

ABHANDLUNGEN

Germany Reunited

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1. Introduction

On October 3, 1990, the German Democratic Republic, a member state of the United Nations, ceased to exist and its territory became part of the Federal Republic of Germany. The five states formed in the German Democratic Republic (GDR) according to the Statute of July 22, 1990, Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen, became Länder of the Federal Republic of Germany. On the same date the territory of East Berlin became part of the Land Berlin which had been a state in the Federal Republic of Germany since 1949, though with a special status¹.

This event was the consequence of the peaceful revolution which took place in the GDR in November 1989. After the fortieth anniversary of the GDR, which had been celebrated with rather pompous ceremonies, it

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¹ Art.1 of the Treaty on Unification concluded on August 31, 1990, between the Federal Republic of Germany and the German Democratic Republic states: "With the coming into effect of the accession of the German Democratic Republic to the Federal Republic of Germany according to Art.23 of the Basic Law on 3 October 1990 the Länder Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt and Thüringen become Länder of the Federal Republic of Germany ...". This Treaty came into force on September 29, 1990, after the two parliaments, the Bundestag and the Volkskammer, freely elected for the first time on March 18, 1990, had given their consent on September 23, 1990. The parliament of the GDR, the Volkskammer, had declared the accession (Beitritt) to the Federal Republic of Germany according to Art.23 of the Basic Law on August 22, 1990, with more than 80 per cent of the votes cast. Art.23 of the Federal Constitution had provided since 1949: "The Basic Law is valid for the time being in the territories of the Länder ... In other parts of Germany it shall be introduced after their accession". Art.23 has been deleted from the Basic Law through a constitutional amendment contained in Art.4 of the Treaty on Unification and adopted according to Art.79 of the Federal Constitution.

soon became apparent that the ruling Marxist-Leninist party, the Sozialistische Einheitspartei (SED), with its Secretary-General Honecker was losing control of the situation². The reasons for these developments were certainly manifold but the most important one appears to be a strategical decision made by President Gorbatschow in Moscow. He had come to the conclusion that the Soviet Union could only survive with much better relations to Western Europe. To build such relations the tension created by the separation of Germany had to be overcome. The only way to do that was to permit the Germans to reunite³.

With the unification of Germany history made a turn which was seen by many as the formal termination of the period after World War II. When Germany surrendered unconditionally on May 8, 1945, and the Allied Powers assumed supreme authority with respect to Germany according to the Declaration of June 5, 1945, the causes for the separation of Germany soon became evident⁴. The Allied Powers were not able or willing to agree on common standards for occupation. Within the Soviet zone a Marxist-Leninist system was quickly set up. The Control Council had only very limited jurisdiction. With the cold war approaching cooperation among the Four Powers became more difficult. In 1948 the Control Council stopped functioning and in 1949 the Federal Republic of Germany was founded in the Western zones of occupation, the German Democratic Republic in the Soviet zone⁵. For a lengthy period the Federal Republic of Germany was recognized as a state and subject of international law with jurisdiction over important parts of Germany by the

² For the development see J. Thies/W. Wagner (eds.), *Das Ende der Teilung* (1990).

³ While in Berlin for the 40th anniversary of the GDR Gorbatschow coined the phrase which was immediately understood to refer to the SED ruling clique: »Wer zu spät kommt, den bestraft das Leben« (Who comes too late will be punished by life), Thies/Wagner, *ibid.*, 92.

⁴ The Declaration states in para.5: "The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Governments 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. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany".

⁵ Cf. for instance D. Hendry/M.C. Wood, *The Legal Status of Berlin* (1987); T. Schweisfurth, *Germany, Occupation after World War II*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law (EPIL)*, Instalment 3 (1982), 191-198; J.A. Frowein, *Die Rechtslage Deutschlands und der Status Berlins*, in: E. Benda/W. Maihofer/H.-J. Vogel (eds.), *Handbuch des Verfassungsrechts* (1983), 29-40.

