschland steht, auf einen Zustand des Friedens in Europa hinzuwirken, in dem das deutsche Volk in freier Selbstbestimmung seine Einheit wiedererlangt."
In: Verdross, Simma, Geiger: Territoriale Souveranitat und Gebietshoheit. Zur volkerrechtlichen Lage der Oder-Neisse-Gebiete.
(Territorial Sovereignty and Gebietshoheit. On the International Legal Status of the Oder-Neisse Territories).
Bonn 1980, at p. 127.

31. Frowein: Legal Problems of the German Ostpolitik.
1974 23 ICLQ 105 at 114.

32. See pp. 134-135 and Note 13, supra.

33. Frowein (Note 31 supra, at 115) suggests as a precedent the relationship between the UK and Ireland. However, there are legal differences in the manner in which Ireland came into existence as a separate State, in comparison with GDR and FRG.

34. 1973 12 ILM 16 (English text)
BGBl 1973 II, p. 423 (German text).

35. "Sie bekraftigen die Unverletzlichkeit der zwischen ihnen bestehenden Grenze jetzt und in der Zukunft und verpflichten sich zur uneingeschrankten Achtung ihrer territorialen Integritat.

    There exists also a Supplementary Protocol to the Treaty, Part I of which also refers to the Parties' common border. However, this deals with practical details, including marking of the border, drawing up of necessary documentation on the course of the frontier and regulation of other problems connected with the course of the frontier.

36. See pp. 141-143 , supra.

37. The Moscow Treaty was ratified on 17 May 1972. The Grundvertrag was initialled on 8 November 1972, signed on 21 December 1972, and ratified on 20 June 1973.

38. The treaties are:
    (a) Agreement between the Government of the FRG and the Government of the GDR on Transit Traffic of Civilian Persons and Goods between the FRG and Berlin (West). 17 December 1972.
    (b) Treaty between the FRG and the GDR on Traffic Questions. 26 May 1972.

39. "The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal or local government or authority ...."
    Declaration re Unconditional Surrender of Germany,
    Preamble, Paragraph 5.
    CMND 1552, No. 7., p. 38.

40. See Note 6, supra.

41. Applications of Bavarian State Government and Federal German Government. 1973. NJW 1539.
    1976 70 AJIL 147 (English summary, with quotations)

42. "In effect, Bavaria was challenging the treaty itself. Attacks against international treaties were nothing new to the Federal Constitutional Court. When still an opposition party, the Social Democrats had also used law suits as a legal vehicle against treaties they opposed politically."
    Geck: Germany and Contemporary International Law.
    1974 9 TILJ 263, at 273.

43. Statute of the Constitutional Court - Bundesverfassungsgerichtsgesetz, section 31.
    There may be some general limits on the binding effect of the decisions of the Constitutional Court - the wording certainly has binding effect (i.e. the tenor of the decisions), but the reasoning probably does not. This may be affected by any particular importance attached by the Court to its reasoning, such as in the present case.
    See: Geck, Note 42, supra, at 275.

44. Note 41, supra. 1973 NJW 1542 col. 2.
1976 70 AJIL 147, at 152.

45. Note 41, supra. at 153.

46. For example, the Warsaw Treaty, Article I (2), in which the FRG and Poland undertake an obligation and express opinions identical to Article 3 of the Grundvertrag. There was much opposition to the ratification of the Warsaw Treaty, but the Oder-Neisse Line has not as yet been compared realistically to a Land frontier, such as exists within the Federal Republic.

47. Gelberg: The Case of the Treaty Concerning the Bases of Relations between the GDR and the FRG. (Remarks on the Judgment Pronounced by the Federal Constitutional Court on July 31, 1973).
1974 15 PWA 259 at 267.

48. Note 41, supra, at 153.

49. One leading West German commentator rightly points out:
"The Treaty on the Basis of Relations is a relatively complicated document of international law; it does not only cause considerable difficulties in interpretation by its verbal compromises, its "agreements not to agree", its deletions and various interpretation instruments, but also reflects the exceptional character of the legal situation of Germany in nearly every provision."
Ress: Die Rechtslage Deutschlands nach dem Grundvertrag vom 21 Dezember 1972. (The Legal Status of Germany after the Basic Treaty of 21 December 1972). Berlin, Heidelberg, New York, 1978, at p. 390.

50. Note 41, supra, at 153.

51. P. 151, supra.

52. Note 26, supra.

53. Excerpt from speech delivered by Honecker at the VIII SED Party Congress on 15 June 1971.
CMND 6201, Doc. No. 135, p. 235.

54. Note 35, supra.

55. "One of the fundamental principles of international law is the principle of territorial integrity, i.e. territorial inviolability. Territorial integrity is a static conception denoting inviolability of the status of territorial possession."
B. Wiewiora: The Polish German Frontier in the Light of International Law. Poznan, 1964, at p. 46.

56. "The Socialist doctrine has raised territorial integrity to the rank of a fundamental principle of contemporary international law."
Ibid, at p. 48.

57. Brownlie, Note 1, supra, at p. 513.

58. General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 1970.
G.A. Res. 2625 (XXV). Adopted without a vote.

59. Note 42, supra, at 272.

60. Ibid.

61. "Wenn die Grenze zur DDR weiterhin als innerdeutsche Grenze bezeichnet wird, so darf man sich doch nicht daruber im unklaren sein, dass diese Grenze auch eindeutig eine volkerrechtliche Qualitat hat."
Frowein: Die deutschen Grenzen in volkerrechtlicher Sicht. (The German Frontiers in Light of International Law).
1979 34 (Teil 1) Europa-Archiv 591, at 596.

62. "Die Grenze zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik ist eine volkerrechtliche Grenze zwischen zwei unabhangigen Volkerrechtssubjekten ..."
Ibid.

63. "Der Vertrag uber die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der DDR (Grundvertrag) vom 21 Dezember 1972 ist der umstrittenste aller Ostvertrage ...."
D. Blumenwitz: Was ist Deutschland? Staats-und volkerrechtliche Grundsatze zur deutschen Frage und ihre Konsequenzen fur die deutsche Ostpolitik. (What is Germany? Municipal and International Law Principles on the German Question and their Consequences for the German Question). Bonn, 1982, at p. 38.

64. "Wichstigtes Ziel der DDR im Rahmen des Entspannungs - und Normalisierungsprozesses war ihr UNO-Beitritt ...."
Ibid, at p. 39.

65. ".... so blieben nunmehr gegenuber der Bundesrepub lik Deutschland nur noch zwei wichtigere Ziele uhrer Westpolitik offen: Erstens die vorbehaltlose volkerrechtliche Anerkennung ihrer souveranen Staatlichkeit, und das mit allen Konsequenzen z B. fur die Grenzen, das Staatsangehorigkeitsrecht, die Weiderverein-igungspolitik; zweitens die Aufhebung der Blockade ihrer Aussenbeziehungen, multilateral in den internationalen Organisa-tionen und bilateral bei den westlich orientieren oder neutralen Landern ...."
B. Zundorf: Die Ostvertrage. (The Eastern Treaties). Munchen, 1979, at p. 211.

66. "Die Ostvertrage und die KSZE-Schlussakte enthalten keine Garantie der Grenzen in Mitteleuropa. Insbesondere gibt es fur die beiden deutschen Staaten kein Anschlussverbot" ....."
Note 63, supra, at p. 43.

67. Guiding principle I. Sovereign equality, respect for the rights inherent in sovereignty.
"....They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement...."

68. Extract from statement to the Bundestag on 13 December 1966.
CMND 6201, Doc. No. 68, p. 149.

69. "Gerade weil der Satz pacta sunt servanda so wichtig ist und weil wir uns im Sinne der Praambel des Warschauer Vertrages bewusst sind- ich habe das vor wenigen Tagen noch einmal in dem Brief an den Kollegen Hupka auch deutlich gemacht -, dass die Unverletzlichkeit der Grenzen und die Achtung der territorialen Integritat und der Souveranitat aller Staaten in Europa in ihren gegenwartigan Grenzen eine grundlegende Bedingung fur den Frieden sind, gerade deshalb stehen wir zu den in diesem Vertrag getroffenen Vereinbarungen, und zwar in vollem Umfang."
Das Parlament. 16/23 Februar 1985, Nr. 7-8, p.11.

70. "... ob die DDR und die Bundesrepublik zueinander Grenzen haben, die denen aller Staaten in Europa in ihrer rechtlichen Qualitat gleichgestellt werden konnen, erscheint, nicht nur im Lichte des Urteils des Bundesverfassungsgerichts, welches von einer staatsrechtlichen Grenze zwischen der Bundesrepublik und der DDR ausgeht, zumindest fragwurdig."
Note 49, supra, at p. 78.

71. "Diese Gleichstellung der Grenze zwischen der Bundesrepublik und der DDR, die mit dieser Einleitungsklausel im Grundlagenvertrag, mit den Grenzen aller Staaten in Europa ausgesprochen ist, legt die Auslegung nahe, daB auch die Grenze zwischen der Bundesrepublik und der DDR (und nicht nur die Grenze beider Staaten zu Drittstaaten) als eine volkerrechtliche Grenze anzusehen ist."
Ibid.

72. "Dieser Satz der Praambel bekraftigt damit den Willen der Parteien, die zwischen ihnen bestehende, auf besatungsrechtliche Akte zuruckgehende Demarkationslinie als Staatsgrenze zu betrachten."
Ibid.

73. "ausgehend von den historischen Gegebenheiten und unbeschadet der unterschiedlichen Auffassungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zu grundsatzlichen Fragen, darunter zur nationalen Frage ...."

74. Note 49, supra, at p. 74.

75. Article 4 of the Moscow Treaty.

76. For example, the Soviet Union maintains military missions in each of the Western sectors of Germany and regularly carries out military patrols there. This function is based upon its status as one of the Four Powers. Moreover, the Soviet Union permits the existence of military missions of the Western Powers, and military patrols, in the GDR. This is also a manifestation of the Four Power status of Germany.

The role of these missions was highlighted in 1985 with the shooting by Soviet forces of a US officer in the GDR.
See: The Times, 26 March 1985:
"Reagan protests to Russians over US major's death"; "First death after 39 years of incidents with Soviet soldiers"; "Counting the missions' cost".

CHAPTER FIVE

The Status of Germany

(i) From 1945 to 1949

From the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Allies,[1] it is clear that this assumption of authority did not effect the annexation of Germany, in the view of the Occupying Powers. They intended that Germany should continue to exist as a State and participate in a peace settlement with its former adversaries. Naturally, if they had annexed that State, the Four Powers would have had no German State with which to make peace and would presumably have been liable for reparations payments. Had Germany ceased to exist, in 1945 or at any time since, for example, when the GDR and FRG came into existence, then it follows that any possible claim that could be made against Poland with regard to the territories which it gained in 1945 would either lapse or devolve upon the two German States. Since they have both recognized, in the Zgorzelec and Warsaw Treaties, the western Polish frontier on the Oder-Neisse line, it would appear that there would be no legal problem to be settled. That is, if there is no "Germany", there can be no peace settlement as provided for by the Potsdam Agreement, at which the western Polish frontier finally would be determined; the issue is simply closed because the course of events foreseen at that time has not transpired. There is the problem whether or not, in that event, a reunified Germany, based upon the territory of FRG and GDR, would share any identity with the German Reich - in which case, could a peace settlement take place with that Germany? Alternatively if Germany has survived since 1945, either

because of or despite the existence of the GDR and FRG, is its potential freedom of negotiation at a future peace settlement restricted in any way by the agreements voluntarily entered into by these two States?

Germany was not annexed, then, if the statement of the Four Powers be accepted. In that case, what was its status? Kelsen, in the first of two articles on the subject[2] suggested, prior to the end of the war, that there were two possibilities: belligerent occupation and the establishment of a condominium. There is overwhelming authority to establish the position that belligerent occupation by itself cannot transfer sovereignty over land.[3] As stated by Jennings,[4] if debellatio follows the belligerent occupation, then a transfer of sovereignty may occur. But again, there is a divergence of opinion over the exact scope of the term debellatio: while the majority seems to take the view that it is the same as subjugation and closely connected with annexation, and that, in this latter sense, it means conquest followed by annexation, there appears to be, if not a school of thought, at least a classroom consensus among West German writers, that debellatio can be distinguished from annexation.[5] It is because this minority view is taken with particular regard to the German question, that it is of some interest to this study. According to Meyn, debellatio may occur, in the view of the minority, without even annexation or devolution of sovereignty, but simply through the total defeat of the conquered State, which would include the overthrow of its government. This would reduce debellatio to a factual situation, without the legal consequences suggested by Jennings. This in turn would permit the argument that, while Germany may have been subject to a debellatio, this itself has no legal consequences for the State of Germany, which continues therefore to exist. The reasoning behind

this interpretation of the meaning of debellatio is however unclear. Given the statement by the Four Powers, that they did not intend to annex Germany, then, prima facie, by adopting the majority view, that debellatio requires not only the total military defeat of a State but also its annexation, a strict interpretation would show that there could not have taken place with regard to Germany a debellatio, the consequence being that it still exists - that is, without prejudice to separate legal considerations which may affect the legal existence of Germany. Nor, by comparison, could debellatio have occurred in the case of Poland in 1939 - although the whole of its State territory was occupied by the Soviet Union and Germany, nevertheless the State continued to function.[6] Occupation itself is a temporary state[7] of affairs which allows the occupier only limited rights with regard to the occupied State.

Kelsen foresaw certain practical problems which might arise with regard to Germany in the event of a status of belligerent occupation being established. He pointed out that States occupying on this basis would have their subsequent freedom of action restricted by the legal scope of this situation, because its temporary and provisional nature would not be appropriate as a legal basis for effecting the fundamental alterations in the German political system which the Allies intended. Kelsen considered also the possibility of basing an occupation of Germany in a treaty, such as a peacy treaty, yet saw practical problems in such an alternative:

> "Any international treaty concluded by a German government under the pressure of military occupation will certainly be declared null and void by German nationalistic propoganda. It is uesless, nay,

dangerous to settle national and international problems, aroused by a conflict of the dimensions of a World War, by a peace treaty imposed upon the defeated State."[8]

Little credence was given to this view. In the Potsdam Agreement, the parties agree that there should be prepared a peace settlement for Germany "to be accepted by the Government of Germany."[9] Kelsen believed that any peace treaty thus imposed upon the defeated Germany, while legally valid, would be politically farcical and basically flawed because there would be an absence of genuine consent on the part of one side. However, he suggested that the problems outlined above could be avoided by establishing in defeated Germany a condominium of the UK, USA and the USSR. This would entail, firstly, a debellatio of Germany, which is here defined as "the elimination of any possible resistance on the part of the defeated state, so that wartime precariousness has ceased to exist and the conquest of the territory is firmly established." There is no mention here of annexation, but Kelsen subsequently suggests that the sovereignty of Germany would be "restored". For sovereignty to be restored, it must, logically, have been taken away, and therefore it may be assumed that Kelsen's debellatio would entail the transfer of sovereignty from Germany to the condominium powers. However, according to the Allies, in their declaration regarding the defeat of Germany, they did not annex that State, so it would appear that Kelsen's theory, depending upon a transfer of sovereignty which would occur through annexation, was not acceptable. This is not to suggest that the legal reasoning of Kelsen was entirely flawed; rather, the Allies deliberately adopted a course of action which was not anticipated by Kelsen because there was no obvious precedent - that is, assumption of supreme

authority short of sovereignty, the defeated State remaining in existence.

Kelsen's views are worthy of discussion here because they show how the legal and political situation in Germany might have developed and allow a comparison to be made between the reality which exists, which is sometimes described as sui generis, and that which could have developed on the basis of legal precedent[10]. It is quite correctly stated that his views as discussed above were de lege ferenda.[11] Allied practice did not subsequently follow his suggestions, but had they followed the existing practice to its logical conclusion, it is submitted that they would have found that Germany had ceased to exist as a State: its armies were completely defeated, its government destroyed, total authority to deal with German territory as the Allies saw fit was assumed:

> "The Governments (of the Four powers) will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."[12]

All of these factors, taken together, amount to a de facto debellatio of Germany and it is only the statement by the Four Powers that they were not actually annexing Germany which prevents the conclusion that they were in fact annexing it and taking over sovereignty. It was this statement which constituted the break with precedent and which formed the basis of the subsequent practice of the Allies. Otherwise, it seems that Kelsen correctly had anticipated future legal development with regard to Germany.

It is necessary at this stage to consider the next comment by Kelsen on this

subject,[13] because it is here that his views actually clash with the expressed views of the Four Powers. He states that, by abolishing the last German Government, "the victorious powers have destroyed the existence of Germany as a sovereign State."[14] But the Allies made it clear that they were not annexing Germany, hence the powers which they had assumed did not amount to sovereignty over Germany, and thus one must dispute Kelsen's assertion. Kelsen's theory that the German State was destroyed attributes an unjustified importance to the act of capitulation by Germany. Without annexation by the Four Powers, capitulation remains just that; it could not lead to legal effects which, by itself, it cannot have.[15] Definitely Germany continued to exist as a State after the defeat of 1945, because the Allies, having the power to bring about debellatio, consciously decided to maintain its existence. This they could also do - the power to cause the State to cease to exist includes the power to carry out lesser deeds, such as removing certain facets of independent statehood, while permitting the shell to remain.[16] However, the fact that Germany survived the military and political defeat of 1945 does not mean that the Reich necessarily continues to exist some forty years later.

Kelsen argued at length his theory that the actions of the Allies, in particular their assumption of supreme authority, have placed Germany under the joined sovereignty of the occupant powers, and he disparaged the terminology employed by the Allies,[17] in order to show that the real situation was different from that claimed. However, the practice of the occupant powers was to show that they still regarded Germany as a State.[18] The view has been put forward that, given that Germany still existed, then the United Kingdom was still at war with that State. This was also a view taken in R v Bottrill, ex parte

Kuechenmeister.[19] If Germany had actually ceased to exist and joined sovereingnty been taken over by the occupant powers, then the possibility arises that the UK was at war with itself. However, the statement of the Court with regard to the state of war was in a municipal law context. Kelsen himself argued that, because a state of war could only exist between belligerent States, and Germany had ceased to exist as a State, the state of war could not exist with regard to Germany, so his argument here is consistent. Nevertheless, the conclusion must be that the Four Powers developed international law in creating their control machinery in Germany, because they deliberately avoided the course upon to them, as expounded by Kelsen, of establishing a condominium, but rather opted to create in Germany a completely new situation. Their explicit statement that they were not annexing Germany, followed by practice, provides the legal basis for their course of action and the confirmation that they intended to follow that course. If the Four Powers had genuinely intended to acquire sovereignty, then it would be reasonable to suppose that such an intention would be clearly expressed. This view has been taken by Mann,[20] who added that other factors counted against Allied assumption of sovereignty. These were, inter alia, that the Communique issued following the Yalta Conference, which outlined intentions with regard to Germany, contained no hint of such an intention. This is one more negative justification, but of greater interest is Mann's point that supreme authority was assumed by the Governments of France, UK, USA and USSR, and not by the States as such. The suggestion here is that the assumption of supreme authority took place, not to acquire sovereignty, but to establish governmental control.

While the various factors affecting the continued existence of Germany as a

State which have been discussed above are not the only relevant ones, they do highlight the basic disagreement among writers in the immediate post-war period - whether or not Germany still existed as a State. Having established that German statehood, albeit in a very limited form, still existed in 1945, it is necessary to consider whether or not it survived another critical date: 1949, when the two German States came into existence, because it is through this analysis, and through an examination of which rights and duties of the German State are also possessed by the GDR and FRG, that a conclusion may be reached as to whether or not a peace settlement will require any further action with regard to the Oder-Neisse line, while the status of the inner-German border depends upon the status of Germany.

(ii) The Status of Germany Following the Creation of the FRG and the GDR

The Federal Republic came into existence in 1949, though its change of status from that of occupied territory to independent State was a gradual process which continued until 1955, when the Paris Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed in October 1954, came into effect. Given the wide range of powers retained by the UK, USA and France, it is possible that the FRG is not a fully independent State; nevertheless, it may be regarded as a State for most purposes: many of the powers retained by the former occupant States exist with regard to Germany as a whole, and not the Federal Republic. The three western zones of occupation had already been joined together into a single unit - Trizonia - under the Washington Trizone Agreement of 8 April 1949. The draft Grundgesetz was approved, subject to certain reservations, and the Occupation Statute promulgated.[21] This sets out the powers which the Federal State and the participating Lander shall have

(Paragraph 1), stipulating that these will be "in accordance with the Basic Law." As the Basic Law was subject to the veto of the three Allies, so the Occupation Statute makes it clear that there exist limitations to the independence of the German authorities. Paragraph 2 sets out in detail those powers which are specifically reserved in order to ensure the accomplishment of the basic purposes of the occupation, including control over the foreign relations of the Federal Republic and its capacity to enter into international agreements. The Western Allies set up the Allied High Commission for Germany,[22] through which they exercised their supreme authority, on the 20 June 1949. This was to come into existence on the 21 September 1949, when simultaneously its Charter came into effect and the Federal Republic came into being. All authority which previously was vested in or exercized by the Commanders-in-Chief of the occupation forces was transferred to the three High Commissioners (Paragraph 2), except for certain military powers, which were to remain in the hands of the Commanders-in-Chief. Previously, supreme control had been exercised by them[23].

Was the Federal Republic a new State, or was it at least partially identical with the Reich? It has been maintained in West Germany that the Federal Republic is identical with Germany.[24] Initially, this was taken to mean that it was legally the same entity and hence only its Government was entitled to speak for the German people and to act for Germany under international law. At a later date the idea of partial identity appeared, in consideration of the fact that, territorially, the Reich and the Federal Republic were unquestionably different. However, the UK, USA and France were careful not to state that they regarded the Federal Republic as identical, when making statements with regard to the

German question:

> "Pending the unification of Germany, the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs."[25]

This statement is notable because, despite describing the FRG Government in this way, the Western Powers did not thereby actually recognize it as the de jure Government of Germany.[26] The Federal Government is described as being entitled to speak for the German people (this does not mean that this statement was correct in law), but no mention is made of any identity between FRG and Germany, which could provide a legal basis for such representation. Instead, this right of the Federal Republic is based upon its having been "freely and legitimately constituted". Another statement, a Joint Declaration by the Allied High Commission on the status of East Germany, issued on 8 April 1954,[27] reiterates the recognition by the Western Allies of the Federal Government as the only legally constituted and freely elected German Government. However, one apparent inconsistency which appears here is that the Allies mention their "determination to work for the reunification of Germany." Reunification and unification seem to be employed synonymously, given that there was no major constitutional development with regard to the unification of Germany during the period between these two statements. There was a regular repetition of these Allied statements,[28] but it was never specified unequivocally that the three Western Powers regarded the FRG as identical with Germany, even when

the Federal Republic was putting forward this view. A forceful case has been made in support of Allied recognition of this identity,[29] although the writer acknowledges the apparent ambiguity of the Allied statements. There is cited one letter written by the Allied High Commissioners to the Federal Chancellor as explaining the Western position so as to establish identity between the Reich and the FRG. This letter stated, inter alia:

> "...pending a final peace settlement and without prejudice to its terms, the Federal Government is the only Government entitled to assume the rights and fulfil the obligations of the former German Reich."[30]

The writer goes on to comment that this does "seem to indicate that the Federal Republic is, or stands in the shoes of or represents, Germany to the exclusion of all other contenders."[31] But both of these statements are flawed by their ambiguity: they both avoid use of the term "identity". One has to question why this term was not actually used, since its inclusion would have made the legal situation less apparently equivocal - though that is not to say that, had the Western Allies regarded FRG and the Reich as identical, that this would have been a correct legal judgment. It is true that the High Commission indicated that only the Federal Government could take on the relevant rights and obligations, but this in itself does not necessarily mean that they saw identity as existing. Given that there had to be some exercise of rights and obligations in order for the territory to function, the Federal Government, which had come into existence through the decision of the Western Powers to create a State or State-like entity on the territory of their occupation zones, was allocated the appropriate power by the UK, USA and France as a manifestation of their

supreme authority with regard to Germany.[32] The FRG came into existence only through the initiative of these States and with their consent; it could not have done so otherwise. Its Government was elected under conditions and according to rules approved by the same States. It may be regarded as a substitute, albeit temporary, for the German State which may or might have come into existence. But it does not thereby become identical with the Reich. This writer fails to understand why such great significance is attached to the fact that the Federal Government was "freely elected". This may have made it easier for it to govern in that it allowed greater internal legitimacy - there was no national uprising during the early years of the existence of West Germany such as occurred in East Germany in 1953, but effective government can undoubtedly be achieved by coercion. On the other hand, if we are going to apply the criterion of being freely elected, whatever that actually means, as a measure of legitimacy, for purposes of international law, then the Federal Republic undoubtedly could not and cannot represent the German people, since the elections for its Government were held only among a portion of the German people who would have been entitled to vote.

Why did the above-quoted writer avoid using the term "identity"? A reading of the whole passage gives the impression that, while the evidence so thoroughly amassed and cited could, if the whole hypothesis be accepted, indicate identity between the Reich and the Federal Republic, nevertheless it is not conclusive; in the opinion of this writer, it is not even very persuasive. The Western Powers had repeated opportunities to affirm that identity did indeed exist, yet consistently avoided so-doing. Even the view, that only the Federal Government is entitled to assume the rights and full responsibilities of

the Reich, can be construed as a delegation of authority by the Allies, as has already been indicated.[33]

Subsequent practice has shown that, regardless of their attitudes until 1970, the Western Powers have certainly moved ground with regard to the question whether or not only the Federal Republic may represent the German people; and if these States clearly do not consider the FRG to have this quality, then it cannot be used as a basis for the identity of the Reich and FRG. Thus following the signing of the Grundvertrag by the GDR and FRG in 1972, the UK, USA and France eventually entered into diplomatic relations with the "so-called German Democratic Republic."[34] Having recognized that such a State existed, there followed automatically certain legal consequences. The Federal Republic is no longer the only State which is considered to be entitled to represent the German people in international affairs. The recognition of the GDR by FRG is to be found in the Grundvertrag.

Until then, the FRG had not recognized the GDR. Thus the FRG Courts had declined to accord protection to GDR trademarks (though the GDR claimed they were entitled to protection under a treaty by which the FRG was bound). The Court said that, because of the non-recognition, any accession to this treaty by the GDR could not have any legal effect vis-a-vis the FRG.[35] Doubts have been raised as to the quality of the recognition contained in the Grundvertrag. Thus West Germany declined to establish an embassy in the GDR, or to permit that State to establish one in Bonn, on the ground that the GDR is not a foreign State. Yet it is surely correct to state that "all the attributes of statehood were formally declared as existing for the GDR by the Federal Republic."[36] Thus the FRG

formally renounced its pretension to be the sole representative of the German people (Article 4) The parties agreed that the jurisdiction of each is confined to its own territory (Article 6); there was an undertaking to respect the territorial integrity of each party and a reaffirmation of the inviolability of their frontiers.

West Germany still maintains that the relationship with East Germany is a special one, and it has refused, despite pressure from the GDR, to "upgrade" the special missions to embassy status. There remains in the FRG a citizenship law which deals with German citizenship, and includes persons who are GDR citizens under GDR law; again, this is a source of dispute between the two States which probably will not be settled without a compromise by both States or substantial concession by the Federal Republic, since they go to the heart of the still-existing though modified policy of the FRG; even if the GDR is a State, it is not foreign; therefore, it is not possible to establish full diplomatic relations because there is one German nation, there is one German citizenship, and it must be available to all Germans. But even the Federal Republic has accepted that there must be appropriate recognition of the separate GDR citizenship, if the GDR itself is a State. Therefore, while any GDR citizen on the territory of the Federal Republic is German under the Federal citizenship law, still the GDR passport, which is evidence of citizenship, is also acceptable for travel to and through the FRG.

The conclusion seems to be that the Western Powers have not treated the Federal Republic as identical with Germany, while the development of relations between the GDR and FRG during the 1970s resulted in the renunciation by the

latter State of many of its claims, in particular the Hallstein Doctrine, according to which the Federal Republic considered it an unfriendly act on the part of any State when it entered into diplomatic relations with the GDR. As a result, diplomatic relations were cut with any State which did enter, or refused to cease, its own relations with the GDR. One notable exception under this policy was the Soviet Union, with which the FRG maintained relations from 1955, the year in which the Hallstein Doctrine first came into effect. As the Federal Republic came to perceive the long-term limitations of the Hallstein Doctrine, the policy gradually altered and improved relations with the States of Eastern Europe were sought actively. This entailed the adoption of the "congenital defect theory" (Geburtsfehlertheorie) "... according to which the East European states, by virtue of their location within the Soviet sphere of influence, had no option but to recognize East Germany. The possible sanctions of the Hallstein Doctrine would no longer be applied to such States."[37]

The Soviet Union has never regarded the Federal Republic as identical, totally or partially, with Germany. The position of the USSR seems to be that, despite its acknowledgment that it shares joint rights and responsibilities with the Western Powers which date back to 1945, the German Reich no longer exists.[38] Two successor States have been established on the territory of the former German Reich, according to both the GDR and the USSR[39].

In the GDR, official positions with regard to Germany have not been consistent. The GDR regarded itself originally as the only representative of the German nation and, in the Zgorzelec Treaty with Poland, cooperation between the two States is described as "cooperation between the German and Polish

nations."[40]

However, the GDR seems to have altered its position with regard to this matter soon after the signature of the Zgorzelec Treaty. In October 1951, the Supreme Court of the GDR took the view that the East German State could not be identified with the Reich. The GDR was seen as something separate.[41] Subsequently, the concept of two separate German States gained popularity in the GDR and became the official policy of that country, during the mid-1950's. The present position is that the Reich collapsed in 1945, but "Germany" continued to exist until 1949 within the new frontiers established at Potsdam.[42] Since 1949, the GDR and the FRG are the successor States of the Reich.[43] This is the so-called dual-State theory. This theory holds that "Germany was eliminated in 1945 and was succeeded by two states. Neither new state was identical with the German Reich, nor was either connected with the other under the German Reich as a common roof. Neither state was more closely related to the other than to any third state."[44]

This theory as stated cannot apply to the legal situation as established with regard to Germany, which is that it survived the defeat of 1945. This is not to say that there do not exist two German States; the Grundvertrag provides evidence of their existence, although according to the West German view as outlined above, this treaty does take account of the special relationship which it believes exists. The dual-State theory precludes the possibility of such a special relationship, neither between the two German States, nor between either or both of these and Germany - since Germany is deemed not to exist, it is impossible to have a special relationship with it. A third theory is the roof

theory.[45] This allows for the continued existence of Germany, but without the normal State organs or capacity to act. Neither German State can claim total identity with Germany, yet they are not foreign to one another. This seems to reflect the more moderate Deutschlandpolitik of the Federal Republic, closely linked to the Ostpolitik. However this theory also has weaknesses, since it requires acceptance of the idea that a State may exist without any apparent capacity for acting whatsoever.[46] It has already been concluded that Germany survived the events of 1945 and continued to exist as a State,[47] yet it seems to be accepted that among the criteria of statehood, independence is of great importance.[48] The absence of a sufficient degree of independence may preclude statehood. Since the Allies took over supreme authority with regard to Germany, prima facie it has no independence and, although the Allies did not wish to annex it, nevertheless it might appear, through the loss of independence, to have ceased to exist. If this be the case then Kelsen was correct in his suggestion that there had occurred debellatio. However, it is submitted that, despite the apparent loss of independence, Germany still existed immediately after assumption of supreme authority by the Four Powers. The clear intention of the Allies was to maintain the existence of Germany. To suggest that it ceased then to exist would render the declaration of non-intention to annex meaningless. This is consistent with the earlier suggestion that the action of the victorious Powers was a deliberate departure from precedent, which subsequently has been accepted as such. Moreover , and as a consequence of the first point, the regime set up in Germany in 1945 was temporary, and therefore did not bring about the dissolution of the old State.[49]

The regime set up in Germany in 1945 as a temporary measure was intended

to govern the country and prepare it to accept a peace settlement once a German Government had been established for this purpose. This settlement was to have provided the framework for the relationship between Germany and the Allied States, including a final delimitation of the German-Polish border. Because such a peace settlement has never occurred, the theory has been developed that there still exists a State of Germany, to which the two German States are related, although it lacks capacity to act in the international sphere and does not function, due to the absence of State organs.

However, a new situation has arisen in Germany which was not foreseen when the Powers made their declaration about the defeat of Germany and the assumption of supreme authority. Two States have come into existence whose territory happens to be that of part of pre-war Germany. These two States appeared because the temporary regime which had been established had acquired a permanent character, indeed had evolved in the opposite direction from that intended: instead of the various occupation zones being governed jointly in matters affecting Germany as a whole, which had been the procedure specified,[50] there occurred a division between the Soviet zone, on the one hand, and the Western zones on the other, which eventually resulted in each side declaring its part of Germany to be a State. It may be argued that each side has repeatedly maintained, over a long period of time, its desire to bring about a united German State; yet their actions indicate otherwise. And even if there exists a genuine will to create, or recreate, a single German State, it may not be identical with the Reich. The recognition accorded to the GDR by the Western Allies and by the Soviet Union to the FRG is an acknowledgement that the temporary regime set up by them has evolved into a permanent division of

Germany, which is manifested most clearly in the existence of the GDR and FRG.

In light of these facts, it is necessary to consider whether the Four Powers wanted "Germany" to continue to exist. Since they have acted as if there were no Germany, by recognizing the two new States, neither of which is identical with Germany, then one may question whether the Germany which survived the defeat of 1945 continues to survive. There is room for the view that the existing joint rights and responsibilities of the Four Powers must apply to a joint territory - Germany. But is this actually so? Or is it rather the competence of the Four Powers which is all-German rather than a State?[51] All four former occupying Powers retained certain rights and duties with regard to Germany as a whole and to Berlin - where the joint control continues to function. But these rights are based not on any agreement with the GDR or FRG; they originate in the defeat of Germany and assumption of supreme authority. If the GDR and FRG were to cease to exist, by creating a new all-German State from the two existing States, the competence of the Four Powers with regard to Germany would remain, since its legal basis is quite separate. On this point there can be no doubt, since any attempt by the FRG to alter its legal status would have to gain the approval of the UK, USA and France,[52] while a similar control would exist for the USSR with regard to the GDR.[53]

Despite the policies of the Four Powers, which deny the existence of identity between the Federal Republic and the Reich, West Germany continues to maintain that there is partial identity between the two;[54] that is, that identity exists on a reduced territory. But this means that the identity is partial only in its geographical application, while the quality or content of it is unchanged. In

the face of an apparent contradiction of legal opinion, it is suggested that, while the Federal Republic is entitled to hold its own views about the status of itself and any German State, the Western Powers may also adopt their own stance, or stances. Since these States possess not only the authority but also the duty to make certain decisions with regard to the Federal Republic in the all-German context, which is a right that takes precedence over a conflicting attitude of the FRG, then in the event of such conflict of opinion, that of the Western Powers must prevail. Such conflicts have already occurred. When the Germans in the Western zones, at the request of the Western Powers, drafted their Grundgesetz in 1949, it was clear that it would not automatically be brought into effect. These States had to approve the draft Constitution. Approval was duly given, but only subject to certain reservations, for example with regard to Berlin. This had the effect of precluding Berlin from being treated as a normal Land of the FRG, which would have been the effect had the draft Grundgesetz been given effect in the form which the Germans had wished.[55] This of course was based on the ground that Berlin was a separate entity from the rest of Germany. Berlin was and remains under Four-Power occupation (or West Berlin does, according to the USSR).

The authority retained by the Four Powers with regard to Germany is exercised not only with regard to the German State which existed in 1945. The German States which have appeared did so only with the consent of the Four Powers, albeit that consent was not forthcoming simultaneously. The recognition of the GDR by the Western Powers did not entail any express or tacit renunciation of capacity to determine the fate of "Germany". That capacity may be construed as pertaining to a future Germany not identical to that State

defeated in 1945; but if Germany still exists, then of course the Four Power capacity will apply to it. The terms of the Declaration regarding the defeat of Germany and the assumption of supreme authority seem to include the possibility of the demise of the Reich and the creation of one or more States upon its territory:

> "The Governments of (the Four Powers) will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."[56]

This statement indicates that the Four Powers could cause the demise of the German State, while retaining their competence to attach to that territory a different status. Even if the terms of recognition accorded by each State to the GDR differ, nevertheless recognition itself entails certain legal consequences,[57] and the common elements in the practice of each State may be regarded as having the effect of joint action over an extended period. This does not mean that there is a "back-door" method of avoiding or ending joint obligations among the Four Powers - it has been made clear that any attempt unilaterally to alter such obligations will not be lawful[58]. Joint action in the context of Germany means action taken by all Four Powers together, not separate unilateral acts having the same effect - but where the Four Powers have, on different occasions, acted in such a way as to cause practical developments in the situation in Germany, whether unilaterally or as a group, subsequent similar acts by other Powers, when added to the earlier ones, may result in a new situation which adds another element to the legal rules in existence - thus, in the case of the GDR, the recognition which ultimately it received from all

Four Powers had legal consequences. Nevertheless, the express retention of joint rights and duties from 1945 means that the recognition must be construed in that context. Thus even separate but similar or identical acts by the Four Powers will not alter their joint capacity if that capacity is maintained. Recognition of the GDR could not alter capacity of the Western Powers thus maintained (just as approval by the Western Powers of the FRG recognition of the Oder-Neisse line did not alter the expressly retained capacity of the Powers).

It should be borne in mind that what is politically inconceivable in 1949 or 1955 may become highly desirable in 1974, and the political events may have international legal consequences which were not anticipated, or, if anticipated, considered to be untenable, either for purely political reasons or perceived legal obstacles. This is not to say that the two are necessarily separate.

The campaign by the GDR to achieve recognition by the Western Powers has already been discussed. The attitude of these States ranged from denunciation of the new "State" to eventual acknowledgment of its status as an equal with the Federal Republic, when the Four Powers agreed to support the applications by the two German States for membership of the United Nations. But the Soviet Union and the other socialist States have regarded East Germany as a State since 1949. The GDR was proclaimed to be a State as of 7 October of that year, following the formation of a People's Council some months previously, which had drawn up a Constitution (adopted in March 1949) and which on the 7 October transformed itself into a parliament. A Soviet Control Commission was formed, to take over and carry out the functions of the Soviet Military Administration,[59] in so far as these were not transferred to the Provisional Government of the

GDR. Recognition by the other socialist States was prompt. The opinion has been expressed that the attitude of the Western Allies, that only the Federal Government was entitled to speak for Germany, was purely political and a legal farce, and was eventually exposed as such by the apparent recognition accorded to each other by the GDR and FRG in the Grundvertrag.[60] This judgment is probably too harsh as far as the Western Allies are concerned. In retrospect, the view that only the Federal Government could represent the German people does seem to have been flawed from the beginning, but to describe this as a legal farce seems to impute bad faith to the conduct of the Western States, while in the view of this writer such an element was not present. Like all other States, the UK, USA and France had political motivation for promoting their ends, in this case the exclusivity of the Federal Republic, as had the USSR with regard to East Germany. The reasons of the two sides were not necessarily similar; nor were the Western Allies invariably united in their approach towards the German question.

The Western States and the Federal Republic also had political reasons for entering into, or improving, relations with the GDR. West Germany wished to achieve a general improvement in its relations with the East. This necessarily entailed a renunciation of the Hallstein Doctrine, while it was necessary to reach an accommodation of sorts with the GDR in order to promote all-Germany policies, including increased contacts between its own citizenry and private citizens living in the GDR. Once the FRG accepted that the GDR represented its own people, it remained open to the Western Powers to ignore this development and not to adjust to it in any way. However, they chose to accept the new situation. Their policy towards the GDR was a consequence of their policy

towards West Germany. If the FRG could accept the existence of the GDR, it was almost natural that the Western Powers would follow suit: to claim that only the Federal Government may represent the German people when the Federal Government believed otherwise would indeed create problems. Nor is it likely that West German policy in this area would be altered without any exchange of views with the Western Allies. In addition, it was clear to the Western Powers that the commitment of the Soviet Union towards the GDR was unlikely to be reduced in the foreseeable future. A situation had arisen which, though not anticipated, constituted a new reality in central Europe, and which it was beyond the competence of one side or the other unilaterally to change. Furthermore, while, with hindsight, the view may be taken, that it was not valid under international law to treat the Federal Government as the only one entitled to represent the Germans, at that time, when there remained uncertainty about the future of Germany, the Allies may genuinely, if mistakenly, have believed that the Federal Government did possess the controversial right attributed to it. The wording was certainly unfortunate. When the Western Powers spoke of "Germany", they did not specify what exactly they meant. It could have included those areas taken over by Poland, or simply the territory of the four zones of occupation plus Berlin, or even excluding Berlin, in view of its separate status.

Neither the FRG nor the GDR is identical with the Reich. The Federal Republic considers itself as partially identical, but this perception of its situation is not shared by the rest of the international community; most important, none of the Four Powers accepts the existence of such identity. If we take the Reich as it existed in 1937 (that is, prior to German territorial expansion

immediately before and during World War II), then the territory of that Reich is now subject to the jurisdiction of seven States: FRG, GDR, Poland (territories east of the Oder and Neisse rivers, including part of East Prussia), USSR (part of East Prussia and occupation of Berlin), France, UK and USA (occupation of Berlin). Two German States exercise sovereignty, albeit limited, over the greater area of the Reich territory with the consent and approval of the Four Powers. Generally, two States cannot simultaneously possess sovereignty with regard to the same territory,[61] though the condominium - which is not the status of Germany - is one exception to this rule. If the Reich does exist, then it may be competing with the Federal Republic for its territory, since the two are not identical. But the existence of FRG as a State is not open to question. It has clearly defined borders within which there is no room for the Reich. The recognition of East and West Germany as States by the Four Powers plus the clear rejection by these countries of any question of identity between the Reich and either German State would seem to leave no possibility for the continued existence of the German Empire. It was within the power of the Four Allies to maintain its existence, as they appeared to do in 1945, but their subsequent actions, taken under their supreme authority, indicate that they adopted a different course. The competence of the Four Powers remains - since any developments or changes in the legal status of Germany have taken place only with their approval, or at their instigation, and subject to their maintaining their residual rights and obligations with regard to Germany as a whole.

The border question must be affected by this conclusion. If there is no Germany, the Oder-Neisse line may be regarded as the permanent frontier between Poland and the GDR. But what of the provision in the Potsdam

Agreement, that this question can only be settled at the peace settlement?

(iii) The Present Status of Germany

The State of Germany, despite appearances, cannot be deemed to have ceased to exist. Although the actions of the Four Powers, in their recognition of the two German States, seem to indicate a policy of favouring the present situation at the expense of the regime created in 1945, nevertheless there exists evidence that the UK, at least, continues to regard Germany as a State. In R v Secretary of State for Foreign and Commonwealth Affairs - ex parte Trawnik and Reimelt,[62] the Secretary of State issued a certificate under Section 21 of the State Immunity Act 1978 certifying that Germany is a State (for the purposes of Part I of the Act) with its own government comprised of, inter alia, members of the Allied Kommandatura of Berlin. In other words, despite its recognition of both German States, the UK maintains the continued existence of a third German State. Given the UK's position as a country with ultimate shared responsibility for the status of Germany, appropriate account must be taken of the certificate, which is conclusive with regard to its contents.[63] The case in question concerned the attempts of West Berlin residents to prevent the creation of a firing range for the use of British soldiers in West Berlin; thus it involved issues of the status of British forces in Berlin, which is part of the wider question - what is the status of Germany? The certificate therefore should be accorded appropriate weight in any evaluation.

It has been pointed out that executive certificates in the UK certify as to facts and not to law,[64] yet determination of facts may itself involve legal assessments.[65] This is no less true where Germany is concerned. The Foreign

Secretary issued the certificate on a question which involved not only the factual question whether Germany was a State in the view of the UK. Underlying this was the fact that the UK has a special authority with regard to the question whether or not Germany exists. By stating, as a matter of fact, that Germany exists, the UK confirmed a situation that is based on its own assessment of itself as one of Four Powers having joint capacity with regard to Germany as a whole. Even if it were argued that the certificate does not attest to Germany's status as a State, but rather, the fact that the UK has recognized that status, it must not be forgotten that the UK is itself responsible for the maintenance of that status. This adds to the value of the certificate as evidence for the continued existence of Germany. Yet, if Germany continues to exist as a State, does it do so despite lacking any stable population or defined frontiers? While the Foreign Secretary's certificate does make some mention of government, if only with regard to Berlin, it is silent on the other factors. It is very tempting in such a situation to resort to the sui generis justification. This entails an acceptance of all the existing inconsistencies and ambiguities of the situation, without fully attempting to resolve it.

However, the statement by the UK that Germany still exists is not necessarily legally inconsistent with the UK's recognition of two new German States, if one accepts the notion of different States for different purposes. Thus Germany is deemed to continue to exist, insofar as matters relating to Berlin and Germany as a whole are concerned (such as the Trawnik case). On the other hand, in all other situations, the reality of two separate German States is recognized. In view of the fact that the UK was responsible for the creation of the Federal Republic, along with France and the USA, and its statement of 1985 concerning

the continued existence of Germany was made in awareness of this, the UK, in the absence of evidence to the contrary, should ,it is suggested, be presumed to regard the simultaneous existence of Germany and the FRG as compatible under international law. This may be possible, if it is accepted that they exist for separate purposes - i.e., neither enjoys the full international legal capacity of "normal" States. In this context, Frowein's hypothesis - that the reality of Germany may amount to no more than a Four Power competence[66] - offers a potential solution. This view has it that the situation of Germany has so altered that, even if that State's existence is formally maintained, as it is by the UK, the reality of the post-war developments is that most of the functions of that State have been assumed by the GDR and FRG,[67] so that nothing remains of the German State except the competence of the Four Powers with respect to Berlin and Germany as a whole. Indeed, to assert that Germany exists as a State, without qualification, would be too far-fetched. Germany can only exist in the restricted sense of an entity which has very little, if any, capacity, to act. The fact that the Trawnik case, in which the UK asserted that Germany is a State, could take place in the UK courts is itself a manifestation of the most unusual legal status of Germany. Trawnik had in the first instance attempted to raise the issue in the West Berlin courts but following his failure had turned to the UK courts.[68] If Germany existed as a State in the sense normally understood according to international law, the circumstances which caused him to turn to the UK courts would not have arisen. It was because the West Berlin court had no jurisdiction over British forces, unless accorded it by the Kommandatura, that no remedy was available in Germany. The competence of the UK court arose as a result of the fact that Berlin is still an occupied city. The occupation regime is one remnant of the old German State deemed by the UK still to be in existence.

Therefore, because, for certain limited purposes, including the occupation of Berlin, Germany still exists, the Trawnik case, in which the UK reiterated the existence of Germany, could arise.

In this context, it cannot be stressed strongly enough that the FRG came into existence at the initiative of the three Western Powers. Therefore, while maintaining that Germany continues to exist, the UK was simultaneously agreeing to the assumption by the Federal Republic of the attributes of an independent State, subject to the reserved rights and duties of the Western Powers. The UK must then be deemed to regard the existence of these States simultaneously as consistent with international law. The UK has allowed or consented to the Federal Republic developing into a State in its own right at the expense of Germany, whose attributes as a State have gradually diminished. In this way the State of Germany has, while continuing to exist, been reduced to no more than a shell for the remaining rights and responsibilities of the Four Powers.

