INTERNATIONAL LAW ASPECTS O F THE GERMAN REUNIFICATION: ALTERNATIVE ANSWERS TO THE GERMAN QUESTION

By, Edward Elwyn Johnson[a]

I. INTRODUCTION

At the center of the cold war, at the heart of the European Community's financial strength, in the midst of Western international politics, lies the German nation. This part of the world sets trends in both the domestic and international realms. Possibly the most widely publicized event in recent international news was the overdue answering of the German Question: what to do with the administration of the severed German State? The reunification of the Communist East Germany with the Democratic West Germany was the healing of one of the last open wounds remaining from World War II. This article will explore the international law aspects of this reunification.

Beginning with an historical overview of the political history of central Europe from World War II until the Reunification, the legal analysis will focus on three separate issues: first, a territory's right in international law to exercise self determination or to suppress self determinative manifestations; second, the validity of the contested German border with Poland; third, the international law governing succession to treaty obligations. For the sake of affording adequate discussion to these issues, other topics which are equally important have been truncated from this article, namely military issues, expropriation disputes, as well as the resolution of meting out

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justice for human rights violations in the former East Germany.

To properly understand these truncated issues a foundational study needs to be made into the issues this article addresses first. This is especially a concern when, as is true here, the evidence of international law is somewhat sparse and oftentimes contradictory. Many rules are based on a consensus of activity, what then is to be made of deviations from that trend? Should deviations from a desired course of action be ignored or deemed to define a new trend? What if that result would violate our notions of human rights? Many of the issues cannot be adequately addressed with traditional legal theories. Rather such concerns may only be properly suited to resolution by the political process instead. These and similar problems should be kept in mind throughout this article as we frame the general discussion of German Reunification in international law.

II. THE HISTORICAL CONTEXT OF GERMAN REUNIFICATION

Neither the East nor the West particularly wanted to let a unified Germany come under the other's control. Allowing Germany to rejoin as one nation was sure to wreak havoc on the politics of the European Union,[1] NATO,[2] COMECON,[3] and the Warsaw Pact.[4] To understand Germany's

[1] The European Union. The six founding states were: Belgium, France, Germany, Italy, Luxembourg, and The Netherlands. Other nations in Europe later acceded; in 1973, Great Britain, Ireland and Denmark joined; in 1981, Greece joined; in 1986, Spain and Portugal joined. Today there are fifteen members since Sweden, Austria, and Finland joined the Community in 1995. *See generally*, DAVID A. O. EDWARD & ROBERT C. LANE, EUROPEAN COMMUNITY LAW (2nd ed. 1995). Member state voting weight according to the European Economic Treaty is based on state population. Adding 17 million people to the population of Germany would change the political dynamic within the union. Albrecht Randelzhofer, *German Reunification: Constitutional and International Implications*, 13 Mich. J. Int'l L. 122, 140 (Fall, 1991).

[2] NATO, The North Atlantic Treaty Organization, created by the signing of the North Atlantic Treaty, April 4, 1949. The original member states were: Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, The Netherlands, Norway, Portugal, the United Kingdom, and the United States. Greece, Turkey, West Germany and Spain joined later.

situation and why reunification was potentially so disrupting to the international community and

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NATO is a military security and defense organization that was the western counterbalance to the Soviet military threat which came to be embodied by the Warsaw Pact. *See generally,* EDWARD, *supra* note 1.

[3] COMECON, **Council for Mutual Economic Assistance, a trade organization of Communist countries.** The former members of COMECON are: Bulgaria, Cuba, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Poland, Romania, and the U.S.S.R. The U.S.S.R. was comprised of the following republics: Armenia, Azerbaijan, Belorussia, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldovia, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. RENATA FRITSCH-BOURNAZEL, EUROPE AND GERMAN UNIFICATION 28, 32, 137-38 (1992); Sam Blay, *Self-Determination: A Reassessment in the Post-Communist Era*, 22 Denv. J. Int'l L. & Pol'y 275, 290 (Spring 1994). Maintaining membership was mandatory, if East Germany were allowed to break ranks it would likely cause the total collapse of the whole group.