Western Powers as well as by the Soviet Union and more and more by other countries of the Eastern bloc. The GDR, however, was not recognized by most Western states until 1972 when the Federal Republic started its »neue Ostpolitik«. Although the Federal Republic of Germany has always claimed that she had not fully recognized the GDR, with the conclusion of the Treaty on the Basis of Relations of 1972 between the Federal Republic of Germany and the German Democratic Republic the two German states entered into normal state to state relations⁶. The Federal Republic of Germany clearly upheld, however, that it was her aim to create a situation where the German people could exercise its right of self-determination⁷.

For a long time the GDR seemed to argue that her position was the same as any sovereign state and no rights of the Four Powers were of any importance. In that respect it was a great success of the German Ostpolitik to have the GDR accept a formal recognition that Four Power rights still existed. The GDR had to notify the Soviet Union that she and the Federal Republic of Germany had agreed that the rights and responsibilities of the Four Powers were not affected by the treaty concluded by them. This note was communicated to the Federal Government and it meant that the GDR could no longer dispute the legal remnants of the occupation of Germany in 1945⁸.

Since the GDR as well as the Soviet Union had frequently stated through the years that Germany as a subject of public international law had ceased to exist in 1945⁹ the recognition of a special status connecting the two German states was of the utmost importance. All Four Powers and the two German states at least formally agreed that the German question was still open. It was no secret that the GDR and at that time also the Soviet Union were of the opinion that the Four Power rights would

⁶ Frowein (note 5), 37 et seq.; id., *Legal Problems of the German Ostpolitik*, *International and Comparative Law Quarterly* 23 (1974), 105–126.

⁷ The preamble of the Treaty on the Basis of Relations stated in para.5: "... not affecting the different positions of the Federal Republic of Germany and the German Democratic Republic as to fundamental questions, among those the national question". The Federal Government communicated a letter to the GDR Government on December 21, 1972, according to which "the treaty is not in contradiction with the political goal of the Federal Republic of Germany, to bring about a state of peace in Europe, in which the German people will reachieve its unity through free self-determination". As to this treaty see Federal Constitutional Court Decisions, Vol.36, 1. See also B. Zündorf, *Die Ostverträge* (1979).

⁸ See *Bundesgesetzblatt (BGBl.)* 1973 II, 429.

⁹ Frowein (note 5), 36 et seq.

soon come to an end with the full recognition of the two German states. However, the Federal Republic of Germany, as well as the Three Western Powers, were determined not to end the Four Power status without a free possibility of the German people for self-determination¹⁰. It did not come as a surprise that the existence of Four Power rights and responsibilities for Germany as a whole was openly discussed in the GDR immediately after the peaceful revolution had taken place and the wall in Berlin had opened¹¹.

2. *The Process of Unification*

Under German constitutional law there were two possibilities to bring about the unification of the Federal Republic of Germany and the German Democratic Republic. The first one which was in fact used and which was the only realistic approach consisted in a formal accession of the GDR to the Federal Republic of Germany under Art.23 of the Federal Constitution. This article provided for the possibility that other parts of Germany could accede to the Federal Republic of Germany¹². The article had first been used when the Saarland joined the Federal Republic of Germany in 1956¹³. It was clear that this article contained the easiest procedural alternative. With the free decision by the representative organs of the GDR the accession could take place. The conditions and consequences could be regulated in a specific treaty between the two German states, which was in fact concluded on August 31, 1990¹⁴.

The other alternative to bring about reunification of Germany according to the constitutional law of the Federal Republic of Germany would

¹⁰ The Convention on the Basis of Relations concluded between the Three Powers and the Federal Republic of Germany which came into force on May 5, 1955, states in Art.7:

“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. They further agree that the final determination of the boundaries of Germany must await such a settlement.

2. Pending the peace settlement, the signatory states will co-operate 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”. See G. R e s s, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972* (1978).

¹¹ E. O e s e r, in *Neues Deutschland*, January 23, 1990, 6.

¹² See note 1.

¹³ For the accession of the Saar see F. M ü n c h, *Zum Saarvertrag vom 27. Oktober 1956*, *ZaöRV* 18 (1957/58), 1–60.