It should be acknowledged that even this interpretation of the Trawnik Case does in fact take account of the sui generis nature of the German problem, in that the peculiar characteristics of Germany are admitted as a precondition for explaining the simultaneous existence of the Federal Republic and the Reich. Any serious attempt to clarify the legal problems in this area must take account of the peculiar situation; in this sense, this interpretation does so. However, the sui generis aspect is not employed as an excuse to avoid analysis of the legal issue; rather, it is accepted as part of that analysis which nevertheless purports to deal with the problem.

If the continued existence of Germany is accepted according to this interpretation, then the possibility of competing jurisdiction should not arise; the Federal Republic has clear limitations imposed upon its freedom of action in areas where the Four Powers still fulfil a role[69] and where there is any dispute with regard to the limits of the jurisdictions, the Four Powers, because of their retained rights, have the final say. Indeed, where the Federal Republic has taken any action which might have been considered as affecting the rights and responsibilities of the Four Powers, the UK at least has regularly expressed an opinion about the consistency of the proposed action with these rights and responsibilities, for example following the initialling of the Warsaw Treaty.[70]

The Germany which continues to exist only according to the policy of the Western Powers (the Soviet Union seems to maintain that Germany no longer exists, that there is no German question[71]) leads a very tenuous existence. The FRG and GDR carry on the normal functions of States while Germany is, as it were, on ice until it can be reconstituted by the unification of East and West Germany. The next issue is, what will be the status of the reconstituted Germany? While such a possibility could not even be described as remote, nevertheless the question has to be considered if a comprehensive evaluation of the status of the Polish-German border is to be arrived at.

It may justifiably be asked why it is assumed that Germany continues to exist, if the Soviet Union rejects the notion. It may justifiably be responded that the Soviet Union, which decided with the UK and USA to maintain the existence of Germany in 1945 by not annexing it, cannot unilaterally alter the position and

claim that Germany no longer exists. To do so could only have legal effect if the other Powers either agreed to the change in policy, or failed to oppose it. Yet the Four Powers have altered the status of Germany by the creation of two new States on German territory and the recognition of them by each of the Powers. Their actions, though not performed in this respect simultaneously, have affected Germany's status.

It has been suggested that, if an international court had to decide whether an international law subject - the German Reich - could be regarded as existing in addition to the FRG and GDR, then its decision could hardly lead to an answer in the affirmative.[72] This is consistent with the view expressed above, that the Reich's existence can only be justified in the exceptional circumstances constituted by the retained rights and responsibilities of the Four Powers. But the writer also stresses that the judgment of such a court would have to be independent of the possible legal relations, which continue to exist, as a result of the capitulation by Germany in 1945.[73] This is explained by the competence retained by the Powers to have a say in the eventual general settlement of the German question.[74] While this assessment is similar to the view of this writer, nevertheless it is suggested that, despite the differing attitudes of the involved States with regard to their rights and responsibilities,[75] the evidence for the continued existence of Germany in some form is sufficiently strong that subject to attachment of primary importance to the legal acts of the Four Powers in this respect, one must acknowledge this existence. But its existence is not absolute or unconditional; Germany remains with us only for certain purposes connected with the unfulfilled provisions of the post-war agreements. The question poses itself - does this mean effectively, that only a competence remains, common to

the Four Powers 3; or rather, does Germany genuinely exist, but only for limited purposes. This may be a matter simply of choosing different words to describe identical interpretations of the situation of Germany. But in the opinion of this writer, there is a significant difference. In the possibility postulated by Frowein (which is not necessarily his own view), it may be that only competences in fact remain to the Four Powers. Yet on the other hand, the Four Power control over Berlin and the maintenance of military missions by the Four Powers in the others' zones, or former zones, of occupation constitutes a maintenance of the policy of continued existence with regard to Germany, in tangible form.

In fact, Germany at present bears some resemblance to a body on a life-support machine. Nothing is being done to the body for fear of the consequences, and the longer it remains on the machine, the greater is the lack of effective will to take action. Yet the machine cannot simply be switched off; the Four Powers' rights with regard to Germany as a whole would cease to exist if Germany ceased to exist, unless they could find some other basis for their retention. The obvious alternative - to resuscitate the patient - is perhaps even more risky; it would be no straightforward task for even the Superpowers to cope with a rescurgent Germany, no matter what restrictions were placed on its military capacity, if the country were to be unified, especially after nearly forty years of the Federal Republic and the German Democratic Republic. The present system allows the Four Powers a substantial level of control over Germany; they are responsible for the country as a whole while permitting the GDR and FRG to function, for most purposes, more or less independently, at least nominally. However, it is suggested that this fear of a unified German State,

being based to a large extent on the experience of two World Wars in the space of about thirty years, is declining and should continue to do so. In these circumstances, even if the external conditions do not permit the existence of a single German State, the fear of and antipathy towards such a development may subside. In the event of a change in the status quo, the conditions favourable towards one Germany may become ascendant.

The importance of the German question (that aspect of it which is concerned with the frontiers of Poland and Germany) lies, not essentially in the nature of the existence of the German Reich; whether the Reich is a State, whether it is a subject of international law, whether it is in existence merely as a manifestation of Four Power competence. Its importance for frontier matters lies in the relationships, if any, which exist between the Federal Republic and the Democratic Republic, on the one hand, and the Reich on the other. It is enough to have established that for matters concerning Germany as a whole, including the frontier between Poland and Germany which under the Potsdam Agreement remains formally unsettled, there remains at least a Four Power competence. This competence, or the State to which it applies, must be related to the rights and duties of the FRG and GDR where these are concerned with the same things, in the event of a unified German State coming into existence. These are the issues of identity and continuity which are discussed below.

FOOTNOTES

1. CMND 1552, Doc. No. 7, p. 38.

2. Kelsen: The International Legal Status of Germany to be Established Immediately upon Termination of the War.
1944 38 AJIL 689.

3. See, for example:
Hague Regulations respecting the laws and customs of war on land, 1907 - Article 43;
Kelsen, Note 2, supra:
"According to general international law and the Hague Convention of 1907, the occupant Power or Powers do not acquire sovereignty over the occupied territory.";
K. Marek: Identity and Continuity of States in Public International Law (2nd ed.).
Geneva, 1968, at p.15.

4. "...a belligerent occupant does not acquire sovereignty until after debellatio."
R.Y. Jennings: The Acquisition of Territory in International Law
Manchester, 1963, at p. 5:
"

5. Meyn: Debellatio. In R. Bernhardt (ed.): Encyclopedia of Public International Law, Vol. 3, Amsterdam, New York, Oxford, 1982, p.145.

6. For example, the Polish Government continued to operate in exile, in accordance with the terms of the Polish Constitution. In addition, Polish armed forces continued to fight against Germany throughout the duration of the war - its army was never totally defeated.

7. "...while continuity of the occupied State remains the fundamental and permanent feature of belligerent occupation, the most significant characteristic of that occupation itself is that it is provisional and temporary."
Marek: note 3, supra, at p.80.

8. Note 2, supra, at 691.

9. Part IA, 3(1).

10. "It was not Kelsen, but the announced policy of the Allies, which eliminated what Kelsen would have considered the best legal basis, namely an armistice, a peace treaty, or some type of agreement by which Germany in law would have given her consent. As the Allies had absolutely ruled out any form of agreement, Kelsen pointed out that a belligerent occupation could not permit the carrying-out of the Allied war aims in conformity with international law. Hence he emphasised that the only legal basis would be debellatio."
Kunz: The Status of Occupied Germany under International Law: a Legal

Dilemma.
1950 3 WPQ 538, at 541.

11. Ibid.

12. Note 1, supra.

13. Kelsen: The Legal Status of Germany according to the Declaration of Berlin.
1945 39 AJIL 518.

14. Ibid, at 519.

15. "Teza Kelsena o zniszczeniu panstwa niemieckiego (jest to rownoznaczne z uzytym przez niego zwrotem o przejsciu suwerennosci niemieckiej na Sprzymierzonych) jest bledna. Umowa, ktora z uwagi na swe podmioty i tresc postanowien jest - w swietle prawa miedzynarodowego - kapitulacja, nie moze wywolywac skutkow prawnych, ktorych z mocy tego prawa kapitulacja nigdy nie powoduje."
Skubiszewski: Zagadnienie panstwa niemieckiego w prawie miedzynarodowym (The Question of the State of Germany in International Law).
1950 6 (I) PZ 331, at 335.

16. Skubiszewski: The Frontier between Poland and Germany as a Problem of International Law and Relations.
1964 5 PWA 311, at 319-321;
Skubiszewski: Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement.
1985 23 AV 31, at 32-33.

17. "Whether the term "sovereignty" is used or not, is of no importance. What counts is whether the fact has been established; and it is established when the conqueror assumes "supreme authority"..."
Note 13, supra, at 522.

18. The attitude of the UK for example, was given in R v Bottrill, ex parte Kuechenmeister, 1946 1 All ER 635.

19. Ibid.

20. Mann: The Present Legal Status of Germany.
1947 1 ILQ 314, at 326.
The necessity for annexation to have occurred in order to have brought about the demise of Germany as a State in 1945 is maintained also by Laun:
The Legal Status of Germany.
1951 45 AJIL 267, at 268-269.
In Laun's view, Germany also survived the creation of the FRG and the GDR (270-271).

21. Doeker, Bruckner: The Federal Republic of Germany and the German Democratic Republic in International Relations, Dobbs Ferry, NY, 1979, Vol.1, at p.85.

22. Ibid, at p. 87.

23. Tripartite Agreement of November 14, 1944 on Control Machinery in Germany, Article 1:
"Supreme authority in Germany will be exercized, on instructions from their respective Governments, by the Commanders-in-Chief of the armed forces of the United Kingdom, the United States of America, and the Union of Soviet Socialist Republics, each in his own zone of occupation , and also jointly, in matters affecting Germany as a whole, in their capacity as members of the supreme organ of control constituted under the present Agreement."
CMND 1552, Doc. No. 3, p. 31.

24. "...the continuation of Germany by the Federal Republic or the theory of identity, as it has come to be called, whether in its narrow sense or in the sense of representation, has met with almost general approval in the Federal Republic.... It was officially adopted and proclaimed by the Federal Government as early as on October 21, 1949..." (by Dr. Adenauer)
Mann: Germany's Present Legal Status Revisited.
1967 16 ICLQ 760, at 778.

"...the Federal Government adhered to the Identitatstheorie or Theory of Identity. This means that the Federal Republic of Germany is not the successor of, but rather identical with, the still existing organless German Reich, although with a jurisdiction limited to the territory of the Federal Republic of Germany."
Geck: Germany and Contemporary International Law.
1974 9 TILJ 263, at 265-6.

25. Communique issued by Western Foreign Ministers, 19 September 1950.
CMND 1552, Doc. No. 49, p. 136, at 137.

26. H.E. Bathurst and J.L. Simpson: Germany and the North Atlantic Community.
London, 1956, at p. 188.
The authors cite an unpublished Minute from the Foreign Ministers of the UK, USA and France to the Federal Government in 1950, to the effect that their countries did not recognize the Federal Government as the de jure Government of Germany.
The same point has been made by Professor Skubiszewski:
Nowe traktaty w sprawach niemieckich: problemy terytorialne
(New Treaties on German Affairs: Territorial Problems)
1973 (5) PiP 13, at 14; and:
Poland's Western Frontier and the 1970 Treaties.
1973 67 AJIL 23, at 25, note 14.

27. CMND 1552, Doc. No. 67, p. 187, at 188.

28. CMND, 1552, Doc. No. 87, pp. 229-230; CMND 6201, Doc. No. 47, p. 109 - Tripartite Statement on the Soviet- East German Treaty, 26 June 1964.

29. Mann, Note 24, supra, at 777-784.

30. Ibid, at 783.

31. Ibid.

32. It is another matter whether the exercise of this supreme authority, without the consent of the USSR, was lawful. The Soviet Union had objected to the formation of a separate Government in Western Germany as a violation of the Potsdam decision according to which, in the Soviet View, Germany was to be treated as a whole (Statement by Soviet Military Governor, 8 October 1949, CMND 1552, Doc. No. 37 p. 124), the Potsdam decisions being themselves an exercise by the Four Powers of their supreme authority.

33. Another unusual feature of the statement by the Allied High Commissioners, upon which Mann placed so much importance, is the reference to the "former German Reich." Taken by itself, this could mean that the Commission believed that Germany had ceased to exist, in which case there may have occurred a state succession, thus removing any chance of the Federal Republic and the Reich being identical. But the statement itself is not sufficient to justify a conclusion either way.

34. "The United States Government considers that the so-called German Democratic Republic established on October 7 in Berlin is without any legal validity or foundation in the popular will."
Dean Acheson, US Secretary of State, 12 October 1949.
CMND 1552, Doc. No. 39, p. 126.

35. International Registration of Trade-Mark (Germany) Case.
Federal Supreme Court of the FRG, 1959.
28 ILR 82, at 87-88.

36. Frowein: Legal Problems of the German Ostpolitik.
1974 23 ICLQ 105, at 115.

37. N.E. Moreton: East Germany and the Warsaw Alliance: The Politics of Detente.
Boulder, Colorado, 1978, at p. 94, note 4.

38. Frowein: Die Rechtslage Deutschlands und der Status Berlins (The Legal Position of Germany and the Status of Berlin).
In: Benda, Maihofer, Vogel (eds): Handbach des Verfassungsrechts, p.29, at 36-37.

39. J. Hacker: Der Rechtsstatus Deutschlands aus der Sicht der DDR (The Legal Status of Germany in the View of the GDR).
Koln, 1974, at pp. 137-139.

40. This wording is unequivocal, as can be seen in the authoritative Polish text:
"...wspolpraca miedzy narodem polskim i niemieckim..."
Dz. U. 1951, No. 14, Item 106.

41. Sonnenfeld: Succession and Continuation, a Study on Treaty Practice in Post-War Germany.
1976 7 NYIL 91, at 101.

42. Poeggel: Zur volkerrechtlichen Lage Deutschlands und beider deutscher Staaten (On the International Legal Position of Germany and the Two German States).
1966 Aussenpolitik (GDR) 1298, at 1302.

43. Ibid, at 1303-1309, esp. at 1305.

44. Geck, Note 24, supra, at 266.

45. Ibid.

46. An outline description of the various theses suggested with regard to the status of Germany and the two German States is given in:
Janicki: Political and Legal Problems in the Development of Relations between the Two German Republics.
1973 14 PWA 145, at 152-154;
K. Skubiszewski: Zachodnia granica Polski w swietle traktatow (The Western Frontier of Poland in the Light of Treaties). Poznan, 1975, at pp. 208-218.

47. See pp. 178-185.

48. Marek suggests that the following definition is a fair summary of a general consensus about the criteria of statehood:
"...there is a State in the international law sense, when there is an independent legal order, effectively valid throughout a definied territory with regard to a defined population."
Note 3, supra, at p. 162.
Jennings has written that "The criterion of statehood in international law must be the enjoyment of a sufficient degree of independent government..."
Jennings: Government in Commission.
1946 23 BYIL 112, at 122.

49. "The presumption is therefore of her (Germany's) continued existence as a State, and a merely provisional arrangement for carrying on her government through an agency set up by the four occupying Powers does not upset that presumption."
Ibid, at 123.

50. Tripartite Agreement of November 14, 1944 on Control Machinery in Germany, Article 1.
Note 23, supra.

51. This question was posed by Frowein, though in the same article he did not attempt to answer it.

Note 36, supra, at 123.

52. "In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the three Powers retain the rights and the responsibilities heretofore exercised or held by them, relating to Berlin and Germany as a whole, including the re-unification of Germany and a peace settlement...."
Article 2 of the Convention on Relations between the Three Powers and the FRG, as amended by the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, 23 October 1954.
331 UNTS 327.

53. "The Soviet Union will retain in the German Democratic Republic the functions connected with guaranteeing security, and resulting from the obligations incumbent on the USSR as a result of the Four Power Agreement."
- extract from statement by the Soviet Government on the Relations between the USSR and the GDR, 25 March 1954.

As a unilateral statement, this cannot bind the GDR. However, Article 4 of the Treaty concerning Relations between the USSR and the GDR of 20 September, 1955 does acknowledge that there exist certain restrictions of the freedom of action of the parties: "The Soviet forces now stationed in the territory of the German Democratic Republic in accordance with international agreements..."
226 UNTS 208.

54. Case before the Federal Constitutional Court of West Germany, brought by by the Bavarian State Government, with regard to the legality of the Grundvertrag.
1976 70 AJIL 147, at 150.

55. Lush: The Relationship between Berlin and the Federal Republic of Germany.
1965 14 ICLQ 742, at 749-757.
According to Arndt (Legal Problems of the German Eastern Treaties, 1980 74 AJIL 122, at 132), Berlin (West) is included in the Constitution of the FRG as a Land, subject to the Allied reservations, which "suspend" the application of the provision including Berlin. The emphasis used by Arndt gives the wrong impression, because the intent and effect of the suspension of the provision with regard to Berlin was to treat it separately and to stress its different status from the Lander of the FRG.

56. Note 1, supra. (Preamble).

57. There still exists controversy as to whether recognition has declaratory or constitutive effect, though the majority of opinion would probably support the following statement:
"...recognition of a State is not constitutive but merely declaratory. The State exists by itself(par lui-meme) and the recognition is nothing else than a declaration of this existence, recognised by the States from which it emanates."

- Part of the Ruling of the Polish-German Mixed Arbitral Tribunal in Deutsche Continental Gas-Gesellschaft v Polish State.
Annual Digest of Public International Law Cases, 1929-1930, Vol. 5, p. 11.
This case is considered to be one of the leading authorities for this subject. In the case of the GDR, recognition by the UK, USA and France did not alter the status of the GDR - though it provided evidence that it had achieved more general recognition as a State - but there were legal consequences for the recognizing States: firstly, it amounted to a final renunciation of the policy that only the Federal Republic could represent the German people; secondly, it showed acceptance of two German States existing simultaneously under international law; thirdly, given that the three States considered their existing rights and responsibilities with regard to Germany as a whole to be unaffected - it may be seen that their action was not regarded as affecting the status of "Germany": that area or entity with regard to which they are responsible. Although the GDR's status as a State was prima facie not affected by the recognition, it did alter its status for the UK, USA and France - and, accordingly, the legal status of Germany, while maintained, had another element added to it. These States now have to accept the GDR as the State responsible for the territory where it exercizes jurisdiction. The USSR was left only with its residual capacity for Berlin and Germany as a whole.

58. Thus, in the Treaty of 20 September 1955, concerning Relations between the USSR and the GDR, certain measures purporting to restrict Soviet competence in the GDR - in so far as that competence was an expression of Four Power Control - such as those dealing with the status and function of Soviet military forces, brought forth swift response from the other Powers: "They (the UK, USA and France) wish in the first place to emphasise that these agreements cannot affect the obligations or responsibilities of the Soviet Union on the subject of Germany and Berlin. The Soviet Union remains responsible for the carrying out of these obligations."
CMND 1552, Doc. No. 87, p. 229.

59. Statement by General Chuikov on the Establishment of the Soviet Control Commission, 11 November 1949.
CMND 1552, Doc. No. 40, p. 127.

60. "The communique issued in 1950 by the Foreign Ministers of France, the United Kingdom and the United States following the termination of Military Government in West Germany, stating that the three Governments "considered the Government of the Federal Republic as the only German Government entitled to speak for Germany", was purely political and a legal farce, which eventually ended in the demasque of November 1972, when the West German DBR and the East German DDR accepted one another as fellow sovereign States, each with its national territory and Government."
Verzijl: International Law in Historical Perspective, Vol. VII. Leyden, 1974, at p. 226.

61. Where two States have conflicting sovereignty claims with regard to an area of territory, it is the function of international law to show how the claims are to be settled. If international law is permitted thus to function, no conflicting claims should exist, as each State will be accorded that territory to

which it is entitled under international law, rather than that territory to which it thinks it is entitled. Thus all territory should be attributable ultimately to one State or another.

62. Law Report, The Times, 18 April 1985.

63. "A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question -
(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State ....."
State Immunity Act 1978, s.21.

64. Warbrick: The New British Policy on Recognition of Governments.
1981 30 ICLQ 568, at 577;
Wilmshurst: Executive Certificates in Foreign Affairs: the United Kingdom.
1986 35 ICLQ 157, at 160-161.

65. Wilmshurst, ibid.

66. Note 36, supra, at 123.

67. Note 54, supra, at 150:
"...the German Reich continued to exist and to have legal capacity, although it lacked the capacity to act for want of institutional organs."

68. "They first attempted to ventilate their concern in a German court in the Western Sector of Berlin. That court, however, had no jurisdiction to try any suit involving a member of the Allied Kommandatura in Berlin unless authorised to do so by that body and, when applied to, the Kommandatura refused to allow the Court to entertain the suit. No other Court existed in Berlin to which the applicants could go."
Trawnik Case, 16 April 1985.
Mr Justice Forbes, p. 2 of Transcript of Shorthand Notes of Marlen Walsh Chener Ltd.

69. Note 52, supra.

70. Exchange of Notes between the Federal German Government and the United Kingdom Government on the 19th November 1970.
CMND 6201, Doc. No. 130, p.229.

71. "...the issues bearing on a peaceful settlement of the "German question" were in effect resolved gradually with the entry into force of the treaties between the FRG and the USSR, Poland, the GDR and Czechoslovakia and of the Quadripartite Agreement on West Berlin. Consequently, the "German question" has been removed from the agenda, and the bottom line has been drawn under the Second World War once and for all."
Alexeyev: USSR-GDR Relations: Fraternity and Co-operation
1985(6) International Affairs (Moscow) 35, at 40.
But the USSR has been highly reluctant to state in unambiguous terms

that the international legal entity Germany which existed in 1945 no longer exists. Thus, in response to an enquiry from this writer to the Soviet Embassy posing this particular question, the reply suggested that the question should be addressed to the embassies of of the GDR and the FRG!

72. "Wenn heute ein internationales Gericht zu entscheiden hatte, ob uber der Bundesrepublik Deutschland und der DDR noch ein Volkerrechtssubjekt Deutsches Reich als existent angesehen werden konne, so wurde diese Entscheidung wohl kaum zu einer Bejahung der Frage fuhren."
Frowein: Die deutschen Grenzen in volkerrechlthicker Sicht
(The German Frontiers in Light of International Law).
1979 34 (Teil 1) EA 591, at 596.

73. "Das ist unabhangig davon - wie besonders betont werden muss - ob bestimmte Rechtsbeziehungen fortbestehen, die ihren Grund in der Kapitulation des Deutschen Reiches am 8. Mai 1945 und den damit zusammenhangenden Vergangen finden."
Ibid.

74. "So ist es volkerrechtlich eindeutig, dass die vier Siegermachte des Zweiten Weltkrieges noch eine rechtliche Zustandigkeit zur Mitsprache bei einer etwaigen Gesamtregelung fur Deutschland haben.".
Ibid.

75. Also acknowledged by Frowein. Ibid.

CHAPTER SIX

The Status, Rights and Duties of a Future Unified German State.

(i) The Continued Existence of the German Question

One view has it that there is no practical purpose in attempting to define the status, rights and duties of a unified Germany, because the possibility of such an alteration of the present system in central Europe is so remote that there is hardly any chance for any conclusions which may be reached to be tested against actual events.[1] This writer is not in sympathy with this opinion, because, while acknowledging that the foreseeable future offers no perspective for any fundamental legal and political developments in Germany, and therefore accepting the regulatory character for the present situation of the post-war agreements including the treaties and agreements of 1970-1973, nevertheless there does remain, it is suggested, uncertainty with regard to the status of Germany, and inextricably linked to this is the question of the Polish-German border. This writer does not believe that the "German problem" is finalised.

Briefly, it may be asserted that two German States will continue to exist within the existing geopolitical structure. The only possibility of any change, whether for the better or worse, in this structure, it is suggested, is through fundamental change in the Soviet Union - and this would have to be a change which would, coincidentally, bring into power a government or ruling body with a different assessment of, and attitude towards, the strategic interests of the USSR. This evaluation applies only in the event of peaceful change in the Soviet Union , by

which is meant peaceful externally of that country; events within may follow a different course.

A fundamental change in the political and legal environment of the two German States then, it is agreed, is at present most unlikely. In the opinion of this writer, it is also both possible and inevitable, the premise for this statement being that the Soviet Union cannot survive in its present form indefinitely. It is also possible that the Soviet Union could, without the impetus of internal political change, agree to a peace settlement as envisaged at Potsdam, concluded with an all-German Government freely elected - a condition regarded by the Western Powers as essential. This is perhaps even less likely to occur than the first possibility postulated.

Given that there may be a change in the position of the two German States, it is, in the view of this writer, an intrinsic aspect of the German question, to establish what will be the status of Germany, what rights and duties will it have and within which borders it is to be confined.

(ii) The Status of a Unified Germany

In the event of a single German State - active as a subject of international law, as distinct from the present Germany which, in most senses, is inactive - appearing on the international scene, its status will depend on the position taken by the Four Powers. They, in exercise of their supreme authority, may decide to form a confederation of the Federal and Democratic Republics, or elect for a closer form of unification. The form of unification is not the most vital in this context, however. Of greater significance would be the political position of the Powers

concerning Germany, because, subject to legal restrictions placed upon them by their own commitments, they could impose conditions upon the German State with regard to certain matters of domestic and foreign policy - just as Austria bound itself to neutrality at the behest of the USSR prior to the removal of foreign troops in 1955. Therefore, there does exist, in any attempt to define the future status of Germany, this element of unpredictability which may apply moreover to a discussion of its rights and obligations. However, useful and accurate conclusions can be drawn from the existing treaties, agreements and statements of the relevant States, and a proper legal assessment arrived at thereby.

The first issue is whether or not the unified Germany would constitute a continuation of the Germany which surrendered to the Allies in 1945, or would it actually form an entirely new State. It should be noted here that the united German State would certainly not exercise at this stage de facto control[2] over any territory apart from, probably, the territory of the GDR and the FRG and perhaps that of Berlin. This is because, even if a decision to alter the Polish-German frontier from its present position were to be taken, this could only be taken in the context of the peace settlement at which that frontier is finally to be settled. Since the peace settlement which would include this matter is to be concluded by the Allies and Germany, it follows that the Germany at the peace settlement could not be in possession of any territories east of the Oder-Neisse line. Therefore, even if the unified Germany is a continuation of the Germany of 1945, at least until the conclusion of the peace settlement it would be limited territorially to the external frontiers of the GDR and the FRG, albeit perhaps temporarily.

It has already been established that the Four Powers and both German States

have different views concerning the existence of Germany. Under present conditions, there is no reason why their varying stances would be altered but clearly, agreement must be reached between all the concerned States about the status of Germany. While the Federal Republic may have "agreed to disagree" with the GDR in the Grundvertrag, such accommodations would be quite inappropriate to any attempted union - if it should be desired to re-establish Germany as a unitary State, the parties must achieve a consensus about what that State is. Here is anticipated the fusion of two entities which have followed very different policies since they came into existence. Although they may disagree (by agreement) about their mutual relations, it is essential that their fusion be based on distinct foundations. Firstly, it is difficult to imagine how, in practice, one State could be created unless there was agreement on exactly what was being created. Secondly, there must be legal certainty. The central issue of this work - the disputed legal status of the Oder-Neisse line - is controversial because of the unsettled status of Germany and issues arising from the failure to conclude the peace settlement envisaged at Potsdam. It is no solution to the problem to substitute one nebulous entity with another.

In the absence of any present consensus about the continued existence of the Reich, the following points are of relevance. If a unified Germany is a continuation of the Reich, if it is identical - then it will automatically be invested with those rights and duties possessed by the latter. Marek stresses the inseparability of continuity and identity in this context. Referring to her own definitions, she writes:

"...the two notions of identity and continuity cannot be separated.

> There can obviously be no continuity without identity, since this would imply the logical absurdity of a predicate without a subject to which it could apply. It could, however, be asked whether the reverse might not, in certain circumstances, be true, whether there might not be identity of a State without its continuity. Unless the possibility of legal miracles is admitted, the question must be answered emphatically in the negative: there is no legal resurrection in international law. Once a State has become extinct, it cannot resume a continued existence. There may well be a historical revival of an extinct State, but not of a pre-existing legal entity."[3]

This extract is relevant to the German problem. If there is no continuity - if Germany had ceased to exist - there could be no question of identity of any rights and duties. Even if this is the position of the USSR, regard must be had also to the Western Powers. The UK maintains the continued existence of Germany - there has been no break, despite the developments since 1949 - therefore there remains some scope for a unified Germany possessing the surviving rights and duties of defeated Germany. Had all the empowered States agreed upon the cessation of Germany's existence, then the matter of which rights and duties would adhere to a unified Germany could be decided on the basis of the law of state succession.[4] The discussion on State succession will show the position of Germany were all the States agreed that it had ceased to exist. The study of identity and continuity is intended to shed some light on the position of Germany according to the UK legal perspective.

Marek defines State identity as "the identity of its international rights and

obligations, as before and after the event which called such identity in question, and solely on the basis of the customary norm "pacta sunt servanda"".[5] The continuity is simply the continuation in existence of the same entity. If the new Germany is to be identical with the old, the question arises, within which frontiers such identity exists; within which area the rights and duties appropriate to such a status may be exercised.

Following the conclusion reached earlier, that there continues to exist a Four-Power competence which supports the theory of Germany surviving[6] until the present day, there is certainly room for the conclusion that all Four Powers do at least agree that they retain that competence with regard to the German territory on which the two former zones of occupation are situated. Such common ground offers perhaps a lowest common denominator from which negotiations on the future of Germany might proceed. Even if the Soviet Union would deny the existence of Germany, it will not dispute that it retains certain functions - which, indeed, it carries out conscientiously; although it is suggested that agreement among all concerned parties would be essential about the status of the German State at a peace settlement[7], such consensus is not necessary at the beginning. Indeed, to seek it might result in progress being halted at a preliminary stage and the abandonment of any attempt to define the eastern frontier of Germany.

That the Powers do not hold identical views on Germany is a state of affairs which does not deny all legal remedies. Their authority is based on a joint assessment, expressed in 1945, that they did not annex Germany, which therefore continued to exist. It is from 1949, with the purported creation of two States, that the substantive differences were given a tangible form which, with hindsight,

would appear to have been virtually irrevocable. Each side made claims on behalf of its own "Germany", and, at least at the outset, asserted that its Germany was the true German State. Since then both States have become firmly established, with perhaps on occasion more than a little help from their friends, and like all States have themselves participated as subjects of international law, in the international arena. The only formal limitation has been the retained rights and obligations with regard to "Germany as a whole". Thus East and West Germany have become progressively more integrated into their respective economic and military alliances, at least in the first years of their existence perceiving their fundamental interests - survival and protection from the other side, as being guaranteed most effectively through very close ties with their blocs and, especially, their own superpowers.[8] In particular, Adenauer and Ulbricht in the first years saw the basic interests and needs of their States as being met through close cooperation with the USA and USSR, though it is probably fair to assert that Adenauer had also a perception of the need for the Federal Republic to maintain close ties with France and other western countries - hence the West German enthusiasm for the European Communities, of which the USA was not a member. This perception of the need for a very close link with either the USA or USSR inspired a loyalty among West and East German leaders towards the superpowers which was not always reciprocated. In other words, while the GDR considered its primary interest (in terms of foreign policy and security) to be a close link with the USSR, the latter State of course took into account its own, often different interests where the GDR was concerned. Thus, it concluded the 1970 Treaty with the FRG in the face of strong opposition from East Germany, which may have felt its own position was threatened by any improvement in relations between these

two States.[9] The Federal Republic also had to accept that, from a US perspective, it was only one aspect of US foreign policy and its position at any given time would depend, not only on how cold was the political climate in Europe, but how hot were other areas of conflict, or potential areas, in which the USA had an interest[10].

Although the integration of each German State into its own bloc has served to deepen the division of Germany, nevertheless the adoption by the Federal Republic of an Ostpolitik which, as is shown by the commitments made by the Federal Republic in the treaties which it eventually concluded, accepted many of the legal demands of the socialist countries, eventually resulted even in the successful negotiation of the treaty between the GDR and FRG on the basis of their mutual relations (which, of course, required the GDR to adopt a different Westpolitik from its previous stance - for example, it agreed that the FRG could continue to maintain that the two States were not foreign to one another, although the GDR itself does not accept this view). Therefore, there came into existence an awareness on both sides that while fundamental differences existed, these need not necessarily prevent the adoption of measures which were regarded as mutually beneficial and acceptable. The result of this was the series of treaties between the Federal Republic and the socialist States and the Four Power Agreement on Berlin. Some of these agreements are relevant to the status, rights and duties of a united German State. Thus the status of Germany should not be decided simply by reference to the retained rights and responsibilities of the Four Powers with regard to Germany as a whole; this as already indicated would be unhelpful anyway because of disagreement on the issue. The two German States have created for themselves, with the approval of the Allies, and have been

given by the Allies, rights and responsibilities which do not prima facie govern the status of Germany as a whole - since that is reserved to the Four Powers - but which may or will restrict or direct the policies and legal positions adopted by a united German State at a future peace settlement, with regard to particular issues, including its eastern frontier.

Any rights or duties of the unified Germany which it may acquire from the Federal and Democratic Republics will depend on its relationship to them. Those passing from the Germany of 1945 would be those few which have survived the creation of what eventually became the two German States, in 1949. The Western Allies gave West Germany, over a five-year period, control over an increasingly large and diverse section of its own affairs, eventually retaining in the Deutschlandvertrag of 1954 only those rights and duties which they held in common with the USSR and which they could not, or would not, alienate.[11] The USSR concluded on 20 September 1955 its own treaty with the GDR,[12] - a treaty concerning relations between the Parties - in which they "solemnly reaffirm that the relations between them are based on full equality, respect for each other's sovereignty, and non-intervention in each other's domestic affairs" (Article 1). The GDR apparently was also becoming a fully independent State, but there remained in the text of the treaty evidence of a residual competence of the USSR, which might affect the freedom of action of East Germany.[13] First of all, the Preamble mentions, inter alia, "... the obligations of the Soviet Union and of the German Democratic Republic under existing international agreements relating to Germany as a whole ...." In other words, the Parties are acknowledging that their freedom of action is not unlimited and the reason for these limitations is the fact that three other States - the UK, USA and France - retain certain rights

over the whole of Germany and Berlin, the eastern sector of which the GDR claims as its capital city, and the justification for these rights can be only the continued existence of, or competence with regard to, Germany. Article 4 of the treaty also acknowledges the peculiarity of the situation of the apparently independent State the GDR:

> "The Soviet forces now stationed in the territory of the German Democratic Republic in accordance with existing international agreements shall temporarily remain in the German Democratic Republic, with the consent of its Government ...."

Two points are worthy of note here: "temporarily" does not necessarily imply or mean that the situation will soon change, whether in fact, in law or both. In international law, a "temporary" situation can easily acquire a permanent character. This is typical of the German situation itself: the division of Germany is nowadays depicted as a permanent settlement the unilateral alteration of which would have unwelcome consequences for world peace. While this may be true, nevertheless it is also the case that the USSR and the GDR supported the reunification of Germany (and therefore the temporary character as a State of the GDR). This aspect of their Germany policy at the time is moreover enunciated in Article 6 of the 1955 Treaty:

> "This Treaty shall remain in force until Germany is re-united as a peaceful and democratic State, or until the Contracting Parties agree that the Treaty should be amended or terminated."

To describe a situation as "temporary" may indicate the attitude of the Parties towards a particular fact or state of affairs; it does not mean that the situation must change; nor does it necessarily detract from the merits of a particular situation. The same holds true for the Federal Republic, which in the Bundestag Resolution attempted unsuccessfully to demean the treaties with the Soviet Union and Poland by describing them as elements of a "modus vivendi" (Paragraph 1) which the FRG sought to establish with the East. These treaties are only temporary in the sense that nothing ever remains the same if enough time passes; the Federal Republic may cease to exist through reunification of Germany. On the other hand, Poland could also cease to exist, a development for which there is well-established historical precedent.

The second point is that, according to Article 4, the Soviet forces stationed in the territory of the GDR do so with the consent of the GDR Government. This implies that the presence of these forces is somehow dependent upon this consent. This, however, is not the case. Firstly, although the GDR Government is said to give its consent, at least according to the actual wording of the treaty, it is nowhere stated that this consent must be obtained in order to legitimize the presence of Soviet forces in the GDR. Had the relevant article stipulated that the Soviet forces remained only with the consent of the GDR, the meaning would be quite different, and it could then be maintained that an attempt had been made to deny this aspect, at least, of the USSR's residual competence. Secondly, even if the Soviet forces do happen to have the consent of the GDR authorities for their presence there, such consent is unnecessary insofar as these forces are present in the GDR, by virtue of the USSR's status as one of the Four Powers, carrying out

functions under the residual authority of the USSR as one of the Four Powers, with obligations and rights vis-a-vis the other three Powers. Thirdly, as a matter of fact if not law, it is not anticipated that the GDR will withdraw its consent to the presence of Soviet forces on its territory.

In other words, despite the rhetoric of the USSR-GDR treaty, the concept of one Germany - however amorphous its form - survived the establishment of a fully-independent East Germany. It also survived the establishment of the Federal Republic as a fully independent State, which meant the division of its rights and duties between the Four Powers, on the one hand, and the two German States on the other. This Germany - or this collection of rights and responsibilities - is all that remains to the Four Powers following the erosion of their supreme authority by giving to the GDR and the FRG so many of the functions of State which they, the Four Powers, had exercised since 1945.

The Soviet and Western views of what actually remains of Germany were not identical; they did recognise a "common responsibility for the settlement of the German question and the reunification of Germany"[14], but it would appear that the USSR was at one time prepared to regard as no longer applicable some of the Allied agreements which were essential for the maintenance of the position of the three Western Powers in Berlin and Germany: the agreements of 1944 and 1945 on the zones of occupation and the administration of Greater Berlin and on the control mechanism in Germany.[15] This dispute was unresolved following rejection by the Western Powers of the Soviet view. Nevertheless, there does exist an agreed common responsibility for Germany among all Four Powers.

In the event of Germany in its unified form being identical with the Germany of the immediate post-war years, it would not of course take over all rights and responsibilities of the Four Powers. Since these are concerned largely with actions which the Allies might be involved in with regard to Germany - in particular, the reunification and the peace settlement, it is evident that it would once more have certain acts carried out concerning it. Just as Germany in 1945-49 had no right to demand a peace settlement, nor would it be able to do so in future. This is the prerogative of the Allies. And if this Germany were a new State, it would still be subject to the exercise by the Four Powers of their competence with regard to it, since they had supreme authority and have expressly retained that competence. It may thus be concluded that, regardless of whether or not the single German State continues to exist, the position of the Four Powers would not be affected with regard to their residual authority. Indeed, despite their differences of opinion on the subject, all Four Powers, in a joint declaration in 1972 concerning the application of East and West Germany for membership of the United Nations, stated that their rights and responsibilities would not be affected by this membership.[16] Thus while there may be an absence of consensus with regard to its scope, the existence of joint authority was acknowledged simultaneously by all Four Powers nearly thirty years after its assumption.

Despite the failure of the Four Powers to agree exactly to what their joint authority pertains, it is possible to offer a legal assessment of it. It is accepted that Germany survived its defeat in 1945; in the absence of evidence to the contrary then, it must continue to exist. Such evidence must be sought in the actions of the Four Powers since it is they that have the right to alter the status of Germany.

The Soviet Union seems to regard Germany as no longer existing, but, to have binding effect with regard to the other three States, they must agree to such an opinion - which does, after all, constitute a drastic change in attitude. The UK, at least, certainly does not accept the Soviet position.[17] And this in itself should be enough to justify the continuation of the German State, since it would appear that the UK is merely maintaining the position agreed upon by all Four Powers at the end of the war, which may not be changed unilaterally or even with the agreement of three of the four Powers; their authority over Germany, including the power to determine its future status, was not to be exercised by majority vote.

While there is evidence to show that Germany has ceased to exist, none of it contains any Four-Power declaration to that effect.[18] Nor is it sufficient to assert frequently and consistently that a particular state of affairs no longer holds true if the other concerned States from the beginning, and consistently, deny the assertion. Herein lies the weakness of this theoretical judgment - although correct, it is believed, in theory, it nevertheless is most unlikely to alter the attitude of the Soviet Union, either because it believes its legal assessment to be the correct one, or because it is unlikely to be prepared to accept the loss of political face entailed by a public reappraisal of its stance.[19] Furthermore, even if the Soviet Union can be deemed to be unable unilaterally to alter its attitude to the continued existence of the German State, it could withhold its agreement to the position of the other Powers in the event of some proposed joint action with regard to Germany, for example because it finds their position unacceptable. This suggests another reason for accepting the lack of consensus among the Four Powers so that it may not be used as a justification to inhibit agreement on the reunified Germany.

It is suggested that the correct approach in assessing the status of Germany is to go back to the time when the Four Powers actually found themselves in agreement - 1945. The various statements and acts cited above purporting to deny the existence of Germany cannot override the consistent maintenance of that Wexistence by States with the authority to do so. In theory Germany exists, then. Yet the Soviet Union does not accept it. It has altered its position and therefore the effective status of Germany in public international law is less certain; to draw conclusions in such circumstances entails a choice between what are believed to be contradictory stances. To support the UK view is to deny the change in policy by the USSR, to take the opposite position is to assert that a State can be obliged (through neither customary international law nor ius cogens) to acknowledge not only a change but a fundamental change against its own volition in the status of another subject of international law for which these States are responsible, albeit in association with the USA and France. It is for this reason that no third way can or should be sought. The UK is upholding the rule of international law and to look for a compromise solution would be to demean that rule. The Soviet Union has taken a stance that is not legally supportable yet its stance will remain tenable as long as it chooses to maintain it. In this context, the acknowledgment in 1972 by the USSR that it retained joint capacity with regard to Berlin confuses the picture further. Therefore, the actual status of Germany is ambiguous in the extreme because of the failure of the responsible States to remain in accord with regard to the exercise of their joint rights and duties.

It is not unforeseeable that the USSR, despite its public utterances on the subject, may, at a later date, alter its attitude concerning the continued existence of Germany, should such a move appear to be expedient. It has in the past acted in

such a way as to contradict earlier legal claims. A notable case is that of Poland in 1939. On 17 September 1939 the USSR invaded and subsequently occupied Eastern Poland, up to a line previously agreed upon, by Ribbentrop and Molotov for Germany and the USSR, in the secret Protocol to the Non-Aggression pact concluded by the two States.[20] While the USSR has denied the existence of this Protocol it is generally accepted in the West that an agreement to partition Poland twas indeed entered into.[21] The point is that the Soviet Union justified its intervention in Poland on the ground that Poland as a State had ceased to exist along with the Polish Government and therefore the Soviet army entered the territory of what had been Poland in order to safeguard the lives and property of the Ukrainian and White Ruthenian populations in that country.[22] The Soviet Union maintained its presence in eastern Poland, which had been incorporated into the USSR, until the attack by Germany in 1941. Yet it is most likely that Poland survived as a State in 1939, despite the whole of its territory being occupied by German and Soviet forces: its armed forces continued the war, a Polish Government in Exile, provision for which was made in the Polish Constitution, functioned continuously - and it is accepted that a State does not cease to exist merely by dint of its whole territory having become occupied by the forces of the other side; debellatio is required first.[23]

Therefore, the position was that the USSR had attempted to justify its unlawful action by recourse to the claim that Poland had ceased to exist.[24] Notwithstanding such a position, the USSR entered into diplomatic relations with Poland once again following the attack by Germany. Yet the State with which it entered into relations was identical under international law with the one which, according to

the USSR, had ceased to exist. In other words, the Soviet Union blatantly altered its position because the prevailing political and strategic considerations made such a move expedient, if not even desirable. If Poland had ceased to exist in 1939, it would have been impossible for the Soviet Union in 1941 to conclude, as it did on 30 July, a Pact with Poland, on, inter alia, the restoration of diplomatic relations.[25] By acknowledging the Polish State in this Pact, the USSR incidentally destroyed the alleged legal basis for its action two years earlier.

While it is hoped that it will not require another war and invasion to precipitate such a fundamental change in attitude with regard to the continued existence of the German State, nevertheless it may justifiably be asserted that the Soviet Union can be induced - perhaps especially if it perceives its own interest being served - to alter its views on even very basic matters.

The difficulty in characterizing the Soviet position is that it does continue to exercise certain functions pertaining to Germany as a whole. There do exist recent statements by Soviet commentators on the German question, to the effect that the German question no longer exists.[26] The Soviet Union regards the question as resolved, which means that it sees the present situation, where two German States coexist and many of the problems or outstanding matters which should have been settled by the peace settlement have been regulated by bilateral treaties, as final. One possible interpretation of this attitude is that there is no scope, from the Soviet perspective, for Germany continuing to exist for the purposes of a peace settlement. And while it does continue to exercise rights and responsibilities derived from the actions of the Four Powers following the defeat of Germany, there is room for the view that such exercise is necessary, not to

preserve the USSR's position at a peace settlement, but for the maintenance of the status quo: while ambiguities may be present, nevertheless a final situation has been arrived at which allows the existence of two separate German States and West Berlin.

This points to characterization of the Soviet position in terms of the whole of Germany having been replaced by the FRG and the GDR plus West Berlin (since it regards East Berlin as forming a part of the GDR).[27] In this sense, it is proper to regard these two States as successor States which have inherited from Germany the obligation to permit the exercise by the Four Powers of those functions which comprise their rights and duties pertaining to Berlin (or West Berlin) and Germany as a whole. Although the two German States are independent, still they have accepted since their foundation, albeit with occasional attempts by the GDR to question the authority of the Western Powers, that certain legal restrictions inhibit their freedom of action but simultaneously allow them such independence as they have. The rights and obligations of the Four Powers both provide a basis for the present situation and help to maintain its existence to the extent that they cannot in practice be separated from the present German structure of two States. It is certainly the case that these rights and obligations of the Four Powers were not intended to become permanent, but then neither of the two German States formally anticipated at the commencement of their existence that they would develop separately - as is evident in the first constitutions of both. The conclusion in the years 1970-1973 of the treaties between the FRG and its immediate eastern neighbours plus Poland and the Soviet Union serves only to strengthen the legal foundation of the geopolitical status quo. In other words, although the original justification for the maintenance of such an intrusive

presence in Germany by the Four Powers was certainly the peace settlement, later developments in the Soviet perception of its own role rendered that justification less relevant; but the status quo which had filled the vacuum depended also on the continued maintenance by each side of its position, which in turn meant that basic stances could not be changed or even modified without extreme caution.

The next, logical step in the Soviet attitude towards Germany could be that, since the German question has been resolved, a reunified Germany would only be able to appear in the context of the "resolved" situation: the issues and problems facing the 1945 Germany would not be those confronting the new unitary State. One consequence of such a policy would be that, despite the apparent clarity of the Potsdam Agreement, the matter of Germany's frontier would not arise - having been resolved! Such a development in the policy of the USSR, in the event of there arising moves towards reunification in Germany, is not unforeseeable, but it would be unlikely to receive a warm reception from the Western Powers which, even if they show no desire to alter the external de facto, perhaps de jure, German boundaries, are unlikely to be prepared to negate suddenly the legal position held since 1945, that the peace settlement is the proper occasion on which to finalise certain provisional arrangements or to demand that they be changed. Indeed, the general position of the socialist States with regard to the specific issues of the Polish-German frontier is that the question was resolved at Potsdam and therefore would not arise in the event of a reunification of Germany.[28]

The conclusion must be that under present conditions, there is insufficient

evidence to justify a definitive statement concerning the identity or lack of it, between a future unified German State and the Germany of 1945-1949. This conclusion assumes that the Soviet Union will not alter its existing view that Germany has failed to survive the creation of the FRG and the GDR. In the event of any developments in Soviet or Western policy towards the question, the practice of the responsible States may enable a more definite assessment. Notwithstanding this judgment, it is appropriate to reiterate at this point that the practice of the UK, which, it is believed, has been consistent in maintaining the original joint decisions of the Four Powers with regard to the survival of Germany, does indicate that Germany still exists.