[4] Warsaw Pact, created by the Warsaw Treaty of Friendship, Cooperation, and Mutual Assistance, May 14, 1955. The member states were the Soviet Union, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania. It was the Eastern counterpart to NATO that subjected its member states to obligatory participation. With the advent of *perestroika* and *glastnost* and the reunification of East Germany with the West it began to lose cohesion

balance of power in the world, the historical context within which reunification came about must be considered. The relevant history for purposes of illuminating the present law of succession of states[5] with respect to Germany's reunification[6] begins with the ending of the Second World War in Europe.

A. World War II

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and was disbanded as of March 31, 1991. Blay, *supra* note 3, at 290.

[5] The law of succession of states purports to answer the question of who succeeds to a state's international obligations when it has undergone a transformation in its sovereign identity. What will later be discussed is the law of secession of states, which purports to answer the questions of self determination; of whether and how a state or territory may secede or otherwise transform its international or sovereign identity.

[6] The movement to bring East and West Germany together from the dismemberment that followed the Second World War came to be known properly as the Reunification, not simply the Unification. This is because it connotes a joining of what was formally unified and also because Germany has already undergone a 'Unification' once before. Germany as a single nation has existed for only about a hundred years. Since antiquity the central region of Europe was comprised of hundreds of small feudal kingdoms, many only as large as the city or castle at its center. It was Otto Von Bismarck who first united the Germanic people into the modern state of Germany. This event gave the people a great sense of identity and pride. No longer were there hundreds of warring clans, but one strong, unified nation. This event has come to be known as the Unification of Germany. Therefore the mending of the split that separated East and West Germany came to be known as the Re-Unification, although they are often used interchangeably for the recent event. *See*, DIETRICH ORLOW, A HISTORY OF MODERN GERMANY, 1871-PRESENT 26-61 (3rd. ed. 1995).

Before World War II ended, Winston Churchill, the Prime Minster of the United Kingdom, met with President Roosevelt of the United States and Joseph Stalin, the leader Union of Socialist Soviet Republics. Together these leaders came to be known as the "Big Three," representing a powerful and formidable union of militarily successful nations. They gathered to discuss their intentions toward Germany should they prevail in the conflict. Their first conference at Tehran, in Iran, from November 28 to December 1, 1943, and later their second conference at Yalta, in the Ukraine on the Black Sea, from February 4 to 11, 1945, revealed their common desire to "dismember" the aggressor, Germany, at the close of the war.[7] Although no Polish or German representative was present, it was decided that Germany's border with Poland should be moved to the West and North, to conform to the path of the Oder and Neisse Rivers.[8] Also in anticipation of the ending of the War, the Protocol on Zones of Occupation in Germany and Administration of the "Greater Berlin"Area (London Protocol) was formed in London on September 12, 1944. In this Protocol, demarcation lines were drawn to divide up Germany and the "Greater Berlin" area within the borders as they existed on December 31, 1937. This date was chosen because it was the day before the Blitzkrieg invasion of Poland occurred which began Germany's wartime territorial

[7] Tehran and Yalta (Crimea) Conferences. *Reprinted in* Documents on Germany, 1944-1985, U.S. Department of State, Committee on Foreign Relations, United States Senate, 92nd Congress., 1st Sess. 8 (1971), [Hereinafter *Documents on Germany*]; [1 FROM SHADOW TO SUBSTANCE 1945-1963] DENNIS L. BARK & DAVID R. GRESS, A HISTORY OF WEST GERMANY 19, 22 (2d ed. 1993) [hereinafter *HISTORY OF WEST GERMANY, Vol. 1*]; FRITSCH-BOURNAZEL, *supra* note 3, at 74-76; Ludwig Gelberg, *The Warsaw Treaty of 1970 and the Western Boundary of Poland*, 76 Am. J. Int'l L. 119, 122 (1982).

[8] With the Oder and Neisse (or Neibetae) Rivers as the new German - Polish border three German states were severed: Silesia, Pomerania and East Prussia. Since there were no Polish or German representatives at the conferences it left the question open whether the change was valid according to normative international law principles. Wladyslaw Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 Am. J. Int'l L. 163, 165 (1992); Jochen Abr. Frowein, *The Reunification of Germany*, 86 Am. J. Int'l L. 152, 156 (1992).

acquisitions.[9] This protocol served two essential purposes: first, to introduce the concept that the German territorial acquisitions of the War would not be recognized; and second, to divide up both Germany and Berlin, the capital city of the Reich, into sections that would each be administered by one of the victorious nations in the hopes that the recompensatory incapacitation would facilitate the post-war effort of the reconciliation, reconstruction and reintegration of Germany with Europe, and Europe with the rest of the world.