¹⁴ See note 1.

have been based on Art.146 of the Constitution. This article stated that the Federal Constitution would cease to be valid on the day when a constitution enters into force which has been adopted by the German people in a free decision¹⁵. This article was drafted by the Parliamentary Council, the organ elaborating the Federal Constitution, to limit the existence of this constitution for the case where the process of unification would not come about by accession to the Federal Republic of Germany. The procedure would then require the elaboration of a new constitution after two or more German states would have concluded a treaty on the merger between them. A constitutional debate has developed in Germany as to whether Art.146 can nevertheless be applied even after the accession under Art.23¹⁶. This is not of interest in the present context. However, it is clear that the great majority of people in the German Democratic Republic wanted to join the constitutional system of the Federal Republic of Germany.

Although the content of the Four Power rights and responsibilities had never been clearly defined after 1945 it was not in doubt that the Four Powers had to give their consent to German reunification¹⁷. The Three Western Powers had agreed with the Federal Republic of Germany in the treaty concluded to regulate their relations after the Federal Republic had become sovereign in almost all respects that their common goal was a unified Germany with a free constitutional system based on the same principles as the Grundgesetz¹⁸. This showed that the Three Powers were under a formal obligation to give their consent to reunification when it became possible under conditions which ensured a free constitutional system in Germany. Besides this treaty obligation, the right to self-determination which has been accepted as a general rule of public international

¹⁵ Art.146 reads: "This Basic Law loses its validity on the day on which a constitution enters into force which has been adopted by the German people in a free decision". The article was amended by Art.4 of the Treaty on Unification and now reads: "This Basic Law, which after the completion of the unity and freedom of Germany is valid for the whole German people, loses its validity on the day, on which a constitution enters into force, which has been adopted by the German people in a free decision". It is a matter of dispute how far Art.146 can still be used without respecting the provisions on constitutional amendments laid down in Art.79 of the Federal Constitution.

¹⁶ See the contributions and discussions in: J. A. Frowein [et al.], *Deutschlands aktuelle Verfassungslage*, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Vol.49 (1990).

¹⁷ Frowein (note 16), 11 et seq.

¹⁸ Comp. note 10.

law had to be respected by the Four Powers in this context¹⁹. This was not in dispute after the population of the GDR, in the elections of March 18, 1990, opted for the unification of Germany. The parties which had subscribed to that goal carried about 85 per cent of the votes.

On September 12, 1990, the Treaty on the Final Settlement with Respect to Germany was concluded by the two German states and the Four Allied Powers in Moscow²⁰. The preamble proclaims that the parties act on the basis of the principle of equal rights and self-determination of peoples and they formally welcome the fact that the German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a state so that they will be able to serve the peace of the world as an equal and sovereign partner in a united Europe. The Four Powers recognized, by subscribing to these principles, that the German people, after exercising their right to self-determination by the election in the GDR and the constitutional decision in the Federal Republic of Germany, taken already in 1949, had, under public international law, the right to unite in a single state.

It is a moot question, therefore, to what extent such a right would also have existed if only a minority in the GDR had opted for unification and a majority could only have been formed by including the people of the Federal Republic of Germany. Whether under the circumstances of a divided state the right to self-determination is held by the peoples of the different entities and also by the people as a whole or only by the latter is a difficult issue²¹. It would seem that under German constitutional law as well as under public international law the Federal Republic of Germany would have had to respect a decision by the majority in the GDR to remain organized in a second German state²². As soon as a state has become a member of the United Nations the right to self-determination must certainly apply to its people.

3. The German Borders

According to Art.1 of the Treaty on the Final Settlement with Respect to Germany the united Germany shall comprise the territory of the Fed-

¹⁹ D. Thüerer, Self-Determination, in: EPIL Instalment 8 (1985), 470.

²⁰ BGBl. 1990 II, 1318; in this issue Annex A.1.

²¹ See K. Doehring, Das Selbstbestimmungsrecht der Völker als Grundsatz des Völkerrechts, Berichte der Deutschen Gesellschaft für Völkerrecht, Vol.14 (1974), 7 et seq.

²² Frowein (note 16), 12-15.

eral Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and "shall be definitive from the date on which the present treaty comes into force". It is added: "The confirmation of the definitive nature of the borders of the united Germany is an essential element of the peaceful order in Europe". Art.1 para.2 states that the united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law²³. According to Art.1 para.3 the united Germany has no territorial claims whatsoever against other states and shall not assert any in the future. Para.4 states that the Governments of the Federal Republic of Germany and the German Democratic Republic shall ensure that the constitution of the united Germany does not contain any provision incompatible with these principles. It is expressly added that this applies accordingly to the provisions laid down in the preamble, the second sentence of Art.23, and Art.146 of the Basic Law for the Federal Republic of Germany. For this reason these articles were amended already in the Treaty on Unification of the Two German States²⁴.