(iii) The Rights and Duties of the United German State

In the event of a united German State becoming active once more on the international plane, the present position concerning its rights and duties can be deduced from the preceding discussion: regardless of identity being agreed to exist with the Germany of 1945, the position of the Four Powers, in terms of their own capacity, will be unaltered. This follows from the conclusion that, despite the differing views of the UK and USSR, both States have agreed along with France and the USA that their rights and duties, as they see them, continue to exist. The difficulty is of course that the USSR, although in the opinion of this writer having adopted a legally unjustifiable stance with regard to certain aspects of the German question, does create uncertainty as to the actual final exercise by the Four Powers of their functions with regard to a united Germany. However, it may be stated that, formally, there is unlikely to be any impediment to the exercise by all Four Powers of their right to decide upon the course of the eastern border of

Germany, as agreed at Potsdam by the UK, USA and the USSR and, subsequently France. Even if the Soviet Union should take the view that the frontier, for whatever reason, has already been settled finally, it would still be open to it to argue that, in continuing to espouse this line, it is nevertheless participating in "the final delimitation of the western frontier of Poland". This would, incidentally, be in accordance with the argument frequently put forward in the socialist countries that delimitation in this particular situation means no more than the formal and detailed enactment of a binding decision of principle.[29] Therefore, while it might be open to the Soviet Union to argue that no decision should be taken with regard to the Polish-German frontier, on the ground that there is nothing to be decided, there would appear to be no formal bar to its participating with the Western Powers in the final delimitation, without thereby compromising its position.

It is impossible to predict exactly how the Four Powers would decide on the scope of their joint authority, given their present discord, but there is no reason why they could not reach agreement on the most important substantive issues; the lack of consensus which is evident now relates to the division of Germany in the first place. Reunification could not occur without substantial movement in the direction of policies which would be acceptable to all Four Powers. Such non-legal criteria defy advance judgment because of the unpredictability of foreign policy. However, it is believed that the two factors - legal stances and foreign policy - even if they are entirely separable, do go together in the German situation to a great extent, perhaps even more than usual, because the two German States are in "the front line" of the division of Europe. Thus it should be anticipated that the political will which would have to accompany any movement

towards a legal solution to the German question would assist the States concerned to reach agreement on the extent of their joint authority, to which, with regard to the Polish-German frontier, there is, as has been shown, no formal bar.

A similar argument to that which has been employed to show how the Soviet Union might agree to participating in a final delimitation of the Polish-German frontier has been used previously to show how the Western Powers could exercise their right to decide on the Polish-German frontier at the peace settlement.[30] It is suggested that, by approving the recognition by the FRG of the Oder-Neisse Line as the western frontier of Poland, the UK, and any other of the Four Powers if they have expressed the same substantive approval, would be obliged at a peace settlement to recognise the Oder-Neisse line. That is, they still have the right to decide on the delimitation at the peace settlement, but their freedom of choice, such as it is, would be restricted and, actually, negated because the previous declarations of approval of the West German recognition of the Oder-Neisse line would have the effect of obliging the States concerned to approve the existing frontier. This is not the view of this writer.[31]

The Soviet position can be differentiated because that State would be in the situation of being able to follow the letter of the Potsdam Agreement, if it chose. In other words, its freedom of action is maintained. The Western States, on the other hand, would, according to the above argument, be bound by their approval to adopt a particular course at the peace settlement. It should in fairness be pointed out that the Soviet Union would also be obliged to agree to the Oder-Neisse line were the above argument accepted.

Even if the Soviet Union argued that the frontier question were resolved, this

could also be taken as that State's contribution to the delimitation of the frontier. There is, therefore, taking into account also the views of the Western Powers, what this writer considers to be conclusive evidence that the frontier question is a proper matter for the peace settlement - at the very least there is required from the Four Powers a formal agreement that the delimitation has already occurred.

It has been argued that "...the decision to change the eastern frontier of Germany was taken by a German Government ...."[32] It is further correctly stated that that Government was composed not of Germans but of the Supreme Commanders of the victorious Powers. The German people, it is concluded, cannot in the event of an all-German Government coming into existence, argue that they are not bound to accept the decision of the German Government when it was composed of the Supreme Commanders.[33] While this argument is also valid, the result postulated, that therefore Germany (since the German people would not in this context have any international legal personality) would be obliged to accept the Potsdam provisions with regard to the Polish-German frontier and therefore not to question the frontier, is incorrect. It is certainly the case that the relevant provision would bind Germany. But it is not the case that the Potsdam Agreement by itself has the effect attributed to it - that of allowing Poland administration in the sense of full sovereignty.[34]

Given the unsatisfactory nature of the Four Power positions with regard to the status of Germany, that is, unsatisfactory in that the evident differences do not allow a definite judgment to be made on the legal position which could be acceptable to all, it is now necessary to consider to what extent the legal morass of the realpolitik acted out since 1945 can be clarified by the results of the Ostpolitik.

In other words, which obligations and rights of the two German States may have a bearing on the German question and in particular the Oder-Neisse line?

The GDR and FRG have both recognised that the State territory of Poland extends to the Oder-Neisse line, which is its western frontier.[35] The GDR recognised this situation as final and irrevocable, while the FRG accepts the situation for itself but maintains that a unified Germany would not be bound to accept the situation as a result of its (the Federal Republic's) recognition.

However, a united German State would certainly possess some of the rights and duties which presently pertain to the two German States. If Germany has not survived the creation of two new republics on the territory of the occupation zones, then they are successor States, each with the wide range of capacities allowed to them by the Four Powers. In this case, should unification occur, the new State would also be a successor State and it would be necessary to consider which rights and duties it would inherit. If Germany <u>has</u> survived, while it is known from the official statements of the Four Powers that neither the Federal Republic nor the Democratic Republic has been regarded as identical with it, nevertheless its capacity to act was suspended for an indefinite period and most of its functions as a State were passed on to the GDR (by the Soviet Union) and the FRG (by the Western Powers).

It is in such a situation that the complexity of the legal developments and different policies of the Four Powers combine to inhibit assessment of the problem as one might a "normal" case of State succession. But what actually happened? Germany continued to exist in its "potential" capacity, but many of its

attributes as a State were permitted to devolve to the GDR and FRG, sufficient indeed for both to receive, admittedly over a period of twenty five years, from 1949 to 1974, virtually universal recognition by the other States of the world. This process by which the rights and duties of one were taken up by two new entities on the international scene was in effect a state succession. The only factor which prevents the characterisation of the process by that term is that Germany was deemed still to exist. There occurred no complete replacement of one subject of international law by another or others such as would have been accompanied by a change of sovereignty:[36] for most purposes, the two republics enjoyed, eventually, complete nominal independence, but with regard to Berlin and Germany as a whole, of course, they could not override the standpoint of the Four Powers which had created them in the first place. In other words, there was substitution of sovereignty for most purposes: the Four Powers, using their supreme authority, permitted it to pass from Germany,[37] albeit without joint agreement at the time, but they retained certain rights and duties which justify a conclusion that Germany had not disappeared from the international scene yet. It is yet another aspect of the unique character of Germany that the Four Powers did not themselves acquire sovereignty over Germany. They specifically refused to annex it, though annexation was one alternative available to them in 1945.[38] It was this refusal to acquire sovereignty, combined with the political failure[39] of the breakdown of cooperation by the occupation authorities, which gave rise to the events of 1949 and the exacerbation of already complex legal problems by the appearance of two claimants, each purporting to be the "real" Germany. By 1955, all that remained of the sovereign German State was that part of it with regard to which the Allies had not relinquished their supreme authority: Berlin and Germany as a whole, which meant the retention of the right to decide on the

borders and status of Germany if and when reunification should occur.

The sovereign status of Germany was thus reduced to a potential status: potential in the sense that it was inactive, but not non-existent. If, therefore, this sovereign status continued to exist, there could have been no full transfer of sovereignty and hence the reluctance to characterize what was definitely a widespread and thorough devolution of rights and obligations to the FRG and the GDR as an instance of State succession. A partial transfer of rights and duties cannot be termed a change of sovereignty. Sovereignty has been split with regard to the territory at present within the frontiers of the two German States. There is no competition among the jurisdictions, though, because of the restrictions placed upon the freedom of action of the two republics by the Allies. Any attempt to act in the name of the German State by either of those entities on which devolved most of its active capacity would constitute an infringement of the supreme authority which the Allies retained. The Federal Republic and Democratic Republic are sovereign States but with limitations placed on their freedom of action in certain situations.

Such a concept as cited above - the limitation on the freedom of action - is nothing new. All States are subject to such limitations: international law prohibits recourse to the use of force as a means of settling disputes - one specific example of the freedom of States being limited regardless of their own wishes (while at one time it could be argued that States were only subject to this limitation because they chose to be, such no longer holds true; all States are bound by the above rule irrespective of their own wishes in the matter by virtue of its status as ius cogens)[40]. States can be obliged, and have so been, to follow a

certain policy as a condition of their existence, their freedom of action being limited by treaty, as with Belgium in 1839[41] - one example of limitations being imposed upon one State, quite lawfully, by others, rather than applying to the whole international community. The significant difference about the situation in Germany is this, that the method of limiting it is quite unique. While other States can be and have been obliged to behave in certain ways, it is not the case that their sovereignty was limited by virtue of another power or powers possessing over all or part of the same territory. The restrictions which apply to the FRG and the GDR concerning the retained authority of the Four Powers are, in themselves, arguably no more intrusive than the binding of Belgium to neutrality in the 19th century or the Austrian example in the 20th century, whereby Austria actually agreed to bind itself to neutrality.[42] However, if Austria maintains its commitment to neutrality, its sovereignty is otherwise no more restricted than that of the vast majority of the other States in the international community. In the case of West and East Germany, they will never have the same measure of control over their territory which is enjoyed by Austria, because they are restricted even within their own territories by what is probably a simultaneous sovereignty, existing in the German State and manifested by the exercise of supreme authority on the territory of the two new Germanies by the Four Powers. While the two jurisdictions do not compete, since they each have quite separate applications, they can coexist. Again, it is not a novel situation for one State to have certain rights on the territory of another, but this would usually be by mutual agreement of the States concerned[43] and not, as is the case in West and East Germany, by virtue of the dictate of a completely different sovereign power. In other words, the "normal" or standard situation would be for one State to allow the other the right to use its territory for certain purposes. Even if this

permission were granted by the granting State because such a concession had been fundamental - for example, to ensure its coming into existence as an independent State and as a condition thereof, this would still not be identical to the situation in which the FRG and GDR find themselves, because the granting State in this hypothesis would still be fully sovereign, that is, the only sovereign entity on that territory. West and East Germany have to coexist within their own territories with another sovereign authority. Herein lies the basic substantive singularity of the German issue.

Is the concept of potential capacity, such as the State of Germany would appear to possess, quite unique? The answer, as so often with Germany, is maybe. It is ironic that among those who would ridicule the concept of Germany continuing to exist, even if only for certain limited purposes, are some Polish international lawyers[44]. For it was the Polish Supreme Court, admittedly in a Poland which, far from being socialist and allied to the USSR was arguably democratic, independent (politically as well as legally) and had only two years previously fought and won a war against the Soviet Union,[45] that felt able to rule that the assumption that the Polish State ceased to exist, after the third partition of Poland in 1795, was recognized as "a historical and legal error."[46] The Court further stated:

> "The Republic as a State existed even after the partitions, although in a potential status....." [47]

So the concept of potential capacity or status is not quite as far-fetched as some would suggest, though it may not have been an accurate assessment by the Polish Supreme Court, in terms of public international law, to claim that the Polish State

had enjoyed such a status.[48] The actual wording used is not so important here, because the meaning and effect are very similar indeed. The Polish court was suggesting that the Polish State continued to exist despite the fact that, over the whole of its territory (whatever its dimensions), sovereignty was being exercised by three other States: the Russian Empire, Prussia and Austria-Hungary. The only difference with Poland was that, as a potential State, like Germany it was completely inactive, but with Germany there exists tangible evidence of its status in the form of the occupation of Berlin and the exercise of certain rights with regard to the whole of Germany.

Although it has been concluded that there occurred no State succession in the usual sense according to which that term is understood, because there was no complete replacement of one subject by another or others, nevertheless the legal existence of two, non-competing sovereign powers on German territory (Germany on the one hand and, on the other, the FRG and GDR) was brought about by the devolution of certain capacities from the former to the latter. In this sense there was a State succession from Germany, though it was not universally characterized as such when the crucial events were taking place, from 1949 to 1955. Each of the new German States was regarded as being not identical with Germany. New entities came into being with sovereign power, subject to the exceptional limitations discussed in the preceding pages. These exceptional limitations are not open to question because they are manifestations of an equally exceptional, but legally valid, right of supreme authority enjoyed by the responsible States.

If it is possible, as is the view of this writer, for two, non-competing sovereignties to exist with regard to one territory, then it should ipso facto be conceivable that State succession may occur with regard to one of these sovereignties (the category of the GDR and FRG) without thereby affecting the other. The succeeding State or States would of course be bound to accept the limitations upon their freedom of action which exist as a result of the Four Power supreme authority, which represents the sovereignty of Germany.

The idea postulated here is that of partial State succession. O'Connell[49] discussed this in the context of one State acquiring part of another State, through, for instance, annexation or cession, so that the territory of one is increased at the expense of the other, but the international legal personality of neither is affected: they remain the same States. With regard to modern Germany, however, what is involved is an altogether different form of succession, because the capacity which was passed from Germany was not total capacity with regard to part of its territory, but partial capacity with regard to all of its territory (that is, minus those areas which had been placed under Polish administration or Soviet control, to the East of the Soviet occupation zone).

The fact that this capacity was actually passed onto two States should not be permitted to confuse the issue: this occurred because by that time, there were two separate de facto authorities in Germany: the Western Powers and the USSR. Although each side did not accord immediate approval to the actions of the other, this was eventually forthcoming. The division of this capacity into two parts of Germany may be regarded, for this purpose, as not expressing any division in the legal character of the capacity which flowed from Germany to the two new States.

They each inherited the same kind of partial authority over their own segments of the German territory, though the practical extent of it may have differed.

The practical consequence of this situation is that, if Germany still exists, a reunified German State would, despite this existence, succeed to those rights and duties of the two German States which should be inherited according to the general law of State succession. It would not be prevented (or saved) by the mere existence of the Germany of 1945 from being subject to the rights and duties of the GDR and FRG with regard to the Polish-German frontier. However, since the final decisions on the status of Germany and its frontiers are to be made by the Four Powers in exercise of their supreme authority, the commitments of the reunified Germany could not override those of the Four Powers with regard to these matters; only subsequent action by the Four Powers could limit their freedom of action: if they have made any statements or taken any action which would have the effect of restricting their final decisions on the status and frontiers of Germany. This reunified German State could only come into existence in the context of the residual Four Power authority, assuming that they will take no action to bring about the demise of that authority in the meantime. Because neither of the two presently active German States is identical with Germany, the new German State would also probably not enjoy that status. The fact that the FRG and GDR derived <u>from</u> the old Germany would not of itself entail an automatic fusion of the new entity with the old; this is because the development of the Federal and Democratic Republics since 1949 has entailed the acquisition of rights and duties such as to create a quite unforeseen, new but nevertheless legally valid state of affairs. Even if the Western Powers and the USSR did not originally intend the entities which they set up in their respective zones of occupation to do

so, these have nevertheless acquired the status of sovereign States, with the consent of the Four Powers.

However, the "new" Germany would still be subject to the residual authority of the Four Powers. Indeed, the actual act of reunification could only occur with their consent, because this would be seen as a development which has to be regulated by them, since it concerns Germany as a whole. Otherwise, it is conceivable, legally, that reunification might take place without the involvement uof the Four Powers, since it might be argued that, if neither the GDR nor the FRG nor a reunified Germany is identical with the "old" Germany, then why should it be bound by Four Power limitations which apply to the Germany of 1945?

In other words, in order to ensure that they could exercise fully their rights and duties with regard to the future unified German State, the Four Powers would require to be fully involved in the unification of the Federal and Democratic Republics, so that the entity thereby created would be bound explicitly to accept the supreme authority of the Powers. The whole point of Germany continuing to exist simultaneously with the FRG and the GDR is to preserve the position of the Four Powers. It would defeat the purpose of continuing to maintain such a complex and troublesome status quo if the two German States could simply unite outwith the context of the retained rights and responsibilities of the Four Powers. These two States <u>are</u> separate subjects of international law but they do not have, indeed cannot have, authority to deal in matters relating to Germany as a whole. Thus a reunified Germany would also be unable so to deal; such capacity is not acquired out of thin air. It follows from this that the reunification of Germany must also be deemed a matter falling within the ambit of the term "Germany as a whole."

While neither the FRG nor the GDR is identical with Germany, nevertheless, they remain subject to Allied capacity with regard to Germany as a whole. The Allied capacity is derived from the supreme authority assumed with regard to the sovereign German State. Although they are not identical with Germany, the FRG and the GDR are both connected with it, in that the capacity retained by the Allies after they created these two States applies also to them: they accepted this in treaties with the Four Powers when they were given independence. Thus there exists this legal link between Germany and the FRG and GDR, which, were they to unite, would render capable of execution the outstanding rights and responsibilities of the Four Powers.

It may be stated that, despite its non-identity with the Germany of 1945, the reunified State will be restricted and bound by the same Four Power capacity as the old Germany. Furthermore, it is the case that, even if Germany has survived the creation of two German States (the Western view), the law relating to State succession will nevertheless play a role in ascertaining what rights and duties will apply to the reunified German State, because of the separate status of East and West Germany under international law. If the Soviet view be accepted, that Germany ceased to exist, then clearly the rules of State succession have a role to play. In either case, then, a reunified Germany will itself be bound by two separate sets of rights and duties: those inherited from East and West Germany and those applicable by virtue of the supreme authority of the Four Powers. Since this authority applies at present to both German republics, they would also pass it on to the succeeding, unified Germany. The Four Power authority then applies directly to Germany through their right to deal with Germany as a whole, and it is inherited from the two presently active German States.

Once again, the problem which may arise is the attitude of the Soviet Union. While the differing legal positions of the Four Powers can be reconciled according to the arguments given above, there remains the conflict of opinion over what are the residual competences of the Powers. However, in light of the above discussion, it is at least possible for a unification of Germany to occur, placing heavy emphasis on the rules of State succession, so that the existing differences might be dealt with as a matter of fact, rather than either side demanding concessions from the other concerning legal stances. Eventually, all Four Powers would have to reach agreement about Germany, but there is no reason why the debate cannot be confined to an evaluation of their joint capacities instead of the necessarily divisive issue of whether or not Germany has existed continuously since 1945, despite the political and legal evolution of the situation.

(iv) The Law relating to State Succession

The law of state succession will be relevant with regard to the German problem in two aspects:

1. the consequences of unification or uniting of two States to create a third State from the perspective of succession to treaties;
2. the particular rules relating to boundary treaties, or territory affected by such treaties, in the event of a succession of States.

As will be shown later, these two aspects are not always separable and both are relevant to a consideration of the obligations of Germany vis-a-vis Poland when it succeeds the FRG and the GDR as a result of unification.

Before this question can be discussed, it is advisable to decide what is meant by the term "State succession" and what are the relevant rules of State succession. The meaning of the term "State succession." Article 2 (1) (b) of the Vienna Convention on Succession of States in Respect of Treaties[50] (hereinafter referred to as VCSSRT) provides:

> " "succession of States" means the replacement of one State by another in the responsibility for the international relations of the territory;"

This definition is the same as that adopted by the International Law Commission as part of its Draft Articles on Succession of States in Respect of Treaties at its 26th Session.[51] In the accompanying commentary, the ILC noted that "...the term is used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event."[52] In other words, the devolution of rights and obligations will be dependent upon other particular rules, whether contained in the Convention, applicable as part of customary international law or by special agreement of the entitled States. It is clear from Paragraph 4 of the commentary that the term "responsibility" has been employed consciously as an alternative to "sovereignty". This is not because sovereignty is not transmitted but rather to take account, according to the Commission, of State practice and to allow for the Convention to cover not only national territory, but also cases such as trusteeship, mandate, protectorate and dependent territory,[53] which may not necessarily be subject to the kind of authority connoted by the term "sovereignty."[54]

An examination of the writings on the subject shows that there is complete agreement on the aspect of substitution or replacement of one State by another with regard to a territory, although some writers hesitate to use the word "sovereignty" when describing the kind of authority transmitted. This holds true for writings in both West and East, contemporary and less recent. Among western writers, McNair describes a situation where "...one State succeeds, wholly or in part, to the personality and the whole or part of the territory of another State."[55] This is quite uncontroversial; there is no requirement that a State cease totally to exist for a succession to occur, while the term "personality" could include forms of authority other than sovereignty, although the successor State may actually acquire a different authority with regard to the territory from that enjoyed by its predecessor (for example, in the case of a newly independent State taking over territory which prior to the succession was subject to the authority of a mandate power). O'Connell writes of "...the factual situation which arises when one State is substituted for another in sovereignty over a given territory...."[56] While this definition postulates only the substitution of one State for another with regard to sovereignty, which might seem on the face of it to exclude other kinds of control, it should be born in mind, first, that this definition is given as part of the introductory remarks to a massive study on the subject of State succession and, furthermore, the author on the same page mentions the process in somewhat more general terms, which might be construed so as to allow for a wider definition of the scope of State succession: "...one State ceases to rule in a territory, while another takes its place."[57] O'Connell goes on to explain that an instance of State succession "...does not necessarily presuppose a juridical substitution of the acquiring State in the complex of rights and duties possessed by the previous sovereign."[58] In saying this his view is almost identical to that

of the ILC in its commentary to the draft articles, where it states that the term "State succession" leaves aside any connotation of inheritance of rights and obligations on the occurrence of that event.[59]

More recently, Brownlie has written that "...State succession arises when there is a definitive replacement of one state by another in respect of sovereignty over a given territory in conformity with international law."[60] Brownlie acknowledges that his definition is subject to amendment in certain cases because it may not be sovereignty which has been enjoyed by the previous State.[61] Otherwise, his definition is in line with the tenor of the other definitions quoted. It is interesting that he adds the rider that the replacement of authority should be in conformity with international law before it will be regarded as a succession. Thus excluded from the ambit of state succession are acquisitions of territory by unlawful means. This is not to say that the other definitions given do include unlawful acquisitions of territory; rather, they are excluded by implication, since, as will be evident from the methods by which succession may occur, a succession of States may arise only in particular situations.

Reference has already been made to the definition favoured by Akehurst.[62] He regards it as "...that branch of international law which deals with the legal consequences of a change of sovereignty over territory." In light of the above discussion, there is nothing to be added to this, except to note that consensus exists with regard to the aspect of replacement of authority.

Moving East, it is evident from the works of some Polish writers that they are in broad agreement with their western counterparts. Skubiszewski, for example, writes:

"With the loss by a state of its subjecthood in international law are linked problems of succession."[63]

While the author in this context does not actually define State succession, it is evident from the above statement that the notion of replacement of one State by another is what has been taken into account. Of course, there does not have to be total loss of statehood (which is mentioned here), and it is certain, from further references in the text to total and partial succession, that the author did not intend to confine the concept to that of total State succession.[64] Professor Skubiszewski has also commented specifically on the German question and the relevance to it of the law of State succession, and reference will be made to this work later.

Returning to the present day, two recently published general texts on public international law by two leading Polish international lawyers, one the professor of public international law at Warsaw University, the other the director of the Polish Institute of International Affairs, confirm the consensus of opinion on the basic concept of State succession. Goralczyk writes that "Problems of succession of international rights and duties appear when a part or all of the territory of one State passes under the sovereign authority of another State."[65] Symonides takes the view that "Succession is the result of changes in territorial supremacy over part or all of a defined state territory."[66] There is no substantive difference between Goralczyk's definition and that of Akehurst. The one potentially different aspect of the description given by Symonides is the use of the term "territorial supremacy", rather than "sovereignty". The two may refer to different situations, just as in German, the term "Souveranitat" (sovereignty) may

define something superior to "Gebietshoheit" (territorial supreme authority). However, in German the two terms are sometimes used synonymously too, which can lead to confusion unless the writer specifies what is actually intended by the use of the lesser term. In the present case, the use of the term "territorial supremacy" perhaps serves the function of causing Symonides' definition to resemble more closely that adopted by the ILC and contained in the VCSSRT. The end result, though, is to confirm the unanimity among writers as to the general abstract meaning of the term "State succession."

The next question must be: in which specific circumstances may a succession of States take place? Such an event may be brought about by a number of different political events, which do not necessarily all have the same legal effects.[67] Among these are included the following: cession, annexation, formation of a union or federation, attainment of independence and partition.[68] It is not proposed to consider the legal effects of each of these, since not all of them are relevant to the German problem. The essential aspect which they all possess is that, following any of these events, there will be a different State exercising authority over the territory concerned.

(v) The Relevant Rules of State Succession - Status of the VCSSRT

The VCSSRT was concluded on 23 August 1978. According to Article 49, it requires fifteen ratifications or accessions before entering into force. By March 1983 a total of six had been received.[69] None of the States whose practice is relevant to this study has as yet ratified the treaty, though it is of more than passing interest that Poland, Czechoslovakia and the GDR have signed it.[70] Each

of these States posseses territory, their tenure over which has in some way been questioned by the Federal Republic of Germany, and the provisions of the treaty, were they to become binding on all of the involved States, would probably serve to strengthen their tenure against possible future claims by, for example, a united German State.

The general rule as to the temporal application of the Convention is set out in Article 7, para. 1"

> "Without prejudice to the application of any of the rules set forth in the present Convention to which the effects of a succession of States would be subject under international law independently of the Convention, the Convention applies only in respect of a succession of States which has occurred after the entry into force of the Convention except as may be otherwise agreed."

So the Convention by itself applies only to successions of States which occur after it enters into force, with one proviso and one exception: where any of its provisions reflect existing law, then they will of course not depend upon the Convention coming into force to be applicable to a case of succession; and States may actually agree to apply the rules of the Convention before it comes into effect. In fact, the provisions regarding the possible retroactive effect of the Convention have been described as the most controversial of those dealing with its scope.[71] Paragraph 1 was to be the only provision dealing with temporal application had the draft articles been accepted without amendment, but this was unacceptable to some States. Indeed, paragraph 1 was itself included despite the

opposition of some members of the Commission.[72] It has been pointed out that Paragraph 1 of Article 7 can itself have a limited retroactive effect.[73] This is because a successor State created after the Convention has come into force may accede to it - so that the provisions of the Convention would apply to its own case of succession. In this case, according to the author, there would occur a retroactive application of the Convention, since the succession would of course precede the accession to the Convention. In other words, if the Convention has acquired the necessary ratifications to bring it into force, and after this a succession of States occurred and the new State adhered to the Convention, then the Convention would actually apply to that case of succession, as the new State has become a party to it - including Article 7, paragraph 1, which provides that the Convention applies to successions which take place after it has entered into force. And since the succession would precede the moment when the Convention comes into force for the successor State it can be said that the Convention does in fact have retroactive effect. Paragraphs 2 and 3 of Article 7 provide further possibilities for the application of the Convention before it actually comes into force, the application being permanent or provisional.

The VCSSRT represents in its final form a mixture of codification of existing law on the subject as well as progressive development of international law. This was acknowledged in the Preamble to the Convention, where it is stated that the States Parties are:

> "Convinced .... of the need for codification and progressive development of the rules relating to succession of States in respect of treaties ...."

It is not proposed to consider to what extent the Convention reflects the interests of the so-called newly independent States at the expense of the former colonial powers and vice-versa. This controversy is not relevant to the situation in central Europe. Nevertheless, in that the rules of state succession as agreed at Vienna are to some extent a product of that controversy, and given that at least some of these rules may be applicable to a future succession of States in central Europe, it should be acknowledged that there will be some indirect influence on developments there.

One of the important issues with regard to the status of the provisions contained in the VCSSRT, as opposed to the Convention itself, is that there is uncertainty in the matter of the rules of State succession.[74] This uncertainty existed prior to the adoption of the Convention and persists because of the lack of support accorded to it in the form of ratifications and accessions. Thus it is necessary still to consider each provision of the Convention separately in order to establish its status, taking into account also the actual effect on the law which may be attributed to the VCSSRT itself - due to the preparatory work for and the influence of the completed Convention, containing as it does a convenient collection of precise rules which, even if they do not necessarily reflect previous State practice, may encourage adherence to the treaty.

The problem with the VCSSRT is to distinguish between what is progressive development and which provisions constitute codification of existing international law (or have become part of the corpus of customary international law as a result of, or since, the adoption of the Convention). The preparatory work of the ILC in this context is always helpful and state practice may offer some

guidance, but in either case, caution must be exercised. On the one hand, as has been indicated, State practice may be equivocal. On the other, the conclusions of the ILC have not always been met with complete approval. Szafarz writes that there has been application of the principle of clean slate in the case of secession of States "by virtue of the hitherto prevailing customary law",[75] but that "...one may assume that travaux preparatoires and the Convention itself serve as evidence that the clean slate principle as applicable in the case of secession is no longer part of customary international law."[76] Brownlie, however, takes the view that the distinctions made by the ILC in its drafts, between newly independent States and other appearances of new States, are not reflected in State practice.[77] He maintains that "...as a matter of general principle a new state, ex hypothesi a non-party, cannot be bound by a treaty, and in addition other parties to a treaty are not bound to accept a new party, as it were, by operation of law."[78] The point here is not to criticize the views of either writer, but to show that the state of the law may not necessarily be that which is presented by the ILC. It would be necessary to look carefully at the relevant travaux preparatoires with regard to each provision.

It has been suggested that, because of the uncertainty of the present law and the difficulty of proving that customary law is not in accordance with the provisions of the Treaty, future State practice will follow, or tend to follow, the rules contained in the Convention.[79] This may help in a very gradual way to establish with some degree of certainty the status of those provisions with regard to which there had existed some doubt - i.e. whether or not they have come to be part of customary law. While the Convention itself and the preparatory work may indeed have contributed to a consolidation of the law,[80] the Convention does itself raise doubts with regard to customary law.

As for the balance of the VCSSRT, it has been suggested that the Convention contains more elements of progressive development than of codification sensu stricto.[81] This ought to encourage further caution in characterising the treaty as declaratory of existing law. Among those provisions which the writer considers to be declaratory of well established norms is Article 11 on boundary regimes, to which reference will be made later. If state practice does indeed follow the provisions of the Convention, then obviously it will come to reflect, increasingly, customary law even if it never enters formally into force in accordance with Article 49.

(vi) State Succession and Germany

In considering how the German question will be affected by the rules of State succession, it is necessary to distinguish between the devolution of capacity from Germany to the two German States and the capacity which will belong to the unified Germany. One event is in the past; the other has yet to occur.

Different rules apply in each case. When East and West Germany came into existence, first of all they were not perceived at the outset as permanent entities although they have since come to be so regarded. The rights and duties which they acquired were held by them often on a temporary basis because it was still anticipated that agreement might be reached on the establishment of one German State by the Four Powers. The whole set up was provisional and this explains why the Four Powers retained their own capacity with regard to Germany as a whole. In this sense, despite the fact that the FRG and the GDR are quite firmly entrenched as individual States within their respective economic, political and

military blocs, the situation remains provisional. The rights and duties of the Allies continue to exist formally and materially.

Because of the confused and unpredictable geopolitical situation in which East and West Germany first appeared, the devolution of capacity from Germany to them by the Four Powers occurred in the form of quite separate arrangements on either side and was accompanied by claims on both sides that the other was acting unlawfully.[82] Both new German States themselves became involved in extensive State practice with regard to the rights and obligations of the Reich, since the devolution of authority from the Four Powers had entailed a division of the areas in which either side - the GDR and FRG on the one hand and the UK, USA, USSR and France on the other - was competent to act, a kind of outline of competence rather than specification of particular treaty rights and commitments.

The two new States had by 1955 acquired what is generally considered now to be full statehood, but subject to the well known provisos or reservations concerning Berlin and Germany as a whole. A situation had been reached in which there were two non-competing sovereign powers existing simultaneously on the same territory.[83] For the purposes of devolution of rights and duties, this process has been characterized as a case of partial State succession.[84] Neither of the two German States is identical with the Reich, a fact which prevents the situation being classified as one of identity of one State and secession by the other, a theory which has been postulated in the Federal Republic of Germany.[85]

The partial succession envisaged is not with regard to part of the territory, but rather of the sovereignty. This is a novel proposition but would appear

accurately to reflect what has occurred in Germany. The consequence is that, despite the ambiguity of their origins, the Federal and Democratic Republics have certainly succeeded to many of the rights and duties of the Reich. They are non-identical, successor States. The succession might be classified as de facto because the situation which has arisen in Germany is at variance with the original intentions of the Four Powers; but each of these States accepts the legal fact of the existence of two German States. Therefore the present situation does not bear the stigma of illegitimacy now, though it may have done so in the 1950's. The succession is certainly ad hoc; because it has developed in a piecemeal fashion, quite contrary to the original plans for Germany's post-war development. However, with the agreements of the 1970's, a political modus vivendi[86] has been achieved which allows for the systematic development of the situation should that be perceived as a desirable objective; or, more likely in the short and medium term - the maintenance of the existing divisions.

In the event of the GDR and the FRG forming one German State, which rights and duties of its predecessors will it inherit? The role of the Four Powers in the reunification has been discussed. Their position would ensure that Germany would definitely be bound by the rights and responsibilities of the Four Powers.[87]

It is legally possible for the unification of the GDR and FRG to occur through the incorporation of one of these States by the other.[88] Were this to happen, the effect would be that the incorporated State ceases to exist and the matter of succession would be: to which of the incorporated State's treaties does the incorporating State succeed? The incorporating State would continue to exist; there would have occurred no break in its life which would deny the identity of

the enlarged State with the pre-incorporation State. The surviving State would continue to be bound by its own treaties and it would inherit those of the deceased State,[89] presumably with the exception of any treaties which could not be performed because of a fundamental change of circumstances which renders performance of the treaty impossible.

With regard to the Polish-German frontier, a commitment on the part of Germany to accept it in its present form would certainly exist. Since both the Federal and Democratic Republics recognise the Oder-Neisse line as the western frontier of Poland, and there is no element in the recognition by either State (in the Warsaw and Zgorzelec Treaties) of that frontier which would be incapable of surviving the incorporation, Germany would in fact be obliged to maintain the recognition accorded to the frontier by the GDR and the FRG.

Nevertheless, the reality of the situation in Germany is such that the form of unification is much more likely to be that of a fusion, or uniting of the two States. Both States have equal status vis-a-vis the other members of the international community and the alliances of which each is a member serve to support their equality. For incorporation to take place, it would, in view of the status quo in central Europe, probably have to be preceded by the unquestioned political and, presumably, military ascendancy of one bloc over the other to the extent that its authority could reach out to incorporate the other German State within the personality of the German State which happens to be associated with the ascendant side. This scenario is not, in the view of this writer, as likely as that which presumes a peaceful drawing together of the two German States accompanied by the political will of the Four Powers to negotiate reunification, on

the basis of equality of West and East Germany. Indeed, given the commitments of all the involved States not to resort to the threat or use of force and their recognition of the inviolability of frontiers, plus the adverse political stances of the GDR and the FRG to each other, it is most likely that incorporation could not occur unless preceded by acts of aggression on at least one side, contrary to international law. Any act of incorporation would then have to be considered in light of that unlawful use of force and the legality of it would be open to question.

The above considerations indicate, therefore, that the peaceful reunification of Germany would have to take the form of a fusion, i.e. uniting, of the two States.[90] It must now be considered what will be the rights and obligations of the new, unified German State. These should be divided into two groups. The first consists of those which are binding on Germany as a whole and exercisable by the Four Powers. It has already been explained why these would continue to apply to the united German State pending a peace settlement: briefly, this is because the actual peaceful unification itself could not take place without the participation of the Four Powers, who, it must be assumed, would, if they still intended to draw up a peace settlement, insist that appropriate conditions be attached to the unification process. The second group of rights and duties would of course be those which the new Germany inherits from the Federal and Democratic Republics. Not only are these two capacities (of Germany on the one hand and the Four Powers on the other) separate in the sense that they pertain to different rights and duties, they are separate also in status. Where the capacity of the Four Powers is concerned, it should be recalled that this constitutes all that remains of the supreme authority assumed by these States in 1945 and maintained without any break since. Because this supreme authority is a manifestation of the sovereignty of Germany, it is

superior to any capacity of the German State created from the FRG and the GDR. In particular, in the event of any conflict of opinion between the Four Powers and the United German State as to matters falling within the capacity of the Four Powers, such as Berlin, the status of Germany as a whole and its frontiers, the position of the Four Powers will prevail over that of Germany. Indeed, there can occur no such substantive conflict, although the contrary may appear to be the case. If Germany should assert that its position on a particular matter binds it, then indeed it may be so bound. But it can only be bound, in certain areas, subject to the rights and duties of the Four Powers, and these will always take precedence. Thus if there arises some apparent conflict of substance, it is not actually so - it would be a conflict of capacity or jurisdiction; it would then be open to the Four Powers to insist that the particular matter falls within their own area of residual authority without the actual merits of the apparent dispute being discussed.

This conclusion follows logically from the view of this writer that Germany still exists for certain purposes and that within the ambit of the area "Germany as a whole", supreme authority is exercised lawfully by the Four Powers. Of course, this does not necessarily mean that the Allies do or would exercise their authority without regard for the views and commitments made by the Germans for themselves since 1949. They are entitled to take into account the actions of the FRG and the GDR, but they are certainly not bound by them unless they have actually assumed an obligation to be bound. Indeed, the Four Powers have also taken action, separately, if not together, for the preservation of their interests as they perceive them even if such measures were not popular with the German people; it is most unlikely that the Germans could muster a majority of their

population to support the division of their State into two new States. While the division of Germany may have been reluctantly supported by a majority in the Federal Republic as a lesser evil than, say, unity under communism or socialist democracy, that is not to say they supported division as an end in itself.

So the Four Powers have in the past taken drastic action which would not meet with German support. But they could exercise their authority in such a way as to take into account the wishes of the German State and the German people. In terms of the Four Power agreements with regard to Germany, insofar as these are still valid, their discretion is unfettered by any commitments to Germany. The consequences of this wide authority are vital to an assessment of the legal status of the Oder-Neisse line following unification.

(vii) The Law Governing the Unification of Germany.

For the purposes of this study, the type of unification anticipated is one in which the personalities of the GDR and FRG would cease to enjoy any separate international legal existence. If, for instance, they were to create a confederation, it is likely that, for purposes of international law, they would maintain their separate legal personalities as well as the rights and duties which attach to these.[91] In that event there would be no question of what capacity would pass onto a successor State and the position would be one of considering whether indeed a unification had actually occurred so as to enable the Four Powers to enter into a peace settlement.

Thus the type of unification envisaged is one in which "...the control of the external relations of all the member states has been permanently surrendered to a central government so that the only state which exists for international purposes is the state formed by the union ...."[92] - in other words, a federal State or some even closer form of union, the essential criterion being that for international purposes only one State exists.

In the event of the GDR and FRG uniting so that they create one new subject of international law, the new State will be faced with the issue of its eastern frontier. The state of the law at the present time is that it will not be bound by the provisions of the VCSSRT as such, because it is not in force and neither East nor West Germany is a party to it. Therefore, the matter of succession to the treaties of the predecessor States will fall to be decided according to customary international law. Even if the GDR and the FRG conclude, as presumably they would have to ensure an orderly succession, an agreement as to the method of succession and the problem of incompatibility of existing treaties, they would still be obliged to unite in accordance with existing rules which bind them, some of which are to be found in the VCSSRT.

The matter of succession by Germany may be divided into three elements: the general question of obligations of successor States after the uniting of States, and the more specific issues of succession to boundary treaties plus the right of a predecessor State to prevent particular treaties surviving a succession of States.

(vii) (a) Uniting of States. The relevant provision of the VCSSRT with regard to uniting of States is Article 31. This deals with the effects of a uniting of States in

respect of treaties in force at the date of succession, and thus would be applicable to the Warsaw and Zgorzelec Treaties, both of which have been ratified. The general rule is contained in paragraph 1:

> "When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State ...."

There are two exceptions stated: a treaty will not remain in force if the other State party or parties agree (subparagraph a); nor will it remain in force if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation (subparagraph b). The most cursory analysis of Poland's State practice with regard to its western frontier makes it possible to state beyond any doubt that it would not agree, other factors notwithstanding, to the lapse of the Warsaw and Zgorzelec Treaties in the event of reunification of Germany. The incompatibility exception will be considered below, as part of the analysis of the rules of State succession with regard to Germany.

Article 31 appeared in the ILC's draft articles as Article 30. In its commentary, the Commission indicated in Paragraph 1 that the provision, which was transplanted without amendment to the Convention, includes "...the case where one State merges with another State even if the international personality of the latter continues after they have united."[93] Thus it would include Germany within

its ambit even if the GDR and FRG continued to exist as States after the fusion. It was further indicated that, for the purposes of the Convention, the succession of States "...does not take into account the particular form of the internal constitutional organisation adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement."[94] In the view of the Commission, the degree of separate identity retained by the uniting States after the succession, within the constitution of the new State, would be irrelevant for the operation of the Convention.[95] Again, insofar as Article 31 may bind the GDR and the FRG, it would appear that almost any kind of framework which they might dream up for the new German State would still include them within the ambit of the Convention. But to what extent, if any, does Article 31(1) represent codification of existing law? The ILC commentary includes an examination of much of the relevant state practice, including that of Germany in one of its previous guises. After examination of the practice which it considered to be relevant, the ILC concluded that they appeared "...to indicate a rule prescribing the continuance in force ipso iure of the treaties of the individual constituent States, within their respective regional limits and subject to their compatibility with the situation resulting from the creation of the unified State."[96] The non-possession of treaty-making power by the constituent States under the constitution of the new State was not considered as preventing the continuance in force of treaties entered into prior to the succession. However, the precedents with regard to federal States (as opposed to non-federal States, to which the ILC was referring above), while less definite, appeared also to the Commission to indicate the existence of a rule prescribing the continuance in force ipso iure of pre-federation treaties of individual States, also within their regional limits.[97]

These conclusions had been arrived at by reference to two relatively recent instances of uniting of States: Egypt with Syria in 1958 and Zanzibar with Tanganyika in 1964. In the case of federal States, as the Commission indicated, the latest practice was less recent: it took into consideration the Swiss Federal Constitution of 1848 and the German Federation of 1871, among others. The view of the Commission was that, while writers tended to distinguish between succession where the new State acquires a federal form and other cases of succession, they tended not to regard the distinction as being of any great significance.[98] In light of the Commission's statement earlier in the commentary to the same article, that the succession "does not take into account the particular form of the internal organization adopted by the successor State ...."[99] it may be assumed that it is in accordance with the effect of the general view of writers, it being another matter whether it accepted the premises for that view, that the federal - non-federal distinction is of little significance in this situation. However, it is evident that some writers consider that, in the event of a federation being created as a result of succession to two or more States, treaty obligations may lapse, so the distinction has been regarded as having, potentially, real influence with regard to succession.

With regard to the German Federation of 1871, the prevailing opinion, according to the Commission, was that the treaties of the individual States continued in force: they either bound the federal State as a successor within their regional limits or they continued to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power.[100] But if these treaties were capable of being terminated merely by dint of an inconsistent exercise of federal legislative power, it signifies that the

Federation was not bound, or did not feel itself bound, to apply the treaties. If under international law it could terminate certain treaties by operation of federal legislative power - i.e. through municipal law - without regard to the views of the treaty partners of the individual States, then it indicates that succession was not always automatic.

In the case of non-federal unions, where a composite successor State is created from two States so that one organ is responsible for the international relations of the new State, the two preceding States may retain their separate identities within the union, or they may cease to exist entirely as separate entities, the single new State succeeding the two or more preceding States to the extent that no evidence of their individual status within the union survives whatsoever. Either case might apply to a unification of Germany. For the purposes of succession to treaties, the result would be the same: one German State would exist under international law as the successor to the Federal and Democratic Republics.

Two recent precedents have been the uniting of Egypt with Syria to form the United Arab Republic (UAR) and Zanzibar with Tanganyika. The latter union resulted in the new State of Tanzania, which has survived to the present day.

The UAR declared that the pre-union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had been concluded.[101] With regard to multilateral treaties, an interesting communication from the Foreign Minister of the UAR to the UN Secretary-General included the statement that "....all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid

within the regional limits prescribed on their conclusion and in accordance with the principles of international law."[102] At first reading, this seems to say that the treaties will remain in force in accordance with the principles of international law. This, if it meant that the UAR considered itself obliged to act in this way, might indicate the existence of opinio iuris with regard to the ipso iure continuation of treaties following a succession involving a union of States. However, the presence of the word "and" makes the statement ambiguous, because it may be read (although this is perhaps less likely) as meaning that the treaties will remain valid within the prescribed regional limits and that, furthermore, they will remain in force in accordance with the principles of international law - as if to say that the regional limits are one thing, while the principles of international law are quite another. That is, they are the normal principles, not necessarily related to treaties which apply to all States in their State practice which do not necessarily include ipso iure succession to treaties. Thus caution should be exercised in attributing too much weight to the statement in the absence of clarification.

Nevertheless, regardless of whether or not it felt itself bound, the UAR certainly did maintain in force wherever possible the treaties of its predecessors. Article 69 of the country's Provisional Constitution read, in part:

> "The treaties and agreements (of Syria and Egypt) will remain valid in the regional spheres for which they were intended at the time of their inclusion according to the rules and regulations of the International Law." [103]

Again, this extract does not by itself show a belief on the part of the UAR that it definitely considered itself obliged to retain the treaties in force, though such may be inferred from the text.