[9] Protocol on Zones of Occupation in Germany and Administration of the "Greater Berlin"Area, Sept. 12, 1944, U.S.-U.K.- U.S.S.R. 227 U.N.T.S. 279 [hereinafter *London Protocol*] Documents on Germany, *supra* note 7, at 1-3 (text); FRITSCH-BOURNAZEL, *supra* note 3, at 73; PAUL B. STARES, ALLIED RIGHTS AND LEGAL CONSTRAINTS ON GERMAN MILITARY POWER 5, 26-28 (text excerpts) (Brookings Occasional Papers, 1990); Peter E. Quint, *The Constitutional Law of German Reunification*, 50 Md. L. Rev. 475, at 589 n.391 (1991). This was later amended to include France in the administration, *see*, STARES, *supra* 29-35.

Before the German Reich signed papers of unconditional surrender on May 7 and 8, 1945,[10] the German leaders knew the Allied Powers intended to change their borders. On June 5, 1945, the Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers (Berlin Declaration),[11] was signed at Berlin, transferring supreme administrative authority to the four main victor states: the United States (U.S.), the United Kingdom of Great Britain (U.K.), France, and the Union of Soviet Socialist Republics (U.S.S.R.). This document contained express statements proclaiming the Victor's power to change Germany's external borders as they deemed fit. The Potsdam Conference, July 17, to August 2, 1945, was then convened to change the border of Germany and Poland along the Oder - Neisse Rivers as was proposed at the Yalta Conference. The decision was to sever three of Germany's *Länder*[12] and give them to Poland. These were (1) Silesia, (2) Pomerania, and (3) East Prussia. The transfer of these "former German Lands," as the Potsdam Agreement referred to them, was declared to be a war reparation. Immediately after this agreement was proclaimed, these *Länder* were seized by Poland and administered as wholly Polish territories.[13] The Potsdam Agreement

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[10] Germany signed papers of unconditional surrender to the Allies on May 8, 1945, ending the war in Europe. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 47; Gelberg, *supra* note 7, at 121.

[11] Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by the Allied Powers, June 5, 1945, 68 U.N.T.S. 189 [hereinafter *Berlin Declaration*], Documents on Germany, *supra* note 7, at 12, 13. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 49, 58, 102, 175; FRITSCH-BOURNAZEL, *supra* note 3, at 76; STARES, *supra* note 9, at 5-6, 9, 40-45 (text excerpts); *see also*, Quint, *supra* note 9, at 589-90; Randelzhofer, *supra* note 1, at 128-29; Gelberg, *supra* note 7, at 121, 125; Frowein, *supra* note 7, at 154; Czaplinski, *supra* note 8, at 165. This was not merely a military surrender, but also a surrender of the German Government and State. Gelberg, *supra* note 7, at 121.

[12] German province - states are called *Länder*, or *Laender*, in the plural form. The singular form is *Land*.

[13] The Potsdam Agreement, Aug. 2, 1945, U.S.A.- U.K. - U.S.S.R. Documents on Germany, *supra* note 7, at 32, 34. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 50-56, 58; FRITSCH-BOURNAZEL, *supra* note 3, 76-78; STARES, *supra* note 9, at 6, 46-57 (text excerpts); *see also*, Quint, *supra* note 9, at 479-83, 590-91, 600-04; Randelzhofer, *supra* note 1, at 136-37; Gelberg, *supra* note 7, at 120-28; Czaplinski, *supra* note 8, at 163-68; Floy Jeffares, *The Gentle Revolution: German Unification in Retrospect*, 20 Denv. J. Int'l L. & Pol'y 537, 543 n.53-56 (1992).

also called for the relocation of the German inhabitants of those regions and encouraged Polish citizens to move in and settle the area.[14] Technically, the finality of the border change awaited a "final peace settlement" that never occurred, but as soon as the Potsdam Agreement was decided the proposed actions were effectuated and it gave the appearance that the move was intended to be permanent, with or without a final peace settlement.[15]

B. The Formation of the European Community

[14] The Relocation or Migration of the German 'expellees' a provision in Article XIII of the Potsdam Agreement. Gelberg, *supra* note 7, at 122-23; HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 35-36, 38-39, 51; FRITSCH-BOURNAZEL, *supra* note 3, at 77-78, 104-05; Frowein, *supra* note 8, at 157.