Art.1 para.5 states that the Governments of the Four Powers take formal note of the corresponding commitments and declarations by the Governments of the Federal Republic of Germany and the German Democratic Republic and declare that their implementation will confirm the definitive nature of the united Germany's borders. This refers particularly to the Polish-German border question where the two German parliaments had adopted resolutions beforehand according to which the German-Polish border on the Oder and Neisse would be finally confirmed²⁵.

It cannot be assumed that Art.1 of the Treaty should be an obstacle to any border adjustment agreed upon between Germany and any of her neighbours. Although the use of the word "definitive" seems to show

²³ This Treaty was signed on November 14, 1990, and will be ratified during 1991. The Treaty provides as follows:

"Art.1. The parties confirm the border as it exists between them and whose delimitation is laid down in the treaties of 6 July 1950 between the German Democratic Republic and the Republic of Poland ... and in the Treaty of 7 December 1970 between the Federal Republic of Germany and the People's Republic of Poland about the basis of normalization of their relations.

Art.2. The parties declare that the border which exists between them is inviolable now and for the future and they agree to respect unconditionally their sovereignty and territorial integrity".

²⁴ See above notes 1 and 15.

²⁵ Bulletin der Bundesregierung, November 16, 1990, 1394.

that the border may not be changed without the agreement of all the parties to the Treaty on Germany this cannot have been the intention of the parties. According to Art.7 para.2 Germany shall have full sovereignty over its internal and external affairs. The impossibility to agree on any changes of her borders would be a limitation of her sovereignty which cannot be assumed²⁶.

The provisions of the Treaty have to be interpreted on the basis of the development which has taken place concerning Germany's boundaries after the end of the Second World War. The so-called Potsdam Protocol of 1945 has always been one of the most important and disputed documents as far as Germany's boundaries after the Second World War are concerned²⁷. Regarding territorial questions two important decisions were taken at the Potsdam Conference in July–August 1945, both subject to the express qualification that they were agreed pending the final determination of territorial questions at the peace settlement²⁸. According to the first decision, the city of Königsberg and the area adjacent to it was to be "placed under the administration" of the Soviet Union. The conference agreed in principle to the ultimate "transfer" of this area to the Soviet Union. As stated in the protocol and in the report of the conference, the President of the United States and the British Prime Minister declared that they would support this proposal at the "forthcoming peace settlement"²⁹.

The second decision concerned Poland. While the Heads of Government reaffirmed "their opinion that the final delimitation of the western frontier of Poland should await the peace settlement", they agreed that:

"Pending the final determination of Poland's western frontier, the former German territories East of a line running from the Baltic Sea immediately West of Swinemünde, and hence along the Oder river to the confluence of the Western Neisse river and along the Western Neisse to the Czechoslovak frontier, ... shall be under the administration of the Polish state and for such purposes it should not be considered as part of the Soviet zone of occupation in Germany"³⁰.

Although the Protocol speaks of "former German territories" the con-

²⁶ A much clearer wording would be needed here.

²⁷ J.A. Frowein, *Potsdam Agreements on Germany*, in: *EPIL Instalment 4* (1982), 141–146.

²⁸ For the text of the Protocol see *Foreign Relations of the United States, Conference of Berlin (Potsdam) 1945, Vol.2* (1960), 1478 et seq.

²⁹ Part V of the Protocol: "City of Königsberg and the Adjacent Area".

³⁰ Part VIII: "Poland, B. Western Frontier of Poland".

text clarifies that the Protocol was not intended to change the boundaries. Therefore, it is unnecessary to discuss the issue whether the victorious powers had any international legal right to formally change Germany's boundaries. However, it cannot be disputed that the Four Powers had entered into obligations *vis-à-vis* Poland³¹. Because the victorious powers had committed themselves in Yalta to move the Polish border to the west, the regulation concerning the German territories east of the Oder and Neisse had to be taken³². It is even clearer for the provisions related to the northern part of East Prussia which was to be put under Soviet administration that the victorious powers entered into obligations, in this respect, among themselves³³.