According to O'Connell, additional caution should be exercised in using the UAR as a precedent because, in his view, the arrangement by which it came into being was sui generis.[104]

It is interesting that when Tanganyika came into being as a newly independent State, while giving notice that all pre-independence treaties applicable to it would continue in force only on a provisional basis, it acknowledged that some treaties might survive by application of the rules of customary law.[105] Although it reserved its position, there is at least evidence in its attitude of a preparedness to accept that there is no total clean slate. When three years later it entered into union with Zanzibar, the new State issued a Note which included the statement that, to the extent that their implementation was consistent with its constitution, all international treaties and agreements of the former States would "...remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law."[106] The wording is identical to the statement of the UAR and is therefore subject to the same reservations as the previous statement insofar as it may evidence opinio iuris.[107]

While the unification of Germany might follow the above pattern, there is no reason why it should not become a unitary State, thus entailing the complete disappearance of the two existing States. The reasons for this are historical as

well as legal: Germany existed as a unitary State from 1933 till 1949 and, for certain purposes, since then; also the two States have the same nationality; not in the sense of citizenship, but in that they share a common linguistic, cultural and historical heritage. Indeed, it is because of this shared past that the GDR, in asserting its separate statehood, has followed a policy of Abgrenzung (demarcation) while the FRG has sought to stress the ties between the two parts of what it considered to be one nation.[108]

The conclusions to be drawn with regard to the ILC's analysis are: unless there is agreement to the contrary (and this is contained in the VCSSRT), any succession to treaties in the event of uniting of States will be applicable only to the territories with regard to which the treaties originally applied - their geographical scope is not automatically extended;[109] the form of uniting is of no significance as far as the Convention is concerned - the same rules will apply to the successor State[110]; treaties of the individual constituent states continue in force ipso iure following a uniting of States, although in the case of federation the precedents are less certain.[111] However, the distinction between federation and other forms of union is probably itself of lesser significance.[112] Most important, the Commission concluded that "... a uniting of States should be regarded as in principle involving the continuance in force of the treaties of the States in question ipso iure."[113] This, it said, was based on the practice of States and the opinion of the majority of writers. The philosophy behind its conclusion was the need to preserve stability of treaty relations:

> "As sovereign States, the predecessor States had a complex of treaty relations with other States and ought not to be able at will to terminate those treaties by uniting in a single State."[114]

That is indeed a most laudable aim, but it is another matter whether the rule expressed in Article 31, Paragraph 1 does in fact reflect customary law and thereby automatically applicable to the unification of Germany. Not all of the practice was consistent and, as the Commission itself acknowledged, writers are not unanimous on the subject. Nevertheless, it is perhaps worth bearing in mind Akehurst's point that, since there is doubt as to the existing law, which may cause problems in proving that customary law is not in accordance with the Convention, future practice may tend to follow the rules as set out in it.[115]

It is difficult to sustain the view, on the basis of the evidence considered, that all cases of uniting of States result in ipso iure succession to treaties. Even since the Vienna Conference in 1978, opinion on this matter has varied. Brownlie argues quite bluntly that new States, since they are non-parties to existing treaties, cannot be bound by them. This rule, which he calls the rule of non-transmissibility, applies both to cases of decolonization and to other appearances of new States, whether by union or dissolution of existing States.[116] The author goes on to criticize the distinction made by the ILC in this respect, i.e. between newly independent States and non-newly independent States, as not being reflected in State practice.[117] However, an interesting caveat with regard to this question is the following statement:

> "This is not to deny that considerations of principle and policy may call for a different outcome in the case of a union of states."[118]

It is possible to discern in this opinion sympathy with the view of the ILC in its commentary, that it is necessary to preserve stability of treaty relations. The

principle that Brownlie is arguing for is this, that sovereign States cannot be bound against their will. If a new State inherits the predecessor's treaties ipso iure, then it is being bound against its will in that its own wishes are not being taken into account. On the other hand, were it to be proved that Article 31(1) is an expression of customary international law, then new States will be bound by it; in Brownlie's view, it had not attained that status by 1978.

Recent Polish studies suggest that Article 31(1) does constitute part of the body of customary international law, although there is disagreement as to when it acquired that status. According to Szafarz, it has become so only since the time of the Vienna Conference.[119] She points out that "...both in the Committee of the Whole and in the Plenary of the Conference the relevant Article was accepted without a vote, by consensus."[120] To adopt such a rule by consensus certainly indicates substantial, even overwhelming support. But it still does not necessarily mean that it was adopted because the States represented felt that the measure expressed customary international law and therefore they were obliged to support it. However, this is the view of Szafarz, who maintains that the adoption by consensus was a clear expression of the opinio iuris of the represented States.[121] One can understand the enthusiasm of Poland to have the VCSSRT enter into force, whether through the necessary ratification and accessions or the recognition of particular provisions as declaratory of customary international law, since, as will be shown, this would work in Poland's interest vis-a-vis Germany, but it is less clear why Polish writers should adopt so slavishly the standpoints of the socialist States and most of the so-called newly independent States. Certainly, the State practice to which Szafarz refers is identical to that discussed in the commentary of the ILC, and it is on the basis of that practice and the consensus adoption of

Article 31(1), plus her opinion that weight must be attached to"...the ever growing interdependence of States...",[122] that she concludes that "...the principle of ipso jure continuity is the only conceivable one in the context of uniting of States" and that the principle is binding in contemporary customary law.[123] The principle may indeed be so binding, but, given that the author cited no additional evidence of state practice in support of this claim other than the somewhat dubious contention that adoption of Article 31(1) by consensus at the Vienna Conference indicates the existence of opinio iuris amongst the members of the international community, then, despite the undoubted merits of the evidence cited, it is not entirely convincing.

Tyranowski takes an even stronger stand with regard to ipso iure succession in the case of uniting of States, maintaining that Article 31(1) "... reflects an already existing customary rule of international law."[124] In fact, he is so sure of this that he cites no evidence to persuade the reader that he may be correct in his evaluation of that provision. The two writers quoted express an opinion which is almost unanimously held in Poland and it may be taken for granted that the future practice of Poland will be to treat Article 31(1) as part of customary international law.

The endorsement by the Vienna Conference of the ILC's view that the form of uniting of States is of no significance, thereby demeaning any possible substantive difference between federal and other kinds of union, is also regarded with approval by Polish writers. This may be viewed as a consequence of their acceptance of the normative character of Article 31(1). Tyranowski, while maintaining that the question "...whether treaties remain in force in case of a

uniting of States is determined by other elements than the constitutional structure of the new State," [125] recognizes however that the foundation for the continuity of treaties may be affected by the constitutional structure of the new State: thus, if the constituent parts of the new State preserve their own treaty-making power, then the continuity of treaties is a result of identity and continuity under international law of the new part-State with the old State, while with regard to treaties outwith the treaty-making capacity of the new part-State there would be succession to treaties.[126] Even in such a case, however, the relevant point is that all of the treaties of the States which made up the union remain in force with regard to the new State.

Szafarz, without discussing the case of federation in any detail, nevertheless accepts that Article 31(1) covers all forms of uniting of States and regards this as part of customary law.[127]

The fact that the Vienna Conference adopted the principle of automatic continuity in all cases of uniting of States does show a determination not to differentiate in future between federation and other forms of uniting of States. Even though the practice prior to then may not have been uniform, the strong consensus in favour of Article 31 (1), combined with the interest of the international community of enjoying certainty in treaty relations, should encourage the establishment of Article 31(1) as a customary norm, if it has not already achieved that status. As sovereign entities, States unite of their own free will. They also have obligations vis-a-vis third States and, as the ILC commented, they should not be able to terminate these treaties by uniting into a single State. This approach is based also upon the primacy of international law over municipal

law, at least with regard to cases of federation resulting from uniting of States,[128] as it denies the possibility of treaties lapsing through an exercise of the federal legislative power which would be inconsistent with the treaty obligations of a predecessor State.

The significance of the above discussion for the situation in which a united German State appears on the international scene is that, in the absence of ratification by East and West Germany of the VCSSRT, there is a movement towards the attainment of customary international law status by Article 31(1) which could bind the united German State to succeed to all treaties of the predecessor States unless agreement to the contrary were reached with the other parties to these treaties, or it could be established that application of the treaty in respect of the successor State would be incompatible with the object and purpose of the treaty.

Even before consideration of the specific question of succession to boundary treaties of the predecessor State(s), it appears that a reunified Germany would have difficulty in escaping the judgment that it is going to succeed ipso iure to the treaties of the FRG and the GDR.

(vii) (b) Succession to Boundary Treaties. The question of succession to boundary treaties is also dealt with in the VCSSRT. Article 11, entitled "Boundary regimes", states, in full:

> "A succession of States does not as such affect:
>
> (a) a boundary established by a treaty; or
>
> (b) obligations and rights established by a treaty and relating to the regime of a boundary."

In its commentary, the ILC immediately raised the question of whether States succeed to the treaties which established boundaries, or rather to the boundary itself.[129] According to the Commission, treaties of a territorial character, which include boundary treaties, have been covered by a traditional doctrine which treats them as part of a separate category which is not affected by a succession of States.[130] The essential question for the purposes of this study must be whether the existing territorial status quo - including the existing frontiers - is bound to remain unchanged following a succession of States, regardless of whether it does so by succession to the boundary treaty itself or to the actual territorial situation created by the boundary treaty. However, the question of what is actually succeeded to may be of importance in deciding whether the territorial status quo survives a succession of States. Tyranowski points out that, if only the actual boundary is succeeded to, rather than the treaty establishing it, then the succession may not include rights and obligations concerning the boundary regime which are contained in the treaty.[131] He adds:

> "What is the basis of the special problem of boundary treaties is that they create a lasting state of affairs and not the fact that they are executed. After their execution the boundary treaties are a lasting foundation of the state they have established and also of the mutual rights and obligations concerning the regime of the boundary." [132]

The point is that, if there were no succession to the boundary treaty, the failure to succeed to some of the provisions of the treaty could endanger the stability of a frontier settlement if the boundary regime in the treaty were part of such a settlement.[133]

While Article 11 of the VCSSRT does not state specifically that boundary treaties are unaffected by a State succession (in fact, paragraph (a), which provides that a succession of States does not affect a boundary established by a treaty, would appear to show a preference for the theory that it is the actual boundary situation rather than the treaty which survives), it does allow for survival of rights and obligations established by a treaty and relating to a boundary regime. Thus boundary treaties may not survive a succession of States intact: provisions not relating to the regime of a boundary will presumably lapse.[134] This division of Article 11 reflects a division among the Members of the ILC, some of whom considered the distinction between succession to boundaries and boundary treaties to be artificial.[135] The inclusion of Paragraph (b) in Article 11 had the effect of rendering the disagreement less important, so it meant that, without admitting that there was succession to boundary treaties as such, relevant provisions of such treaties were included within the ambit of the Article. It was considered by the ILC that, by formulating the rule of state succession and boundaries in these terms, it was acting in accordance both with previous practice and the trend of modern opinion.[136] The Commission further characterized Article 11 as being purely negative, in that it "...goes no further than to deny that any succession of States simply by reason of its occurrence affects a boundary established by a treaty or a boundary regime so established."[137] Thus it remains perfectly possible to challenge the validity of a boundary following a succession of States on other grounds.

Opinion would appear to be almost unanimous that Article 11 reflects existing customary international law and did so at the time of the adoption of the Convention. The ILC quoted various judicial decisions in favour of this judgment.

In the Free Zones of Upper Savoy and District of Gex Case (France v Switzerland (1932)[138], there arose the question of the extent to which France, as a successor State to Sardinia, was obliged to respect the Treaty of Turin of 1816 between Switzerland and Sardinia. This treaty had fixed the border between Switzerland and Sardinia, and France had succeeded to Sardinian territory which was covered by the treaty. The PCIJ held that France was bound to respect, meaning adhere to, the 1816 treaty because it "...succeeded Sardinia in the sovereignty of that territory."[139] These words were quoted by the ILC with approval in its Commentary which pointed out that the Swiss Government itself had strongly emphasized what it considered to be the "real" character of this treaty. According to the Commission, this case is "generally accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding ipso jure upon a successor State."[140]

However, the Commission did reserve its position somewhat with regard to the ambit of the PCIJ ruling. Because the territory in question (the Free Zones) was established as part of international settlements reached at the end of the Napoleonic Wars, it was unclear, said the Commission, whether the Court's judgment applied generally to treaties of a territorial character or whether it was intended to be limited to treaties forming part of a territorial settlement and establishing an objective treaty regime.[141] Nevertheless, even if the latter alternative were the correct one, it still evidences a conviction that there was obligatory succession in limited cases.

The idea of objective treaty regimes was considered also by the ILC in the preparatory work leading up to what became the Vienna Convention on the Law

of Treaties of 1969. For the purposes of that treaty, at least, it preferred not to propose any special provision on treaties creating such regimes.[142] But a similar notion appeared in the Aaland Islands Case (Sweden v Finland) (1920)[143], a case which was also taken into account by the ILC with regard to Article 11 of the VCSSRT. This dispute arose before the PCIJ had been set up and was referred by the Council of the League of Nations to an ad hoc Committee of Jurists. The question was whether or not Finland was obliged to maintain the demilitarized status of the Islands. The circumstances were that Great Britain, France and Russia had agreed upon the demilitarization of the Islands as part of the 1856 peace settlement between these three States, the Islands at that time having been under Russian sovereignty. Following Finland's detachment from the Soviet Union at the end of World War I, Finland being the successor to this territory, Sweden argued that Finland was bound by the provisions of the 1856 treaty concerning the demilitarization of the Aaland Islands. The Committee of Jurists held that, while it could not accept the existence of ionternational servitudes in the true technical sense of the term,[144] the demilitarization provisions were indeed still binding upon Finland. According to the Committee, if there was such a thing as a real servitude in the present case, then it would bind Finland to observe the provisions of the 1856 treaty. However, that country was bound for another reason:

> "The provisions were laid down in European interests. They constituted a special international status relating to military considerations, for the Aaland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them."[145]

> "Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law, cannot escape from the obligations imposed upon it by such a settlement of European interests.
>
> The recognition of any State must always be subject to the reservation that the State recognised will respect the obligations imposed upon it either by general international law or by definite international settlements relating to its territory."[146]

This case illustrates how States as successors may be bound to adhere to treaty rights and obligations not only with regard to their boundaries but actually the whole of the inherited territory. Furthermore, the obligation may be vis-a-vis States which are not even parties to the treaty which imposes it in the first place: Sweden was not a party to the treaty which imposed the demilitarized status on the Aaland Islands. According to the ILC, the decision in Sweden's favour could be made in this way because the 1856 treaty, an international settlement established in the general interest of the international community, had a dispositive effect:

> "Thus it seems to have viewed Finland as succeeding to an established regime or situation constituted by the treaty rather than to the contractual obligations of the treaty as such."[147]

As well as being relevant to the case of a united Germany and the obligations which it inherits automatically with regard to its boundaries and territories from

the two German States, the Aaland Islands Case is pertinent with regard to the obligations of the German State which survived in 1945. Both in the Yalta and Potsdam Agreements, provision was made for a third State (Poland) to have certain rights vis-a-vis another State (Germany). Of course, Germany was not a party to either of these agreements, but they were made with full legal authority: the Yalta Agreement expressed with regard to Poland's western frontier the intentions of the Three Powers. Once Germany was defeated, they concluded the Potsdam Agreement which, being a partial implementation with regard to Poland's western frontier of the Yalta provisions, constituted an exercise by the Powers of their lawfully assumed supreme authority. In the Potsdam Agreement, although they were acting for themselves, they were acting with regard to Germany, whose own authority for independent action had been temporarily suspended. The Yalta and Potsdam Agreements may be regarded as provisional objective regimes with regard to Germany, the purpose of which was to prepare the way for the still outstanding peace settlement with Germany. This peace settlement will itself constitute a definitive settlement by which, according to the above precedent, other States would be bound.

Two more recent cases regarded by the ILC as relevant to State succession with regard to boundaries are the Temple of Preah Vihear Case (Cambodia v Thailand) (1961) [148] and the Rights of Passage over Indian Territory Case (Portugal v India) (1957).[149] In the latter case, the ICJ ruled that the right of passage of Portugal to two enclaves in Indian territory had been established as a regional custom with regard to private persons, civil officials and goods in general. Portugal had exercised this right against the UK and India had inherited this situation when it acquired independence.[150] In other words, India succeeded to real obligations

with regard to its territory automatically, without reference to its own will in the matter.

Although the Temple Case did not deal with State succession in the sense of appearing in the judgment of the ICJ, it is relevant to the issue of boundary treaties. The boundary between Siam and France had been fixed by treaty in 1904 and neither Thailand (Siam) nor Cambodia (the successor State of France with regard to the relevant territory) appear to have disputed the continuance in force of this treaty following the attainment by Cambodia of independence.[151] In the view of the Commission, more important for its purposes were the submissions of the two States with regard to the French-Siamese treaty of 1937 and Cambodia's succession to France's rights thereunder:

> "...both parties seem to have assumed that, in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand considered that succession would be limited to provisions forming part of the boundary settlement itself, and Cambodia that it would extend to provisions in a subsequent treaty directly linked to it."[152]

Both of these cases show a belief on the part of the involved States that successor States are bound to observe obligations of the predecessor(s) with regard to provisions dealing directly with territory, i.e. relevant to the scope of the successor's sovereignty or the exercise of that sovereignty. The question of frontiers, though dealt with separately in the VCSSRT, is one aspect of rights and

duties pertaining to territory and this explains the relevance of the Rights of Passage Case. The Commission seemed to be quite certain that the assumption of both parties in the Temple Case, that there must be succession to boundary settlements concluded by or with regard to predecessor States, reflected a general opinio iuris:

> "That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear."[153]

This attitude is also reflected in literature on the subject, though that is not to say that authors all agree on the content of Article 11 of the VCSSRT. Brownlie, while maintaining the view that a new State is generally not bound by treaties of the predecessor, nevertheless accepts that "...the change of sovereignty does not as such affect boundaries."[154] This he regards very much as an exception to the general category of so-called dispositive treaties (those which deal with rights over territory), and that succession to rights and obligations in such treaties always occurs, because they "...run with the land....".[155] These would of course include boundary treaties. A similar attitude was taken by O'Connell, who said such treaties are more of a conveyance than an agreement, "...an instrument for the delimitation of sovereign competence within the impressed territory. The State accepting the dispositive obligation possesses for the future no more than the conveyance assigned to it, and a Power which subsequently succeeds in sovereignty to the territory can take over what its predecessor possessed. The basis of the restrictions imposed on the territory is therefore not destroyed by the change of sovereignty."[156] McNair also supported the existence of a special

category of dispositive treaties and quoted in support of his opinion, inter alia, the Aaland Islands demilitarization treaty.[157] Brownlie regards this distinction as unjustified, arguing that there exists insufficient evidence either in principle or practice to permit it.[158]

With regard to boundaries in particular, O'Connell wrote:

> "If a boundary treaty merely defines a frontier, then it is instantly executed, and what is inherited is not the treaty but the territorial extent of sovereignty."[159]

The problem in such a case is that if a boundary treaty leaves the actual delimitation of a boundary to future settlement and a change of sovereignty occurs in the meantime, is a successor State bound? Presumably, if the delimitation provisions are essential to the definition of the boundary, then they would constitute "real" elements of the original boundary treaty, to which a new sovereign would succeed as a consequence of succeeding to the boundary. The simple "conveyance" theory is criticized by Tyranowski, who argues that it has not been substantiated in international law and, further, that it automatically excludes the question of boundary treaties themselves from the problem of State succession in respect of treaties. This would have the further consequence of excluding rights and obligations concerning the boundary regime from being subject to succession.[160] Thus Tyranowski argues that it is the boundary treaty itself which is the object of succession, thereby maintaining the stability of frontier regimes.[161] This provides some support for Brownlie's argument against the existence of a general category of dispositive treaties in the sense that it

excludes from that category treaties relating to boundaries. Regardless of the alleged distinction between dispositive and non-dispositive treaties, all writers would probably agree that the elements of treaties relating to boundaries, if not the treaties themselves, survive a succession of States. This is a minimal position and it does not necessarily mean that those who would argue for succession to boundary treaties themselves are actually guilty of an error of judgment. If the question of succession of States and boundaries is posed in the form "Does a successor State have an obligation to respect boundaries?" rather than "Do boundary treaties bind a successor State?", then it may be more easily answerable. If a successor State is obliged to respect existing boundaries, then it may be argued that it is bound by all parts of the treaties of the predecessor State(s) which were applicable to its boundaries. Such a position is certainly consistent with the evidence discussed thus far. Another way of expressing the position, which emphasizes the stability of the international territorial regime and perhaps clarifies the basis for the importance of succession with regard to boundaries, is provided by O'Connell:

> "Since a State can acquire from another only so much territory as that other possessed, the latter's boundary treaties with neighbouring States delimit the extent of the territory absorbed."[162]

State practice would also appear to support the characterization of Article 11 of the VCSSRT as customary international law. The ILC discussed in this context Article 62(2)(a) of the Vienna Convention on the Law of Treaties which provides, as an exception to the general rule according to which a fundamental change of circumstances may be invoked as a ground for terminating or withdrawing from

a treaty, that such fundamental change of circumstances may not be invoked "if the treaty establishes a boundary." The Commission said that the exception to Article 62 with regard to treaties was accepted by most, but not all, States which participated at the United Nations Conference on the Law of Treaties which led to the adoption of the Convention.[163] The view that Article 62 as a whole reflects customary international law finds strong support in the Fisheries Jurisdiction Case (Jurisdiction) (United Kingdom v Iceland) (1974)[164], in which the ICJ stated in its judgment:

> "This principle, and the conditions and exceptions to which it it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances."[165]

In its preparatory work to Article 62, the ILC argued for the boundary exception because it appeared already to be generally accepted as such by jurists and because Article 62, were this exception not included, might become a source of dangerous frictions rather than an instrument of peaceful change.[166] In its commentary to the VCSSRT, the ILC argued that these considerations appeared to apply with the same force to a succession of States.[167] Thus the necessity for the maintenance of boundary regimes in all circumstances had already obtained widespread support among States.

An interesting study of the rebus sic stantibus rule with regard to frontiers

indicates that there has been some opposition to the frontier exception in Article 62.[168] The author looks at State practice in which States have attempted to alter their obligations relating to territorial sovereignty by application of the rebus sic stantibus rule, but concludes that these cases cannot be interpreted as militating against the exclusion of treaties establishing frontiers from the operation of the rule, because such was not the purpose of the practice concerned.[169] On the basis of State practice and the preparatory work for the Vienna Convention on the Law of Treaties, he takes the following view:

> "The binding character of the prohibition to adduce the rebus sic stantibus norm with respect to frontier treaties, established already in customary international law ..."[170]

> "The prohibition of its application with respect to frontier treaties is in full harmony with the most important and unconditionally binding principles of universal international law. In the field of the law of treaties it represents an important example of the application of the principle of territorial integrity of States in conjunction with the principle of the prohibition of the use of force in international relations."[171]

The Commission examined various instances in which, following a succession of States, the parties involved considered themselves bound not to question treaty elements with regard to boundaries. These included: while Somalia disputes its boundaries with Ethiopia and Kenya, it does not claim that as a successor State, it is ipso iure freed from any obligation to respect boundaries established by treaty of

the predecessor State. It raises its challenge on grounds of self-determination. The predecessor State was the UK, which in 1897 concluded an agreement on its boundary with Ethiopia. Both the UK and Ethiopia considered that this treaty remained in force. Again, the UK argued in response to Afghanistan's questionning the boundary settlement between the two States following the independence of Pakistan and India, that clauses dealing with the establishment of an international boundary could not be affected, even if the treaty itself was.[172]

Another case not looked at by the Commission, but quite pertinent to this study, is that of the incorporation by Germany of the borderland of Alsace-Lorraine from France, as a result of which Germany took over the rights of France with regard to that territory. According to a decision of the Reichsgericht (German Supreme Court) of 1891, the boundary treaty concluded between the Grand Duchy of Baden and the French Kingdom on 5 April 1840 remained in undisputed force.[173] Though this is a municipal law case and quite dated, it shows an attitude on the part of Germany which was reflected in the twentieth century in the inter-State disputes quoted above. In the view of Tyranowski, the decision "...expresses in an almost model way the customary norm of international law in accordance with which boundary treaties concluded by the predecessor devolve ipso iure on the successor State." His opinion is that ipso iure succession to boundary treaties is determined by what he calls "the fundamental principle of succession": that succession does not affect existing State boundaries.[174] Furthermore, the same writer considers, and cites substantial evidence in support of his claim, that "Practice shows unequivocally that with regard to traditional cases of State succession (annexation, cession, secession, uniting and dissolution

of States) the customary norm of international law is that the boundary treaties of the predecessor devolve ipso iure on the successor."[175]

Insofar as these comments cover the same ground as Article 11 of the VCSSRT, they are, in the opinion of this writer, quite justified. But from the evidence taken into account thus far, it would appear that not all aspects of boundary treaties must devolve ipso iure on the successor State - purely political provisions, for example, probably would not. Tyranowski describes the FRG-Poland treaty on the normalization of their mutual relations as a boundary treaty, because it contains provisions concerning the western frontier of Poland.[176] According to Tyranowski, then, any State succeeding to the Federal Republic ought to succeed ipso iure to the whole treaty. Now in the view of this writer, a united German State almost definitely would succeed to the whole of the Warsaw Treaty: but it would succeed to those Articles (i.e. all except Article I) which do not deal with the frontier under the rules governing succession following a uniting of States, and it would succeed, under the obligatory succession with regard to frontiers rule, only to Article I. Article III(2) of the Warsaw Treaty provides that the parties agree that a broadening of their cooperation in the sphere of economic, scientific, technological, cultural and other relations is in their mutual interest. This is all fascinating stuff and presumably intended to encourage improved relations between the two States and therefore a Good Thing, but why should the successor State of the FRG succeed to this provision ipso iure just because Article I of the same treaty contains West German recognition of the Oder-Neisse line? For such is the logical conclusion of Tyranowski's argument. In fairness, it should be noted that Tyranowski does acknowledge one problem area, viz., the extent of ipso iure succession with regard to provisions concerning a frontier regime, but

asserts that the successor will also inherit such provisions where they constitute an integral part of a frontier settlement, i.e. if they are a condition for the course of a boundary.[177]

The conclusions of the ILC with regard to Article 11 and the customary law basis for it seem to emphasize the situation created by boundary treaties rather than the treaties themselves. It speaks of "boundary settlements" being unaffected by occurrence of State succession.[178] It expressly acknowledged what it considered to be the prevailing opinion of jurists that it is the legal situation created by the treaty rather than the boundary treaty itself to which ipso iure succession should apply: in such a situation, it would seem to be "...a general rule that a succession of States is not as such to be considered as affecting a boundary or a boundary regime established by treaty prior to that succession of States."[179]

In conclusion, it may be said that Article 11 of the VCSSRT does constitute customary international law and must therefore be regarded as applicable in all future cases of State succession regardless of whether or not the predecessor State is a party to the Vienna Convention. It is possible that the scope of succession with regard to boundaries extends beyond the ambit of Article 11 under customary law, so as to include treaties dealing with boundaries, but the evidence considered above is not in itself sufficient, in the view of this writer, to justify such a conclusion.

(vii) (c) Binding Effect of Actions of the Predecessor State(s). It is necessary to consider for the purposes of this study a third question, in addition to the rules governing State succession upon a uniting of States and with regard to

boundaries, viz. to what extent, if any, may a predecessor State bind a successor State in its actions, independently of the rules considered above?

The reason for this is that the Federal Republic of Germany has asserted with regard to the Warsaw Treaty that it acted in its own name and therefore could not be considered by its action as in any way compromising or restricting the freedom of action of a united German State.[180] It is obvious from the general discussion above that a united German State is going to have severe problems in finding an escape route if it should desire to avoid obligations of the GDR and FRG to which it would succeed. On the face of it, the rules governing uniting of States and succession to boundaries, the application of which to the German problem will be outlined in more detail below, do a most effective belt and braces job in obliging a united German State not to question the boundaries which it would inherit. However, the FRG made, one presumes seriously, the assertion that the Warsaw Treaty could not bind a future unified German State and, in the interests of a comprehensive assessment of the German question, this assertion deserves to be considered.

The statement by the FRG that it entered into the Warsaw Treaty only in its own name would, in most other agreements, be regarded as quite innocuous. It is a general rule of the law of treaties that States cannot bind other States against their will. This follows directly from the concept of State sovereignty. Article 34 of the Vienna Convention on the Law of Treaties provides:

> "A treaty does not create either obligations or rights for a third State without its consent."[181]

Thus it is implied in every treaty that, subject to the application of other rules of international law, no other States may be bound by the treaty. The FRG would appear to have been stating the obvious then, but, as is clear from its Note to the three Western Powers after the signature of the Warsaw Treaty, its aim was to prevent any possibility of a united German State becoming automatically bound to respect the Oder-Neisse line as the Polish-German frontier because of the FRG recognition of it in Article I. It has been concluded already that neither West nor East Germany is identical with the Germany which survived after 1945,[182] and so there is no question of the Warsaw Treaty becoming binding upon that Germany by virtue of any identity between the two. Nor would a united German State be identical with the Federal Republic (unless it incorporated the GDR, a possibility which may effectively be discounted). Therefore it would not be bound by the FRG's treaty obligations simply by reason of the fact that the FRG had undertaken them.

The Federal Republic was attempting to preserve what it perceived to be the freedom of action of a united German State with regard to its eastern frontier at a future peace settlement, as envisaged at Potsdam. Nevertheless, the legal position of the united German State and the assessment of its rights and duties must be established from all of the law that is relevant: not only the treaties and agreements concluded amongst the Four Powers, the two German States and many other European States including, crucially, Poland; regard must of course be had also to the general rules of international law, including the law of State succession. In this context, the declaration by the Federal Republic cannot override any legal effects which may arise from the creation of a united German State. If a united German State will be bound by any commitments of the FRG, it

will be so bound through the operation of rules discussed earlier in this chapter; the Federal Republic itself has no right to restrict the freedom of action of Germany and the latter State cannot be obliged to adhere to any limitation of its sovereignty which the former may attempt to establish:[183] "The State inherits certain rights and duties irrespective of the will of the predecessor or even of its own will."[184]

Moreover, as Skubiszewski points out,[185] if the FRG declaration is to be considered as a reservation to the Warsaw Treaty, it would require to be accepted by Poland in order to be valid between the two States, and Poland accepted no such reservation. In this context, a speech made by the Polish Foreign Minister on 27 April 1972 shows the attitude of Poland. He emphasized that the treaty was the only acceptable platform for Polish-West German relations,[186] and in a subsequent speech made one month later, soon after the adoption of the Bundestag Resolution, the same person stressed that no reservation contained in that Resolution could affect the Warsaw Treaty under public international law.[187] This statement was important because Article 2 of that Resolution included the following claim:

> "The FRG has assumed on its own behalf the obligations it undertook in the Treaties"[188] (with the USSR and Poland).

Therefore, Poland made it clear that the declaration of the FRG, made both in 1970 and in 1972, that its obligations vis-a-vis Poland could not bind Germany, had no legal effect.

Clearly, the declaration by the Federal Republic cannot bind a united German State in the absence of consent by that State. Even if it should agree to be bound by the wishes of the Federal Republic, it would nevertheless be restricted in its freedom of action by the rules of customary international law with regard to succession in the event of uniting of States and concerning boundary regimes. The Federal Republic cannot prejudge the succession issue.

(viii) The Rights and Duties of the United German State in Light of the Relevant Rules of State Succession

If there were to occur fusion between West and East Germany so as to create one State, this would certainly have the effect of bringing about the replacement of the two existing States by one State in the responsibility for the international relations of the relevant territory;[189] despite the somewhat abnormal existence of two separate sovereignties with regard to the territory, if it be accepted that they may exist, then it is feasible that one of these may be subject to a succession of States within its own limits of authority.

From the foregoing discussion, it may be stated that any general rules of succession would have to be part of customary international law to be applicable to the present case. Neither of the German States is a party to the VCSSRT, which anyway is not yet in force. Opinion would appear to support strongly automatic succession to treaties within their territorial limits; however, there remains dissent from this view. Nevertheless, insofar as the discussion is confined to the frontiers of Germany, it may be stated that boundary treaties and those parts of treaties which relate to the regime of a boundary will be succeeded to.

The results of the succession for the Oder-Neisse line would be reached, first, by taking the relevant treaties of East and West Germany and extracting those elements relating to the frontiers. Because there would definitely be succession to these frontier provisions, it is of lesser importance that there remains uncertainty over the issue whether or not a new State created by the uniting of two or more existing States must ipso iure be bound by all treaty rights and obligations of the preceding States. Second, having established what these provisions are, they must be considered in light of the rights and duties of the Four Powers relating to Germany as a whole. In the absence of any foreknowledge of how the Four Powers might act during a unification of Germany, it must be assumed that they would seek to exercise their joint responsibilities with regard to Germany as a whole at the subsequent peace settlement in a manner consistent with their previous statements on this subject; in any case the final delimitation of the Polish-German frontier would take place only then.

This is yet another situation in which the present different policies of the Four Powers to the German question require consideration. If, as the USSR holds, Germany ceased to exist, then the united Germany would be a successor State to two States which were themselves successor States of Germany. The difficulty would be in deciding how the continued exercise of Allied rights and duties could be consistent with such a situation. It is not possible to anticipate how the USSR would act in such a situation - since it is the one Power which presently maintains that there is no German question. It is possible, however, for the USSR to participate in a peace settlement on the basis that there is one German State, regardless of its age, with which the Polish-German frontier should be delimited (but not altered).[190]

The problem is quite different if, as is the view of this writer, Germany continues to exist simultaneously with the FRG and GDR, that existence being manifested by the continuous performance of certain functions by Allied personnel in Germany. If East and West Germany, existing simultaneously with Germany, did unite, thereby creating one German State, what would be the relationship, if any, of that new German State to the old one? One possibility is that, since the Federal and Democratic Republics are themselves partial successors (in the sense of having succeeded to part of its sovereignty rather than part of its territory) of Germany, the new united State might be regarded as a partial succession by the old Germany: that is, a deliberate choice by the Four Powers to recreate the status quo ante by reversing the legal developments of 1949-1955 and subsequently. This would have the effect of establishing identity between the two Germanies. However, would there be a legal obligation on the part of the Four Powers to establish any such identity? In the Convention on Relations between the Three Powers and the Federal Republic of Germany (as amended by No. I to the Protocol of Termination of the Occupation Regime of the Federal Republic of Germany) of 23 October 1954, it is provided, in Article 2, that:

> "... the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement."[191]

The corresponding treaty between the USSR and the GDR states, in Article 5:

> "(The Contracting Parties) will .... make the necessary efforts to achieve a settlement by peace treaty and the reunification of Germany

on a peaceful and democratic basis."[192]

While it may be maintained that the use of the term "reunification" means the re-establishment of the same legal entity, the fact that the Four Powers have denied the existence of any identity between the Germany of 1945-1949 and the two present German States reduces the chances of them treating a State created by the unification of the FRG and the GDR as identical. One of the reasons for denying identity between either the FRG or the GDR with Germany was to deny either of them, acting unilaterally, the capacity to act for the whole of Germany, and it might therefore be argued that this justification, of preventing the GDR or FRG from, individually, acting for the whole of Germany, would no longer be relevant following reunification. However, regardless of the justification for treating both the Federal and Democratic Republics as non-identical with Germany, there is no legal basis for assuming automatic identity of the reunified Germany and the old Germany. By itself, it could not acquire any rights, duties or capacities other than those possessed by the predecessor States, unless accorded them by the Four Powers.

The creation of the GDR and FRG in 1949 was not merely a change of government with regard to the relevant territory. If such were the case, the likelihood of identity would be much stronger, because a change of government by itself does not entail any break in statehood. The events of 1949-1955, even if regarded at the time as temporary, in that provision was made for the eventual final exercise of Allied intentions with regard to the whole of Germany, did nevertheless cause a permanent change in the status of Germany. Two States were established as subjects of international law separate from Germany. By

uniting, they would create one subject of international law, also separate from the Germany on the territory of which they were situated. Another reason for suggesting that the Four Powers would be reluctant to treat the reunified Germany as identical with the old Germany is that developments did not simply cease when the GDR and FRG were created. They themselves incurred obligations, some of which might even have been regarded as impossible for a united Germany to incur except by authority of the Four Powers. Germany would inherit the obligations of the FRG and the GDR with regard to its boundaries and, while the Four Powers would still retain the power to decide on Germany's frontiers, it might be more difficult for them to propose alterations to these frontiers, because the new State, being legally identical with the old Germany, would itself be committed to respecting the present external borders of the GDR and the FRG. Such a situation would be inconsistent with the policies followed hitherto by at least the Western Powers. It might arise that Germany, in the event of identity existing, would be bound through succession to the frontier obligations of the FRG and GDR, as recognized by the Four Powers, but not bound until the final decision at a peace settlement, as stipulated at Potsdam. Such a conflict was not presumably intended. Moreover, there is no reason why the Four Powers' rights and duties with regard to Germany must apply only to the German State which existed in 1945. The Allies assumed supreme authority with Germany, including the absolute right to decide on its status. Thus they could jointly bring about the legal demise of that State without simultaneously losing any rights or duties which they possessed with regard to it, because one of their rights was that of absolute power over its status.

It might, in practice, be necessary to introduce some mechanism whereby their rights and duties continued to exist with regard to any entity created on German territory, but this should be regarded not as a legal impediment but rather as a practical measure necessary to ensure the continuation of the Four Power capacities. Indeed, such a course of action would bear resemblance to that adopted by the USSR in its relationship with the GDR, whereby the Soviet Union regards the GDR as a successor State to Germany (in the traditional meaning of the term - i.e., succession to territory); it seems to regard Germany as no longer in existence, but it nevertheless acknowledges the existence of, and continues to exercise, certain rights and duties which are based on its original status as one of the Four Powers and expressly provided for in certain instruments such as the 1955 treaty with the GDR mentioned above.

There are, then, justifications for the view that a reunified Germany could be identical with the pre-1949 Germany, although under existing conditions there are legal impediments to such a course. It is most unlikely that identity would have to be regarded as existing. Another option is that the new German State would not be identical with the pre-1949 Germany, but rather would exist, temporarily, side by side with it. In such a situation, the prognosis would be less complex. The reunified Germany would succeed to the territorial obligations of the two predecessor States. The rights and duties of the Four Powers regarding Berlin and Germany as a whole, which constitute the remaining evidence of the separate statehood of Germany, would then be capable of final application with regard to outstanding matters, including the delimitation of the Oder-Neisse line at the peace settlement with the united German State. Once actually exercised, no capacities would remain to the Four Powers (unless some were agreed with the

German State or imposed as a condition of the peace settlement, in which case they would have a different legal basis). The final manifestations of the Germany of 1945 would have been incorporated into the reunified Germany, which alone would survive. In other words, until the final exercise of their remaining joint supreme authority, or until the decision is taken to renounce jointly such authority without its being exercised, the united German State could exist only in the context of, and subject to, the Four Power capacities which evidence the survival of the old united German State.

(ix) Applicability and Effect of the Zgorzelec and Warsaw Treaties

The situation which would arise for a reunified Germany is that, whether or not identity would exist with the old Germany, it would have to acknowledge the binding effect upon it of the obligations incurred by the GDR and the FRG with regard to the Oder-Neisse line. These of course are to be found in the Zgorzelec[193] and Warsaw Treaties of 1950 and 1970 respectively.[194] The former treaty describes the Oder-Neisse line as "the state frontier between Germany and Poland",[195] while the latter characterises it as "the western State frontier of the Polish People's Republic."[196] When two or more States agree by treaty that a State frontier exists, they do not merely acknowledge the geographical disposition. By describing the Oder-Neisse line as a State frontier, the GDR and the FRG also showed that they accepted Poland's physical existence as a State extending in the West to that line and it follows therefrom that Poland exercises sovereignty over the relevant territory and that they agreed to such a state of affairs:

> "...the frontier of a state is also a juridical concept. In international law it means a line that separates the territory over which one state

> has sovereignty from the territory that belongs to another state, areas which are res nullius or res communis, or territory which has been endowed with a status different from sovereignty. The use of the term "state frontier" means that the signatories consider that the area which lies beyond the Oder and the Neisse is under the territorial supremacy and sovereignty of Poland."[197]

In asserting that Poland does exercise sovereignty over the Oder-Neisse territories, the Potsdam Agreement must be recalled: it granted Poland mere "administration". However, being an agreement between the UK, USA and USSR and binding these States as well as France (to the extent to which that State agreed to be bound)[198] and Germany, it would not bind the future GDR and FRG as third States, except insofar as they have accepted or had it lawfully imposed upon them. While they succeeded in part to the authority exercised by the Four Powers, of course they are not identical with Germany (and not therefore directly bound by the Potsdam Agreement), nor have they inherited any obligations or rights concerning the final decision on the eastern German frontier - a power explicitly retained by the Allies. It follows that West and East Germany could incur for themselves obligations with regard to the Polish-German frontier, despite the continued existence of Germany. Their sovereignty is limited by the occupying Powers which created them and one of the limitations is that the final decision on this frontier would have to await the peace settlement. A reunified Germany would inherit these obligations regardless of its own wishes, but subject to the Four Power authority. In other words, Poland can rightly maintain vis-a-vis East and West Germany, as well as a reunified Germany, that it is entitled to exercise sovereignty over the Oder-Neisse territories, but to retain such capacity after the

peace settlement, it would require the support of the Four Powers, through a final formal delimitation of the frontier along the Oder-Neisse line.

Despite the apparent recognition of Polish sovereignty by the Germans outlined above and supported by Skubiszewski, Frowein and Meyrowitz,[199] it must be acknowledged that opinion is not unanimous with regard to the legal significance of the West German commitment contained in the Warsaw Treaty. It is no surprise that West German and Austrian writers in particular have questioned the nature of Poland's tenure with regard to its western territories. Such doubts have been expressed relatively recently by Verdross, Simma and Geiger in a joint work on the legal status of the Oder-Neisse territories.[200] They start from the proposition that Germany as a whole continues to exist in the sense of international law and that it is not limited in extent to the area of the FRG; under international law it is a legally existing State, though incapable of acting.[201] This remark is in itself disputable, as the authors admit.[202] Firstly, exception cannot be taken to the belief in the continued existence of Germany, since this writer agrees with the proposition. However, the assertion that Germany exists as a State in the sense of international law should be qualified. Verdross et al argue that Germany is incapable of acting and that this is what makes it different. Yet this writer would argue that, rather, Germany in a sense is capable of acting, but it is the form of that capability which makes it so unusual in comparison with other States, for its acts are carried out by the Four Powers when they exercise their competence with regard to Germany as a whole. This competence is the final active manifestation of the German State as represented in the acts carried out under the supreme authority of the Four Powers. Germany cannot act outwith the Four Power capacity; this shows its individuality. It is

certainly true that the united German State does not act for itself at present; this is Verdross's point. The supreme authority of the Four Powers constitutes authority acquired instead of sovereignty. The acts of the Four Powers may be regarded as acts for Germany and even by Germany in that the Four Powers assumed all active authority for that country. Some of this was surrendered to the FRG and the GDR; those elements retained evidence the continued statehood and, when the Allies act in their special capacity with regard to Germany, this shows how Germany may act, even if only through the Allies.

Verdross et al are also correct to assert that Germany is not limited to the territory of the FRG. Germany certainly exists within the confines of the four occupation zones. The implication behind this assertion is that some may regard Germany as being limited to the territory of the FRG, whether on a temporary and practical basis or on a legal basis, because of the theory, as enunciated by the Federal Constitutional Court in 1973, that the Federal Republic is partly identical (teilidentisch) with Germany.[203] Of course, this Court is entitled, within the confines of its municipal jurisdiction, to indulge in whatever "whimsical speculation(s)"[204] may happen to occur to its judges while they are not contemplating their return to Berlin. But, as has been established, all questions regarding the status of Germany are the prerogative of the Four Powers. Any statements of the Federal Constitutional Court, be they the ratio decidendi, obiter dicta or whimsical speculation, cannot bind the Four Powers. Moreover, it follows that any attempt by this Court to attribute to its rulings international legal effect must be treated as ultra vires. Certainly such utterances have no legal effect on the status of Germany, or the FRG and the GDR under public international law. Any criticisms which apply to the Court in its ruling on partial identity apply

a fortiori to those writers who support this dictum.

Following from their conclusion that Germany continues to exist, and to exist beyond FRG territory, Verdross et al consider the likely status of the areas to the east of the Oder-Neisse line. It is in this context that the distinction between sovereignty (Souveranitat) and territorial supreme authority not amounting to sovereignty (Gebietshoheit)[205] acquires significance. They argue that the distinction between territorial sovereignty and Gebietshoheit is recognized both by State practice and the international legal judiciary.[206] Further, that the Oder-Neisse territories are subject not to the sovereignty of Poland, but merely to its Gebietshoheit, because the "original" sovereign retains its rights over the territory.[207] The basis for this evaluation is, apparently, Article IV of the Warsaw Treaty:

> "This Agreement shall be without prejudice to any bilateral or multilateral international agreements which the Parties have previously concluded or which affect them."[208]

According to Verdross et al if this provision reserves to a future peace treaty the decision with regard to sovereignty over the Oder-Neisse territories, a treaty which only an all-German Government can enter into for Germany (and it is clear from the text as a whole that the writers support such a view), while on the other hand Article I of the Warsaw Treaty provides that the Oder-Neisse line constitutes, for the FRG, the western State frontier of Poland, this can only mean that the Federal Republic does not actually recognize the territorial sovereignty of Poland over the Oder-Neisse territories; however, the FRG will raise no further objections to the exercise by Poland of full Gebietshoheit in these territories.[209]

Although there is much to be said for the proposition that only an all-German Government may enter into a peace treaty for Germany with regard to the Oder-Neisse line in order to achieve a final arrangement of this issue in the sense that this was envisaged in the Potsdam Agreement (since it is the Potsdam Agreement, among others, which is taken into account when the obligations referred to in Article IV of the Warsaw Treaty are mentioned), two criticisms must be made. Firstly, with regard to the assessment by Verdross et al of the Potsdam Agreement; secondly, concerning the effects which they attribute to Poland's tenure over the Oder-Neisse territories, as a result of the Potsdam Agreement, vis-a-vis West Germany.

In the Potsdam Agreement, it is provided that the final delimitation of the western frontier of Poland should await a "peace settlement".[210] The term "peace treaty" is not employed; it is true that a peace treaty could be a likely means by which the outstanding matters would be regulated, but this process could take another form, for instance, the agreement upon a settlement not including any peace treaty in the traditional form.[211] Furthermore, the impression might be gained from the wording used by Verdross et al that the united German State must have a say in the final decision on the eastern German frontier. Two conditions suggest that Germany would have no say: the first of these is contained in the Declaration of 5 June 1945 by the Four Powers regarding the defeat of Germany and the assumption by them of supreme authority in that State. The Preamble states, inter alia:

> "The Governments (of the Four Powers) will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."[212]

The second is contained in the Potsdam Agreement itself. Part I A(3)(1) of the Protocol stipulates, in part, that the Council of Foreign Ministers "....shall be utilised for the preparation of a peace settlement for Germany to be accepted by the Government of Germany ....".[213] Although the Council of Foreign Ministers does not operate, nevertheless the commitment to prepare a peace settlement has survived.

The view has been taken [214] that the three Western Powers, at least, may have, in the Deutschlandvertrag, committed themselves to acceptance of a genuine right of negotiation for Germany at the peace settlement, under Article 7, paragraph 1:

> "The Signatory States are agreed that an essential aim of their common policy is a peace settlement for the whole of Germany, freely negotiated between Germany and her former enemies, which should lay the foundation for a lasting peace ...."[215]

It must be asked whether the Western Powers alone had the authority to accord to Germany a right of negotiation which it certainly did not possess under the 1945 provisions. On the face of it, the Soviet Union would also have to agree to such an alteration of the status quo. It must also be asked if the expression, that a freely negotiated peace settlement is an essential aim of the parties, actually amounts to a legal commitment in the first place.

There is a second sentence in paragraph 1. This says:

"They further agree that the final determination of the boundaries of Germany must await such settlement."

If this is interpreted strictly, then the Paragraph, read as a whole, seems to claim a right for States other than the Four Powers to participate in the decision with regard to Germany's frontiers: "...Germany and her former enemies ....". This would certainly exceed the ambit of the right claimed under the June 1945 Declaration on the assumption of supreme authority, since this reserves to the Four Powers the right to determine the boundaries of Germany. Acting together, they could certainly seek to include other States in the decision-making process. However, such an action would require the consent of all four States, not only the western ones.

It would appear, therefore, that any extension of the right to decide on Germany's frontiers, is of a dubious nature, both as to the quality of such a right and the number of States to which it may be actually extended. At most, the three Western Powers have taken upon themselves the obligation to maintain, as a political commitment, their support for the inclusion of Germany as an active participant in the decision-making process at a future peace settlement.