[15] For a discussion of the controversy over the Final Peace Settlement, *see*, Quint, *supra* note 9, at 479, 591, 600-01, 603-05; Randelzhofer, *supra* note 1, at 136-37 (Potsdam deficient because of the lack of the final peace settlement); *see generally*, Gelberg, *supra* note 7, at 123-27 (most of those who argue to have the Potsdam invalidated are using national constitutional law to do so, but an international agreement cannot be avoided because it is contrary to a contracting state's own constitutional law, *see*, MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 90 (2d. ed. 1993)); *see generally*, Czaplinski, *supra* note 8, at 163-68.

The Unified Europe Movement spread in the aftermath of the War in an effort to create an integrated Europe that would be free from the future threat of an internal war. Its intention specifically was to draw Germany into the bosom of Europe proper in order to prevent another rogue break away which had now been the cause of two world wars. A series of treaties were signed that did not just establish international legal ties, but an international order that culminated in the creation of the European Community.[16]

C. Cold War Politics

The Cold War developed when East - West relations deteriorated, in no small part due to disputes over the administration of Germany. The Soviets took full advantage of the power granted them by the post war treaties with Germany and the Allied Powers by exercising their

[16] The first was the 1951 European Coal and Steel Community Treaty. This controlled the supply of industrial materials in Europe by regulating their manufacture and distribution by establishing a free trade zone for these materials. In 1957, the European Atomic Energy Community Treaty, Mar. 25, 1957, also called the EURATOM Treaty, was created to promote research and development of nuclear power in Europe. Also, in 1957, the Treaty of Rome established the European Economic Community. This treaty was culturally as well as economically focused. This is reflected in its declaration of purpose which was to promote cooperation in all fields of human endeavor and create a common market within the member states. Finally, the Merger Treaty of 1965 combined the governing bodies of all three communities into one that resembles the modern European Community that exists today. Merger (Brussels) Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965 [hereinafter *Merger Treaty*]. The name 'European Economic Community' was later was shortened to simply the European Community by the Maastricht Treaty of 1992 and is commonly referred to today as the European Union. EDWARD, *supra* note 1, at ¶ 3, 4, 9-14.

control over the sector of Germany they administered and separating it from the other three quarters held by the other Allied Powers. The five *Länder* that were under Soviet control that were segregated included: (1) Berlin-Brandenburg, (2) Mecklenburg-Vorpommern, (3) Sachsen - Anhalt, (4) Sachsen, and (5) Thüringen. Since both Germany as a nation and Berlin as its capital city were divided into four sectors, each under the control of one of the Allied Nations, when the U.S.S.R. exercised its administrative rights over the portions of Germany under its control it created a very difficult problem. Berlin was in the Soviet *Land* of Brandenburg. When the Soviet portion was severed from the rest of Germany, three quarters of Berlin was still under the control of the West and isolated in the middle of Communist territory. This made Berlin both an opportune hub for international espionage for the East and West, but also a painful thorn in each other's side.

The Western Allies soon found their German occupation too expensive to continue indefinitely, even with their portion of Germany paying some of the bill. When the decision was made to create a semi-autonomous state out of the western German territory the Occupation Statute was created by the Western Allies on May 12, 1949.[17] This Statute denied the government of West Germany competence in the areas of foreign affairs and military policy once the government became officially established. The Allies did not want to deny Germany complete international identity, they merely placed a control mechanism over what they saw as the more troublesome aspects of statehood. On May 23, 1949, the Federal Republic of Germany (F.R.G., West Germany) was officially created when their *Gründgesetz* (literally "Basic Law") went into

[17] Occupation Statute, May 12, 1949. Documents on Germany, *supra* note 7, at 148. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7 at 231, 252, 254-55; Quint, *supra* note 9, at 592-96; Randelzhofer, *supra* note 1, at 128-29.

effect, which served as a temporary constitutional document.[18] A few years later when the F.R.G. showed signs of stability and economic strength, a greater measure of autonomy was given the new nation according to the General Treaty of May 26, 1952.[19] This Treaty gave the F.R.G. full authority over its internal and external affairs, subject to two very specific reservations of power over questions concerning both reunification generally and Berlin specifically.[20] The F.R.G. also wanted some assurance that the Allied Powers would help them realize their goal of unifying with the eastern portion of their severed nation. So in article 7 of the General Treaty the Three Powers stipulated that their common aim would be to achieve unity for divided Germany under a liberal democratic constitution and for it to be integrated into the European Community.[21]

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[18] The creation of the F.R.G. under the Basic Law. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, a, 217-27, 231; FRITSCH-BOURNAZEL, *supra* note 3, at 92-93; *see generally*, Randelzhofer, *supra* note 1, at 122-23, 128-29. The constitution was temporary to accentuate their firmly held belief that the division of their country was also temporary. It contained express provisions that would be used to unify the two half states, article 23 and article 146. Quint, *supra* note 9, at 480-81.