The two German states had concluded different agreements concerning the Oder-Neisse boundary. The GDR had, already in 1950, signed a treaty with Poland by which the border along the Oder and Neisse was confirmed as the state boundary between Poland and Germany. It is interesting that at that time the GDR confirmed the boundary between "Poland and Germany"³⁴. The Federal Republic of Germany concluded the Warsaw Treaty with Poland on December 7, 1970, which uses a formula very similar to the Görlitz Treaty. The two parties are in agreement that the existing boundary line is "the western state boundary of the People's Republic of Poland". However, the Federal Republic of Germany insisted on having Art. IV of the Treaty included which states that the agreements concluded by the two parties or which concern them are not affected by the Warsaw Treaty³⁵.

On November 14, 1990, the Federal Republic of Germany and the Republic of Poland signed the Treaty concerning the Confirmation of the Boundary between the Two States³⁶. The preamble refers to the unification of Germany as a state with "definitive borders". According to Art. 1 the parties confirm the Oder-Neisse border and they refer to the treaties of July 6, 1950, between the German Democratic Republic and Poland as

³¹ Frowein (note 27), 145 et seq.

³² In Yalta "accessions of territory in the North and West" which Poland should receive were agreed. See Foreign Relations of the United States (note 28), 1567, 1572.

³³ See above at note 29.

³⁴ UNTS 319, 93.

³⁵ UNTS 830, 327; the present author acted as an independent adviser in the negotiations leading to the Warsaw Treaty in 1970; as to the difficult legal issues involved see J. A. Frowein, Zur verfassungsrechtlichen Beurteilung des Warschauer Vertrages, *Jahrbuch für Internationales Recht* 18 (1975), 11–61.

³⁶ See above at note 23.

well as to the Warsaw Treaty of December 7, 1970, between the Federal Republic of Germany and Poland. In Art.2 the parties declare that the border between them is inviolable and they engage themselves to fully respect their sovereignty and territorial integrity. With this treaty the difficult history of the Oder-Neisse border has finally been concluded³⁷.

One may discuss how Poland acquired title to the former German territories. One view is that the Treaty of 1990 should be seen as a cession of territory by Germany³⁸. However, it would seem appropriate to employ a more differentiating analysis of the development. Poland had already treated these territories as falling under Polish sovereignty soon after the Potsdam Agreement³⁹. Although that was certainly not valid under public international law Poland gained recognition for her actions by all the states of the Eastern bloc including the German Democratic Republic. In 1970 the Federal Republic of Germany decided to accept that the territories had become Polish but added the reservation explained above. Of the Four Allied Powers at least two, the United States and Great Britain, had not yet given their consent to a final change. All of the Four Powers and the Federal Republic of Germany finally accepted the outcome of the Second World War in 1990. This should be seen as the recognition of an annexation brought about by the immediate post-war developments. When the Four Powers agreed to put these territories under Polish administration in 1945 they wanted to prepare the way for a peace settlement under which the Polish border was to be moved to the west⁴⁰. This peace settlement never came. From this difficult development a lengthy dispute over the territorial situation arose. This dispute was finally settled in 1990 with the reunification of Germany.

The legal basis for the decisions taken in Potsdam remains doubtful, especially as far as the provisional territorial arrangements and the agreement on population transfer is concerned⁴¹. Nevertheless the provisional territorial arrangements agreed upon at Potsdam became the basis for the post-war order in Europe and for the detachment from Germany of

³⁷ For the history see O. Kimminich, *Oder-Neisse Line*, in: *EPIL Instalment 12* (1990), 267, 271.

³⁸ In that sense E. Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, *Neue Juristische Wochenschrift* 43 (1990), 1065, 1071 et seq.

³⁹ S. Krülle, *Die völkerrechtlichen Aspekte des Oder-Neiße-Problems* (1970).

⁴⁰ Frowein (note 35), 44–47.

⁴¹ No rule of public international law can be cited which would have entitled the Four Powers in 1945 to take such far-reaching decisions regarding territorial changes.

vast parts of her former territory, especially the old German provinces of East Prussia and Silesia. Germany finally recognized that situation in 1990.