It is now necessary to consider the characterization by Verdross et al of Poland's tenure over the Oder-Neisse territories as Gebietshoheit with regard to the Federal Republic. West Germany, when signing the Warsaw Treaty, emphasized that it could act in its own name only: it could not commit any other State.[216] This reflects no more than the maxim pacta tertiis nec nocent nec prosunt, or, as it is expressed in the Vienna Convention on the Law of Treaties:

"A treaty does not create either obligations or rights for a third State without its consent." (Article 34). [217]

Opinion, while admitting certain possible exceptions, follows the ruling given in the German Interests in Polish Upper Silesia Case (Merits), that "A treaty only creates law as between the States which are parties to it ...." [218,219].

The Federal Republic of course sought to prevent any other State, but particularly Poland, from imputing to it recognition of the boundary by Germany as a whole - a not unreasonable imputation, given previous FRG claims to identity with Germany. But the FRG is not and never has been identical, or even partially identical, with any other German State, because the Four Powers have always denied such identity. Therefore, while the two States, in Article IV of the Warsaw Treaty, did acknowledge the existence of other instruments of international law which affect them, they were acting for themselves only. Their actions had no effect as such on the position of the Four Powers (it is another matter that some or all of the Four Powers may have restricted their own freedom because of approval given to the Treaty); nor can the Potsdam Agreement restrict the capacity to act of West Germany if that State acts only within the limits set upon its freedom of action when it acquired sovereignty. Acting only in the name of the Federal Republic of Germany, the FRG could not, even if it claimed to, affect the rights and duties of the Four Powers, or the three Western Powers, concerning Germany as a whole. They are quite separate States.

Given the lack of identity, given that the FRG entered into the treaty for itself alone, there could be no limit upon the extent of the commitment it might incur - as long as this were genuinely accepted for itself only and the States acted in

accordance with international law. This is exactly what occurs in Article I of the Warsaw Treaty: the parties agree that the Oder-Neisse line forms the western State frontier of Poland and acknowledge, in Article IV, that they agree upon this without affecting any other relevant treaties and agreements. It is vital to bear in mind at this stage the extraordinary peculiarities of the situation. West Germany has no common boundary with Poland; it has never shared a boundary with Poland. Yet for twenty years it had been depicted in Poland as the main threat to that State's territorial integrity - the revanchist German State. It is probably true that this was done at least partly for domestic political ends (in particular, to nurture a stronger sense of national unity in the socialist State, as opposed to national unity against the socialist State, which seems sometimes to be omnipresent). Yet there was always a genuine fear in Poland of the German threat, apart from that whipped up by the authorities. The ratification of the Warsaw Treaty seemed to remove this threat, though from time to time it is revived in the official media - which perhaps does indicate, given the absence of any real challenge, that the revanchist threat has been a useful tool at certain times which its manipulators are reluctant to give up.

West Germany, through its claims to speak for all Germans and its sometime claim to identity with the Reich, through its refusal to acknowledge any Polish claims, through its strident assertions that the German question still had to be settled, was perceived from Warsaw as a source of insecurity. When the FRG sought eventually to establish its relations with the States to its east on a more normal footing, it had to acknowledge the needs of those States. Poland's principal condition as far as West Germany was concerned was simple: recognition by that State of the Oder-Neisse line.[220] Poland already considered itself to be sovereign over the Oder-Neisse territories; the GDR accepted this interpretation of the situation. Poland regarded the Federal Republic as

representing itself only. But by entering into the Warsaw Treaty, the FRG could no longer assert that it was not bound to accept the territories as part of the Polish State. If the Federal Republic were identical with Germany, it could mean either that Germany was bound by the Warsaw Treaty to accept the Oder-Neisse line as the boundary under public international law, or (perhaps more likely) the treaty could never have been concluded in the first place because the frontier issue is not something which Germany is competent to decide for itself. But the FRG was acting for itself, and acting within its competence. Its act did not affect in any way the position of the Four Powers and their position did not present any legal impediment to it. In fact, the Western Powers expressed their approval of the FRG's initialling of the treaty and emphasized at the time that their own position was unaffected.[221] Any treaties or agreements concluded by the Federal Republic or affecting it - the formula used in Article IV - could not inhibit its ability to recognize in the fullest sense the Oder-Neisse line as the western State frontier of Poland, because these were concerned with the status and frontiers of Germany as a whole, and the Federal Republic did not seek, at any point, to attribute to Germany any legal consequences from its own action in entering into the Warsaw Treaty.

Why did the Parties refer to the border as the western State frontier of Poland, rather than, say, the Polish-German frontier? Both States had to take into account their own legal positions as well as their relationship towards the GDR. Poland considered that there was no German State with which to decide upon this issue; the FRG spoke only for itself. The formula adopted succeeded in respecting both stances. Poland had already concluded a border treaty with the GDR and, had it agreed upon a formula with the Federal Republic which incorporated the idea of

Germany, it could have been perceived by the GDR as some form of interference in its internal affairs. Furthermore, for Poland to agree on a "Germany" formula in the Warsaw Treaty, this might have undermined its contention that it had settled the issue of the frontier in the Zgorzelec Treaty of 1950 with the GDR. Poland's view was not that the FRG had any legal say in the frontier issue, but that, given its previous opposition to the Oder-Neisse line, Poland had been unable to conduct normal relations with it.[222]. Therefore recognition of the frontier had no constitutive effect for Poland here; what mattered was that it had constitutive effect for the Federal Republic which, after the entry into force of the Treaty, would be unable to question the frontier, with the consequence that the mutual relations of the two States could be normalized.

A less calculable factor was the offence which might be caused to the GDR by the Treaty, at a time when the FRG sought to improve its relations with all of the socialist States. The GDR would appear to have been against Poland normalizing its relations with the FRG before the two German States had themselves entered into some formal relationship.[223] By reaching a consensus with Poland and the Soviet Union without having recognised the GDR, the Federal Republic can only have strengthened its negotiating position vis-a-vis that State. Nevertheless, given that West Germany did want to come to terms with the GDR, the setback for the GDR may have been mitigated by the fact that the Warsaw Treaty did not formally impinge upon its own authority as the German State actually bordering Poland, by using the name of Germany in the agreed formula for the frontier.

The formula incorporated in Article I constitutes further evidence in favour of the separate existence of, on the one hand, West Germany and, on the other,

Germany itself. Regardless of the nature of Poland's tenure over the Oder-Neisse territories vis-a-vis the Four Powers, it has a quite separate authority with regard to West Germany: the Warsaw Treaty - i.e., West Germany bound itself through that instrument; it committed itself to a position which amounts to no less than full recognition by it of Polish sovereignty over the territory to the east of the Oder-Neisse frontier.

The argument of Verdross et al. that Poland can have only Gebietshoheit as a result of the Warsaw Treaty, is based on the false premise that Germany retains title over these territories, and therefore, that the FRG could not recognize Poland as having sovereignty.[224] It has been shown that, independently of the existence vel non of Germany, and independently of the extent of its territory, the FRG was capable of recognizing Polish sovereignty.

The position with regard to the German Democratic Republic is less fraught with controversy. Fewer claims have been made on behalf of the GDR as being identical with Germany: those who claim such a relationship to exist between the FRG and Germany base their arguments, to a large extent, on the claims made by the Federal Republic itself. The GDR has long ceased to have such pretensions and now claims to act for itself only, though the Zgorzelec Treaty was concluded by the GDR in the name of the German nation and it does refer to the frontier as the German-Polish State frontier.

It is clear from the Preamble of this treaty that the parties regard it as having an executory character with regard to the Potsdam Agreement:

> "...desiring to stabilize and consolidate mutual relations on the basis of the Potsdam Agreement which established the frontier on the Oder and Lusatian Neisse ...."

The reserved authority of the Four Powers with regard to the frontier question does not prevent such a conclusion. The separate personality of the GDR from Germany enables the former State to recognize with legal effect, for itself, the frontier which the Parties consider to have been established in 1945. As the German State actually bordering Poland, it is appropriate that it be competent to treat the agreement with Poland as executing, that is, giving effect to, the decision of the Allies as it sees it. This of course is without prejudice to the competence of the Allies. The Warsaw Treaty is of course non-executory in character; this is because the Federal Republic is not in a position to give practical effect to the Potsdam Agreement, even if it shared the Polish and East German interpretation of that instrument.

Contrary to the opinion held by the extremist school of Polish thought concerning territorial issues, the Zgorzelec Agreement does not constitute the peace settlement mentioned in the Potsdam Agreement.[225] Such a judgment entails a nonsensical reading of the Potsdam Agreement combined with a smug deafness to all the statements of the Western Powers and even those of the Soviet Union, insofar as that State has acknowledged the continued existence of Four Power capacity without specifying what this actually means.

Greater merit does perhaps pertain to the notion that the GDR, as the successor State to Germany on that part of its territory adjoining Poland, by concluding the

Treaty of 1950, did lawfully settle the frontier issue.[226] However, the GDR could only perform such an act within the limits of its own authority. If Germany had ceased to exist - the East German view - then, as the successor State, the GDR would have an authority denied to the FRG, because of the former's geographical proximity to Poland, to conclude a frontier settlement. If, on the other hand, Germany continued to exist for certain purposes, then the GDR is excluded from creating any obligation outwith its own limited capacity in this field, and the Zgorzelec Agreement is therefore unable to act in such a way as to bind the German State.

(x) Compatability Following the Unification of the GDR and the FRG

Were Article 31 (1) (b) of the VCSSRT to be applicable to the unification of the two German States, the question arises whether or not the border provisions contained in the Warsaw and Zgorzelec Treaties would be so radically affected that their application vis-a-vis the united German State would be incompatible with the objects and purposes of the original treaties.

For various reasons this question must be answered in the negative. First of all, there exists the general customary rule of international law, expressed in Article 11 of the VCSSRT, that a succession of States does not as such affect obligations and rights established by a treaty and relating to the regime of a boundary. Given the apparent strength of authority in favour of the rule that a change of sovereignty does not as such affect boundaries, any form of unification which purported to render the border provisions, when applied to the united German State, incompatible with the objects and purposes of the treaties, would be unlawful without the agreement of Poland.

Furthermore, there is no time limit contained in either of the treaties which would restrict their application according to the duration of the existence of West and East Germany as separate States. One of the purposes of the treaties was to provide stability in central Europe and this itself would indicate that the treaties ought to continue to be applied.

The Federal Republic has stressed that it undertook the obligations contained in the Warsaw Treaty in its own name only. But such a declaration is not in itself sufficient to prevent the devolution of certain rights and obligations.[227] The treaties, as well as containing no time limit, contain no provisions which would prevent the devolution, by normal rules of State succession, of the frontier provisions as a binding source of rights and obligations upon the united German State. The only limitations are those contained, by implication, in Article IV of the Warsaw Treaty, which expressly maintains the validity of existing treaties and agreements concluded by or affecting the Parties. No corresponding provision exists in the Zgorzelec Treaty.[228] Since neither the FRG nor the GDR has, or has ever had, capacity to act in the name of Germany as a whole, and since upon unification, this German State would still not be identical with the Germany as a whole the separate existence of which is still maintained by at least some of the Four Powers, the unified German State would be created subject to the eventual exercise by the Four Powers of their authority with regard to the final peace settlement, but still a quite separate subject of international law. It would inherit for itself the border provisions of the Zgorzelec and Warsaw Treaties. The only way in which the rights and duties of the Four Powers and, in particular, the right to decide upon Germany's frontiers, can affect the united German State, is through the establishment of a peace settlement. This can only occur, under the

present rules, after the unification. The act of unification would be between the FRG and the GDR alone and, as such, would incorporate the obligations incurred by each with regard to frontiers. Because the unification of West and East Germany would not diminish or increase the rights of the Four Powers (it would bring hitherto dormant rights into play), the rights and duties of the Four Powers would not affect the position of the unified German State at the time of succession. The full capacity of the Four Powers would remain and the succession of States would take place in that context: i.e., subject to this capacity, which may even represent in a sense the continued statehood of Germany since 1945.

FOOTNOTES

1. "It would be academic now to consider the manifold ways of solving the problem of succession when Germany is reunited. The prospect is too distant, and the exercise would be too theoretical."
   Skubiszewski: Poland's Western Frontier and the 1970 Treaties
   1973 67 AJIL 23, at 27.

2. This does not mean to say that Germany would exercise only de facto control over any territory; rather, it avoids defining at this stage the nature of Germany's control over any territory whatsoever, since such definition is not the purpose of the particular issue and could mislead.

3. K. Marek. Identity and Continuity of States in Public International Law (2nd ed). Geneva, 1968, at p. 6.

4. This law is also relevant, as will be shown when the question of the succession of Germany to the rights and oboligations of the GDR and the FRG is discussed.

5. Marek, Note 3, supra, at p. 14. The reference to the norm "pacta sunt servanda" takes account of Marek's view that the identity and continuity must be the result not of a convention, but of general international law, in particular "pacta sunt servanda", since a taking over of all the rights and obligations of one State by another, by agreement, would constitute a transaction between two subjects of international law - thus there would be no identity.

6. Chapter Five, pp. 208-210.

7. p. 223 , supra.

8. P.H. Merkl: German Foreign Policies, West and East
   Santa Barbara, 1974, at pp. 82-88; 90-92.

9. Wettig: East Berlin and the Moscow Treaty
   1971 Aussenpolitik 256-269, especially at 258-263.
   Another view, which questions the extent to which the GDR and USSR attitudes towards the signature of the Moscow Treaty may have differed, may be found in:
   N.E. Moreton: East Germany and the Warsaw Alliance: the Politics of Detente. Boulder, Colorado, 1978, at pp. 154-156.

10. Merkl, Note 8, supra, alludes to this at p. 89.

11. Convention on Relations between the Three Powers and the Federal Republic of Germany (as amended by No. I to the Protocol of Termination of the Occupation Regime of the Federal Republic of Germany), esp. Article 2.
    331 UNTS 327

12. Treaty concerning the Relations between the Union of Soviet Socialist Republics and the German Democratic Republic.
    226 UNTS 208.

13. Professor Skubiszewski also considers that the Soviet Union acknowledges in the treaty its residual competence:
    "All this (i.e. aims of the 1955 USSR-GDR treaty), of course, cannot be strived for and eventually achieved without Soviet participation in the exercise of rights and responsibilities that go back to 1945."

    The Great Powers and the Settlement in Central Europe.
    1975 18 JIR 92, at 102.

14. Ibid., at 103,
    Quoting a directive from the Heads of Governments of the Four Powers to their Foreign Ministers at the Geneva Conference of Heads of Government, July 1955.

15. Ibid.
    CMND 1552, Doc. No. 129, p. 328.

16. Declaration of 9 November 1972.
    CMND 6201, Doc. No. 156, p. 264-265.

17. R. v. Bottrill, ex parte Kuechenmeister,
    1946, 1 All ER 635;
    R.v. Secy. of State for Foreign and Commonwealth Affairs, ex parte Trawnik and Reimelt,
    Law Report, The Times, 18 April 1985.

18. This is also the view of Frowein, at least insofar as "Germany" may be regarded as existing as a consequence of the supreme authority of the Four Powers, which has not been relinquished:
    "Formell haben die Vier Machte gemeinsam einen actus contrarius zu der Ubernahmeerklarung vom 5.6. 1945 bezuglich der obersten Regierungsgewalt nie gesetzt."

    J.A. Frowein: Die Rechtslage Deutschlands und der Status Berlins. (The Legal Position of Germany and the Status of Berlin).
    From: Handbuch des Verfassungsrechts. Benda, Maihofer, Vogel (eds). (1983), p. 29, at 40.

19. This problem perhaps points to a general weakness in the application of public international law. That is, however, not the subject of this thesis.

20. Agreement of 23 August, 1939.
Nazi-Soviet Relations, 1931-1941: Documents from the Archives of the German Foreign Office (R.J. Sonntag, J.S. Beddie, eds.) Washington, 1948, at p. 78.

21. N. Davies: God's Playground. A History of Poland (Vol. II). Oxford, 1981, at p. 433; Davies also cites the source given in Note 20 above.

22. Marek, Note 3, supra, at p. 428.

23. G. Schwarzenberger: International law as applied by International Courts and Tribunals. Vol. II: The Law of Armed Conflict. London, 1968, at pp. 166-169.

24. A detailed analysis is given by Marek, Note 3, supra, in Chapter IX, at pp. 427-449.

25. Ibid, at p. 445.

26. Cf, for example: Alexeyev: USSR-GDR Relations: Fraternity and Cooperation.
1985 (6) International Affairs (Moscow) 35.

27. This view has been taken, in the context of the Potsdam Agreement, by Klafkowski:
"...it is evident that the Potsdam Agreement is, whether politically or legally, binding in relation to "the whole of Germany", the latter term being frequently referred to. In this way, the Potsdam Agreement binds the two German States established on the territory of the former German Reich.
The Polish-German Frontier and the two German States.
1966 7 PWA 109, at 111.

28. Cf. for example, the Preamble to the Zgorzelec Treaty between Poland and the GDR regarding the Demarcation of the German-Polish frontier 319 UNTS 93.
Hidden amongst the cliches and cant concerning peace-loving nations and frontiers of peace and friendship it is just possible to discern the phrase "the Potsdam Agreement which established the frontier" on the Oder-Neisse rivers.
While it might just be argued that "established" could mean as little as the preliminary establishment of the frontier in one place, perhaps liable to future amendment, this has certainly not been the interpretation attached to it by the Polish State, which has described the border as "final and inviolable, in conformity with the provisions of the Potsdam Agreement" (zgodnie z postanowieniami umowy poczdamsmkiej, za nienaruszalana i ostateczna ....)
Of course, the Potsdam Agreement does not use these terms to describe the

frontier, but this is how the Polish State regards it:
Press communique from the Politbureau of the PUWP on the ratification of the treaty between Poland and the FRG.
Warsaw, 19 May 1972.
1972 Zbior Dokumentow 807, at 809. Zgorzelec Agreement.
1980 21 PWA 297, at 303.
Gelberg: The Warsaw Treaty of 1970 and the Western Boundary of Poland.
1982 76 AJIL 119, at 123.

30. Skubiszewski, Note 1, supra, at 30-31.

31. Chapter Three, pp. 91-98.

32. Jasica: The Legislation in the Federal Republic of Germany and the Problem of Normalization of Mutual Relations between the Polish People's Republic and the Federal Republic of Germany.
1975 7 PYIL 77, at 84.

33. Ibid.
The USA State Department, in a Memorandum of 13 July 1950, also expressed the view that there existed in Germany, after the unconditional surrender and assumption of supreme authority by the Allies, a German Government, composed of Allied personnel but separate from the Allied Governments.
Whiteman's Digest, Volume I. Washington D.C., 1963, at pp. 332-334.

34. Jasica, Note 32, supra, at 83.

35. Chapter Three, p. 108.

36. "The term "state succession" is used to describe that branch of international law which deals with the legal consequences of a change of sovereignty over territory."
M. Akehurst: A Modern Introduction to International Law (5th ed.) London, 1984, at p. 157.

37. The supreme authority acquired by the Four Powers included for each State the right to act as it wished within its own zone, insofar as this did not interfere with the existing joint rights. It is in fact arguable that the creation of two new republics, despite the statements of willingness by all Four Powers to pursue as a long term aim the reunification of Germany, was an unlawful departure from the stated aim of maintaining German unity - the effect was certainly to discourage unity - but the claims by all Four Powers to keep alive the aim of reunification allow their action to be characterized as lawful.

The supreme authority including the competence to "determine the boundaries of Germany or any part thereof and the status of Germany or any area at present being part of German territory". But according to the statement of the Four Governments of 5 June 1945 regarding Control Machinery in Germany (CMND 1552, Doc. No. 9, p. 43), in matters affecting Germany as a whole, control was to be joint. The legality of the creation of two German States, at least from this perspective, may be reduced to the question: was the creation by each side of a German State in its own area of occupation capable of being characterized as a matter exclusively for its own decision, or did it constitute such a measure as to concern Germany as a whole and therefore, presumably, requiring the agreement of all Four Powers in each case?

38. "The right of the victors to annex German territory .... was firmly rooted in the customary rule on acquisition of territory by virtue of subjugation ... practice prior to 1945 has shown that the victorious belligerent had the right to extend its sovereignty over the defeated enemy's territory when certain facts materialized."
Skubiszewski, Note 13, supra, at 94.

39. The cessation of joint exercise by the Four Powers of control over Germany should only be regarded as political failure if there was a genuine will to bring about reunification of the occupation zones.

40. "This term, connoting a rule of law which is peremptory in the sense that it is binding irrespective of the will of individual parties ....."
C. Parry and J.P. Grant: Encyclopaedic Dictionary of International Law. New York, 1986, at p. 201.
While there is disagreement as to what rules, if any, form examples of ius cogens it has been suggested that one which may be approaching general acceptances as such is the rule against aggression
(M. Akehurst, Note 36, supra, at p. 41).

41. R. Ogley: The Theory and Practice of Neutrality in the Twentieth Century London, 1970. at pp. 41-43.

42. Ibid, at pp. 183-185.

43. I. Brownlie: Principles of Public International Law (3rd ed.), Oxford, 1979 at pp. 372-376.

44. Cf. for example:
Gelberg: Does the German Reich Still Exist?
1979 20 PWA 102.
Janicki maintains that the German State survived in 1945 though the Reich did not. This statehood, according to the author, came to an end in 1949 with the creation of the GDR and FRG;
The Question of German Citizenship after after 1945 (in the Light of

the Defeat and Fall of the Reich) and its Repercussions in
Relations between Poland and the Federal Republic
1984 25 PWA 211, at 220-222.

45. Note 21, supra, at pp. 394-399.

46. "bledem historycznym i prawnym":
Supreme Court ruling of 29-30 September 1922, published in
Orzecznictwie Sadow Polskich, vol. II, no. 346.
Cited by S. Gebert: Nabycie i utrata obywatelstwa polskiego
(Acquisition and Loss of Polish Citizenship), in:
Prawo w Polsce. Warszawa, 1978, p. 331 at 332.

47. "Rzeczpospolita i po rozbiorach istniala jako panstwo, aczkolwiek
w stanie potencjalnyn ...."
Ibid.

48. Marek, Note 3, supra, at p. 417, seems to say that a new Polish State
came into existence in 1918, which would indicate the belief on her part
that Poland had not existed in any legal sense as a State between the third
partition and 1918, especially if one reads this in conjunction with her
statement (pp. 4-5) that there can be no identity without continuity.
However, Marek is silent on the specific issue of potential status for
Poland, as claimed by the Court.
Brownlie (Principles, p. 672) mentions the possibility that continuity
by virtue of general recognition by third States may arise in the form of
a reversion, so that a successor State may be regarded as recovering a
political and legal identity displaced by an intervening
period of dismemberment, and cites Poland as one possible example
of such a process.
As Brownlie indicates, Poland refused in 1918 to accept that it was the continuation in State form of the USSR, Prussia and Austria on its territory after it acquired independence. Marek would argue strongly that, without such continuity, identity cannot exist (cf. pp. 223-225, supra).
Brownlie's view that continuity may exist through reversion to the old status places the emphasis on the requirement of general recognition; yet this seems to attach a constitutive quality to the recognition. Can reversion really be said to appear through the actions of other States?
The "potential" status of Poland prior to 1918 is impliedly supported by Arndt, who argues:
"The interpretation of the Constitution (of the FRG) generally accepted by the Parliament (Deutscher Bundestag), the Federal Government, and the Federal Constitutional Court is that this German nation was not extinguished in 1945, or in 1949, or subsequently - and therefore exists even today. Undeniably, it is currently unable to act under international law - as, similarly, were Poland between its partition at the end of the 18th century and 1918, and Austria between 1938 and 1945 - because it lacks state organs capable of functioning."

Legal Problems of the German Eastern Treaties.
1980 74 AJIL 122, at 124.

But when Poland was partitioned, the partitioning States actually intended to bring about its legal demise as a State. Unlike the Four Powers, which continue to exercise certain functions with regard to Germany as a whole, Russia, Prussia and Austria performed no such actions with regard to Poland.

49. D.P. O'Connell: International Law, Vol. I, (2nd ed.,) London, 1970, at p. 365.

50. Text contained in:
United Nations Conference on Succession of States in Respect of Treaties. Official Records. Vol. III. A/CONF.80/16/Add.2;
1978 17 ILM 1488; 1978 72 AJIL 971.

51. Document A/CONF.80/4, p. 5 in the Official Records cited above.
Originally contained in YILC, 1974, Vol. II Part One, pp. 174-269.

52. Ibid., at p. 6 (paragraph 3).

53. Ibid (paragraph 4).

54. "In the case of the replacement of a mandate or trusteeship by a sovereign state ... it is not sovereignty but a special type of legal competence which is replaced."
Brownlie, Note 43, supra, at p. 651.

55. Lord McNair: The Law of Treaties, Oxford, 1961, at p. 590.

56. D.P. O'Connell: State Succession in Municipal Law and International Law Vol. I. Cambridge, 1967, at p. 3.

57. Ibid.

58. Ibid.

59. See p. 254, supra.

60. Brownlie, Note 43, supra, at p. 651.

61. See Note 54, supra.

62. See Note 36, supra.

63. "Z utrata przez panstwa podmiotowosci w prawie miedzynarodowym wiaze sie zagadnienie sukcesji."
K. Skubiszewski: Podmioty prawa miedzynarodowego. (Subjects of International Law)
In: Muszkat (ed.): Zarys prawa miedzynardodowego publicznego, Vol. I. Warszawa, 1955, at pp. 149-150.

64. Ibid.

65. "Zagadnienia sukcesji praw i zobowiazan miedzynarodowych wystepuja wtedy, kiedy czesc lub cale terytorium jednego panstwa przechodzi pod wladze suwerenna innego panstwa."
W. Goralczyk: Prawo miedzynarodowe publiczne w zarysie (Public International Law in Outline)
Warszawa, 1983, at p. 124.

66. "... sukcesja to rezultat zmiany zwierzchnictwa terytorialnego nad czescia lub caloscia okreslonego terytorium panstwowego."
R. Bierzanek, J. Symonides: Prawo miedzynarodowe publiczne (Public International Law).
Warszawa, 1985, at p. 128.

67. Akehurst, Note 36, *supra*, at p. 157.

68. See, for example:
Jones: State Succession in the Matter of Treaties.
1947 XXIV BYIL 360, at 361;
Brownlie, Note 43, *supra*, at p. 651;
Parry and Grant, Note 40, *supra*, at p. 377.

69. M.J. Bowman and D.J. Harris: Multilateral Treaties. Index and Current Status. London, 1984.

70. Poland signed on 6 August 1979, the GDR on 22 August 1979 and Czechoslovakia on 30 August 1979.
Bowman and Harris, ibid.

71. Szafarz: Vienna Convention on Succession of States in Respect of Treaties: a General Analysis.
1979-80 10 PYIL 77, at 79.

72. It was adopted by 8 votes to 4 with 5 abstentions.
Para.2 of commentary to Draft Article 7. See Note 51, *supra*.

73. Szafarz, Note 71, *supra*.

74. "State succession is an area of great uncertainty and controversy. This is due partly to the fact that much of the state practice is equivocal and could be explained on the basis of special agreement and various rules distinct from the category of state succession. Indeed, it is perfectly possible to take the view that not many settled legal rules have emerged as yet."
Brownlie, Note 43, *supra*, at p. 652.

75. Szafarz, Note 71, *supra*, at 113.

76. Ibid, at Note 75.

77. Brownlie, Note 43, *supra*, at p. 666.

78. Ibid.

79. Akehurst, Note 36, supra, at p. 159.

80. "Since in the field of succession to treaties customary law will always remain the most important, it must be stressed that the Convention together with the codification process which preceded it, have already contributed to the consolidation of the contents of that law, thus accomplishing a major part of their task."
Szafarz: Succession of States in Respect of Treaties in Contemporary International Law.
1983 12 PYIL 119, at 139.

81. "... judging by the practice of States, the opinions expressed in legal doctrine and the debates which took place at the Vienna Conference, it can be asserted that in the Convention itself the element of "progressive development" of international law prevails over the element of codification sensu stricto."
Szafarz, Note 71, supra, at 108.

A useful list of those provisions of the treaty which the author considers to have constituted customary international law prior to 1978 and those which she thinks have acquired that status since then is given in another study on this subject:
Note 80, supra, at 130.

82. "The United States Government considers that the so-called German Democratic Republic established on October 7 in Berlin is without any legal validity or foundation in the popular will. This new government was created by Soviet and Communist fiat. It was created by a self-styled "People's Council" which itself had no basis in free popular elections. This long-expected Soviet creation thus stands in sharp contrast to the German Federal Republic at Bonn which has a thoroughly constitutional and popular basis."
Statement by Dean Acheson, US Secretary of State.
12 October 1949.
CMND 1552, Doc. No. 39, p. 126.

"...The Soviet Government declared that the formation of the Bonn separate Government is a gross violation of the Potsdam decisions, according to which the Governments of the USSR, the United States, Great Britain, and France assumed the obligation to consider Germany as one whole ...."
Statement by General Chuikov, Soviet Military Governor in the GDR, referring to a Soviet Note sent to the Western Powers on 1 October 1949.
8 October 1949.
CMNS 1552, Doc. No. 37, p. 124.

An Allied High Commission Press Release of 10 October 1949 expresses the views of all three Western Powers regarding the apparent legality of the Federal Republic and the apparent illegitimacy of the GDR.
CMND 1552, Doc. No. 38, pp. 125-126.

83. See pp. 243-245, supra.

84. See pp. 249-250, supra.

85. This theory and its consequences are outlined by Ress, who points out that even if the GDR has attempted to secede that process has not necessarily been completed yet:
G. Ress: Die Rechtslage Deutschlands nach dem Grundvertrag vom 21. Dezember 1972. Berlin, Heidelberg, New York, 1978, at p. 202 ff.

86. It must be stressed that the term modus vivendi applies only to the political situation. There is in no sense implied a legal modus vivendi: see Chapter Two, pp. 33-34; Chapter Three, pp. 88-89.

87. See pp.251-252, supra.

88. Tyranowski: Boundary Treaties between Poland the Two German States and the Problem of State Succession.
1979 20 PWA 112, at 131.

89. Ibid, at 131-132.

90. The terms "fusion" and "uniting" are used synonymously in this context.

91. "Confederation signifies the establishment of a new subject of international law but it does not establish a new State; this is not therefore a case of State succession."
Tyranowski, Note 88, supra, at 125.

A confederation is a union of States in which "... a central government, though it exists and exercises certain powers, has not wholly absorbed the control of the member states' external relations so that for international purposes there exists not one state but a number of states ...."
J.L. Brierly: The Law of Nations (3rd ed). Oxford, 1942, at p. 88.

92. Ibid, at pp. 87-88.

93. See Note 51, supra, at p. 82.

94. See Note 51, supra, at p. 82 (Paragraph 2).

95. Ibid.

96. Ibid, at p. 87 (Paragraph 26).

97. Ibid.

98. Ibid, at p. 82 (Paragraph 6). This is also the view of O'Connell: Note 56, supra, Vol. II at p. 71.

99. Ibid, at p. 82 (Paragraph 2).

100. Ibid, at p. 82 (Paragraph 7).
This is also the opinion of O'Connell:
"Among the authors who consider the Empire to have been a federation there are differing views on the theoretical fate of the treaties of the States. One view is that they lapsed altogether; a second view is that they bound the Empire in virtue of the supremacy of international law over constitutional law; a third view is that they bound the Empire as the successor to the States or the North German Confederation; and a fourth, and it is believed the correct, view is that they continued to bind the States through the Empire until terminated by an inconsistent exercise of federal legislative power."
Note 56, supra, Vol. II, at p. 57.

101. Ibid, at p. 84 (Paragraph 16).

102. Ibid, at p. 84 (Paragraph 15).

103. Quoted by O'Connell, Note 56, supra, Vol. II, at p. 71.

104. Ibid, p. 74.
Given the sui generis nature of various aspects of the status of Germany, the precedent is perhaps more apt in the German context than might at first be appreciated.

105. Note 51, supra, at p. 85 (Paragraph 18).

106. Ibid, at p. 85 (Paragraph 19).

107. The only different term used in the Tanzanian statement is "in force" instead of "valid", which is not relevant to the issue of opinio iuris and whether or not it is expressed in these statements.

108. H. Krisch: The German Democratic Republic. Boulder Colorado, 1985, Chapter 4.

109. Note 51, supra, at p. 86 (Paragraph 24).

110. Ibid, p. 82 (Paragraph 2).

111. Ibid, p. 87 (Paragraph 26).

112. Ibid, p. 82 (Paragraph 6).

113. Ibid, p. 87 (Paragraph 27).

114. Ibid.

115. Akehurst, Note 36, supra, at p. 159.

116. Brownlie, Note 43, *supra*, at p. 666.
McNair suggests with regard to a uniting of States where one State jones a federal State, the treaties of the former State may lapse if the federal constitution allows "...no international capacity and no treaty-making capacity...."
Note 55, *supra*, at p. 629.

117. Ibid.

118. Ibid.

119. Szafarz, Note 80, *supra*, at 130.

120. Szafarz, Note 71, *supra*, at 102.

121. Ibid.

122. Ibid.

123. Ibid.

124. Tyranowski: State Succession: Boundaries and Boundary Treaties. 1979-80 10 PYIL 115, at 126.

125. Tyranowski: Note 88, *supra*, at 127.

126. Ibid.

127. Note 71, *supra*, at 101-102.

128. O'Connell, Note 56, *supra*, Vol. II, at pp. 54-55.

129. Note 51, *supra*, at p. 27 (Paragraph 2).

130. Ibid.

131. Tyranowski, Note 88, *supra*, at 117.

132. Ibid, at 117-118.

133. Ibid, at 118.

134. Note 51, *supra*, at p. 31 (Paragraph 19).

135. Ibid.

136. Ibid. (Paragraph 20).

137. Ibid.

138. PCIJ Ser. A/B, No. 46.

139. Order of 6 December 1930, PCIJ Ser. A, No. 24, p. 17.

140. Note 51, supra, at p. 27 (Paragraph 3).

141. Ibid, (Paragraph 4).

142. YILC, 1966, Vol. II, p. 231.

143. League of Nations Official Journal, Special Supplement No. 3, p. 3.

144. Ibid, p. 16.

145. Ibid, p. 19.

146. Ibid, p. 18.

147. Note 51, supra, at p. 28 (Paragraph 5).

148. ICJ Reports 1960, p. 6.

149. ICJ Reports 1960, p. 6.

150. Ibid, p. 40.

151. Note 51, supra, at p. 28 (Paragraph 6).

152. Ibid (Paragraph 7).

153. Ibid, p. 29 (Paragraph 11).

154. Note 43, supra, at p. 667.

155. Note 36, supra, at p. 157.

156. Note 56, supra, Vol. II, at pp. 14-15.

157. Note 55, supra, at pp. 659-660.

158. Note 43, at pp. 659-660.

158. Note 43, supra, at p. 667.

159. Note 56, supra, Vol. II, at p. 273.

160. Note 88, supra, at 117.

161. See p. 283, supra.

162. Note 56, supra, Vol. II, at p. 273.

163. Note 51, supra, at p. 29 (Paragraph 10).

164. ICJ Reports 1974, p. 3.

165. Ibid, pp. 20-21 (Paragraph 36).

166. Paragraph 11 of the ILC Commentary to Article 62, quoted in:
Note 51, supra, at p. 29 (Paragraph 10).

167. Note 51, supra, at p. 29 (Paragraph 10).

168. Jasudowicz: The Prohibition to Apply the rebus sic stantibus Norm with Respect to Treaties Establishing National Frontiers.
1976 8 PYIL 155, at 158.

169. Ibid, at 162.

170. Ibid, at 180.

171. Ibid.

172. Note 51, supra, at pp. 29-30 (Paragraphs 12-15).

173. Decisions of the German Supreme Court relating to International Law.
1879-1929, Series A, Section II, Vol. I, Berlin 1931, p. 116.
Quoted by Tyranowski: Note 88, supra, at 112; O'Connell:
Note 56, supra, Vol. II, at p. 273.

174. Ibid.

175. Ibid.

176. Ibid. at 113.

177. Ibid, at 124.

178. Note 51, supra, at p. 31 (Paragraph 17).

179. Ibid (Paragraph 18).

180. In a Note Verbale transmitted to the Ambassadors of the three Western Powers in Bonn on 19 November 1970, following the initialling of the Warsaw Treaty, the FRG said:

> "In the course of the negotiations which took place between the Government of the Federal Republic of Germany and the Government of the People's Republic of Poland concerning this Treaty, it was made clear by the Federal Government that the Treaty between the Federal Republic of Germany and the People's Republic of Poland does not and cannot affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the United States of America as reflected in the known treaties and agreements. The Federal Government further pointed out that it can act only in the name of the Federal Republic of Germany."

The Treaty between the Federal Republic of Germany and the People's Republic of Poland. Bonn, 1971, at pp. 10-11.

181. This undoubtedly reflects customary international law: Brownlie, Note 43, supra, at pp. 619-620.

182. Chapter Five, pp. 190-197.

183. This is also the opinion of Professor Skubiszewski: Nowe traktaty w sprawach niemieckich: problemy terytorialne. (New Treaties with Regard to German Affairs: Territorial Problems). 1973(5) PiP 13, at 15-16:

"... RFN nie jest w stanie w drodze aktu jednostronnego zapobiec temu, izby jej ewentualny i przyszly sukcesor przejal uklad lub wynikajace z niego zobowiazania. Sprawa nalezy do stosunkow pomiedzy sukcesorem (czyli zjednoczonym panstwem niemieckim) a pozostalym kontrahentem (czyli Polska); poprzednik sukcesora (tj. RFN) nie moze prawnie i skutecznie przeszkodzic sukcesji."

- "... the FRG is not in a position, by means of a unilateral act, to prevent its eventual and future successor from taking over the treaty or obligations resulting from it. The matter belongs to relations between the successor (that is, the united German State) and the remaining contracting party (that is, Poland); the successor's predecessor (i.e. FRG) cannot legally and effectively prevent the succession." (My translation)

184. "Panstwo dziedziczy pewne uprawnienia i obowiazki niezaleznie od woli poprzednika lub nawet swej wlasnej woli." Ibid, at 15.

185. "... nic nie wskazuje na to, jakoby Polska zgodzila sie na takie zastrzezenia. Tymczasem dwustronny charakter ukladu przesadza, iz aprobata drugiego kontrahenta jest konieczna, by zastrzezenie uczynic skutecznym."

- "...nothing indicates that Poland agreed to such reservations. Meanwhile, the bilateral character of the treaty shows in advance that the approval of the other contracting party is necessary to make the reservation effective." (My translation) Ibid.

186. Trybuna Ludu, 28 April 1972.

187. Trybuna Ludu, 26 May 1972.

188. CMND 6201, Doc. No. 150, p. 256.

189. See pp. 254-258, supra.

190. See pp.239-241, supra.

191. See Note 11, supra.

192. See Note 12, supra.

193. See Note 28, supra.

194. 830 UNTS 328.

195. Article. 1.

196. Article . 1.

197. Skubiszewski, Note 1, supra, at 37.
A similar view is expressed by Frowein, writing with regard to the Warsaw treaty: Die deutschen Grenzen in volkerrechtlicher Sicht(The German Frontiers in the Perspective of International Law).
1979 34 , E A Teil I, 591 at 591-592.
"Nach Art.I des Warschauer Vertrages ist die Oder-Neisse-Grenze fur die Bundesrepublik Deutschland eindeutig die Staatsgrenze zwischen Polen und der DDR. Das Gebiet ostlich von ihr ist polnisches Staatsgebiet ...
Der Wortlaut des Art.I des Warschauer Vertrages stellt fest, dass die bestehende Grenzlinie die westliche Staatsgrenze der Volksrepublik Polen bildet. Westliche Staatsgrenze bedeutet, dass das Gebiet bis dahin zum Staatsgebiet der Volksrepublik Polen gehort. Da ein Gebiet nicht einerseits Staatsgebiet eines Staates, andererseits eines anderen Staates sein kann, ist mit dem Inkrafttreten dieses Vertrages fur die Bundesrepublik Deutschland Klarheit dahin geschaffen worden, dass fur sie die Oder-Neisse-Gebiete polnisches Staatsgebiet geworden sind".

-"By Art. I of the Warsaw Treaty, the Oder-Neisse frontier is for the Federal Republic of Germany undoubtedly the State frontier between Poland and the GDR. The territory east of it is Polish State territory....
The wording of Art I of the Warsaw Treaty states that the existing frontier line constitutes the western State frontier of the Polish People's Republic. Western State frontier means that the territory up to there belongs to the State territory of the Polish People's Republic. That a territory cannot on the one hand be State territory of one State, and on the other hand of another State, is with the coming into effect of the treaty made clear for the Federal Republic of Germany, that for it the Oder-Neisse territories have become Polish State territory." (My translation).

Meyrowitz also appears to interpret Art I. to this effect: Le Traite de Varsovie du 7 Decembre 1970 (The Warsaw Treaty of 7 December 1970).
1971 75^2 RGDIP, 944, at 997.

"...la R.F.A. "constate", c'est-a-dire reconnait, l'existence de cette souverainete comme souverainete de jure. Car la constatation que la ligne de l'Oder-Neisse" constitue la frontiere d'Etat occidentale de le Republique populaire de Pologne" implique a l'evidence la constatation que l'autorite exercee par l'Etat polonais d l'egard de ses provinces du Nord et de D Ouest est de la meme nature que celle qu'il detient sur le reste de son territoire: la souverainete."

- "The FRG notes (or certifies) that is to say recognizes, the existence of this sovereignty as sovereignty de jure. For the observation that the Oder Neisse line "constitutes the western State frontier of the People's Republic of Poland" implies obviously the observation that the authority exercised by the Polish State with regard to its provinces in the North and West is of the same nature as that which it holds over the rest of its territory: sovereignty."
N.B. Meyrowitz uses, in his French translation of the word "agree" the term, "constatent, d'un commun accord". It might have been more accurate had he used the term employed in the French translation provided in the UNTS, viz. "affirment d'un commun accord."

198. "The Protocol contained in section I(B) an agreed letter of invitation to be addressed to the Governments of France and China with the proposal to join the Council of Foreign Ministers. France accepted this invitation. Formal French statements show that France was also informed about the other decisions taken at Potsdam. The French Government accepted the provision for the aims of occupation including those concerning the German eastern frontier. France objected, however, to the establishment of central German departments, and to several other parts of the Protocol, including the economic principles. France was therefore never bound by the entirety of the decisions taken at the Potsdam Conference."
Frowein: Potsdam Agreements on Germany (1945)
In: R. Bernhardt (ed.): Encyclopedia of Public International Law, Vol. 4, Amsterdam, New York, Oxford, 1982, p. 141 at 143.

199. It should be pointed out here that these authors are stated to be in agreement with this writer with regard to the legal significance of the term "State frontier", as contained in the Warsaw Treaty, but that opinions on other aspects of the Oder-Neisse frontier as a legal issue do vary.

200. A. Verdross, B. Simma, R. Geiger: Territoriale Souveranitat und Gebietshoheit. Zur Volkerrechtlichen Lage der Oder-Neisse Gebiete. (Territorial Sovereignty and Gebietshoheit. On the International Legal Status of the Oder-Neisse Territories).
Bonn, 1980.

201. "Unsere Darstellung der volkerrechtlichen lage der Oder-Neisse-Gebiete geht davon aus, dass "Deutschland als Ganzes" als Staat im Sinne des Volkerrechts bis heute fortexistiert und sich in seiner raumlichen Ausdehnung nicht etwa auf die Bundesrepublik Deutschland beschrankt. Deutschland ist nach unserer Ansicht ein nach Volkerrecht zwar rechtsfahiger, aber handlungsunfahiger Staat."
Ibid, at p. 11.

202. Ibid.

203. Case before the Federal Constitutional Court of the FRG, brought by the Bavarian State Government, with regard to the legality of the Grundvertrag. 31 July 1973.
1973 NJW 1539.
English summary and partial translation: 1976 70 AJIL 147.

204. Skubiszewski, Note 1, supra, at 25 (referring to the sometime FRG claim that it was identical with the Reich within its frontiers of December 31, 1937).

205. In view of the difficulty entailed in establishing a more concise yet accurate translation of Gebietshoheit, the German term will be employed henceforth.

206. "Die Staatenpraxis ebenso wie die volkerrechtliche Judikatur unterscheiden klar und deutlich zwischen der territorialen Souveranitat und der Gebietshoheit ...."
Verdross et al, Note 200, supra, at p. 15.

207. "... der ursprungliche territoriale Souveran dieses sein ("Eigentums"-) Recht uber das Gebiet behalt, wahrend der faktisch die Staatsgewalt uber das betreffende Gebiete ausubende Staat die Gebietshoheit in einem Umfang innehat, dass das Territorium fur alle praktischen Zwecke als sein Staatsgebiet."
- "...the original territorial sovereign of this retains its ("Property"-) right over the territory, while the State actually exercising executive power over the territory in question holds Gebietshoheit to such an extent that, for all practical purposes, the territory appears to be its State territory."
Ibid, at p. 87.

208. See Note 194, supra.

209. "Wenn der Warschauer Vertrag in Artikel IV die Entscheidung uber die territoriale Souveranitat hinsichtlich der Oder-Neisse-Gebiete einem kunftigen Friedensvertrag vorbehalt, den fur Deutschland nur eine gesamtdeutsche Regierung eingehen kann, andererseits aber Artikel I des Warschauer Vertrags besagt, dass die Oder-Neisse-Linie fur die Bundesrepublik Deutschland die westliche Staatsgrenze Polens bildet, so kann dies nur bedeuten, dass die Bundesrepublik zwar nicht die territoriale Souveranitat der Volksrepublik Polen uber die Oder-Neisse-Gebiete anerkennt, dass sie aber gegen die Ausubung der vollen Gebietshoheit des polnischen Staates in diesem Gebieten keine Einwendungen mehr erhebt."
Verdross et al. Note 200, supra, at p. 86.

210. Potsdam Agreement (Protocol), Part VIII, B.
CMND 1552, Doc. No. 13, p. 57.

211. This is also the opinion of Professor Skubiszewski:
"The Potsdam Agreement does not use the words "peace treaty", but uses the term "peace settlement", which seems to be a wider concept and does not exclude another method other than a traditional peace treaty."
Taken from private comments made with regard to this thesis, 26 June 1985.

212. CMND 1552, Doc. No. 7, p. 38.

213. Note 210, *supra*, at p. 49.

214. "In Article 7 the parties to the Deutschlandvertrag specify that what they have in mind is not a settlement imposed by the Great Powers but one which is "freely negotiated between Germany and her former enemies .... In other words, frontiers are no longer, in the view of the three Western Powers and the FRG, a subject to be regulated through unilateral action by the Big Four, but a matter to be negotiated with the participation and consent of the German Government and other Governments."
Skubiszewski, Note 13, *supra*, at 101.

215. Note 11, *supra*.

216. Note 180, *supra*.

217. 1969 8 ILM 679.

218. PCIJ Ser. A, No. 7, at pp. 28-29.

219. McNair, Note 55, *supra*, at p. 310;
Brownlie, Note 43, *supra*, at pp. 619-620;
Goralczyk, Note 65, *supra*, at p. 88.