[19] The Convention on Relations between the Three Powers and the Federal Republic of Germany, *also called*, the General Treaty, May 26, 1952. U.S.- U.K.- Fr.- F.R.G. Documents on Germany, *supra* note 7, at 208. It went into force on May 5, 1955. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 290, 300-02; Quint, *supra* note 9, at 594-96; Randelzhofer, *supra* note 1, at 129.

[20] Allied Power Reservation over F.R.G. autonomy. Quint, *supra* note 9, at 594; Randelzhofer, *supra* note 1, at 129.

[21] Article 7, para. 2 of the General Treaty. Documents on Germany, *supra* note 7, at 208. *See*, Quint, *supra* note 9, at

595; Frowein, *supra* note 8, at 153, 161; Blay, *supra* note 3, at 301 n.54; *see also*, United States: Letters Transmitting Treaty on Final Settlement to Germany to the U.S. Senate, 30 I.L.M. 570, 571.

Meanwhile, the Soviet puppet government, administering what was being called East Germany (the German Democratic Republic, G.D.R.), was quick to recognize the permanence of the division. Even before East Germany was granted the status of independent statehood, the provisional government signed the Agreement Concerning the Demarcation of the Established and the Existing Polish-German State Frontier on July 6, 1950 with Poland, which was commonly referred to as the Treaty of Görlitz.[22] This act officially recognized the Oder-Neisse border between the two states that was established by the Potsdam Agreement.[23] However, according to its wording this treaty was merely declaratory in nature, and so was rejected by the West as an ungrounded and ineffectual attempt to circumvent East German sovereignty.[24]

Four years later the U.S.S.R. granted East Germany independent statehood on March 25, 1954.[25] In the Paris Protocol the U.S.S.R. reserved rights pertaining to "Germany as a whole," meaning specifically questions concerning reunification,[26] just as the Allies had done with the

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[22] The Agreement Concerning the Demarcation of the Established and the Existing Polish-German State Frontier, July 6, 1950, G.D.R.- Pol. [hereinafter *Treaty of Görlitz*] 319 U.N.T.S. 93. *Also called*, the Zgorzelic or Zgorzelec Treaty. FRITSCH-BOURNAZEL, *supra* note 3, 105-06; Quint, *supra* note 9, at 603; Gelberg, *supra* note 7, at 123, 124, 128; Frowein, *supra* note 8, at 156; Czaplinski, *supra* note 8, at 164.

[23] *Supra* note 13.

[24] The nonbinding nature of the Görlitz Treaty. FRITSCH-BOURNAZEL, *supra* note 3, 105; Quint, *supra* note 9, at 603-04; Czaplinski, *supra* note 8, at 164.

[25] The G.D.R. was operating under a provisional constitution as early as 1949. Quint *supra* note 9, at 480, 593. Later the Soviet Union granted official conditional sovereignty to the split nation. Declaration of the Government of the U.S.S.R. Concerning the Granting of Sovereignty to the German Democratic Republic, Mar. 25, 1954; FRITSCH-BOURNAZEL, *supra* note 3, 89-90. The G.D.R.'s constitution was intended to be permanent unlike the F.R.G.'s Basic Law, which reflects the differences of opinion toward the separation of the two German states.

[26] Power reservation, according to the Paris Protocol, Mar. 26, 1954. Quint, *supra* note 9, at 593, 595-96 n.420; Randelzhofer, *supra* note 1, at 129. The Frankfurt Documents, July 1, 1948, noted that even after a new German government was established, the Western Allied military governors "reserve to themselves such powers as are necessary to ensure the fulfillment of the basic purpose of the Occupation." Among other things, these powers included control over Germany's foreign relations, certain aspects of foreign trade, reparations, disarmament, and security of the occupation forces, and the authority to ensure the German government's observance of its own constitution. Indeed, the "Military Governors will resume their exercise of their full powers in an emergency threatening security, and if

F.R.G. Later friendship treaties between the G.D.R. and the U.S.S.R. carried the same message, that G.D.R.'s independence was not complete.[27]

necessary to secure compliance with the constitutions or the occupation statute." Frankfurt Documents, July 1, 1948. Quint, *supra* note 9, at 591-92.