It may be added here that the confirmation of the German borders in the Treaty of September 12, 1990, also concerns the small border adjustments which have been agreed upon for the western borders of Germany between the Federal Republic of Germany and her western neighbours. During the period from 1949 to 1990 the Three Western Powers had always taken the view that border changes, also on the western border of Germany, remained subject to final confirmation at a settlement for Germany as a whole⁴².

It has already been discussed whether the confirmation of the German borders as made definitive in Art.1 of the Treaty on Germany limits German sovereignty as far as possible rearrangements of the German borders are concerned⁴³. As far as normal border treaties are concerned it seems clear that the Treaty was not intended to limit Germany's sovereignty. It is less certain whether a radical change of Germany's borders with the agreement of the state concerned could also be brought about without the Four Powers being legally affected. Assuming that Poland would voluntarily want to cede all the former German territories to Germany the rights of Poland could not be affected by that change. The sentence in Art.1 para.1 of the Treaty on Germany according to which the confirmation of the definitive nature of borders of the united Germany is an essential element of the "peaceful order in Europe" would seem to give the Four Powers a certain *droit de regard* in such a situation. They would be able to argue that the peaceful order in Europe could be in danger with a complete change in the territorial composition of European states. This would seem to be a remaining competence of the Four Allied Powers circumscribed in the Treaty of September 12, 1990.

4. The Termination of the Four Power Rights and Responsibilities

Art.7 of the Treaty on Germany stipulates:

"The French Republic, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America hereby terminate their rights and responsibilities relating to Berlin and to Germany as a whole. As a result, the corresponding, related quadripartite agreements, decisions and practices are terminated and all related Four

⁴² Frowein (note 5), 46 with note 103.

⁴³ Above p.7 et seq.

Power institutions are dissolved. The united Germany shall have accordingly full sovereignty over its internal and external affairs”.

45 years, three months and six days after the Four Powers had assumed supreme authority with respect to Germany they agreed to terminate their rights. However, on September 12, 1990, the Treaty on Germany was only signed. According to Art.9 the Treaty shall enter into force on the date of deposit of the last instrument of ratification or acceptance by the contracting states. The united Germany ratified the Treaty on October 13, 1990, the United States of America on October 25, 1990, the United Kingdom on November 16, 1990, and the French Republic on February 4, 1991. As the last of the Four Powers to do so, the Soviet Union deposited its instrument of ratification on March 15, 1991⁴⁴.

With the signature of the Treaty on September 12, 1990, in Moscow the Four Powers formally suspended their rights and responsibilities concerning Berlin and Germany as a whole from the date of the unification of Germany until the coming into force of the Treaty on Germany⁴⁵. This meant that with the unification on October 3, 1990, the rights and responsibilities could no longer be exercised but were “suspended”. An interesting legal question would have arisen if one of the Four Powers had not ratified the Treaty on Germany. Could it then have been said that Germany had not acquired full sovereignty since the Four Power rights were only suspended? It would seem that with the unification of Germany on the basis of the agreement of all those concerned the Four Power rights could not have been revitalized. That was recognized by all the Four Powers when, in the preamble to the Treaty on Germany, they stated: “Recognizing that thereby, and with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole lose their function”. Accordingly, all the Four Powers, under international law, would have been estopped from arguing that they could revive the Four Power rights if one of them had not ratified the Treaty on Germany. The correct legal analysis would have been that with the unification of Germany brought about by an act of self-determination with the consensus of all the Four Powers their rights and responsibilities had become obsolete even without a formal treaty coming into force.

⁴⁴ BGBl. 1991 II, 587.

⁴⁵ The German text is published in BGBl. 1990 II, 1331; a French version may be found in *Revue Générale de Droit International Public* 94 (1990), 1176. The English text may be found in the Annex, *infra* A.2. See also *International Legal Materials* 30 (1991), 555.