220. N. Ascherson: The Polish August. London, 1981, at pp. 52-53.
Ascherson's view, that for Poland the most important factor was to gain unqualified recognition of the frontier by the FRG, is confirmed by Polish writers:
"There was only the problem of the attitude of the West German Government to the established and existing western frontier of Poland; the CDU/CSU Governments in Bonn had for 20 years refused to recognise this frontier, which excluded the possibility of any agreement and normalisation of relations between the two countries and made it impossible to eliminate that hotbed of distrust and unrest in Europe."
Sulek: The Normalisation Agreements of 1970-72 and European Security. 1972 13 PWA 219, at 236;

"Dla Polski fundamentem normalizacji bylo uznanie granicy na Odrze i Nysie".
- "For Poland the foundation for the normalisation was the recognition of the border on the Oder and Neisse." (My translation)
K. Skubiszewski: Zachodnia granica Polski w swietle traktatow.
(The Western Frontier of Poland in the Light of Treaties).
Poznan,1975, at p. 229.

The author discusses the evolution of the FRG position, from the conception of non-aggression to acceptance of the frontier, at pp. 228-237.

221. "Her Majesty's Government note with approval the initialling of the Treaty. They share the position that the Treaty does not and cannot affect the rights and responsibilities of the Four Powers as reflected in the known Treaties and Agreements."
Extract from Note sent by the UK Government to the FRG Government on 19 November 1970. Similar Notes were sent by the US and French Governments.
CMND 6201, Doc. No. 130, p. 229.

222. Sulek, Note 220, supra. Further explanation of the Polish perception of this problem is given at pp. 230-231.
Nicholas Bethell is correct to say that "...it had been a non-negotiable point on the Polish side to include in the treaty a statement that the Oder- Neisse Line 'is' the frontier between Germany and Poland" - N. Bethell: Gomulka: His Poland and His Communism, Harmondsworth, 1972, at p. 276.
But he is incorrect to say that Poland wanted the frontier settlement to be between "Germany" and Poland; such a formula would have contradicted twenty years of Polish policy on this issue. Poland's view was that there existed two German States, one of which had already recognised the Oder-Neisse line. Poland had never regarded West Germany as being able to act in the name of Germany under international law.

223. Ascherson, Note 220, supra, at pp. 98-100.

224. See p. 311, supra.

225. Gelberg, Note 29, supra, at 123; Fiszer, Note 29, supra, at 303.

226. Gelberg, Note 29, supra, at 123.

227. See pp. 297-301, supra.

228. The Preamble does contain the statement that the Parties desire "... to stabilise and consolidate mutual relations on the basis of the Potsdam Agreement which established the frontier on the Oder and Lusatian Neisse..."
It might be thought that, since the Parties accepted the Potsdam Agreement as the basis for their mutual relations, they would accept also that part of it which postponed the final delimitation of Poland's western frontier until a peace settlement. However, since Poland and the GDR are of the view that the Potsdam Agreement actually settled this issue, it may justifiably be said that the Zgorzelec Treaty contains no provision corresponding to Article IV of the Warsaw Treaty.

CHAPTER SEVEN

Problems of Nationality as a Consequence of the Territorial Changes in Poland and Germany in 1945

(i) Introduction

The title of this chapter indicates what should be stressed at the beginning. It is not proposed to deal with the general rules, be they international or municipal, relating to citizenship. The subject is not being considered as a separate issue; rather, it is discussed with regard to the particular problems which arose as a result of the mass movements of population and territorial alterations in central Europe (the former being, to a large extent, a result of the latter), especially with regard to the Germans - both Reichsdeutsche and Volksdeutsche.[1] The position of Polish citizens who, at least until 1939 and, in many cases, till 1945, had lived in that part of Poland which in 1945 was detached from Poland for the benefit of the Soviet Union,[2] will also be considered. The study then will deal essentially with the Poles and the Germans and will be presented in the context of the Polish and German (i.e., the FRG, the GDR and Germany) States, those States the frontiers of which form the main topic of this thesis.

There were at least two stages in which the Germans left the areas they had inhabited. First of all, there were those who were evacuated or fled voluntarily ahead of the advance of Soviet and Polish armies from the east.[3] Some of these may have left as early as 1944, but they may be classed as one category. Secondly, there were those who had remained in the German eastern territories and other parts of eastern Europe as they fell to the Allied forces, but who were

subsequently obliged to leave in accordance with Paragraph XII of the Protocol of the Potsdam Agreement. This provides, inter alia:

> "The three Governments, having considered the question in all its aspects, recognise that the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken. They agree that any transfers that take place should be effected in an orderly and humane manner."[4]

In other words, those Germans remaining in these areas were forcibly expelled. However, their legal status would be no different for present purposes from that of those who had already left because, had these individuals not left earlier, they would have been obliged to do so by virtue of the above decision.

Arguably, a third stage of mass population movement of Germans has occurred, though this was certainly not forced. This is the emigration from Poland to either the FRG or the GDR of Polish citizens agreed to be of German ethnic origin, by mutual agreement of the States and Red Cross organisations involved and on an individual basis, i.e., each individual or family made a separate application which was given individual attention. Thus, while the numbers were such as to constitute a mass movement, amounting to several hundred thousand,[5] in fact the decision whether to move to another country from Poland was taken not by that State, but by the people affected. It was open to them to remain in Poland.[6] While there may exist interesting questions with regard to the citizenship of these people, by far the more important is the former category:

those who were obliged to leave as a result of the execution of the Potsdam Agreement.

There remain other categories of Germans: Volga Germans who were forced to move within the Soviet Union[7] and full German Citizens who were deported to, or obliged to remain in, the Soviet Union for extended periods amounting on occasion even to ten years or more.[8] Questions which arise with regard to these people relate perhaps more to the legality of their detention and treatment in the Soviet Union rather than what particular citizenships they may possess. They will form no further part of this discussion.

The citizenship status of the Poles is less complicated. The study will be restricted to those born in what was eastern Poland between the wars and is now part of the USSR, and those born in the Oder-Neisse territories and the southern part of East Prussia. It does not concern itself with those living outside Poland who have lived in Poland at some time and who possessed Polish citizenship yet failed to renounce it (or to gain the consent of the relevant Polish authorities to such renunciation.[9]). Nor does it deal with their descendants, who may have acquired Polish citizenship through the jus sanguinis,[10] which is possible under Polish citizenship law.[11] Theoretically, any person possessing Polish citizenship may not be recognized as having another citizenship.[12] Because Poland of course cannot regulate the conferral of citizenship by other States, cases arise where persons of Polish citizenship may possess another citizenship. This may be voluntary or by automatic operation of law. Thus, people born outside Poland, at least one of whose parents is a Polish citizen, may acquire the citizenship of the host country and of Poland. This was particularly easy in, for instance, the United

Kingdom, where, until the entry into force of the British Nationality Act, 1981, citizenship was generally accorded by operation of the jus soli[13] principle.[14] The problem for such dual citizens is that, in Poland, they could be treated as Polish citizens and therefore forced to perform military service or prevented from leaving the country. Such cases have been recorded in the past,[15] but it has to be said that, as far as Poland is concerned, those most at risk in practice are persons who have actually lived in Poland but then acquired a foreign citizenship while abroad, rather than those born outside Poland to Polish parents, who would appear to enjoy some kind of de facto immunity, even to the extent of being able to visit Poland using foreign passports.[16]

These cases have been mentioned because they raise issues of real legal significance and deserve to be mentioned in any look at the operation in practice of Polish citizenship law insofar as it may affect other States.

Before discussing the citizenship issues relating to the Oder-Neisse territories and Germany, mention should also be made of the present writer's general perception of the matter.

(ii) Historic Rights or Recovered Territories?

The Germans and the Poles would appear to have much more in common than many of them would, perhaps, like to believe. On both sides there exists, at least in certain circles, an inability to view their common past through any but the most nationalistically-tinted glasses. This tendency finds its apotheosis in the debate about disputed territories, areas where both nations[17] have maintained a presence over extensive periods. Unfortunately, this bigotry finds its way even

into legal analyses of this matter. This is not surprising if one happens to consider that international law is not to be studied as if in a vacuum, but rather ought to be related to its historical-political-economic context. This writer believes that a greater understanding of the law will be achieved by looking at it in the wider context of its development. However, it is suggested that the wider context - the reference to historical and political factors in support of one side's case - is exactly what has been used deliberately to obscure relevant facts which might influence a legal analysis. In particular, since 1945, the insistence by West Germans of the Germans' "historic rights" to the eastern territories and the absolute confidence of official Poland and many of its apologists that Poland has finally "recovered its territories" in the west, all serve to obscure, by gross over-simplification, the history of territories which, in truth, have a far more complex past. Indeed, the proposition could be defended that they have never been entirely one nor the other.

The present writer has deliberately avoided undertaking, for the purposes of this thesis, detailed study of the history of these territories because, in the first place, the year 1945 provides a clear critical date (because of the assumption in that year by the Four Powers of supreme authority with regard to Germany and the Agreement reached at Potsdam concerning the right of Poland to administer "former German territories" and the expulsion of the Germans from these territories). These measures were, legally, quite independent of any pre-war legal regime in that area and were legally binding on all the parties, plus Germany (and Poland accepted the arrangements[18]). In the second place, to enter into the pre-1945 history of these territories (from the point of view of clarifying their legal status) is to enter an endless cave without the option of

turning back. The point is that such research may indicate that, pre-1945, one side or the other had a stronger claim. But, it is suggested, this would not be decisive; and even if it were decisive, the events of 1945 mentioned above were so radical that they would take precedence, in terms of the legal weight to be attached to them, over whatever title existed in 1945 prior to the end of the war, or, indeed, prior to 1939.

These issues are being discussed here, rather than in one of the chapters devoted specifically to territory, because they are particularly relevant to the issue whether or not there exists a Recht auf die Heimat.[19] And, if there is such a right, does it extend to those who were expelled as a result of the measures adopted in 1945? The Recht auf die Heimat is essentially concerned with the relationship of people to the territory which they inhabit; thus the expulsion of the Germans, the question of their nationality and citizenship status, and the question of any connections which they may have to these territories, are all related. Nevertheless, if there does exist a Recht auf die Heimat, it must be established in light of the measures taken after World War II concerning Germany and the Germans.

There is no shortage of writers who have sought to reinforce legal arguments by playing the history card. The one thing which seems to be common to all is that they choose to present the history of these territories in such a way that little, if any, room remains to take account of the legitimate claims of the other side. For instance, the Director of the Gottingen Research Committee felt able to claim that "....these provinces have been a part of Germany since time immemorial and their inhabitants German according to language and

civilization."[20] For him this was beyond question; the reader was not invited to consider to what extent they really were, or had been, German. Such was his enthusiasm for the greater glory of Germany that he even described the Free City of Danzig as part of German territory.[21] He also claimed that the FRG was so altruistic that, acting "in the interest of the free world", it called "for the return of those territories belonging to it."[22] In other words, the FRG, in addition to purporting to speak on behalf of all Germans, also claims to act on behalf of "the free world", whatever that may be.[23]

Another writer who is guilty of presenting a one-sided historical view of this problem is de Zayas. In his book about the expulsions,[24] he writes about the historical presence of the Germans in the relevant areas. This writer is not questioning the accuracy of his statements about the German presence; rather, it is the absence of discussion of the Polish presence which may mislead. For example:

> "It is difficult to convey to people unfamiliar with German tradition and attachment to the soil the emotional meaning of the loss of the ancient German provinces east of the Oder-Neisse Line ....."[25]

Had the Germans not displayed such a deep attachment to the soil of other States from 1938 onwards, they might never have incurred the losses which obviously cause such deep distress to Dr. de Zayas. De Zayas cannot be defended from the charge that he abuses history to help justify legal arguments, on the ground that his book is primarily historical. He clearly attempts to deal with legal issues

related to the Oder-Neisse territories and the expulsions. While his book is about the expulsion of the Germans, to omit almost any reference to the Polish presence is to give the impression that these areas were exclusively German.

Having said this, it is appropriate to stress that most writers who have discussed German citizenship and the expulsions have sought to examine the legal issues without necessarily mentioning the view that the relevant territories and populations had been exclusively German.

In Polish legal literature, there exists also a substantial number of references to the history of the problem, in describing the areas as the "recovered territories." In fact, the term has been employed regularly throughout the post-war period, and adopted officially by the Polish Government, as is shown in the following examples.

Thus Bolestaw Wiewiora, one of the leading Polish experts on Polish-German issues under international law until his death in 1963, describes these territories as having been returned to Poland, after their seizure centuries before, thanks to the historic decision taken at Potsdam with regard to the Polish-German frontier.[26] He elaborates on this later in the same work:

> "One has to stress, though, that the lands which Poland was given in the west and in the north were not at all lands strange to us. Poland has historic rights to these lands. They were lost to Poland as a result of centuries of German expansion, carried out under the slogan

"Drang Nach Osten."[27]

There can be no doubt that the writer claims on behalf of Poland some form of legal title based on previous rights enjoyed by that State with regard to these territories.

According to Wiewiora's colleague, Professor Alfons Klafkowski, it even became official Polish policy to define these lands as recovered territories:

> "Poland regained her Western Territories under the provisions of the Potsdam Agreement .... The lands returned to Poland in 1945 were officially defined as Recovered Territories. The name implies a return to the mother country of territories which in the course of history have suffered the vagaries of fate, as is frequently the case with border lands."[28]

The Oder-Neisse territories and the southern part of former East Prussia form about one-third of contemporary Poland. Some might therefore feel that it is stretching a point somewhat, even if one accepts Klafkowski's definition, to describe this area as "border lands". It is perhaps just possible that, in view of the large areas which have formed the basis of territorial disputes, the term can be justified.[29]

Official approval of the idea of recovered territories can actually be found without great difficulty. The then Polish Foreign Minister, in a speech to the Polish Parliament, described them as such in a speech in 1972 concerned with the

ratification of the Warsaw Treaty:

> "Wroclaw, Szczecin and Gdansk have again become Polish cities. The Polish population living in the Mazury region, on the Oder river and the Baltic, subjected for for centuries to Germanization, returned to its Motherland."30

Even Manfred Lachs discussed the historic Polish links with these territories, though he avoided describing them as "recovered" and was more circumspect about the significance of these ties.[31]

A more dubious claim is made by Jasica, who maintains:

> "There was a deep conviction among the whole Polish people, expressed also by the Polish Government in Warsaw, the Polish Government-in-Exile in London, and by the Polish Roman Catholic Church as well, based on history, but first of all on the decisions of the Yalta Conference, that the territories east of the Odra and Nysa Rivers were due to Poland and that, therefore, the Polish armed forces and their Soviet allies did not conquer enemy territory, but regained Polish territories; at the beginning they were even called "Regained Territories."[32]

While it is possible to picture Mikolajczyk, Bierut and Gomulka possessing such thoughts, it is less easy to imagine two inhabitants of Warsaw, trying to survive in

their ruined city, discussing the finer points of the issue whether or not Szczecin had ever been a Polish city. A greater incentive towards finding the Polish character of these areas would, of course, have been provided by the knowledge that nearly one-half of pre-war Poland was to become a part of the Soviet Union.

As with writers who favour a "German" interpretation of the legal status of the Oder-Neisse territories, there are many Polish writers who do not play the history card and who concentrate on the study of aspects of the problem more amenable to legal assessment. Nevertheless, the reader is frequently confronted by purported legal analyses which seem to claim a monopoly of legal rights and the truth - both on the West German and the Polish sides. This writer considers that these contradictory claims serve only to support the proposition that the problems of nationality and expulsions, if considered in the pre-1945 context, will remain insoluble.

In terms of their past, and the question, whether the Oder-Neisse territories are really Polish recovered territories or subject to the historic rights of the Germans, the only fair conclusion is that they are neither one nor the other; or perhaps they are both. The same may be said for some of the people who live in contemporary Poland where there were substantial German populations until 1945, and for some of those who left for Germany.[33]

The better approach then, it is suggested, is to be concerned only with the legal aspects of the issues which will be considered, wherever possible. Associated issues of a non-legal character will be considered only if essential to a clear legal conclusion in specific cases.

(iii) The International Character of Nationality

The traditional, and widely accepted, view is that nationality and questions relating to it are a matter for the exclusive jurisdiction of each State. It was up to each State to decide questions of nationality for itself. This view was expressed by the Permanent Court of International Justice as early as 1923:

> "The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain."[34]

A matter solely within the domestic jurisdiction of a State was not regarded by the Court as necessarily involving only one State:

> "The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law. As regards such matters, each State is sole judge."[35]

The right of each State to decide its own rules relating to nationality was confirmed in the Nottebohm Case:

> "It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality..."[36]

This state of affairs has found widespread support among writers. Weis describes this attribution to the domestic jurisdiction as being recognized both by customary and conventional international law; it is, furthermore, "an essential element of [the State's] sovereignty."[37] Oppenheim also mentions that it is for municipal, not international, law to determine who will be considered a subject of a State.[38] The proposition, as far as it goes, would appear to be generally accepted in the West and would appear to enjoy strong approval in the USSR too.[39]

Two qualifications must be made to this apparently generally accepted rule. First of all, it is not actually accepted universally. Professor Brownlie, in particular, considers that there exist "compelling objections of principle to the doctrine of freedom of States in this context."[40] At the risk of over-simplification, it may be said that Professor Brownlie argues convincingly that the obligations incumbent upon all States under general international law are such, that it is rather the case that States cannot have exclusive control over questions of nationality; that to have such control would indicate a certain immunity from international law and an ability to ignore and impinge upon the equal rights of other States. In other words, to stress the exclusive jurisdiction of States is to mis-state the position.

The second qualification to the general rule is one mentioned invariably by writers who state the general proposition. They then go on to argue that

nationality is a concept of both municipal and international law, and that its international character has the effect of limiting the international freedom of States to regulate matters of nationality,[41] or of limiting the obligation of other States to recognize the attribution of nationality (because of a breach of international legal limits on the freedom to determine nationality).[42] Attempts to justify the general proposition of exclusive jurisdiction while acknowledging the existence of internationally effective curbs on freedom of action can even lead to confusion and contradiction. Randelzhofer seems to suffer particularly badly. On the one hand, he considers that "the freedom of States to regulate their nationality is today somewhat more restricted by rules of international law than it was in 1923/43; on the other, he states that the "validity of the conferment of nationality in municipal law is in no way limited by international law."[44]

These two statements cannot be reconciled, unless they are interpreted to mean that, within its municipal jurisdiction, the State enjoys complete licence to regulate its citizenship, but that any measures which it takes may not necessarily be entitled to recognition in the international arena, if they breach the rules.

Such an interpretation makes a nonsense of the international law relating to nationality. It is a rule of international law which provides that States have the right to decide upon matters of citizenship. To then argue that, therefore, international law has no effect upon the actions of States when they are regulating citizenship matters is to render meaningless the rules of international law applicable to this matter. It is also the case that the State regulates its citizenship because it is the sovereign - i.e., no other State can regulate its citizenship. But, while each State is entitled, under international law, to enjoy

freedom from interference by other States in the conduct of its internal affairs, it is not entitled to enjoy freedom from interference by international law. As a State, it is inherently bound by certain rules,[45] such as the rules of universal customary international law. The proposition can be defended that, were a State to adopt legislation purporting to attach its citizenship to persons with no cultural, ethnic or domiciliary connection to it, such measures would, or could, constitute an infringement of the sovereignty of other States. Such considerations highlight the conflict involved between the freedom of a State within its municipal jurisdiction and the limitations imposed upon it by international law. But even if a State can have a citizenship law, valid within the domestic jurisdiction, which is nevertheless outwith the conditions imposed by international law, is this necessarily an argument for saying that the citizenship law should therefore be subject to international law? Or is it not more an indication that greater clarity is required in defining the relationship of international law to municipal law, and the need, if such a need be perceived, of obliging all States to ensure that municipal laws, to enjoy municipal validity, must be in conformity with international law?

Despite such conflicts, which may not be solved, it is possible that the relationship between international law and municipal law can be regulated relatively satisfactorily.

The flexible approach, in such a situation, seems to reflect more accurately the relationship between municipal and international law in matters of nationality:

> "Nationality is not capable of performing a role confined to the reserved domain or the realm of state relations: in principle it has two aspects, either of which may be dominant, depending on the facts and type of dispute."[46]

Weis, while acknowledging the legislative competence of the State in matters of nationality, acknowledges that a State can be limited in its freedom of action by its own treaty obligations,[47] and by "the principles and rules of customary international law,"[48] which include conditions for the acquisition and loss of nationality which a State may impose and rules for the solution of conflicts of nationality laws and determination as to nationality in doubtful cases.[49] Nevertheless, while regarding such rules as having validity in international law, Weis maintains the supremacy of municipal law, as far as the acquisition and loss of nationality are concerned, within the domestic jurisdiction of the State: thus a State will be internationally liable if its nationality law fails to conform to its international obligations. But the municipal law remains valid, though unlawful.[50]

Frequently discussed in the context of this problem is the Convention on Certain Questions Relating to the Conflict of Nationality Laws,[51] adopted at The Hague in 1930. While this is of limited authority in establishing the status of the rules it incorporates,[52] Article 1 does indicate the problem of the fact that, while the State confers nationality;, the obligation upon other States to recognize the act of the conferring State is limited:

> "It is for each State to determine under its own laws who are

> its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

The limits imposed by international law are very clearly set out, but the problem remains that, even within the Convention, the jurisdiction of the conferring State is not limited; limitations exist only vis-a-vis other States, such as the now well-established rule that a State cannot afford diplomatic protection to one of its own nationals against a State if its national also possesses the nationality of that State (Article 4). While the second sentence of Article 1 may detract from the international legal validity of questionnable nationality regulations, can it really be said that the principle of autonomy is thereby deprived of its integrity?[53] It might be argued, though this writer would not necessarily do so, that, by indicating the limited duty of other States to recognize citizenship laws, the Convention thereby acknowledges the fact that a State does not need to have the recognition of other States for its citizenship law for that law to enjoy validity within the State; in other words, at least for some purposes, the integrity of the principle is maintained despite the limited obligation of recognition by other States.

The strength of the proposition that matters of nationality belong to the competence of each State, and the extent of its acceptance, however qualified, are perhaps reflected in the fact that even those who criticize or modify the proposition very often start their account of the position by stating it. Despite the qualifications which must be made in establishing the international legal

significance of the rule, it does contain an element of truth that withstands attack. All States do regulate their nationality, though this has certainly not been the case since time immemorial. The right to regulate it is not questioned. It is where the exercize of the right goes beyond the limits which preserve the sovereignty of other States that it is subject to international restriction.

Such a proposition is no more than a statement of the preceding analysis. The State is bound by rules of municipal law and international law. Taken together, the sum of rights and duties which are applicable would mean that the municipal law had to conform to the obligations existing vis-a-vis other States. It is only by separating the jurisdictions from each other completely that the distinction can be maintained. Certainly, if the State wishes its nationality law to be effective in the international arena, it will need to ensure that it is compatible with international customary law and other generally recognized principles.[54] The State will be answerable, moreover, under international law for its acts which have international effect, including those connected with its nationality; that much is clear from the Nottebohm case:

> To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court."[55]

The discussion of the extent to which the rules relating to nationality fall within the domestic or international jurisdictions shows that, in conjunction with the right of each State to regulate its citizenship, there are limits imposed by

international law upon this freedom which come into play whenever problems arise between States with regard to nationality. This is of great significance in the case of Germany, as will be shown below.

(iv) Nationality in the FRG and the GDR in the Context of Germany as a Whole.

It is necessary to go back even beyond 1918 to find the origins of the contemporary state of affairs of German nationality. In 1913, the German Reich enacted a nationality law, the Reichs-und Staatsangehorigkeitsgesetz.[56] Thus its territorial scope included not only the whole of pre-war Germany but also large areas of territory which became part of the Polish State after World War I as a result of Poland's independence and the provisions of the Versailles Treaty, Prussian Poland, as it were.[57]

The nationality law entered into force on 1 January 1914[58] and, at first provided for two categories of German citizen: citizenship of a federal State or direct imperial citizenship.[59] Federal citizenship applied mainly to those born to parents having German citizenship, whether within the Reich or outwith it. Imperial citizenship was reserved for other categories, such as aliens in German colonies or natives of such colonies, former German citizens not resident in Germany[60] and certain aliens employed in the imperial service.[61] In such cases citizenship was not automatic but could be granted on application. Dual citizenship was generally not permitted but possible in certain cases.[62] The whole situation was further complicated by provisions relating to the acquisition and loss of other federal citizenships within the Reich.[63]

However, the position was simplified somewhat by the Ordinance of 5

February 1934 concerning German Nationality. This abolished the separate citizenship of each German Land and established a single German citizenship.[64] Various other amendments were made during the 1930s, the purpose of which was to remove from certain categories of person the status of and entitlement to German citizenship, though other States did not always accept fully these changes.[65]

It should also be mentioned at this stage that, following the establishment of the Polish State, the territorial scope of the German nationality law was reduced in accordance with the reduction in the Reich's area. The Versailles Treaty of Peace between the Allied and Associated Powers, on the one part, and Germany, on the other, provided, inter alia, at Article 91:

> "German nationals habitually resident in territories recognized as forming part of Poland will acquire Polish nationality ipso facto and will lose their German nationality."[66]

Thus international regulation of its citizenship law was agreed to by Germany at this stage, if only for restricted purposes. Article 91 also imposed a requirement that German nationals who had become resident in these territories only after 1 January 1908 should obtain special authorization from Poland before they could acquire Polish citizenship. There also existed, for a temporary period of two years, various rights of option for another nationality, depending on the individual's place of habitual residence. Article 91 applied also to Upper Silesia; however, it came into force for that area only after the definitive distribution of the relevant territory following the plebiscite which was held there in 1921.[67]

Poland was also left with international obligations concerning the regulation of its citizenship after Versailles. It concluded a peace treaty with the USA, the British Empire, France, Italy and Japan.[68] This was done in accordance with Article 93 of the peace treaty between Germany and the Powers. Articles 3-6 dealt with the acquisition of Polish nationality by persons resident in Poland possessing different nationalities. Again, it was open to such persons to opt for another nationality, though if they did so they usually had to leave for the State whose nationality they had chosen.

After Versailles, therefore, the position was that persons born on Polish territory which, in 1913, had been part of the German Reich, no longer acquired German nationality, because the German citizenship law had ceased to apply to these areas. They became Polish. Germany, then, became the Germany which existed within the frontiers of December, 1937, i.e. prior to the territorial expansion which occurred before and during the Second World War. Until then, the German nationality law did not as a rule confer nationality on individuals born on Polish territory.

After the defeat of Germany in 1945, by which time the territorial scope of its nationality laws had been further extended to include areas incorporated into the Reich, as well as persons of German origin living in other parts of Eastern Europe,[69] all of which acts (annexation during the conflict and overriding the municipal laws of the States concerned) could be regarded as unlawful in that they appear to have been in violation of the Hague Convention No. IV concerning the Laws and Customs of War on Land, some elements of the German citizenship

law were repealed by the Allies, including the law of 15 September 1935 on Reich citizenship.[70]

At this point there remained extensive German populations in the territories east of the Oder-Neisse line which were controlled by the Poles, as well as in Hungary and Czechoslovakia. Most of these were transferred to the areas under Allied occupation in accordance with the Potsdam Agreement. There remained thousands of German citizens in Poland (i.e., Poland within the post-1945 frontiers), though many of these did eventually leave for Germany.

As is known, the Allies did not annex Germany; it continued to exist as a State. Therefore, the inhabitants of Germany retained the citizenship of that State. This was uniform throughout the four zones of occupation and remained so at least until 1949. It might have been thought, and with good reason, that following the creation of two new States in 1949, they would each have adopted their own citizenship legislation. However, neither West nor East Germany did so. The law of 1913 would appear to have remained in force in both States from 1949 until 1967, though the GDR did in the meantime enact laws which referred to citizens of the GDR, while the FRG has also added to the 1913 law. That is not to say that the law has been applied uniformly in the GDR and the FRG.[71]

(v) <u>The GDR and German Citizenship</u>

With the creation of the GDR in 1949, a constitution was adopted which claimed that there was only one German nationality - <u>Article 1 (4)</u>. The GDR claimed to be the only representative of the German people and purported to act on its behalf in international affairs.[72] This much it shared in common with the

Federal Republic. But at some point the GDR leadership started to develop a policy of separation from the other German State. This was developed, as far as internal legal measures were concerned, with the adoption of a separate citizenship law for the GDR in 1967.[73] It is widely considered that the catalyst which made the adoption of such measures feasible, through the consolidation of unimpeded State control in the GDR, was the construction in 1961 of the Berlin Wall.[74] The 1967 law has actually been described as the main de jure event of the separation of Germany.[75] It certainly made quite clear to the world that the GDR saw itself as a separate entity from the Federal Republic. But the legal separation has been taken a stage further by the 1974 Constitution of the GDR.

According to the 1967 law, citizenship of the GDR came into existence with the founding of the GDR.[76] It covered mostly persons who were German nationals at the time the GDR was founded and who had their domicile or regular abode in the GDR and had not lost their citizenship in the meantime,[77] plus persons of German nationality at the time of the founding of the GDR who, having their domicile or regular abode outside the GDR, had voluntarily been recorded as GDR citizens by the competent authorities.[78]

Dual citizenship is not specifically prohibited, but the GDR will not permit its citizens to assert towards it any rights or duties arising from the citizenship of another State.[79] In theory, this is not as exclusive as the equivalent Soviet provision, which provides that Soviet citizens will not be recognized as belonging to citizenship of another State,[80] nor is it as strict as the Polish law, which provides that a Polish citizen cannot simultaneously be recognized as a citizen of another State,[81] but the effect would be the same, viz., to deny to the dual national

the opportunity to be treated as a citizen of his second State while in the GDR. This is accepted practice, but could have harsh effects upon individuals who have acquired the GDR citizenship through operation of GDR law, yet have few actual links with that country.

The law came into effect upon proclamation[82] and simultaneously repealed several other laws and decrees concerned with nationality, including the 1913 citizenship law plus all its remaining valid amendments and supplementary regulations.[83] Thus there can be no doubt that the 1913 law was applicable in the GDR. In other words, in 1967, the GDR formally renounced, by its repeal, the 1913 law, which provided for one German citizenship, and adopted a new, quite separate, citizenship. The provisions of this law clearly were intended to differentiate the citizenship status of the inhabitants of the GDR from that of the FRG population, to establish the link between the East Germans and the GDR and to break the link with Germany as such, and thereby any possible connections with the Federal Republic.

Yet the links with the past were not entirely severed. A new constitution was adopted the following year, in which the GDR clearly asserted its separate identity, yet nevertheless acknowledged some form of relationship to Germany, though not necessarily a legal one. The GDR described itself as a socialist State of the German nation;[84] again, a commitment towards unification of Germany, admittedly on the basis of "democracy and socialism",[85] was specified. However, this constitution was substantially amended in 1974. Gone from the Preamble and the first part of the constitution are the references to the German people and the German nation. The GDR is no longer a socialist State of the German nation; it is a

socialist State of workers and farmers.[86] Article 8 (2) of the 1968 version, describing the aims of fostering normal relations with the FRG and working towards unification, has disappeared completely. This is a consequence of the conclusion by the two States of the 1972 Treaty on the Basis of their Relations, in which the Federal Republic finally acknowledged, while reserving its position on the German question, the separate existence as a State of the GDR.[87] According to the GDR interpretation, the FRG has finally recognized that the two States are quite separate and this is reflected in the 1974 amendments, which show the culmination of the development by the GDR, both internally and internationally, of its separate existence as a State. Given that every State has the right to its own citizenship, by recognizing the GDR as a State the FRG has also recognized this right.

It is possible that a link remains between the GDR citizenship and German nationality. It has been suggested that, under Article 1 (a) of the 1967 law, the GDR citizenship is derived from the German nationality:

> "A citizen of the German Democratic Republic is anyone who
> (a) was a German national at the time of the founding of the
> German Democratic Republic ...."[88]

But the writer correctly adds that GDR citizenship was deemed to be retroactive to the creation of the Democratic Republic in 1949. Such an arrangement would be consistent with the policy that Germany had ceased to exist in 1949, and that the GDR was a successor State vis-a-vis Germany. As a successor State, its inhabitants, in the absence of specific agreements otherwise, would have acquired the

citizenship of the new State at the moment of succession, i.e. the population would follow the change of sovereignty.[89] Weis is reluctant to support the change of nationality by automatic process of law from the old State to the successor State where the former has been totally extinguished[90] (the view of the GDR); however, the GDR clearly regards its citizens as having acquired its nationality in this way.

Therefore, according to its own interpretation of the legal status of Germany, the GDR regards its citizens as possessing GDR citizenship only. While they did at one time possess German nationality, this is no longer the case because there is no German State in existence; nor is there any link between the GDR citizenship and that of Germans who are citizens of the Federal Republic.[91] The GDR is, of course, entitled to decide for itself how to regulate its citizenship, but this freedom, apart from any limitations which may exist with regard to its right to act domestically without external interference, is certainly limited in the international arena. Apart from the general conditions imposed by international law, States which continue to regard the State of Germany as still existing, even if only for very limited purposes, may also regard that State as having citizens. These might be all persons regarded as German under the German nationality law of 1913 as amended by the Control Council. They could possess two German citizenships - one for the GDR and one for Germany. In the event of a unification of the GDR and the FRG and the creation of a common citizenship for the new State, because the united State would not be identical with the surviving German State, the population would continue to have two citizenships, though that of the "old" Germany would cease to exist when that State itself ceases to exist.

While it is possible that the USSR has estopped itself from maintaining the existence of the all-German nationality (since it regards Germany as having ceased to exist), such a situation would, in the view of this writer, have developed in breach of the joint rights and duties shared by the USSR with the three western Powers, including the right to alter the status of Germany by joint action. While the three Western Powers may not have accepted the unilateral Soviet limitation, or alteration, of the joint capacity, and although the USSR has recognized the continued existence, in principle, of Four Power capacity (in the joint statement made by the Four Powers with regard to the application by the FRG and the GDR for admission to the United Nations Organisation),[92] nevertheless a situation of conflicting obligations has arisen, founded on the fundamentally different perceptions of East and West about the German situation as an issue of law and politics. The Soviet Union might be said to regard the Four Power capacity as continuing to exist only on the territory of the FRG and the GDR, while aspects which have not been fulfilled as intended (in particular, the conclusion of a peace settlement) have in practice been regulated on an ad hoc, often bilateral, basis, are awaiting the conclusion of a peace settlement with the FRG and the GDR after they have unified, or are simply no longer relevant. In this context, the USSR recognizes only one nationality for the GDR - the DDR Staatsburgerschaft, as provided for in the law of 1967, and a second, legally distinct, nationality for the citizens of the FRG.

The three Western Powers have all recognized the GDR as a State. This they did following the conclusion of the Grundvertrag. The UK would appear to have recognized it by the sending of a telegram from the Foreign Secretary to the GDR Foreign Minister on 22 December 1972,[93] and diplomatic relations were

established on 8 February 1973.[94] Diplomatic relations were established between France and the GDR the following day, 9 February 1973, while the USA waited until 3 September 1974 before making the leap.[95]

Having recognized the GDR, the Western Powers also of course recognized the GDR citizenship. Hitherto, this had not always been the case. The GDR had been regarded not as a State but as the Soviet zone of occupation in Germany. Its acts had, to some extent, been given effect in the UK on the premise that it was acting on behalf of the USSR, i.e. it was subordinate to that State, the authority of which in and over the GDR was recognized by the UK.[96]

The GDR passport was not acceptable for travel to many western countries for a substantial period - firm evidence of the refusal by these States to recognize the GDR and its citizenship.[97] However, these States had already made it clear at a NATO ministerial meeting in 1972 that, despite the developments in Germany, all the rights and responsibilities of the Four Powers would continue.[98] This means that the GDR citizenship must have been regarded as existing simultaneously with whatever kind of German nationality its inhabitants possessed through Germany as a whole.

The question might legitimately be asked, what is the practical effect of this apparent dual nationality? On the territory of the GDR, there is no effect; the GDR does not recognize it anyway. The Western Powers themselves do not actively promote any all-German nationality; their action is restricted to maintaining nationality by implication from their all-German policy: Germany exists, for certain purposes, but is not active, except perhaps through the manifestation of

all-German statehood which occurs in the exercise of Four Power rights and responsibilities in limited areas. The only active citizenship for citizens of the GDR at present, therefore, is the GDR citizenship. Their all-German nationality is a real one which exists in a potential condition. This view, however, is not shared by the USSR. Furthermore, while present geopolitical circumstances persist, it is most unlikely that the political will may arise to bring about any alteration in the legal status of Germany and, consequently, its nationality.

(vi) The FRG and German Citizenship

There is, in a sense, no West German citizenship as such - or so each West German Government would have the world believe. But there is a law governing citizenship and nationality in West Germany. This is an amended version of the 1913 law, similar to that which existed in East Germany until 1967. But the difference ends there. While, in the GDR, the policy of treating the GDR as a successor State of the defunct Germany was developed during the 1950s,[99] and the retention of the 1913 law to regulate citizenship became a legal and political anomaly which was eventually remedied, with retroactive effect, in 1967, in the FRG on the other hand the retention of the 1913 law represented a manifestation of a quite different legal assessment of, and political stance towards, the status of Germany, which, though it never enjoyed the support of any of the Four Powers as far as the legal aspects were concerned, nevertheless received substantial political backing. This was of course the FRG claim to being identical with Germany.

The FRG also came into being in 1949 with a constitution. This was the Basic Law (Grundgesetz) of the Federal Republic of Germany.[100] It was promulgated by

the Parliamentary Council on 23 May 1949 and, with various amendments, remains in force to the present day. The Grundgesetz contains certain provisions relating to nationality and these must be taken into account along with the 1913 law. First of all, power to legislate on citizenship in the Federation is vested exclusively in the Federation.[101] This is not in itself of great significance internationally, except that it enables third parties to rely entirely on the authority of the Federation in nationality issues. Article 16 deals with deprivation of citizenship, but most important is Article 116, which provides:

> " (1) Unless otherwise provided by law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock (Volkszugehorigkeit) or as the spouse or descendant of such person.
>
> (2) Former German citizens who, between 30 January 1933 and 8 May 1945, were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall be regranted German citizenship on application. They shall be considered as not having been deprived of their German citizenship if they have established their domicile (Wohnsitz) in Germany after 8 May 1945 and have not expressed a contrary intention."

While the 1913 law as amended remains valid today, it must be read in conjunction with the Grundgesetz Article 116(1). Although the Basic Law applies only within the territory of the Federal Republic,[102] provision is made for it to

apply to "other parts of Germany ....on their accession." But it purports to apply to many more Germans than just those in the Federal Republic; it covers all Germans within the territory of the Reich as it existed on 31 December 1937 who had been admitted as refugees or expellees (plus their spouses and dependents) in addition to the normal category of German citizens, which, under the 1913 law, included at least all Germans living in the Germany of 31 December 1937. What this means is that any citizens of the GDR who succeed in reaching FRG territory will be entitled to citizenship. In fact, they will possess it automatically, but will not be obliged to be treated as such at least since the conclusion of the Grundvertrag in 1972; they may, if they wish, enter the FRG and remain there as GDR citizens.

The essence of the FRG policy is that it continues to regard the 1913 law as providing one German citizenship for all Germans, whether in the Federal Republic or the Democratic Republic.[103] This is a direct consequence of the FRG policy that Germany continues to exist, and, furthermore, that the FRG and Germany are identical, or partially identical.

In the opinion of the Federal Republic, Germany survived the defeat of 1945 and continued to exist as a subject of international law.[104] The GDR was regarded not as a State but as some kind of puppet institution set up in the Soviet zone of occupation.[105]. Not being a State, the GDR could not grant its citizenship to its population, who remained, in the eyes of the FRG, Germans under the old German citizenship law, as described in Article 116(1) of the Grundgesetz.

Article 116(1) also classifies as Germans persons who have been admitted to

the territory of the Reich within its 1937 frontiers. This has been interpreted by a Dutch court as "not a provision on citizenship but a rule relating to certain foreigners, designed to grant a special status to these groups in order to safeguard their persons and their property."[106] But this provision does purport to give to such persons all rights available under the Grundgesetz to German citizens. These include, in Articles 1-18, substantial basic rights, which are available to all the persons covered by Article 116 (1) (subject to the effective territorial limitations of Federal authority). Germans who are not German citizens are in effect accorded all of these rights, which are directly enforceable.[107] Even if Article 116(1) is not a provision on citizenship, it may fairly be said that its effect is to accord rights which, together, are akin to that status. Article 116(1) has been described as introducing, instead of the distinction between national and foreigner, a kind of gradation beyond that of German national, to include also "German" - what the writer describes as a kind of antichamber (une sorte d'antichambre) of German nationality, including disparate groups of people with German connections, many of whom have actually acquired German nationality later.[108]

The FRG citizenship law is an expression of its Deutschlandpolitik. It claims to be identical, legally, with the German State which survived after 1945.[109] This claim has never been accepted by any of the Four Powers, and it must not be forgotten that it is these States, and not the Federal Republic, who have the right to decide upon the status of Germany in accordance with their supreme authority. The closest that the Western powers ever came to acknowledging any all-German capacity of the FRG was the following statement:

> "Pending the unification of Germany, the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs."[110]

This was no more than political support. It is certainly not necessary for a government to be freely and legitimately constituted to be entitled to speak for a people in international affairs. Besides, the FRG Government had received no support from the population of the Soviet zone of Germany. The statement of course should be taken in its context, which was that both the FRG and the GDR were competing to gain recognition as "the" German State, one supported by the Western Powers, the other by the USSR.

Mention should be made of the fact that the Western Powers did actually approve the Grundgesetz, and impose certain amendments, before it was allowed to come into effect. They therefore may be deemed to have approved of the definition of a German contained in Article 116(1). The fact that they did not amend Article 116(1) indicates that they did not perceive it as impinging upon the separate status of Germany itself, for which they were responsible. Thus they refused to agree that Berlin, or West Berlin, be included as a Land in the initial organisation of the Federal Republic.[111] Despite the differentiation of Berlin from the other Lander, it has been included in the Grundgesetz.[112] In fact, not only West Berlin, but Greater Berlin, is included. Berlin is, however, treated quite separately from the other Lander.[113]

The FRG continued to accord its nationality according to the 1913 law because it regarded itself as being identical with Germany. If the two were identical, then their citizenships were also identical under Federal law. In fact, the Federal Republic failed to differentiate between the two:

> The German Empire, continued by the Federal Republic of Germany, was the only German State, which in law, though not in fact, had jurisdiction over the whole of Germany and its population."[114]

This was the position in West Germany until the conclusion of the Grundvertrag with the GDR in 1972. It meant that Germans in the sense of Article 116 (1) included all inhabitants of the GDR plus an uncertain number in the Oder-Neisse territories, all of whom had a right to be regarded as German by the official organs of the FRG, provided that they would be present in the Federal Republic.[115] This right was established as a constitutional one.[116]

The Federal Republic was regarded as a newly organised continuation of the German State, identical with it, and therefore all German citizens continued to be German citizens in relation to the Federal Republic.[117] This obviously caused problems with the Democratic Republic, particularly after it had established a separate citizenship for itself. But for the Federal Republic, the maintenance of the single German nationality became, as well as being a consequence of its German policy, in practice one of the vital ties between the people in the two German States, and therefore, regarded as a major unifying factor.[118] So the

position in 1972, according to the FRG, was that there was only one German nationality, to which all Germans in the FRG and the GDR were entitled. This was the nationality available under the law as it applied in the Federal Republic, which claimed to be identical with Germany.

The position was altered somewhat as a result of the Grundvertrag: the FRG recognized the GDR as another State in Germany.[119] The FRG thereby acknowledged the GDR citizenship; but again, that citizenship must be considered in the light of the FRG recognition, which was by no means unqualified. The two States had agreed that they disagreed on the national question.[120] In the FRG view, the GDR could not be a foreign State, even if it is another State. This was confirmed by the ruling of the Federal Constitutional Court (Bundesverfassungsgericht) in its judgment of 31 July 1973 following the application by the Bavarian State Government to have the treaty with the GDR declared void on grounds of its incompatibility with the Basic Law.[121] This ruling binds the FRG in all its aspects.[122]

By agreeing in the Grundvertrag that the jurisdiction of each of the Parties was confined to its own territory, and by agreeing to respect each other's independence and autonomy in internal and external affairs,[123] the Federal Republic was obliged to modify its policy concerning citizenship. This was expressed by the Court in the following terms: in accordance with the general obligation that the treaty must conform to the Basic Law, the treaty should be interpreted so that any GDR citizen (DDR Burger - the use of this term in itself could be taken as an admission by the Court of the existence of GDR citizenship) finding himself in the area of protection of the FRG (in den Schutzbereich der

BRD) and of its constitution as a German, should be treated as a German like any citizen of the FRG.[124] This is because the FRG still considers itself identical with Germany, and its citizens to be citizens of Germany. Thus, while acknowledging the right of the GDR to control its own citizenship within its own territory, the FRG, in exercize of its own right to control its citizenship, would accord equal treatment to GDR citizens subject to the above conditions.

This would appear to explain the modification by the FRG of its position vis-a-vis Germany. In the judgment of the Court, because of the territorial restrictions on its jurisdiction, the Federal Republic is no longer identical, but rather, partially identical (teilidentisch) with the Reich as regards its territorial extent.[125] The Court then went on to claim that the FRG population and territory belong to and are part of, the unitary German State - the Reich.[126] In the view of the Court this nationality embraced even GDR citizens within the GDR.

The judgment of the Court must be open to question. Regardless of its significance within the municipal jurisdiction, the Grundvertrag clearly placed relations between the two German States on the international plane; they are governed by international law. How else can the relationship be characterized, when they establish its basis in a treaty which accords them equal rights,[127] agree to be guided by the purposes and principles set out in the UN Charter,[128] undertake to respect one another's territorial integrity and confirm the inviolability of their mutual frontier,[129,130] and agree to exchange permanent missions?[131] These are all functions carried out, rights enjoyed and obligations undertaken, usually, by States. The reservations made by the Federal Republic do not bind the GDR to accept that State's position on the German question. These

reservations do have legal effect within the FRG. But on the international plane, it is the treaty itself which signifies the extent of the Parties' commitment.

It has been suggested that the Federal Constitutional Court had in reality adopted the theory whereby two German nationalities (of the FRG and the GDR) coexist beneath the roof of the common German nationality.[132] Such a situation, were it the case, would receive much support from this writer. But this is not what the Court did. It emphasised that the FRG citizenship, legally, was identical to that of the Reich. While this may be settled, however incorrectly, within Federal law, it cannot be the case under international law.

In its international relations with the GDR, the FRG cannot force that State to recognize the FRG's position on nationality where that stance transgresses the bounds of international legality. Different theories exist in the Federal Republic about the relationship of the GDR citizenship to that of the FRG and Germany. Some are outlined by Bleckmann, who rightly points out that the GDR is a State "with its own jurisdiction also on nationality matters."[133] One of these theories is that the 1967 GDR citizenship law must be interpreted in the sense that it confers not citizenship of the GDR, but the common German nationality.[134] This ignores the fact that it is for the GDR to decide matters of its nationality; the FRG cannot exceed its own jurisdiction. While if the matter is discussed in terms of international law, then it must be discussed, insofar as the status of Germany is concerned, according to the position of the Four Powers, since it is they who retain the authority to decide the future status of that State.

Much comment exists with regard to the FRG concept of German nationality

and the attempts to extend it beyond citizens of the FRG. Janicki mentions an exception to the rule according to which GDR citizens are regarded as Germans under FRG law: these are aliens in the FRG who, "not having "German citizenship" in the West German sense of the term, have acquired or acquire the citizenship of the GDR, that is, have become citizens of that state by naturalization."[135] Such persons, in the FRG, may be given "identity cards valid for citizens of the German Democratic Republic."[136]

Janicki expresses a typical Polish view, that Germany no longer exists. His opinion is that the Reich ceased to exist in 1945, but that German statehood survived until 1949, when "the limited German statehood of the occupation came to an end. In this way German citizenship in the all-German sense came to an end too. Its place was taken by the institutions of citizenship of the Federal Republic of Germany and the German Democratic Republic."[137]

Bernhardt, on the other hand, considers that the inhabitants of the GDR, and Germans beyond the Oder-Neisse line, do possess a special status based on valid FRG law and that this status is consistent with international law.[138] They are all Germans in the sense of Article 116(1) of the Grundgesetz.[139]

Hailbronner believes that the judgment of the Federal Constitutional Court does not justify a reduction of German citizenship in the sense that only those who wish it may be treated as German citizens. German citizenship as a status denoting membership of the all German State population is independent of the will of the population. So long as the GDR is not regarded as a foreign country in relation to the FRG, its citizens cannot be recognized as having a foreign

citizenship.[140] This is no different in its essentials from Bernhardt's analysis and reflects accurately the position within the FRG. Such an approach is justified, in that nationality is, to a large extent, a matter for domestic regulation. Nevertheless, it has its international aspects, and the two German States are not exempt from this consideration. Indeed, because of their peculiar circumstances, they are, if anything, even more susceptible to international law in this area. Because besides the restrictions imposed by general international law they are subject to the peculiar conditions pertaining to Germany.

It should be stated once more that, in the opinion of the Four Powers, which is decisive, the Federal Republic is not identical with Germany. Therefore, its citizenship is not the same as the German citizenship which exists as a facet of German statehood. The relationship of Germany to the Federal Republic is the same as that which it enjoys towards the Democratic Republic. FRG and GDR citizenships are quite separate under international law and under GDR law, but not under FRG law. Under FRG law, its citizenship is the same as that of the German State, but international law rejects this thesis. Under GDR law, GDR citizenship is quite separate from that of the FRG; it enjoys no closer legal ties with that State than with any other, and there is no all-German citizenship. This position enjoys the support of the USSR, which, by doing so, probably has breached its joint rights and responsibilities by unilaterally altering its stance on the maintenance of all-German statehood.

Every citizen of the GDR and the FRG possesses an all-German citizenship if he or she comes within the definition of a German according to the citizenship law of 1913, as amended until 1949. This citizenship is separate legally from any

German citizenship such persons would acquire upon a unification of the FRG and the GDR. This is because the unified State would not itself be identical with Germany. Frowein argues that the "quality of "German" as far as legal status is concerned should be taken to be one of the consequences of continuing Four Power rights and special relations between the two German States. This status of German is certainly different from a regular nationality since no single German Government exists."[141] This is correct as a proposition of international law. But this is not the single German nationality claimed by the Federal Republic; such a claim does not induce a duty of recognition by other States, certainly not by the GDR. However, it is probably justified to say there is a genuine link to connect the FRG and Germans who seek its protection after leaving the GDR,[142] in that GDR citizens share their all-German citizenship with FRG citizens. True, the link is not with the Federal Republic if it is considered just as any State. If one considers the special circumstances, however, a political connection might be established. This might detract from the view that there is no identity between either presently active German State and Germany, but the possible political link is surely insufficient, by itself, to establish identity.

(vii) Citizenship in the Oder-Neisse Territories and Polish East Prussia

Given that the German nationality may extend to Germans within the Reich frontiers of 31 December 1937, the question arises about the nationality of the inhabitants of those German areas which fell under Polish administration in 1945, and which have been recognized as Polish State territory by the GDR and the FRG. The only doubt as to Poland's title to those territories is the theoretically existing right to alter the frontier at a peace settlement (though any alteration could result in an increase rather than reduction of Polish territory).

Nevertheless, Poland considers itself sovereign with regard to these territories and regards all its laws as applicable there in the same manner as they apply throughout Polish territory. The first move towards this was the Decree of 13 November 1945, which came into force fourteen days later, providing that the whole body of law binding in the circuit of the District Court in Poznan should take effect in the Recovered Territories.[143] It was made absolutely clear in this case that the territory was regarded as Polish sovereign territory and that all German legislation was incompatible with the legal order which had been established. Therefore, the Polish citizenship law of 20 January 1920[144] became applicable in these areas, to be followed by the citizenship laws of 8 January 1951[145] and 15 February 1962[146]. Each of these laws emphasizes that dual citizenship for a Polish citizen will not be recognized by the Polish State.[147] This should not have given rise to any substantial problems. During the immediate post-war years, most of the German population had been transferred to Germany proper (i.e., to one or other of the four occupation zones) in accordance with Part XII of the Potsdam Protocol. Nevertheless, it was clear that, even after the transfers had ceased in 1948, substantial numbers of Germans remained in Poland. Of those, many left for the FRG or the GDR during the 1950's.[148] This did not see the end of the problem. Poland acknowledged in 1970, in an Information by its Government, that "a certain number of persons of indisputable ethnic German origin", as well as persons from mixed families, remained in Poland.[149] In addition, the existence of separated families was acknowledged and the Polish Government undertook to give further consideration to these cases, as well as cases of "Polish nationals"[150] who wished to be reunited with relatives in the GDR or the FRG. These relatives may have been Polish citizens; but it is inconceivable

that most did not hold German nationality within the terms of the 1913 law as applied in the FRG, or GDR citizenship according to the 1967 law. In such cases, dual nationality would probably have arisen.

The admission by Poland of the existence of ethnic Germans in Poland signifies that most of them, at least while resident in Poland, would have had dual nationality. This is because all persons residing in the recovered territories who wished to remain in Poland had to acquire Polish citizenship by means of a special verification procedure which involved demonstration of Polish nationality and submission of a declaration of loyalty to the Polish State.[151] Other persons, Polish citizens who had claimed German nationality, were deprived of Polish citizenship and removed from Polish territory.[152] The intention thus was to have only Polish citizens living in Poland - through the exclusion and removal of the above categories plus the mass transfer of Germans.

The dual nationality arises because, even having Polish citizenship, such ethnic Germans, if born in those parts of Poland which were part of the Reich in 1937 - the recovered territories - would still be German according to the 1913 law. Given the continued existence of the all-German State, they might even be tri-nationals. According to the West German assessment of the 1913 law, such persons could only be dual nationals, since, in this view, the Federal and German nationalities are one and the same thing. According to the view that Germany exists as a separate subject of international law, they could be citizens of Germany, but not of the FRG or the GDR (but they could be citizens of Poland). Thus there are three possible nationalities available - but not all at the same time. So trinationality would exist only in a special sense; it would not be available

under one system of law (such an occurrence is not rare - multiple nationality can exist among citizens of a State which does not recognize the right of its nationals to possess any nationality apart from its own).

Nevertheless, it should not be forgotten that the German State exists only in very special circumstances, one of which is that it must lose substantial amounts of territory, formally, at a peace settlement. Thus the nationality of Germany, insofar as it extends to these areas, may also be regarded as restricted. Furthermore, the Potsdam Agreement provided for the transfer of the German population from these areas; from this it might be argued that the all-German nationality was no longer to apply to those areas, unless some were returned to Germany at the peace settlement.

If there are any ethnic Germans remaining in Poland - and up to 125,000 more left for the FRG and GDR as a result of the Polish-West German Protocol on Resettlement concluded in 1975[153] - then they will continue to enjoy dual nationality. This issue is a sensitive one: the Polish Government has regularly disputed the numbers of ethnic Germans cited by West German sources to be living in Poland, and moreover considered that its preparedness to cooperate in emigration had been exploited by Polish nationals for employment purposes.[154] As long as West German Governments are prepared to maintain the existence of an ethnic German minority in Poland, there will remain instances of dual nationality. Such persons will either be regarded as German citizens or as Germans within the meaning of Article 116(1) of the Grundgesetz, as will their spouses and descendants.

For Poland, there are no legal restrictions on its tenure over the Oder-Neisse territories and the southern section of former East Prussia. The inhabitants of these areas are Polish citizens. Given that the FRG has recognised the Oder-Neisse line as the Western State frontier of Poland, it has been suggested that it is required to amend its domestic legislation to conform to its international obligations; in particular, that Article 116(1) of the Grundgesetz should be either amended or given a new interpretation.[155] The response of the West German Government would be that its recognition of the Oder-Neisse line must be considered in the context of the still-existing German State, and that it can act only in its own name. However, by taking up with Poland the case of ethnic Germans living in Poland, the Federal Republic clearly exceeds its self-proclaimed limited capacity, because it dealt with German matters outwith the FRG jurisdiction. In this respect, Poland, by agreeing to deal with the FRG, is hardly exempt from all blame.

Clearly, the FRG continues to regard the Polish recovered territories as Inland[156] for the purposes of its citizenship legislation, since it continues to maintain the right to regard as Germans persons it claims to be living there, of German ethnic origin. Despite the fact that the FRG does not attempt to exercise any authority outside its own territory, the mere existence of FRG municipal law which purports to deal with some of its citizens may justifiably be perceived as an interference in Poland's right to conduct its own internal affairs.

If the Polish recovered territories were not considered to be Inland, any German who at his request acquired Polish citizenship could lose his German citizenship. This is because a German will lose his German nationality if, having

neither his domicile (Wohnsitz) nor his permanent residence (dauernden Aufenthalt) in the Inland (as that term is understood by the FRG), he acquires on his own application a foreign citizenship. Because these territories are still regarded as Inland, the acquisition of Polish citizenship does not entail the loss of German citizenship under FRG law.[157]

The Federal Republic will almost certainly maintain its present view of who, legally, are Germans as long as the German question remains formally unsettled. It has succeeded through cold war and Ostpolitik in retaining the definition in Article 116(1) of the Grundgesetz, despite the opposition from the socialist countries. While the numbers of ethnic Germans may have diminished to insignificant amounts - though the FRG would dispute this - the remaining numbers, plus their spouses and descendants will continue to be regarded as Germans by the FRG, and the problem will remain open.

(viii) Citizenship of Transferred Populations

Following the establishment of Polish jurisdiction over the recovered territories, German nationals were transferred beyond the Oder-Neisse line. For those who had never held Polish citizenship, there was no alteration in their status; they remained German nationals in Germany.

The position of Germans who had been transferred from Poland, but who prior to 1939 had held Polish citizenship, was somewhat different. This was taken account of in the citizenship law of 1951, which reflected the fact that the population of Poland had become more "Polish" (in the sense that ethnic minorities of Polish citizenship were no longer living on Polish territory) as a

result of the frontier alterations and population movements. Article 4 provides:

> "Polish citizenship will not be held by any person who did have Polish citizenship on 31 August 1939 but who lives permanently abroad and who:
> (1) in connection with the change of the borders of the Polish State, acquired citizenship of another State in conformity with an international agreement, or
> (2) is of Russian, Byelorussian, Ukrainian, Lithuanian, Latvian or Estonian nationality, or
> (3) is of German nationality, unless the spouse of this person has Polish citizenship and lives in Poland."

The effect of Article 4(3) would be to exclude from Polish citizenship all those German nationals who had held it until then, but who were included in the transfer of Germans from Poland, unless the spouse lived in Poland and had Polish citizenship. An earlier decree of the Polish Government, made on 13 September 1946,[158] had already deprived of Polish citizenship persons who had claimed German national status before and during the war.[159]

It is not uncommon for States to allow for the deprivation of their citizenship - such provisions exist in the Soviet citizenship law of 1 December 1978,[160] the GDR citizenship law of 1967[161] and in the latest Polish citizenship law.[162] Weis lists various grounds upon which deprivation of citizenship is based in municipal law. These include: entry into foreign service or military service or acceptance of foreign distinction, departure or sojourn abroad, conviction for

certain crimes, political attitude or activities and racial or national grounds.[163] Such acts are by no means confined to the socialist countries; deprivation of nationality may occur according to the laws of countries of the West and East, as well as other States. Mass denationalisation, as provided for in Polish legislation of the late 1940's and early 1950's, is regarded as a relatively recent phenomenon.[164]

Account should be taken of the fact that most, if not all, of those Germans who lost their Polish citizenship by such measures were already resident in Germany, as a result of their removal from Poland, and possessed German nationality. There was, therefore, as much of a link between the individuals affected and the German State as there was with Poland. It is unlikely that any of those affected became stateless as a result of Polish measures.[165] The question arises whether these Germans possessed a Recht auf die Heimat, but deprivation of nationality would not have breached such a right, if it exists. Those who claimed it invariably stressed their German nationality and their "right" to the Heimat as one they held as Germans, not Poles. Given that Poland transferred the Germans from these territories - described as "former German territories" in thePotsdam Agreement - by rights created in its favour by those States bearing responsibility for Germany, to then take the logical step of removing Polish nationality from these Germans could hardly be regarded as a breach of an international duty (such a breach being perhaps illegal).[166]

The status of Polish citizens who lived in that part of Poland which fell under the State jurisdiction of the USSR is governed by different criteria. The transfer of this part of Poland to the USSR is much less controversial; both of the

States involved were agreed that this should take place. The role of other States in this territorial adjustment was seen at the Yalta conference. They agreed that "... the eastern frontier of Poland should follow the Curzon Line with digressions from it in some regions of 5 to 8 kilometres in favour of Poland."[167] Thereafter, the frontier became a bilateral matter for Poland and theUSSR,[168] and these States concluded treaties on the Polish-Soviet boundary on 16 August 1945[169] and on 15 February 1951. They stated that their common frontier had been established by the decision of the Crimea (Yalta) Conference,[170] and the frontier was described in Articles 1 and 2. The frontier between the two States passing through East Prussia was established "pending final decision on territorial questions at the peace settlement."[171] A separate treaty confirming this part of the frontier was signed on 5 March 1957, and came into force on 4 May 1957.[172] The eastern territories of Poland were regarded as being, without dispute, under Soviet sovereignty since 16 August 1945, by the United States Foreign Claims Settlement Commission in a 1961 Decision.[173]

Polish citizens resident in these territories who had possessed Polish citizenship prior to 17 September 1939 (the date of the Soviet invasion of Poland) were to be permitted to leave for Poland proper - i.e., west of the Curzon Line - subject to the condition that this applied only to Polish and Jewish nationals.[174] The consent of the USSR for this transfer was required because the people involved had acquired Soviet citizenship in the meantime, the Soviet Union having incorporated these territories into the USSR (some of it via Lithuania) and imposed Soviet citizenship on all the inhabitants,[175] by means of an internal decree.[176] Following the German invasion of the USSR and the reestablishment of diplomatic relations between Poland and the USSR, the USSR acknowledged the

existence of Polish nationals on Soviet territory, but, in a Note to the Polish Government on 16 January 1943, once again claimed that all Poles from Eastern Poland (i.e., east of the Curzon Line) were Soviet nationals.[177] This was their status under Soviet law in 1945; hence the need for Soviet consent, expressed in an agreement between the two States of 6 July 1945,[178] to the departure for Poland of those persons who had been Polish citizens prior to 17 September 1939.[179] Before leaving for Poland, the requirement existed to denounce the Soviet citizenship prior to resettlement in the country of choice. Thus dual nationality was avoided through resettlement in accordance with the terms of the convention.

It is clear that the citizenship status of Polish citizens, particularly those formally resident in that part of Poland invaded and occupied by the USSR on 17 September 1939, was highly confused, particularly because of changes in Soviet policy towards the inhabitants of these territories, changes which were frequently accompanied by legislative acts purporting to deal with nationality and citizenship.[180]

Those Poles who exercised the right to opt for Polish citizenship, as provided for in a decree issued by the Supreme Soviet on 22 June 1944,[181] were able subsequently to leave for Poland. But this decree covered only Soviet citizens of Polish nationality who were serving personnel of the Polish army in the USSR, those who had served in it, those who were collaborating with it, plus their families. This degree did not therefore necessarily cover all the pre-war Polish citizens who had acquired Soviet citizenship. Nevertheless the 1945 agreement, coupled with a further Polish-Soviet agreement of 25 March 1957 regarding

further repatriation from the USSR of Polish nationals,[182] left most Polish nationals in Poland.

Remaining instances of dual nationality between the USSR and Poland have been settled according to rules set out in two conventions, of 1958[183] and 1965.[184] Poland has also concluded a treaty with the GDR on the settlement of cases of dual nationality.[185] The rationale behind all of these instruments is the prevention of cases of multiple nationality as such, rather than the regulation of citizenship of persons who have been involved in mass population movements. As has been mentioned, the socialist countries have adopted a uniform approach to nationality in that they do not recognize, and seek to avoid, the holding by their own citizens of other citizenships.[186] The Polish-GDR treaty of 1975 on the regulation of cases of dual nationality explicitly recognizes the common attitude of the two States in this area.[187]

The conclusion is that persons who possessed Polish citizenship prior to 17 September 1939 subsequently acquired Soviet citizenship if they had been normally resident in that part of Poland incorporated into the USSR (east of the Curzon line). All such persons of Polish and Jewish nationality, excluding therefore Polish citizens of Ukrainian, Byelorussian, Lithuanian, Estonian and Latvian nationality, were permitted to leave the USSR for Poland during and after 1945. Those who possessed Soviet citizenship had to denounce it prior to departure to Poland, thereby retaining only Polish citizenship.

(ix) <u>The Legality of the Mass Transfer of Germans from the Oder-Neisse Territories and Polish East Prussia</u>

The discussion is being restricted to the German population because it is in this context that legal controversy exists. No substantial objections to the transfer of the Polish populations from pre-war Eastern Poland have been raised on legal grounds.[188] That is not to say that this transfer was definitely lawful in all its aspects; nevertheleiss, it is generally accepted and little is to be gained from going into the matter in depth.

Nor will the legality of the transfer of the German population of Soviet East Prussia be discussed. There was general agreement that this territory should be transferred to the USSR[189] (and, indeed, that the southern part should become part of Poland).[190]

The principal objections raised with regard to mass transfer after World War II concern the transfer of the German population from those areas of Germany which fell under Polish administration as a consequence of the Potsdam Agreement, which had stipulated that "the transfer to Germany of German populations, or elements thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken."[191] It was on this foundation that Poland proceeded to expel from its territory, including that under its administration, the German population, some of which was indigenous, some already evacuated from other areas of what had been, hitherto, eastern Germany. It has been claimed that "approximately 16 million Germans were either put to flight or expelled from their homes in the years 1944 to 1949 and even beyond."[192] The writer then states that Poland "annexed some 41,000 square miles of German territory which had been provisionally placed "under Polish administration" at Potsdam. These annexations", he adds, "resulted in the expulsion of the German native

populations from East Prussia, Memel, Danzig, Pomerania, East Brandenburg, Lower Silesia, Upper Silesia, and Sudetenland."[193] This includes territories "annexed" by the USSR, which the writer had mentioned already.

There are two objections to the above statement. Firstly, the German populations were not expelled as a result of Polish and Soviet annexations. It is irrelevant for these purposes whether or not these territories had been annexed. The transfer of Germans took place under the authority of the Potsdam Agreement, not because of any annexations. Even if Poland did purport to annex this territory, and even if such annexation were unlawful, the expulsion of the German population did not thereby become unlawful. Secondly, the writer describes Danzig as part of the German territory. This is false and misleading: Danzig had been a Free City incorporated into the Reich. That incorporation had not been recognized by the UK and USA, at least, nor by Poland. Considering that the author himself later stresses that Danzig was not part of the Reich,[194] it is all the more confusing that he describes it as German territory.

The number of Germans actually expelled from the Polish recovered territories has been the subject of dispute, one side (the West German) claiming that much higher numbers resided there than the other was prepared to admit. According to Churchill, Stalin claimed that most of the Germans had already fled and that the Poles had simply taken over deserted areas in the wake of the Soviet military advance.[195] Churchill, however, believed that up to eight million Germans remained in these territories, or had their homes there.[196]

The actual number of persons expelled is not, however, of significance for

the legality of the expulsion - whether one million or ten million people were involved, it was surely a mass expulsion - but it is important in that it shows that the Potsdam Agreement certainly intended that Germans should be expelled from the Oder-Neisse territories and not only from the pre-war Polish territory. The Allied Control Council adopted a plan for the removal of 3,500,000 Germans from Poland to the Soviet and British zones of occupation.[197] The estimates of the number of Germans in pre-war Poland vary from about 800,000[198] to 1,400,000.[199] Clearly, then, the Control Council's plan was meant to include in the transfer Germans still in the Oder-Neisse territories.

Perhaps the principal charges made against those who ordered and executed the expulsions is that they were contrary to the Recht auf die Heimat of the expellees,[200] and that the manner of execution was such that it constituted a crime against humanity.[201] The former claim is sometimes expressed in the context of an apparent right to self-determination of the German people.

As for the legality of expulsions, Brownlie has taken the view that expulsions "may occur by agreement and are lawful provided certain conditions are observed."[202] He then cites the Potsdam Agreement as a case in point, and it is true that the proper authorities - the UK, USA and USSR - did agree to the expulsions. This was not a matter for Germany to decide, the Allies having assumed supreme authority. Brownlie suggests, furthermore, that the normal rules of belligerent occupation may not be applicable in a situation where a war of sanction results in the final defeat and occupation of an aggressor State and "the imposition of measures designed to remove the possibility of recurrence of aggression."[203] The author considers the occupation of Germany and the

measures adopted by the Allied Control Council to be an excellent case in point. In such instances, the regime established is not a normal belligerent occupation; it may entail basic changes in the structure of government and political life of the country.[204]

The removal of the German population from the Oder-Neisse territories could certainly be regarded as a measure to improve security and reduce chances of aggression in future; the substantial German minority in Poland prior to 1939 (around 3% of the total population) served to reduce the security of that State, particularly as relations with Germany deteriorated.[205] Skubiszewski has suggested that a State may undertake a transfer of population when a part of its population is considered disloyal, more dedicated towards a foreign State and desiring that the territory inhabited by them be incorporated into another State.[206] The German population in the Oder-Neisse territories could certainly be regarded as anti-Polish after six years of war between Poland and Germany, and even as a threat to its existence, since it was Germany that had invaded Poland from the Oder-Neisse territories in 1939.

Such measures as those carried out by Poland are acknowledged explicitly by Professor Brownlie as perhaps entitled to consideration as legitimate measures of security intended to prevent future threats to the peace,[207] and the legality of mass expulsion has been explicitly recognized recently by a distinguished West German international lawyer as lawful in certain circumstances, in particular "where a State by avoiding such measures would be exposed to a situation which could endanger its own existence",[208] unless its performance would violate jus cogens.

The possibility that expulsions may be contrary to the principle of the right of self-determination is acknowledged by Skubiszewski and Doehring, but the latter argues that despite this, mass expulsion may be justified to protect the State's existence,[209] while the former argues that there is no general right under international law of a people to decide its fate by plebiscite (one of the rights claimed for the Germans in the Oder-Neisse territories); not can the right of self-determination be taken into account without reference to Article 107 of the United Nations Charter,[210] which could suspend the application of the right of self-determination of the Germans as citizens of an enemy State.[211]

There exists, then, substantial authority in favour of the legality of the mass expulsions which occurred from the Oder-Neisse territories. It is suggested that, as a matter of principle, mass expulsions may, in certain circumstances, be lawful; and in the case at hand, the action was lawful because of the legitimate entitlement of Poland to remove from its territory a population which constituted a fundamental threat to its own security as a State, and perhaps a threat to the security of other States. This action was taken with the express approval of the States responsible for the government of Germany and in execution of a policy set out in the Potsdam Agreement.

The transfer of the Germans was to be carried out in "an orderly and humane manner." It is quite possible that the method of transfer did not correspond in every case to this requirement. However, that in itself does not detract from the legality of the actual transfer. It may signify that the States responsible should have ensured that standards of treatment were such that all

transfers were orderly and humane. If they were not, then those who suffered might feel they should be able to bring a claim against the Polish State for the manner of their transfer. But the Potsdam Agreement itself makes no provision for this.

It is worthy of note that the FRG Government, which had been active in asserting the "rights" of the expelees to regard the Oder-Neisse territories as their homeland, has expressed the view that any right of self-determination of the German people, the implementation of which the FRG demands, does not entail the making by the FRG of any territorial claims, nor does the FRG claim any alteration of frontiers.[212] This view was expressed in the Bundestag Resolution of May 1972. It does not bind any State but is an expression of FRG foreign policy. It shows that, in the view of the FRG, even the exercise by Germans from the Oder-Neisse territories of the right to self-determination cannot justify the alteration of the existing territorial status quo. Any Recht auf die Heimat proposed by the Germans, in light of this declaration, pertains not to particular German territory, but to a right to live in Germany.

The rationale behind the territorial situation established as a result of the Versailles peace settlement after the First World War was that, in Europe, national frontiers should reflect, if possible, the actual ethnic populations - hence the number of plebiscites held to settle finally the frontier between Germany and Poland in Upper Silesia and East Prussia. This was feasible only to a limited extent. Large ethnic minorities in several States were a not uncommon phenomenon between the wars.

In 1945, a new method was adopted, at least with regard to Germany. Instead of drawing boundaries to follow existing ethnogeographic configurations, the boundaries have been drawn (subject to final delimitation) according to other criteria, including territorial compensation (though the idea of compensation for Poland as a result of losing territories in the East was probably not a causal legal link between the western frontier of Poland and its eastern territories)[213]. New ethnogeographic configurations have been created, artificially, to conform to the new boundaries which were imposed without the need for German approval.

The fact that the German population was expelled from the Oder-Neisse territories has been cited as evidence of the Allies' intention to make these territories permanently Polish, and to free it of troublesome elements.[214] A counter argument to this is that, if such were really the intention of the Allies, then it renders meaningless the reservation to a peace settlement of the final delimitation of the frontier.[215] However, it is not suggested by the author of the proposition, that the mass expulsion evidenced the Allies' intention to settle the Polish-German frontier on the Oder-Neisse line, that the frontier question was therefore definitively settled indirectly through the mass expulsions (this is how such a proposition has been interpreted[216]). Rather, Skubiszewski has always maintained that the frontier is a matter that remains to be finally regulated at a peace settlement (his view is that such regulation must take the form of a confirmation of the existing situation[217]). His point is that the mass expulsions show <u>evidence</u> of a future intention to establish the frontier on the Oder-Neisse line. The reason for the failure to do so at Potsdam is that the instrument agreed upon there was not a peace treaty. Therefore, it is quite logical, having delayed the actual peace treaty, nevertheless to take measures which are deemed

necessary and which, formally, do not have to await such an agreement.

Clearly, there exist many problematic legal issues with regard to the matter of mass expulsion or transfer of populations. The aim here has been to show how these matters arise in the context of the Polish-German frontier, and to suggest that the peculiar circumstances argue in favour of the legality of the actions which were taken. Any Recht auf die Heimat, if it exists, may be subject to a more vital and greater State interest of security and territorial integrity. However, the claims of individuals are not lightly to be dismissed.

The Institut de Droit International has considered mass transfer of populations and its conclusions were reported in 1952.[218] The participants must have been acutely aware of the significance of the subject so soon after 1945. The Report presented to the Session by Count Pallieri in 1950 stressed the need to consider the rights both of individuals and of States, although from the perspective of human rights alone, he would decide on a conclusion contrary to population transfers.[219] States had to try to make good citizens of all their inhabitants. But all possibility of transfer was not denied to States, and it was stressed that this was particularly so in the case of implacable opposition to the State by individuals.[220] Yet such transfer must not be conducted in an inhumane manner. While stressing that States did have the right to transfer populations, the Count repeatedly invoked the duty to act humanely; the duty went along with the right.

Members of the Institute were also offered a questionnaire regarding population transfers. The tenth and final question concerned the transfers

carried out in accordance with the Potsdam Agreement. There was a certain reluctance to deal with the legality of this transfer. One participant described it as a lesser evil,[221] hardly a definitive articulation of his views on the legality of it. Another regarded the transfer as a temporary measure and considered it inappropriate to discuss the question while a legal solution remained outstanding.[222] De Visscher thought that the Potsdam dispositions with regard to transfers were inspired by political aims only and on that basis believed that they could not be considered legitimate from the point of view of international law.[223] Winiarski considered that the Potsdam accord was exceptional but necessary; Germany's consent to what occurred later was obtained through its unconditional surrender, while Poland, Czechoslovakia and Hungary gave their express agreement. He also claimed that the Agreement took account of the arrival of massive amounts of people from the east of Poland, though it is unclear whether this was regarded as a political or legal link.[224]

The general impression is of the controversy that the issue inspired, though there remained near unanimity on the existence of a right to transfer populations subject to certain restrictions on the State's freedom.[225]

This tends to support the conclusion that, while the Allies probably were justified in ordering the transfer of the Germans from the Oder-Neisse territories, serious doubts exist about the way in which the transfers were executed.

Footnotes

1. Reichsdeutsche - the term used to describe those of German Citizenship
Volksdeutsche - the term used to describe so-called ethnic Germans living as national minorities in other States, usually to the south and east of Germany.
De Zayas: International Law and Mass Population Transfers.
1975 16 HILJ 207, at 228-229.

2. This means all Polish territory east of the Curzon Line, with alterations of 5-8 kilometres at certain points in Poland's favour.
Yalta Agreement: first sentence of the fourth paragraph of the section relating to Poland.
Text in: G. Doeker & J.A. Bruckner (eds.): The Federal Republic of Germany and the German Democratic Republic in International Relations, Vol. 1, p.19. Dobbs Ferry, N.Y., 1979.

3. M.R. Marrus: The Unwanted. European Refugees in the Twentieth Century. Oxford, 1985, at pp. 325-326;
K. Skubiszewski: Zachodnia granica Polski. (The Western Frontier of Poland). Gdansk, 1969, at pp. 325-331;
A.M. De Zayas: Nemesis at Potsdam. London, 1977, esp. pp. 60-79.
The third work cited here presents a description of the flight and evacuation only from the perspective of the Germans who were involved.

4. CMND 1552, Doc. No. 13, p. 57.

5. A. Klafkowski: The Legal Effects of the Second World War and the German Problem. Warsaw, 1968, at p. 186.
According to the author, the Polish and West German Red Cross Organisations agreed to a family reunification campaign which enabled thousands to leave Poland for West Germany. With the GDR, the agreement was reached on a State-to-State basis. The reason for the different levels of agreement was the non-existence of normal relations between the FRG and Poland.

6. One argument nurtured carefully by many Germans is that the expulsion of the Germans was a breach of the Recht auf die Heimat (this will be considered later).
If there was an infringement of such a right - if, indeed, such a right did then exist - it can be argued that, for those who left voluntarily during the 1950's and later, any such right was not infringed as they could have remained in Poland.

7. De Zayas, Note 1, supra, at 254.

8. De Zayas, Note 3, supra, at pp. 69-70.

9. Law of 15 February 1962 on Polish Citizenship.
Dz.U. 1962, No. 10, Item 49.
Articles 13-15 deal with the loss of Polish citizenship.
Article 13 (1) specifies that, in order for a renunciation of Polish citizenship to be recognized by the Polish authorities, the consent of the appropriate Polish authorities must first be obtained to the change of citizenship:
"Subject to the exceptions foreseen by this law, a Polish citizen may acquire a foreign citizenship only with the permission of the appropriate Polish organ to the change of citizenship. The acquisition of a foreign citizenship results in the loss of Polish citizenship."
(Translation by this write
It may be seen that Article 13 (1) does not expressly provide for consent to the renunciation of citizenship; it provides for consent to the change, which entails renunciation since, under Polish law, a Polish citizen may not possess simultaneously another citizenship. In other words, consent should be obtained prior to acquisition of the foreign citizenship. However, this does not of course happen in practice because, to be effective outside Poland, the foreign citizenship does not need to be approved by the Polish authorities. Permission to change the citizenship is, effectively, permission to renounce it.

10. Jus sanguinis - this means nationality based on descent from a national.
It is one of the "two main principles on which nationality is based:"
I. Brownlie: Principles of Public International Law (3rd ed.), Oxford, 1979, at p. 386.
See also: P. Weis: Nationality and Statelessness in International Law (2nd ed.). Alphen aan den Rijn, 1979, at p. 95;
A. Randelzhofer: Nationality. In R. Bernhardt (ed.): Encyclopedia of Public International Law, Vol. 8, Amsterdam, New York, Oxford, 1985, p.416, at 418.
Each of these writers makes clear the lack of disagreement about the place of jus sanguinis as one of the two most important criteria for establishing nationality.

11. 1962 Law, Article 6(1):
"A child born of parents, one of which is a Polish citizen, the other being a citizen of another State, acquires Polish citizenship by birth. However, its parents may, in a declaration made unanimously before the appropriate organ within three months of the date of the child's birth, choose for it the citizenship of a foreign State of which the other parent is a citizen if, under the law of that State, the child acquires its citizenship."
Note that the place of birth in no way affects acquisition under this provision.

12. 1962, Law, Article 2:
"A Polish citizen according to Polish law cannot simultaneously be recognised as a citizen of another State."

13. Jus soli - this means nationality based upon the place of birth; it is the second of the two principles according to which nationality is normally decided.
See Brownlie, Weis, Randelzhofer, Note 10, supra.

14. British Nationality Act, 1948, Section 4:
"Subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth ...."
The ambit of this Act was periodically amended by legislation the purpose of which was to curb immigration, so that, to obtain full effective rights within the UK, it was, eventually, generally necessary to be born within the UK itself. Nevertheless, for the enjoyment of protection by the UK under international law, such restrictions were of less significance.

15. Rode: Dual Nationals and the Doctrine of Dominant Nationality.
1959 53 AJIL 139, at 139.

16. This writer possesses both Polish and British citizenships, has always travelled to Poland using a British passport, and has never experienced any difficulty in obtaining a Polish visa or in leaving that State.
Polish visa application forms do not even contain a question as to whether or not the applicant possesses Polish citizenship. They contain a request for information about citizenship, which may be answered by referring only to the second citizenship, thus allowing the applicant to conceal the possession of Polish citizenship without actually giving false information.
However, the form does ask where the applicant was born, whether the applicant has ever lived in Poland, and , if so, when the applicant was last there.

17. The term "nation" is preferred to the term "State" here because it may be argued that Poles and Germans have often lived on the relevant territories, but even when German and Polish States existed, they were not necessarily identical with the contemporary Polish and German States.

18. K. Skubiszewski: Zachodnia granica Polski w swietle traktatow (The Western Frontier of Poland in the Light of Treaties). Poznan, 1975, at p. 69.
The author writes that Poland expressed agreement to those dispositions made at Potsdam concerning its interests, i.e. to the matter of the frontier, and to the settlement concerning expulsion of the population. Poland also fulfilled duties which fell to it as a result of these arrangements.
See also B. Wiewiora: The Polish-German Frontier in the Light of International Law. Poznan, 1964, at pp. 93-96.
The writer argues that the Potsdam Agreement is a pactum in favorem tertii, and that Poland enjoys rights vis-a-vis another third State - Germany.
Skubiszewski also mentions the notion of a pactum in favorem tertii in the Potsdam Protocol:
La frontiere polono-allemande en droit international
(The Polish-German Frontier in International Law).
1957 28 RGDIP 242, at 246.

19. Various attempts have been made to describe in English this relationship between the individual and territory. It has been called the "right to one's native land" (Wiewiora: West German Territorial Claims against Poland and International Law. 1961 2 PWA 3, at 14); the "right to the homeland" (Janicki: The Territory and State Citizenship in the Legal Systems of the German Democratic Republic and the German Federal Republic. 1971 12 PWA 44, at 78). It has also been translated as the "right to one's native parts" (Krasuski: Poland, the German Problem and the Two German States (1944-1974). 1974 15 PWA 17, at 26). It may be that Recht auf die Heimat (or Heimatrecht) is simply one of those German phrases better left in the original.

20. Von Braun: Germany's Eastern Border and Mass Expulsions . 1964 58 AJIL 747, at 749.

21. Ibid.

22. Ibid, at 748.

23. It is also worthy of note that Von Braun claimed that the Oder-Neisse territories belonged to the FRG. This must mean that he regarded Germany and the FRG as identical, which, of course, they are not. And if these territories do, or did, belong to the Federal Republic, the question arises, why it should have entered six years later into a treaty with Poland in which it clearly admitted it regarded the relevant territory as being part of Poland.

24. De Zayas: Note 3, supra.

25. Ibid, at p. xxiii.
The discussion of the Polish claims, as presented by the Polish Government, is restricted to a four-page rebuttal by the author at pp. 168-172.

26. Wiewiora: Poczdamskie decyzje o granicy Odra-Nysa Luzycka (Potsdam Decisions on the Oder-Lusatian Neisse Frontier). 1955 XI (2-3) PZ 22, at 22.

27. "Trzeba wszakze podkreslic, ze ziemie, ktore Polska otrzymala na zachodzie i polnocy, nie byly bynajmniej ziemiami dla nas obcymi.
Do ziem tych Polska posiada prawa historyczne.
Odpadly one od Polski wskutek wiekowej ekspansji niemieckiej, prowadzonej pod haslem "Drang nach Osten." "

28. Klafkowski: The Polish-German Frontier and Two German States. 1966 7 PWA 109, at 115.

29. Klafkowski gives the impression that the Oder-Neisse territories are described as "Recovered Territories" in the Potsdam Agreement itself. This,of course, is not the case (though they are described as "former German territories").
Ibid.

30. Information by Stefan Olszowski, Minister for Foreign Affairs, Concerning the Ratification of the Treaty between Poland and the FRG. 27 April, 1972.
1972 Zbior Dokumentow, No. 78, p. 678, at pp. 684-685.
More formally, the relevant areas are referred to as "Regained Territories" in Polish legislation. The Polish Citizenship Law of 8 January 1951 (Dz.U.1951, No. 4, Item 25) refers to persons living in the area of the "Recovered Territories" - Article 2 (3).
Wladyslaw Gomulka, who was First Secretary of the Polish United Workers Party in the immediate post-war years until his disgrace, was also the first Minister for the Western Territories, from 1945-1949. The ministry was later dissolved, though both it and Gomulka were featured on one of a series of stamps issued in 1985 to commemorate 40 years of the return of these territories to Poland.

31. M. Lachs: The Polish-German Frontier. Warsaw, 1964, at pp. 14-16.

32. Jasica: The Legislation of the Federal Republic of Germany and the Problem of Normalization of Mutual Relations between the Polish People's Republic and the Federal Republic of Germany.
1975 7 PYIL 77, at 84-85.

33. "... that's how it is with the Kashubes .... The Kashubes are no good at moving. Their business is to stay where they are and hold out their heads for everybody else to hit, because we're not real Poles and we're not real Germans, and if you're a Kashube, you're not good enough for the Germans or the Polacks. They want everything full measure."
G. Grass: The Tin Drum. Harmondsworth, 1965, at p. 409.

34. Nationality Decrees in Tunis and Morocco Case.
(1923) PCIJ Series B. No. 4, p. 24.

35. Ibid.

36. 1955, ICJ Rep., p. 4, at p. 20.

37. Weis, Note 10, supra, at p. 65.

38. L.V. Oppenheim: International Law (8th ed., ed. by H. Lauterpacht).
London, New York, Toronto, 1955. Vol. 1, at p. 643.

39. G. Ginsburgs: The Citizenship Law of the USSR.
The Hague, Boston, Lancaster, 1983, at pp. 19-29.

40. Brownlie, Note 10, supra, Chapter XVIII. The quotation is at p. 381.
See also the article by the same author: The Relations of Nationality in Public International Law.
1963 39 BYIL 286-364.

41. Randelzhofer, Note 10, supra, at 417:
"... State practice, the decisions of international and municipal courts and tribunals and the views of writers acknowledged that matters of nationality are left to municipal law, but subject to the international obligations of States."
This is precisely why the apparently exclusive jurisdiction of States to regulate nationality is open to question.

42. Oppenheim, Note 38, supra, at pp. 643-644.

43. Randelzhofer, Note 10, supra, at 417.

44. Ibid.

45. O'Connell points out that even new States are bound by customary international law (i.e. they may not repudiate it).
D.P. O'Connell: International Law. London, 1970, Vol. 1, at p. 5.

46. Brownlie, Note 10, supra, at p. 382.

47. Weis, Note 10, supra, at p. 70, 85.

48. Weis, Note 10, supra, at p. 88.

49. Weis, Note 10, supra, at p. 90.

50. Weis, Note 10, supra, at p. 89.

51. 179 LNTS 89.

52. Brownlie, Note 10, supra, at p. 385;
Skubiszewski: Elements of Custom and the Hague Court.
1971 31 Za o RV 810, at 819-820.

53. Brownlie, Note 10, supra, at p. 385.

54. W. Goralczyk: Prawo miedzynarodowe publiczne w zarysie
(Public International Law in Outline) (3rd ed.)
Warszawa, 1983, at p. 242.

55. Note 36, supra, at p. 21.

56. Bernhardt: German Nationality. In: R. Bernhardt (ed):
Encyclopedia of Public International Law, Vol. 8, Amsterdam,
New York, Oxford, 1985, p. 258.

57. Klafkowski: The Concept of Inland in West German Legislation and
Court Judgments as a Foreign Policy Programme of the Federal Republic.
1980 21 PWA 203, at 231.

58. Section 41.
English translation of the law taken from: United Nations Legislative
Series. New York, 1954, p. 178, at p. 185.

59. Section 1.

60. Section 33.

61. Section 34.

62. Section 17 (2) and Section 25.

63. See, for example, Sections 20 and 21.

64. Section 1.

65. Weis, Note 10, supra, at pp. 119-123.

66. HMSO: The Treaty of Peace between the Allied and Associated Powers and Germany.
London, 1920, at p. 52.

67. H.W.V. Temperley (ed.) : A History of the Peace Conference of Paris.
London, 1924, Vol. 6 at pp. 617-630.

68. Note 66, supra, at pp. 219-237.

69. Parts of pre-war Poland were once again declared to be within the Reich and its laws extended to these territories.
See Klafkowski, Note 57, supra, at 233.

70. Control Council Act No. 1, Repealing of Nazi Laws. Berlin,
20 September 1945. Article 1 (1) (1)
Official Gazette of the Control Council for Germany, No. 1, p. 6.
This law, which abolished some of the Nazi citizenship legislation, did not have retrospective effect. Thus persons who had lost their citizenship under the relevant legislation did not automatically regain it.
Jennings: Government in Commission.
1946 23 BYIL 112, at 125.

71. Wengler: International Law Problems of the Situation of Germany.
1959 15 REDI 1, at 13-14.

72. See, for example, the Preamble to the Zgorzelec Treaty of 1950, in which the GDR purports to act on behalf of the German nation in concluding the frontier agreement with Poland.
The GDR, in fact, regarded itself at first as the only German State - the continuation of the Reich:
J. Hacker: Der Rechtsstatus Deutschlands aus der Sicht der DDR
(The Legal Status of Germany in the View of the GDR). Koln, 1974, at pp. 111-113.
A.J. Peaslee: Constitutions of Nations (Revised 3rd ed.). The Hague, 1968, Vol. III,. at p. 334.

73. 1967 I Gesetzblatt, p. 3.

74. Bothe: The 1968 Constitution of East Germany.
1969 19 AJCL 268, at 269.
Bender: "The world held up by a wall".
The Times, 12 August 1986.
A more detailed discussion by the same author on this subject appears in Die Zeit, 8 August 1986, p. 3:
"Sind wir unschuldig an dem Monstrum?"

75. Bothe, ibid.

76. Preamble.

77. Article 1 (a).

78. Article 1 (b).

79. Article 3 (1).

80. Law on Citizenship of the USSR, Article 8:
"A person who is a citizen of the USSR shall not be recognized as belonging to citizenship of a foreign state."
In: Butler: Basic Documents on the Soviet Legal System.
New York, London, Rome, 1983, at p. 265.

81. "A Polish citizen according to Polish law cannot simultaneously be recognized as a citizen of another state." - Article 2. Note 9, supra.

82. Article 19 (1).

83. Article 19 (2).

84. Article 1 (1). According to Bothe, this provision might be significant with regard to possible self-determination in the future: Note 74, supra, at 290.

85. Article 8 (2).

86. Article 1.
The text of the 1974 amended constitution referred to here is an English translation published in 1974 by Staatsverlag der DDR and Verlag Zeit im Bild.

87. The acknowledgment by the FRG of the GDR's separate existence may be said to permeate the whole treaty, but it is especially evident in Article 6:
"Die Bundesrepublik Deutschland und die Deutsche Demokratische Republik gehen von dem Grundsatz aus, dass die Hoheitsgewalt jedes der beiden Staaten sich auf sein Staatsgebiet beschrankt. Sie respektieren die Unabhangigkeit und Selbstandigkeit jedes der beiden Staaten in seinen inneren und ausseren Angelegenheiten."
"The FRG and the GDR proceed on the principle that the jurisdiction of each of the two States is confined to its own territory. They shall each respect the other's independence and autonomy in its internal and external affairs."

88. "La doctrine ouest-allemande fait une double observation. D'autre part, la citoyennete de la Republique democratique est derivee de la "nationalite allemande" (Art. 1,a), d'autre part, le preambule de la loi de 1967 fait retroagir la citoyennete a la creation de la Republique democratique avec l'intention d'effacer la nationalite allemande des resortissants de la R.D.A. au profit de la citoyennete."
Koenig: La nationalite en Allemagne (Nationality in Germany).
1978 24 AFDI 237, at 256.

89. Brownlie, Note 10, supra, at p. 658.

90. Weis, Note 10, supra, at p. 137.

91. "Schon vor der Ersetzung der DDR-Verfassung von 1949, die "nur eine deutsche Staatsangehorigkeit" zuliess, durch die Verfassung von 1968 setzte sich in der DDR die These durch, mit der Staatsgrundung in Jahre 1949 sei ein neuer Staat mit einer eigenen Staatsangehorigkeit entstanden, die weder mit der Staatsangehorigkeit in der Bundesrepublik noch mit einer nicht mehr existierenden gesamtdeutschen Staatsangehorigkeit zusammenfalle."
Bernhardt: Deutschland nach 30 Jahren Grundgesetz
(Germany after 30 Years of the Basic Law).
1980 38 Veroffentlichungen der Vereinigung der deutschen Staatsrechtslehrer 7, at 28.

92. CMND 6201, Doc. No. 156, pp. 264-265.

93. Baroness Tweedsmuir of Belhelvie, speaking as the Minister of State, Foreign and Commonwealth Office, in the House of Lords:
"... on 22nd December [1972] my right honourable friend the Secretary of State for Foreign and Commonwealth Affairs sent a telegram to the Foreign Minister of the GDR proposing talks, and according to our practice that constituted recognition."
CMND 6201, Doc. No. 159, p. 267.

94. CMND 6201, Doc. No. 160, p. 268.

95. J. Skibinski: Problemy normalizacji stosunkow NRD-RFN
(Problems of Normalization of Relations between the GDR and the FRG).
Warszawa, 1982, at pp. 311-312.

96. Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)
(1967) 1 A.C. 853. House of Lords.
This case is discussed by Grieg in:
The Carl Zeiss Case and the Position of an Unrecognised Government in English Law.
1967 83 LQR 96-145.
The acts of the GDR could not be regarded as done on behalf of the USSR as the de jure sovereign (Greig, p. 103), because the USSR, in common with the other three Powers, did not hold sovereignty over Germany. They could, on the other hand, be recognized as performed on behalf of the de jure "governmental authority" - as the USSR is described in the Foreign Secretary's certificate.

97. D.C. Turack: The Passport in International Law. Lexington MA, Toronto, London, 1972, at p. 239.

98. CMND 6201, Doc. No. 157, p. 265.

99. B. Zundorf: Die Ostvertrage (The Eastern Treaties). Munchen, 1979, at pp. 281-282.
J. Hacker, Note 72, supra, at pp. 151-153.