It has not always been understood, even in Germany, that the remaining position of the Four Powers concerning Germany as a whole contained a very important dynamic logic for a possible reunification of Germany. The Three Powers had agreed in Art.7 of the Treaty between them and the Federal Republic of Germany on their relations that they aimed at a reunification⁴⁶. One day the Soviet Union could discover her interest in the same goal. In this case the German Democratic Republic would be faced with a very difficult situation. The Soviet Union has exercised her rights on the basis of the Four Power status in 1989/1990.

It would seem to be the correct analysis that the Four Power rights and responsibilities were always conditioned by the absence of a resolution of the German question. President Weizsäcker summed up the situation aptly as follows: "The German question is open as long as the Brandenburg Gate is closed". The opening of the Brandenburg Gate set in motion the process which ended on October 3, 1990. On this day Four Power rights and responsibilities could no longer limit Germany since all the Four Powers had agreed on the solution for German reunification.

5. Conclusion

The disappearance of a state in the centre of Europe by peaceful means and a free decision of the people concerned is an historic event. It also raises a number of difficult legal issues. It may not be exaggerated if one underlines that the agreement to German reunification became possible only after the Federal Republic of Germany, by her foreign policy since 1949, had shown that full co-operation within the European framework would always be her approach. The system created by the European Community, North Atlantic Treaty Organization and the other European structures could convince the Soviet Union that confidence in German reliability was justified. At a very early stage during the unification process it became clear that the Soviet Union would accept the principle which is now expressed in Art.6 of the Treaty on Germany, according to which the right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom, shall not be affected by the Treaty on Germany.

The rules of public international law concerning state succession are among those most hotly disputed in specific cases. It was therefore of considerable importance as a precedent that the two German states agreed

⁴⁶ Above p.5.

to include Art.12 in the Unification Treaty which concerns the agreements concluded by the German Democratic Republic⁴⁷. According to Art.12 those treaties will be discussed with the other parties on the basis of protection of confidence, the different interests and taking into account the competences of the European Communities. The principles of a free and democratic constitutional system based on the rule of law will also be of importance according to Art.12. The outcome of these discussions may be, as the treaty provides, the formal statement that the agreements concluded by the GDR remain in force, will also be amended or have terminated. It would seem that this is an excellent manner in which to deal with the tricky issues of state succession. Most likely a very large number of treaties will be found to have terminated with the disappearance of the German Democratic Republic⁴⁸.

Looking back to German post-war history and the discussion on the legal consequences of the events in 1945, 1949 and later the picture now already seems quite clear: After the Second World War, which had been begun by a criminal German Government, Germany was occupied within her boundaries as of December 31, 1937. All territorial acquisitions after this date were restituted by allied acts already in 1945. The freely elected German Federal Government has always recognized these early allied measures as binding⁴⁹. In the western part of the occupied Germany the German state which had not disappeared was reorganized in 1949 by acts

⁴⁷ As an official English text of Art.12 does not yet exist, the author refers to the translation placed at his disposal by Mr. Giegerich, pursuant to which Art.12 reads as follows: "(1) The Contracting Parties are agreed that the international treaties of the German Democratic Republic shall, in the course of the establishment of the unity of Germany, be discussed with the contracting partners of the German Democratic Republic under the aspects of the protection of legitimate expectations, the interests of the states concerned and the treaty obligations of the Federal Republic of Germany. The discussion shall take into account the principles of a free democratic basic order founded on the rule of law, observe the competences of the European Communities and shall be aimed at regulating or determining those treaties' continued applicability, adjustment or expiration.

(2) The united Germany shall define its position concerning the devolution of international treaties of the German Democratic Republic after consultations with the contracting parties concerned as well as the European Communities, if the latter's competences are affected.

(3) If the united Germany intends to accede to international organizations or other multilateral treaties to which the German Democratic Republic but not the Federal Republic of Germany is a party, an agreement shall be reached with the contracting parties concerned and with the European Communities, if the latter's competences are affected".

⁴⁸ See S. Oeter, German Unification and State Succession, in this issue, 349 et seq.

⁴⁹ Cf. D. Blumenwitz, Die territorialen Folgen des Zweiten Weltkrieges für Deutschland, *Archiv des Völkerrechts* 23 (1985), 1-30.

of German authorities confirmed by free elections. Although these organs also had the intention from the very beginning of including the German territory in the Soviet zone of occupation, this was not possible because of Soviet resistance⁵⁰. In this part another German state was created by Soviet intervention. This state, the German Democratic Republic, could never gain any sort of democratic legitimacy from its citizens.