100. The version referred to throughout is the English translation published by the Press and Information Office of the Federal Government in Bonn, 1986, as amended up to and including 23 August 1976.

101. Article 73 (2).

102. Article 23.

103. Scholz: Die Effektivitat der deutschen Staatsangehorigkeit. (The Effectiveness of German Citizenship).
In: D. Blumenwitz and B. Meissner (eds): Staatliche und nationale Einheit Deutschlands - ihre Effektivitat. (State and National Unity of Germany - its Effectiveness).
Bonn, 1984, p. 57, at p. 59.

104. "The Basic Law - and not merely a doctrine of international and constitutional jurisprudence - assumes that the German Reich outlasted the collapse of 1945 and perished neither with the capitulation nor with the exercise of foreign governmental authority in Germany by the Allied Occupation Powers nor at any later time ...."
1976 70 AJIL 147, at 150; 1973 NJW 1539, at 1540, columns 1-2.

105. This explains the adoption of the Hallstein Doctrine, according to which the FRG was the only legitimate German State, and any State (other than the USSR) which recognized the GDR as a separate State would be subject to sanctions by the FRG, including the rupture of, or refusal to enter into, diplomatic relations.
See: B.R. Bot: Nonrecognition and Treaty Relations.
Dobbs Ferry NY, 1968, at pp.41-44;
P. Windsor: Germany and the Management of Detente.
London, 1971, at pp. 36-37.

106. Decision of the Raad voor Rechtsherstel, 17 July 1956.
1959 53 AJIL 461-462.

107. Article 1 (3).

108. Koenig, Note 88, supra, at 241.

109. Mann: Germany's Present Legal Status Revisited.
1967 16 ICLQ 760, at 777-779.

110. CMND 1552, Doc. No. 49, p. 137.

111. Message from the Foreign Ministers of the Western Powers to the Military Governors concerning the Basic Law. 8 April 1949: "The Foreign Ministers are not able to agree at this time that Berlin should be included as a Land in the initial organisation of the German Federal Republic." CMND 1552, Doc. No. 29, p. 115.

112. Article 23.

113. Despite the acknowledged close links between West Berlin and the Federal Republic, opinion strongly interprets the actions of the Western Powers as having the effect of excluding Berlin from the Federal Republic. See, for example: Bathurst: Legal Aspects of the Berlin Problem. 1962 38 BYIL 255, at 267-272; Lush: The Relationship between Berlin and the Federal Republic of Germany., 1965 14 ICLQ 742, at 786-787; Rotfeld: Legal Foundations of the West Berlin Status, 1974 6 PYIL 97, at 103-105; Simpson: Berlin: Allied Rights and Responsibilities in the Divided City. 1957 6 ICLQ 83, at 91-93.

114. Bleckmann: German Nationality within the Meaning of the EEC Treaty. 1978 15 CMLR 435, at 437.

115. "Deutsche im Sinne von Art. 116 Abs. 1 GG sind fast alle Bewohner der DDR und eine nicht exakt feststellbare Zahl von Bewohnern jenseits der Oder und Neisse. Sie haben ein verfassungsmassiges Recht darauf, von den Organen der Bundesrepublik als Deutsche behandelt zu werden. Die Ausubung dieses Rechts ist in der Regel von der Anwesenheit in der Bundesrepublik abhangig." Bernhardt, Note 91, supra, at 32.

116. Mann, Note 109, supra, at 783, note 122.

117. "Aufgrund der Identitat zwischen der Bundesrepublik Deutschland und dem Rechtssubjekt Deutsches Reich war es konsequent, dass alle deutschen Staatsangehorigen mit dem Entstehen der Bundesrepublik Deutschland ihre Staatsangehorigkeitsbeziehungen zu der Bundesrepublik als dem neu organisierten deutschen Staatswesen fortsetzten." Frowein: Die Rechtslage Deutschlands und der Status Berlins (The Legal Position of Germany and the Status of Berlin). In: Benda, Maihofer, Vogel (eds.): Handbuch des Verfassungsrechts. 1983. 29, at 48.

118. Zundorf, Note 99, supra, at p. 282.

119. Note 87, supra.

120. Preamble.

121. Reported in the American Journal of International Law and Neue

Juristische Wochenschrift.
Note 104, supra.

122. Bleckmann, Note 114, supra, at 438;
Hailbronner: Forum: Deutsche Staatsangehorigkeit und DDR - Staatsburgerschaft. (German Nationality and GDR Citizenship).
1981 JS 712, at 717.

123. Article 6.

124. 1976 70 AJIL 147, at 153; 1973 NJW 1539, at 1544, column 1.

125. Ibid, at 150, 1540, column 2.

126. Ibid.

127. Article 1.

128. Article 2.

129. Article 3.

130. The notion of inviolability of frontiers has been described as a "principle of international relations":
Symonides: The Inviolability of Frontiers and the Territorial Integrity in the Treaties Between Poland the GDR, Between Poland and the FRG and in the Final Act of the Helsinki Conference.
1981-82 11 PYIL 25, at 36.
The same writer also considers it to be an element of the principle of territorial integrity and of the principle of non-use of force in international relations, as found in the UN Charter.
Ibid, at 27.

131. Article 8.

132. Bleckmann, Note 114, supra, at 438.

133. Ibid, at 441.

134. Ibid.

135. Janicki: The Question of German Citizenship after 1945 (in the Light of the Defeat and Fall of the Reich) and its Repercussions in Relations between Poland and the Federal Republic.
1984 25 PWA 211, at 213.

136. Ibid.

137. Ibid, at 222-223.

138. Bernhardt, Note 91, supra, at 31.

139. Ibid, at 32.

140. Hailbrouner, Note 122, supra, at 717.

141. Frowein, Legal Problems of the German Ostpolitik.
1974 23 ICLQ 105, at 125.

142. Ibid.

143. L. and J.J. v Polish State Railways
Polish Supreme Court, 11 June 1948.
24 ILR 77.

144. Dz. U.R.P. 1920 No. 7, item 44.

145. Note 30, supra.

146. Note 9, supra.

147. 1920 Act, Article 1; 1951 Act, Article 1; 1962 Act, Article 2.

148. Klafkowski, Note 5, supra.

149. Information by the Polish Government, Paragraph 2.
In: Press and Information Office of the Government of the FRG:
Documentation Relating to the Federal Government's Policy of Detente.
Bonn, 1978, at p. 38.

150. Ibid.

151. Gebert: Nabycie i utrata obywatelstwa polskiego (Acquisition and Loss of Polish Citizenship).
In: Zreszenie Prawnikow Polskich: Prawo w Polsce. Warszawa,
1978, 331-354, at 338.

152. Ibid, at 337, note 10.

153. Protocol on Resettlement.
In: Documentation .....' Note 149, supra, at pp. 55-56.

154. Note 149, supra.

155. Janicki: Legal Problems Involved in the Realization by the Federal Republic of Germany of the Treaty with Poland dated 7th December, 1970.
1977 18 PWA 76, at 88-89.

156. On the somewhat complex meaning of the term Inland (meaning, roughly, German domestic State territory) in FRG law, see:
Klafkowski, Note 57, supra (whole article).

157. Seeler: Die Staatsangehorigkeit der deutschen Aussiedler aus Polen (The Nationality of the German Resettlers from Poland).
1978 31' NJW 924, at 925, column 1.

158. Decree of 13 September 1946, on the exclusion from Polish society of German nationals (Dz. U. 1946, No. 55, Item 310).
Gebert, Note 151, supra at 337, Note 10.

159. Ibid, at 337.

160. Article 18:
"Deprivation of USSR citizenship may occur in an exceptional instance by decision of the Presidium of the USSR Supreme Soviet, if the person has committed actions which discredit the high calling of a citizen of the USSR and harm the prestige or state security of the USSR....."
Butler, Note 80, supra, at p. 266.

161. Article 9 (c):
"Citizenship of the German Democratic Republic is lost by dispossession.";
Article 13:
"Citizens having their domicile or abode outside the German Democratic Republic can be dispossessed of citizenship of the German Democratic Republic for gross violation of the duties of citizenship."

162. Article 15 of the 1962 law provides for deprivation on six grounds, provided the person concerned is staying abroad.

163. Weis, Note 10, supra, at pp. 118-119.

164. Ibid, at p. 120.

165. Brownlie suggests that there may even be a presumption in international law against statelessness:
Note 40, supra, at 337-338.

166. Ibid, at 339-340.

167. Yalta Agreement. Note 2, supra.

168. Skubiszewski, Note 3, supra, at p. 413.

169. M. Whiteman: Digest of International Law,
Washington, 1964, Vol. 3, at p. 274.

170. Article 1.

171. Article 3.

172. 274 UNTS 133; text also in Whiteman (vol. 3), Note 169, supra, at pp. 276-277.

173. Whiteman (vol. 3), Note 169, supra, at pp. 278-279.

174. Gebert, Note 151, supra, at 338.

175. K. Marek: Identity and Continuity of States in Public International Law

(2nd ed.). Geneva, 1968, at pp. 427-431.

176. Ibid, at p. 446.
Ginsburgs points out that Soviet citizenship was not bestowed upon all Poles located in these territories, but on those who were permanently resident there, and who were present when these territories were incorporated into the USSR:
Soviet Citizenship Law. Leyden, 1968, at p. 106.

177. Marek, Note 175, supra, at p. 451.

178. Ginsburgs, Note 176, supra, at pp. 164-169.

179. Ibid, at p. 115.

180. Ibid, at pp. 104-115.

181. Marek, Note 175, supra, at p. 463.

182. Ginsburgs, Note 176, supra, at pp. 173-176.

183. 319 UNTS 277.

184. Ginsburgs, Note 176, supra, at p. 210.

185. Convention of 12 November 1975 on the Regulation of Cases of Dual Citizenship.
Dz. U. No. 15, Item 91.

186. Sipkov: Settlement of Dual Nationality in European Communist Countries. 1962 56 AJIL 1010, at 1019.

187. "...zwazywszy, ze w stosunkach miedzy obu Panstwami istnieje calkowita jednomyslnosc w sprawach obywatelstwa..." - "considering, that in relations between both States there exists complete unanimity in matters of citizenship..."
Preamble.

188. But Marek questions the legality of the whole Yalta Agreement vis-a-vis Poland, describes Poland as having been a puppet State at the time of the Potsdam Agreement, which implemented some of the Yalta decisions, and thereby questions the legality of the Polish Government's agreement to the settlement of teritorial issues and, arising therefore, the transfer of the Polish population.
Note 175, supra, at Chapter IX, Section III.

189. "The Conference has agreed in principle to the proposal of the Soviet Government concerning the ultimate transfer to the Soviet Union of the city of Konigsberg and the area adjacent to it .... subject to expert examination of the actual frontier."
Potsdam Protocol, Part V.
Note 4, supra.

190. "I reminded Bierut that there was no dispute about giving Poland the portions of East Prussia which were south and west of Konigsberg ..." W. Churchill: The Second World War (Vol. 12 - Triumph and Tragedy). Paperback Edition. London, 1964, at p. 295.

191. Note 4, supra.

192. De Zayas, Note 1, supra, at 228.

193. Ibid.,

194. Ibid, at 229.

195. Note 190, supra, at p. 289.

196. Ibid.

197. Skubiszewski: Le transfert de la population allemande etait-il conforme au droit international? (The Transfer of the German Population. Was It in Conformity with International Law?). 1959 Cahiers Pologne-Allemagne 42, at 51-52.

198. Skubiszewski: The Frontier between Poland and Germany as a Problem of International Law and Relations. 1964 5 PWA 311, at 314-315.

199. De Zayas, Note 1, supra, at 229.

200. Wiewiora, Note 18, supra at 153-159.

201. De Zayas, Note 1, supra, at 237-242.

202. Brownlie, Note 40, supra, at 324.

203. I. Brownlie: International Law and the Use of Force by States. Oxford, 1963, at p. 408.

204. Ibid.

205. Wiewiora, Note 18, supra, at pp. 133-136.

206. Skubiszewski, Note 197, supra, at 52.

207. Brownlie, Note 203, supra, at p. 409.

208. Doehring: Die Rechtsnatur der Massenausweisung unter besonderer Berucksichtigung der indirekten Ausweisung (Legal Qualification of Mass Expulsion with Special Reference to Indirect Expulsion). 1985 45 Z a o RV 372, at 389.

209. Ibid.

210. Skubiszewski, Note 197, supra, at 46.

211. Article 107, UN Charter:
"Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

212. "The inalienable right to self-determination is not affected by the Treaties. The policy of the FRG aiming at the peaceful restoration of national unity within the European framework is not in contradiction with the Treaties which do not prejudice the solution of the German question. By demanding the implementation of the right of self-determination, the FRG does not make any territorial claims nor does it claim any alteration of frontiers."
CMND 6201, Doc. No. 150, p. 257.

213. Skubiszewski, Note 3, supra, at pp. 411-414.

214. Skubiszewski: Les traites sur les frontieres en Europe centale (1970-1973) (The Treaties on the Frontiers in Central Europe (1970-1973)) 1974 6 PYIL 7, at 11.

215. H. Kraus: The Status under International Law of the Eastern Territories of Germany within the Frontiers of the Reich as at 31st December 1937. 1963, at p. 32.

216. Ibid.

217. "The external frontiers of Germany remain a subject matter to be dealt with in a peace treaty with that country .... the Powers can no longer demand a revision of Germany's external frontiers as they exist today, let alone impose a territorial settlement that would be different from the present."
Skubiszewski: The Great Powers and the Settlement in Central Europe. 1975 18 JIR 92, at 124-125.

218. 1952 44 II Annuaire de l'Institut de Droit International 138-199.

219. Ibid, at 148.

220. "...nous n'avons pas nie toute possibilite de transfert et nous le reconnaissons particulierement utile dans les cas ou l'opposition des individus a l'Etat est irreductable."
Ibid, at 149.

221. "L'accord de Potsdam ne s'explique que comme un recours des Chancelleries a la politique du moindre mal, telle qu'elle est definie a la fin de notre response globale."
G. Scelle, Ibid, at 180.

222. Schatzel, Ibid, at 185.

223. Ibid, at 190.

224. Ibid, at 192.

225. Pallieri, Ibid, at 195.

CHAPTER EIGHT

Conclusions

(i) The Status of Germany

It has been concluded that evidence exists for the proposition that the Germany of 1945 continues to exist in some limited form. It is possible that this is no more than a certain retained competence of the UK, USA, USSR and France with regard to Berlin and Germany as a whole. There is also reason to suggest that, although the Allies did not assume sovereignty over Germany, it is their continued acts in Berlin and Germany, plus those which they retain the right to perform on some future occasion, which represent the only active manifestation of that German State. Germany, it has been argued, continues to exist as a State with a legal personality quite separate from both the FRG and the GDR. The sovereignty of Germany, manifested through the exercise of supreme authority by the Allies, is quite separate and independent from that of West and East Germany, which succeeded to most active elements of German sovereignty during the years 1949-1955.

The ideas expressed with regard to the status of Germany bear some resemblance to the roof (Dach) theory,[1] according to which the FRG and GDR exist simultaneously with Germany. But legal differences do exist. The roof theory has it that Germany continues to exist, though without organs. The GDR and the FRG are connected under the roof formed by this German State. Neither

may claim identity with the whole of Germany; neither is a foreign State vis-a-vis the other.[2] One problem with the roof theory is that the GDR, at least, would oppose it, on the ground that it regards itself as a successor State to the German State, which has ceased to exist. The legal structure proposed by this writer has the advantage of being non-discriminatory: it ignores the views of both German States on the ground that this is a matter for the Four Powers anyway and lies quite outwith the competence of West and East Germany.

Insofar as it has been shown that both West and East Germany do exist simultaneously with Germany, it may be considered that Germany forms a kind of roof, the more that these two States did succeed to part of the statehood of Germany without it actually ceasing to exist. But it is not possible to sustain the close legal connection of the GDR and FRG to each other as well as to Germany, a link which is of fundamental importance to the roof theory. No identity exists between Germany and the other two German States. There is, however, one definite link in law. This would become active upon unification of the two German States. It is the right of the Four Powers to decide upon the status and frontiers of Germany. This right exists with regard to the Germany of 1945, yet it would be exercised with regard to the united German State, being in fact the vehicle for the retention of Allied rights and duties. From the perspective of the Four Powers, the notion that East and West Germany are not foreign States to one another, as claimed by the Federal Republic and postulated according to the roof theory, is difficult to justify, just because they deny any identity. The Federal and Democratic Republics are entitled, as they have done in the Grundvertrag, to regulate their mutual relations. They are even entitled, within the limits of their authority, to differ

inter se as to the legal character of their relationship. But any theory which claims identity with Germany would constitute a contradiction of the views of the Four Powers in a domain which they have lawfully reserved to themselves, and should therefore not be regarded as possessing a sound legal basis.

Germany does exist as a kind of roof; it would be futile and unrealistic to deny the obvious connections. But the legal link is not great and can only assume its full potential following unification. Like Germany itself, it is in many ways potential rather than actual. The relationship, as it exists in the view of this writer, is founded not on the wishes and acts of West and East Germany, but on the practice of the Allies.

The roof theory at its most extensive would include, in addition to the FRG and the GDR, non-State entities: both parts of Berlin, the territories east of the Oder-Neisse and, until it became part of the Federal Republic in 1956, the Saar.[3] The Saar would, of course, be included now as a Land in the Federal Republic. Were the two German States to unite, it is not foreseen that Berlin would be excluded from the process, though, given its separate status, it is possible that the inclusion of Berlin might be formally postponed until the final settlement. Problems could arise with regard to the status of East Berlin, treated as it is by the USSR and the GDR as part of the GDR, contrary to the views of the Western Powers and the FRG. Nevertheless, such difficulties would not prima facie affect the border question.

The Oder-Neisse territories could only be considered as part of Germany in this

writer's version of the roof theory, to the extent that they have not been formally and finally separated from the rest of Germany at a peace settlement. Yet again, it should be stressed that they would not form part of the German State created from the GDR and the FRG prior to such a settlement. Only insofar as the Allies have not, acting as the supreme authority for Germany, separated these territories from Germany, does any connection remain.

(ii) The German Commitment to the Oder-Neisse Frontier

The separate personality of the GDR and the FRG from Germany is vital in evaluation of the status of the Oder-Neisse line. At present, this frontier is as valid under international law vis-a-vis East and West Germany as any other frontier. Both States have expressly recognised it as the western frontier of Poland and neither has any right to question it in the future. Poland's title is founded, not on the treaties with the FRG and the GDR, but on the Potsdam Agreement. This instrument is equivocal with regard to the western frontier of Poland, having postponed its final delimitation till a peace settlement, pending which Poland was to administer the Oder-Neisse territories. However, having recognised the Oder-Neisse line as Poland's western State frontier, East and West Germany have also recognised Polish sovereignty over the relevant territory. Therefore, should these two States unite, the successor State would inherit the obligation to treat Poland as sovereign over these territories and to accept the Oder-Neisse line as the western State frontier of Poland.

Such a commitment would not exist for the Four Powers; nor for the Germany with regard to which they exercise supreme authority. These States are

bound by the Potsdam Agreement and, unless they can agree jointly to create a new situation, the legal effect of which would be to remove the still open question of the peace settlement, they cannot be obliged to accept Poland as sovereign over the Oder-Neisse territories for all purposes. The border question remains, then, to be settled at the peace settlement. There is much to be said for the view of Skubiszewski and Frowein, that while this question remains, formally, to be decided on that occasion, the acts of at least some of the Four Powers, through which they have expressed their approval of the Zgorzelec and Warsaw Treaties, estop them from questionning the existing situation; in other words, that the final delimitation can be no more than the confirmation of the present territorial disposition. However, the reservation of existing rights and duties expressed simultaneously with the approval of these treaties and at other important dates detract from the merits of this theory. If these States were obliged to do no more than confirm the Oder-Neisse line at the peace settlement, a similar commitment would exist on the part of the surviving German State as represented by the authority of the Four Powers. The Polish frontier question would, legally, be answered.

(iii) The Status of the Oder-Neisse Territories

These territories remain, formally, subject to final confirmation or alteration at a peace settlement. This is because of the provision in the Potsdam Agreement which accords Poland the right to administer the territories until that time. At present, Poland exercises a jurisdiction over these territories which is no different from that which it exercises over the rest of the territory subject to

Polish rule. A special Ministry was set up soon after World War II to deal with the territories gained from Germany but this was disbanded a few years later.

Poland regards itself as sovereign over these areas and enjoys the support of the Soviet Union in this. Poland also enjoys sovereignty vis-a-vis the FRG and the GDR as a result of the bilateral treaties concluded with these States in 1970 and 1950 respectively. The support of the Soviet Union is subject to confirmation of the peace settlement because of that State's status as one of the Four Powers, but the Soviet Union itself maintains that this question was settled at Potsdam. The Soviet view is believed to be an incorrect interpretation of the commitment it made in that instrument, since it seems to contradict the wording of the agreement and the intention of the Parties at the time. It may be assumed, however, that, were the USSR to agree to participate in a peace settlement, it would take the position that the frontier could only be that which already exists; this follows from its consistent commitment to the Oder-Neisse line as the western frontier of Poland.

The Oder-Neisse frontier enjoys the same protection as all other frontiers under international law. This means that any violation of this boundary would be just as unlawful as other boundary violations. The only potential means of alteration of the frontier, which differentiates it from other frontiers, is through the exercise of powers described in the Potsdam Protocol. The inviolability of the Oder-Neisse line is expressly included in the general agreement on inviolability of European frontiers contained in the Moscow Treaty.[4] The Warsaw Treaty contains, in Article I, paragraph 2, an affirmation of the inviolability of the "existing frontiers" of the FRG and Poland both at the time of conclusion of the

treaty and in the future. Any violation of the frontier would constitute a breach of Article 2(4) of the United Nations Charter.[5] It has been argued that the term "inviolable", as used in the Moscow Treaty, may also preclude peaceful change[6] - in other words, would a peaceful change of a frontier constitute a violation in the sense of Article 3 of the Moscow Treaty? Even if Article 3 does possess this wider meaning, the Polish western frontier remains subject to the Potsdam provisions until these are executed or the Four Powers take joint action to dispense with the outstanding elements. Nevertheless, this also means that Poland is at present the State responsible for this territory under international law and it is entitled to all the protection available to other States.

There is no question that the three Western Powers also regard Poland as being responsible for the Oder-Neisse territories under international law. By maintaining the right to decide upon the final delimitation of the Polish-German frontier, however, they cannot be said to have acknowledged Poland as the de jure sovereign authority for these areas. No State may act entirely as it wishes within its own territory because it must adhere to the rules of international law. In this sense, Poland is no more restricted than any other State. But the formal temporal restriction on Poland's tenure persists: it has the right to administer this territory but the frontier is subject to delimitation by the Four Powers at some unknown future date. Polish authority vis-a-vis the FourPowers may be characterised as being subject to certain limitations which make it look more like Gebietshoheit than anything else. In that case, which State possesses sovereignty? To the extent that the Germany of 1945 continues to exist, it may retain certain rights with regard to the Oder-Neisse territories, but only in a certain context. Just as Germany continues to exist as the vehicle for the

maintenance of certain Allied rights and responsibilities, while most active elements of its statehood were devolved upon the GDR and the FRG, so Germany continues to possess rights over this area, which may amount to sovereignty for certain purposes only: the exercise by the Allies of their supreme authority by making the final delimitation of the frontier. Only in this sense, i.e. through the exercise of certain functions by the Four Powers, may it be said that sovereignty vests in Germany. For all practical purposes, Poland became responsible for the territory.

Furthermore, in asserting the Four Power rights with regard to the territory, relevant duties must also be taken into account. In particular, the obligation assumed by the Powers that Poland must receive territory at the expense of Germany. This means that at least some territory, of indeterminate area, must be assigned to Poland; therefore, the sovereignty of Germany exercised by the Four Powers, such as it is, is further limited by this obligation.

The Oder-Neisse territories have been treated separately from other pre-war German areas since 1945. Germany was to be divided into three zones of occupation - one each for the USSR, the UK and the USA (with the exception of Greater Berlin, which was to be occupied jointly by these three States) - by agreement of these countries in the Protocol of 12 September 1944[7] as amended by the Agreement of 14 November 1944.[8] However, this plan was amended, firstly, to include France as an occupying power. France was accorded its own occupation zone (on territory detached from the UK and US zones) in Germany as well as a zone in Berlin (also detached from the UK and US zones). France acquired an equal say in the control and destiny of Germany.[9]

Of greater importance is the second amendment. In the Potsdam Agreement, it was decided that, being under Polish administration, the Oder-Neisse territories "should not be considered as part of the Soviet zone of occupation in Germany."[10] Two points must be mentioned: Poland also was authorised to administer two areas of territory under this provision, which were not part of the Oder-Neisse area - Gdansk (the former Free City of Danzig, which was not part of Germany in 1939), and that part of East Prussia which did not fall under Soviet jurisdiction. Secondly, the areas which fell under Polish administration were excluded from the Soviet zone of occupation "for such purposes". This might be read as implying that for other purposes, beyond those for which Poland had to administer the territory, it might be regarded as remaining under Soviet occupation. In particular, it might be construed as maintaining a residual Soviet competence and responsibility. Nevertheless, already in 1945 there was a clear decision, taken by the UK, USA and the USSR, and subsequently approved by France, to treat these areas separately, and this decision was given immediate effect. Following the statement made at Yalta, that Poland should, in principle, receive substantial accessions of territory in the north and west, the decision made at Potsdam may be perceived as the first stage in the detachment of territory from Germany and its attachment to Poland.[11]

The attitudes expressed in the immediate post-war period by the Western Powers towards the new territorial situation can be described at best as mixed. Certainly, it was not felt at the time by all Four Powers that Poland should unquestionably receive at a peace settlement all that had fallen under its administration.[12] The position is confused somewhat by the establishment of the socialist system of government in Poland which, in itself, may have contributed to

a more radical divergence of opinion among political leaders than had actually existed at Potsdam. However, it is possible to make a stronger case, with hindsight (taking into account the division of Germany and Europe plus subsequent legal developments on the bilateral level) for the view that only by the mid-1970's, when most of these developments had already occurred, might it justifiably be argued that in 1945 the whole of the Oder-Neisse territories had already begun to be detached from Germany and attached to Poland.

While the Four Powers continued to cooperate in the day to day running of occupied Germany, it might have been possible for them to come to an agreement for the final settlement of outstanding issues relating to that country. This might have entailed some adjustment of the area placed under Polish administration. In 1945, Poland's tenure certainly seemed to be temporary in that a peace settlement was genuinely anticipated; placing large areas under Polish administration was not per se a final disposition of the territory. But even in 1945, the Potsdam Agreement may be taken to have begun the process of detachment of an indeterminate amount of territory from Germany for the benefit of Poland. And with the passage of time, it has become increasingly justifiable to take the view that this indeterminate amount would turn out to be the area placed under Polish administration in 1945.

Poland then has enjoyed the right of administration over these territories as far as the Western Powers are concerned, and the right of sovereignty vis-a-vis the GDR and the FRG and, at least in that State's opinion, with regard to the Soviet Union also. Because of the residual Four Power capacity, this administrative tenure is still significant and remains subject, theoretically, to alteration. Yet it is

also possible that administration itself may come to acquire the legal character of sovereignty. Thus Skubiszewski cites instances of administration over territory where such administratiion proved to be "the first and decisive step towards sovereign rule", whatever its original limitations and purpose.[13] The author himself stresses that analogies between these and the situation east of the Oder-Neisse line should not be drawn too far. The significance of these instances is that there was no express reservation of sovereignty to another State. The Potsdam Agreement is also silent as to the maintenance of German sovereignty over the relevant areas. Nevertheless, it does contain the express statement that the final delimitation of the frontier is to take place at the peace settlement. Again, Professor Skubiszewski is in a position to cite other examples of what he refers to as "detachment of territory prior to a regulation of its definite status."[14] In other words, "a State can lose supremacy over a part of its territory and yet the determination or delimitation of the specific frontier may take place at a later date."[15] Skubiszewski argues that administration by Poland may be exercised "a titre de souverain", and that such a state of affairs has been brought about by: the granting of administration to Poland by entitled authorities, this administration having a wider substantive validity than mere internal administration;[16] the absence of any express reservation of sovereignty with regard to these territories; the view that sovereignty is not a mere status, but also the ability to exercise the rights of sovereignty, as expressed by Max Huber in the Island of Palmas Case and Judge Sir Percy Spender in the Right of Passage over Indian Territory Case.[17] Perhaps the crux of the argument is the following statement:

> "....when a clause protecting the unchanged status of sovereignty is absent, the purpose of the administration helps to elucidate the status

> of the territory. The aim of the Great Powers was to revise the eastern frontier of Germany in favour of Poland. The Potsdam Agreement constituted the basic decision which gave expression to that aim. In view of the purpose which the Great Powers intended to achieve there was practically no chance to establish, let alone maintain, the duality between the exercise of sovereignty by Poland and the nominal sovereignty supposedly retained by Germany."[18]

The purpose of according the right of administration to Poland was to make that State entitled to exercise full authority over the area until a peace settlement, at which Poland would certainly acquire some, perhaps all, of the territory. Even if Poland has become sovereign for all purposes, that sovereignty remains subject to an exceptional limitation not normally attached to this type of tenure, viz. the right of other States to decide upon the final disposition of the territory. This is acknowledged by Professor Skubiszewski, who nevertheless argues convincingly, that matters which, normally, would have been dealt with in a peace treaty, have been rather regulated through a series of settlements, including the Warsaw and Zgorzelec Treaties. By approving, separately, these settlements, the Four Powers have committed themselves to accepting the present Polish-German frontier if and when they finally should exercise their entitlement to decide upon the frontier at the peace settlement.[19]

> "...the rights and responsibilities of the Four Powers, forty years after Potsdam, do not include the competence to impose a territorial regulation that would be different from the present."[20]

However, in the opinion of this writer, such a view cannot be sustained. The Western Powers, at least, have repeatedly and consistently reserved all their rights pertaining to Berlin and Germany as a whole at every critical date. It is not without significance that they did so when expressing their approval of the Warsaw Treaty. The very purpose of these reservations has been to keep alive their rights and duties whenever it might appear that they may be altered. One of the most significant of these has been the power to determine the Polish-German frontier. To argue that this power has been so reduced in its scope as to constitute nothing more than the right, formally, to confirm the existing situation, is to deny the intended and real effect of these consistent and repeated reservations: to hold that these States, by their actions, have actually committed themselves to an obligation which they appear never to have intended to assume. Because all actions of the Western Powers which might indicate a binding commitment to approval of the Oder-Neisse line at a peace settlement were made subject to the condition that the right to decide the course of the Polish-German frontier was retained.[21] Therefore, even if Poland does indeed enjoy sovereignty vis-a-vis all States with regard to the Oder-Neisse territories, it is sovereignty subject to the Four Power authority.

In this context, certain similarities may be noticed between Poland and the FRG and GDR. Just as West and East Germany are recognised to have full sovereignty within the limits of their authority, but nevertheless lack certain powers because of the retained Four Power authority, which is based upon the continued existence of Germany, it might be argued that Poland's tenure has gradually acquired the attributes of sovereignty, even though this is actually limited. For most purposes, Poland exercises sovereign authority over the Oder-Neisse territories.

Furthermore, if, as Verdross et al have argued, Germany possesses sovereignty over the Oder-Neisse territories, then it may also be considered to possess sovereignty at least for certain purposes, with regard to the territory of the Federal and Democratic Republics (unless they would argue that German sovereignty is confined to the Oder-Neisse territories and East Prussia). Yet few would question nowadays the existence of the FRG and the GDR as sovereign States within their frontiers. If German sovereignty can exist (albeit subject to very precise limitations) simultaneously with that of the GDR and FRG on their territory, might it not exist simultaneously with the sovereignty of Poland over the Oder-Neisse territories - again, subject to the various conditions imposed by the entitled States, including Poland's right definitely to receive some territory at the expense of Germany? Alternatively, if Poland enjoys mere Gebietshoheit with regard to this area, do not, then, East and West Germany enjoy no more than this authority over their territories? The Four Powers, it is clear, regard the FRG and the GDR as possessing sovereignty over their own territories. If two sovereignties, each subject to peculiar limits, can exist simultaneously on the areas allotted to these States, it may be possible for two sovereignties to be present also with regard to the Oder-Neisse territories.

One difficulty in attributing sovereignty to Poland is that of establishing when exactly that State may be deemed to have acquired it. No such doubts apply to the FRG and the GDR: they had each become sovereign States by 1955, following their establishment in 1949. In the case of Poland, the most that can be said is that by 1972, following the ratification of the Warsaw Treaty, its sovereignty had been recognised by both German States and the USSR, and the three Western Powers had approved of the Warsaw Treaty. To the extent that Poland enjoys sovereignty,

this may be regarded as the conclusion of a process begun in 1945 and stretched out over a period of nearly thirty years. But the Warsaw Treaty did not accord title over these territories to Poland.

The legal conclusion is clear: Poland's tenure over the Oder-Neisse territories is as secure and as comprehensive as it can be, so long as Four Power capacity regarding Germany's frontiers exists. The Western Powers have not committed themselves to the Oder-Neisse frontier to the extent that they may not question it at a peace settlement. Had they not expressly reserved their full capacity, they would, through their approval of treaties concluded in the meantime, probably be bound to do no more than confirm the existing arrangement should a settlement ever take place. In such circumstances, it is suggested, the analysis presented by Professor Skubiszewski would be the correct one. Thus, as far as the question of Poland's right to respect for itswestern frontier, on the Oder-Neisse line is concerned, the essential difference between that view and the opinion of this writer lies in the effect of Four Power approval of recognition by the FRG and the GDR of the Oder- Neisse line.

Taking into account the fact that the new German State created following the unification of West and East Germany would be bound not to question the obligation, which it would inherit automatically, to recognize the Oder-Neisse frontier as the line at which its sovereignty ends and that of Poland begins; taking into account that Poland has in fact administered these territories as its own since 1945; considering also that these facts are part of a new but nevertheless real situation which developed quite differently from the way events were anticipated in 1945 during the fist post-war months; given that the

right of the Allies to decide upon Germany's status and frontiers, representing the final manifestations of statehood of the Germany of 1945, would actually fall to be exercised vis-a-vis the united German State which had itself inherited an obligation to accept legally the frontier from two German States created by the Four Powers, it is almost inconceivable that the Western Powers (since the Soviet Union is already on record as accepting the Oder-Neisse line unreservedly) might propose any alterations at the peace settlement. Nor is there any evidence that that these States retain any hostility towards Poland's permanent right of sovereignty over these areas.

The only impediment to unreserved Polish sovereignty is the insistence of the Western Powers that this matter must await the peace settlement. This is the obligation assumed at Potsdam. But obligations assumed by the UK, USA and the USSR, and concurred in by France, can be altered: the Potsdam Agreement contains no provision which would prohibit further joint action by the Four Powers apart from that provided for in that instrument: if they have supreme authority, then the only limits upon them are themselves (so long as they act within international law generally). The Four Powers have agreed jointly, as recently as 1972, when they expressed their support for the applications by the FRG and the GDR for membership of the United Nations, that they continue to have joint rights and responsibilities. Therefore, there is nothing to stop them, if they have the political will, from agreeing jointly, after deciding that the outstanding provisions of the Potsdam Agreement (whatever these may be) are no longer capable of performance, to assume a new joint course of action. This could entail a complete reappraisal of rights and responsibilities, including the recognition of the Oder-Neisse line as the western State frontier of Poland for all

purposes, and no longer subject even to theoretical revision. Alternatively, without making reference to any other aspects of their capacity, the Four Powers could agree that, without implying any judgment as to the present legal status of the Oder-Neisse frontier and the territories to the east of it, from a certain date onwards they accept this frontier for all purposes as the Polish-German frontier and that they renounce any right they might have to alter it. If, as is claimed, the Four Powers have supreme authority over Germany, and even if that supreme authority has been limited to certain purposes since the creation of the FRG and the GDR, then they can make such commitments.

Such a scenario is not unthinkable. During the Berlin Blockade or following the erection of the Berlin Wall, few would have predicted that already by 1971 the situation of West Berlin would have been regulated to such a degree that it is no longer, even if potential remains, one of the most sensitive areas of the world. If the Four Powers could find the political will to settle this issue (admittedly not in legal terms), it is possible that they could come to an agreement about the Oder-Neisse line. What is lacking in this case is the desire of the Western Powers to accept unreservedly Poland as the sovereign authority with regard to the territories it gained in 1945. In this sense, the provision in the Potsdam Agreement,. whereby the final delimitation of the Polish-German frontier is postponed until a peace settlement, is not so much a legal restriction as a political excuse not to act.

(iv) The FRG-GDR Frontier

Under international law, there is no question that West and East Germany

exist as separate States. This means that their common frontier is an international frontier. The Federal Republic has claimed that the two States, though separate, are not foreign to each other. This has not been accepted by the Democratic Republic; it regards the relationship as the same as that between any other two States. Thus the GDR considers the frontier to be an international frontier in the full legal sense of that term: that point at which the territory of one State ends, to be replaced by the territory of another, quite separate, State. The FRG accepts that the frontier is inviolable, but maintains that it has a peculiar status, even if it is not treated differently in practice. The Federal Constitutional Court has likened it to a Land frontier within the Federal Republic. This comparison is spurious. The FRG and the GDR are foreign States vis-a-vis each other. The only possible link is through the still-existing all-German State, with which neither is identical, or even partially identical, in law.

In the context of the still-existing Four Power rights and responsibilities, the frontier may be regarded as some form of internal demarcation line. In this role it is highly restricted. Such a status cannot apply between any States except for the three Western Powers on the one hand, and the Soviet Union on the other.

In the event of unification by the FRG and the GDR, the border between them would disappear. However, it would continue to exist as a demarcation line for the Four Powers until they had finally ended their role in the settlement of outstanding questions relating to Germany. It is therefore a matter of contemporary controversy, as is the Oder-Neisse frontier. However, unlike the latter, it would surely lose most if not all of its significance as a matter of dispute

following unification, unless perhaps the Four Powers elected to retain some form of, hitherto unforeseen, residual capacity in Germany even following a peace settlement.

(v) Outstanding Issues of Citizenship Arising from the Territorial Changes and Mass Movements of Population

Although each State enjoys substantial freedom to regulate its citizenship, international law will not necessarily afford unfettered recognition of such regulation. This is because international law itself places restrictions on the validity of nationality rules, especially insofar as these may be seen to affect legitimate rights of other States.

The international character of citizenship is of significance with regard to Germany. The FRG maintains the validity (with certain amendments) of the Reich citizenship law of 1913. This law had also been applied in the whole of Germany from 1945-1949, and in the GDR from 1949 onwards. This was consistent with the position of both German States at the time of their creation in 1949: each one claimed to be the only German State; its nationality was the only German nationality.

The GDR quickly altered its position on the German question, eventually taking the view that two new German States had succeeded to the all-German State, which no longer existed. The adoption in 1967 of a separate citizenship law, for the GDR exclusively, constitutes one of the most obvious and legally significant expressions of this policy. It purports to establish retroactive effect for the

separate GDR citizenship to the year 1949. This is consistent with the later, but not the earlier, GDR assessment of its status relative to Germany as a whole. The 1967 law does not attempt to extend East German citizenship to the citizens of the FRG as a group. This is in conformity with the belief that, just as the FRG is a separate State no different from any other State, so its citizens possess a quite separate citizenship and are in no way entitled to preferential or discriminatory treatment under GDR citizenship law relative to nationals of other States.

However, it is possible that both GDR and FRG citizens possess a second nationality: that of the still-existing all-German State. Such a nationality is at present not active; it would depend for its coming into effect upon the German State becoming active again. Such a nationality is held also by those FRG citizens who would possess German citizenship under the 1913 law in its state as at 1949. The 1913 law, as developed in the FRG since then, should be seen, in terms of international law, as the citizenship law of the Federal Republic only. The fact that successive FRG Governments regard the 1913 law as applicable as the German nationality law cannot of itself achieve for the law such a status on the international plane. The Four Powers do not regard the FRG as being legally identical with the German State. It follows that the citizenships of each must be separate. The only link, on the international level, between the FRG and the German citizenships, is that which exists between the GDR and the German citizenships.

The varying attitudes towards nationality issues, where Germany is concerned, reflect and follow from the different stances of the involved States with regard to

the German question as a whole. The very close connection of nationality issues to State and territorial ones is shown also with regard to the populations of the Oder-Neisse territories. Persons of German ethnic origin living in these areas are regarded under the FRG Constitution as Germans, despite the fact that most of them will be also Polish citizens. This provision remains in force despite the recognition by the FRG that the relevant areas constitute Polish State territory. This may be explained by the possible special status of the Oder-Neisse territories: they remain, formally, subject to delimitation at a peace settlement. Nevertheless, this special status applies only vis-a-vis Germany, for which the Four Powers are responsible under international law. For the FRG, it is Polish State territory only. This is beyond question because, firstly, the FRG enjoys no legal identity with Germany; secondly, because the FRG explicitly recognized it as such. Therefore, the Oder-Neisse territories, legally, enjoy no closer connection to the FRG than any other areas of Poland, despite their history. The FRG decision to treat as Germans Polish citizens from these areas should be considered in this context and may justifiably be regarded as interference in the internal affairs of another State.

The present situation is that any Polish citizens who are German under the FRG Constitution probably enjoy dual citizenship, even though they are unable to demand to be treated as citizens of the FRG while in Poland. In its attitude to nationality questions, the FRG is as unjustified as in its attitude towards territorial questions. Its claim to partial identity with the Reich is untenable under international law; so is the ambit which it claims for conferral of its citizenship. Given the restriction of its present and future claims with regard to territory

which the Federal Republic accepted in the treaties of 1970-1972 with the Soviet Union, Poland and the GDR, the failure to adjust its laws with regard to nationality accordingly indicates a real discrepancy between municipal law and international obligations.

The number of persons resident in Poland who might be German according to West German law is relatively small in comparison with the amount of German citizens who inhabited the Oder-Neisse territories and the southern section of East Prussia prior to 1945. This is due to the fact that most of those who had not already left voluntarily were obliged to depart for one of the zones of occupation in Germany in accordance with the agreement reached at Potsdam by the UK, USA and USSR.

Similar mass movements of (mostly) Polish citizens occurred, as those resident in pre-war eastern Poland left or were expelled from these territories. The two States involved - Poland and the USSR - have not questioned the legality of these actions and they are no longer controversial. But the legality of the expulsion of the Germans in accordance with the Potsdam Agreement has been disputed by the FRG. However, there exists historical precedent for the validity of mass expulsions, and there is substantial agreement that such expulsions may be justified where the vital interests of the State are concerned. Moreover, the Potsdam decision to transfer the Germans is regarded as an example of a lawful mass movement decided upon by the entitled authorities.

The actions of the Four Powers with regard to Germany, including the decision

to expel the German population from the Oder-Neisse territories, has to be seen as part of the general programme to establish a new regime in Europe following the defeat of Germany. The Four Powers assumed supreme authority and clearly considered this to include the right to transfer enormous numbers of Germans to new domiciles. It would appear that States do, in certain circumstances (such as those prevailing in Europe in 1945), have the right to transfer large numbers of people. This is what happened.

The Oder-Neisse territories were, even in 1945, regarded as "former German territories." The expulsion of the Germans was part of the preparations for the outstanding peace settlement, at which Poland was to receive substantial accessions of German territory. It would seem unlikely that all of the Germans remaining in these areas would have been removed if it was genuinely anticipated that some of these territories would once more fall under German control by decision taken at the peace settlement. This adds to the strength of Poland's claim.

Finally, it may be stated that there remain, formally, outstanding legal issues with regard to the Oder-Neisse frontier and, consequently, the former German territories now contained within Poland. These must be decided at a peace settlement, or else the Four Powers must either decide to remove the formal requirement that such a settlement should take place at all, or take some joint action which would remove the frontier question from the agenda of such a peace settlement. In the meantime, the Four Powers have taken measures towards a peace settlement, including the mass expulsion of Germans from the relevant

territories. But since 1949, no joint action has been taken. However, outstanding issues have been regulated on a bilateral basis (where the western frontier of Poland is concerned) and, on what was regarded at the time as a temporary basis, for Germany, by the Western Powers on the one hand and the Soviet Union on the other. These arrangements with regard to Germany now seem permanent, although the German question remains as a legal issue. There is no apparent joint political will amongst the Four Powers to take the radical action necessary, either to settle outstanding questions - on which they are, anyway, in disagreement - or to declare them formally to be closed and remove them from existence.

Footnotes

1. See Chapter Five, p. 194.

2. Geck: Germany and Contemporary International Law.
1974 9 TILJ 263, at 266;
Janicki: Political and Legal Problems in the Development of Relations Between the Two German Republics.
1973 14 PWA 145, at 151.

3. "Teorie Dachu (Dachtheorie) albo ram Rzeszy przedstawiaja panstwo niemieckie jako zbior porzadkow partykularnych. Dwa z nich, tj. RFNiNRD, maja charakter panstwowy, trzy zas sa niepanstwowe: Berlin Zachodni, Berlin oraz obszary polozone na wschod od Odry i Nysy (do r. 1956 istnial jeszcze czwarty porzadek niepanstwowy, mianowicie Saara."
K. Skubiszewski: Zachodnia granica Polski w swietle traktatow (The Western Frontier of Poland in the Light of Treaties).
Poznan, 1975, at p. 213.

4. Article 3 provides, inter alia:
"[The FRG and the USSR] regard today and shall in future regard the frontiers of All States in Europe as inviolable such as they are on the date of signature of the present Treaty, including the Oder-Neisse Line which forms the Western frontier of the People's Republic of Poland...."
The express inclusion of the Oder-Neisse line in this article prevents any interpretation which would seek to exclude it from the general agreement. Otherwise, it might be maintained, if without foundation, that the Oder-Neisse line lacked the character of other frontiers to the extent that it was excluded from the rule concerning inviolability of frontiers.

5. Cf. The General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, of 24 October 1970:
G.A. Resolution 2625 (XXV), which states, in part:
"Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States."

6. Rauch: The Treaty of August 12, 1970 between the Federal Republic of Germany and the Union of Soviet Socialist Republics": a Textual Analysis.
1971 4 NYU JILP 173, at 178-179.

7. CMND 1552, Doc. No. 1, p. 27.

8. CMND 1552, Doc. No. 2, p. 29.

9. Agreement between the Governments of the UK, USA, USSR and France regarding amendments to the Protocol of 12 September 1944 on the Zones of Occupation in Germany and the Administration of Greater Berlin.
CMND 1552, Doc. No. 12, p. 45.

10. Potsdam Protocol, Part VIII B (second paragraph).

11. Skubiszewski: The Great Powers and the Settlement in Central Europe.
1975 18 JIR 92, at 98.

12. Chapter Three, p. 94.

13. Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement.
1985 23 AV 31, at 35.
Similar views were expressed by the same writer in an earlier study on this subject.
The Frontier Between Poland and Germany as a Problem of International Law and Relations.
1964 5 PWA 311-331.

14. Ibid, at 39.

15. Ibid.

16. Ibid, at 33.

17. Ibid, at 39.

18. Ibid.

19. Skubiszewski: The Western Frontier of Poland and the Treaties with Federal Germany.
1970 3 PYIL 53, at 65-66.
Skubiszewski, Note 1, supra, at 29-31.

20. Skubiszewski, Note 241, supra, at 40.

21. Chapter Three, pp. 94-104.

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