The German Democratic Republic identified herself as a new subject of international law which had nothing to do with the former German state and was based on Marxist-Stalinist ideology as a constitutional system. After some uncertainties in relation to German unification it became clear in the 1950s that the German Democratic Republic saw herself as a new state which had seceded from Germany. This secession was, in public international law, never fully effective because some constitutional remnants as to the relations between the Federal Republic of Germany and the GDR still existed⁵¹. In 1989/1990 the secession of the GDR ended and she became part of the Federal Republic of Germany, which always considered herself as the continuation of the German state founded in 1867/1871⁵².

The German territories east of the Oder and Neisse were separated from Germany by allied acts in 1945 and were not treated as part of the Soviet zone of occupation but rather put under a specific Polish or Soviet administration. The GDR recognized in 1950 that these territories were under Polish sovereignty. The Federal Republic of Germany, twenty years later in 1970, made the same statement but reserved the position of the Four Allied Powers which could not be changed by a treaty between Germany and Poland. With the reunification of Germany the Four Powers confirmed the border along the Oder and Neisse and the united Germany concluded a treaty with Poland repeating her recognition of the border.

The Federal Republic of Germany had continued the international legal position of Germany during the forty years of separation. The responsibility which the Four Powers had carried for Germany as a whole, with

⁵⁰ The preamble of the Basic Law of 1949 stated that the German people in the Länder of West Germany had acted also for those Germans who had been prevented from participating in the adoption of the constitution.

⁵¹ Frowein (note 5), 37–40.

⁵² In 1867 the North German Federation came into existence as a federal state under the political leadership of Prussia. In 1871 the Southern German States acceded to this federation, according to the view which became generally accepted.

the most evident and visible effects in Berlin⁵³, was a sort of framework which held the parts of Germany together. The constitutional rule according to which all federal and other state organs in the Federal Republic of Germany had to try their best to bring about reunification, which was laid down in the preamble and in Arts.23 and 146 of the German Basic Law, found its implementation in 1990⁵⁴.

Probably the most important factor for the continuation of Germany in the minds of the German people was the existence of a common German nationality. According to Art.116 of the Federal Constitution Germans, in the sense of the Constitution, were all those who held German nationality in 1949. The Federal Republic of Germany successfully claimed that according to this rule all those remained German nationals who had acquired this nationality according to legislation⁵⁵. For those who also held the nationality of the German Democratic Republic the German nationality was effective mainly as an "open door" (Scheuner). It meant that all citizens of the GDR had the possibility, wherever they saw that chance, to put themselves under the protection of the Federal Republic of Germany. In fact, the Federal Republic of Germany was able to convince many states that they should treat the two German nationalities on the basis of letting the individual decide which nationality he wanted to invoke⁵⁶. The justification for that practice lay in the fact that no self-determination of the German people had been possible after 1945. The special status of Germany with the continuing existence of the Four Power rights and responsibilities was seen as a special reason to keep the possibility open for every German to choose between the two German states and nationalities. It could not be seen as an abuse when the individual decision of any German citizen was respected as long as no free self-determination of the German people was possible. With this practice, based on federal constitutional law, the responsibility of the Federal Republic of Germany for Germany as a whole found its most effective expression⁵⁷.

⁵³ J. A. Frowein, Berlin, in: EPIL Instalment 12 (1990), 58–63; Hendry/Wood (note 5).

⁵⁴ See Decisions of the Federal Constitutional Court, Vol.36, 1 et seq.

⁵⁵ Frowein (note 5), 48–54.

⁵⁶ J. A. Frowein, Das Individuum als Rechtssubjekt im Konsularrecht. Zu den Konsularverträgen mit der DDR, in: Internationales Recht und Wirtschaftsordnung, Festschrift für F. A. Mann zum 70. Geburtstag (1977), 367–380.

⁵⁷ The Federal Constitutional Court, in the famous *Teso* decision, found that persons naturalized in the GDR also acquired German nationality, in the sense of the German Constitution, see Decisions of the Federal Constitutional Court, Vol.77 (1987), 137 et seq.