[27] For example the Treaty Concerning Relations Between the Union of Soviet Socialist Republics and the German Democratic Republic, Sept. 20, 1955, U.S.S.R.- G.D.R. 226 U.N.T.S. 201; Treaty of Friendship, Mutual Assistance and Cooperation, June 12, 1964, U.S.S.R.- G.D.R., 553 U.N.T.S. 249; and the Treaty of Friendship, Cooperation and Mutual Assistance, Oct. 7, 1975, U.S.S.R.- G.D.R., 1077 U.N.T.S. 75.

The definitive Cold War schism between the East and West in Europe was the erection of the Berlin Wall in August of 1961. Recalling that the city of Berlin was located in the middle of the Soviet controlled *Land* of Brandenburg, and that three-fourths of the city belonged to West Germany and one fourth to East Germany, West Berlin was essentially an island of democracy in the middle of the Iron Curtain. As the conditions in the Iron Curtain countries deteriorated under Soviet communism, people began to defect to the West in droves. Many conveniently escaped through West Berlin. To stop this drain of human resources the G.D.R., under the guidance of the U.S.S.R., tried to cut off access to West Berlin. The effort began as a barbed wire fence around the border but grew into the archetypal monolith of Soviet oppression, complete with mine-fields, a no-man's land that served as a killing zone, and guards with machine guns who had orders to shoot any person on sight attempting to cross the border. Many people lost their lives trying to gain their freedom. This was intended to keep the East in, but whatever the intent was, the actual effect it had was to seclude West Berlin from the rest of the world.[28]

D. The *Ostpolitik*

[28] Raising of the Berlin Wall, Aug. 1961. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7 at 465-470; FRITSCH-BOURNAZEL, *supra* note 3, 11-13; Peter Ludlow, *The German-German negotiations and the "Two-Plus-Four" Talks, in* GERMAN UNIFICATION IN EUROPEAN PERSPECTIVE, 15, 16-17 (Wolfgang Heisenberg, ed., 1st ed. 1991); *see also,* Quint, *supra* note 9, at 482; Jeffares, *supra* note 13, at 537, 539.

The first Chancellor of the F.R.G., Konrad Adenauer, adhered to what was called the Hallstein Doctrine[29] as a political agenda throughout most of his political career. This was a manifestation of Germany's desire to be firmly integrated with the West and not the East. But what this reactionary mentality entailed was to refuse to recognize the legitimacy of the G.D.R.'s government, claiming to be the only true representative for the German People.[30] The erection of the Berlin Wall however, sparked a countermovement in earnest. The Hallstein Doctrine was gradually abandoned in favor of the policy of *détente* that came to be embodied in the Harmel Report.[31] This was aimed at gradual, long-term improvements in their relationship with the East through friendship agreements, economic assistance and compromise. Many began to see the benefit of recognizing the legitimacy of the Soviet influenced G.D.R. government in order to move toward reconciliation, especially because it was clear that a hostile approach benefitted neither side and brought them to the brink of war more than once. This movement in the political system of West Germany geared toward friendly relations with the East was labeled the *Ostpolitik*.[32] The hard line Hallstein stance softened with time and led to the signing of a series of treaties between

[29] The Hallstein Doctrine directed early West German politics. This was a reaction to the threat of communist expansion, and an effort by West Germany to become a legitimate, respected and fixed member of the western political community. Quint, *supra* note 9, at 482.

[30] Referring to the provision in the Basic Law that is contrary to accepted norms of international law, the *"Alleinvertretungsanspruch."* This attempted to give F.R.G. citizenship to citizens of other sovereigns, not just the G.D.R., but also extending the offer to any people of German descent living anywhere. *Id.*; Gelberg, *supra* note 7, at 123.

[31] The Harmel Report written by Pierre Charles Harmel, Belgian Foreign Minister, initiated the full swing movement of *détente*, a long term process of easing tensions and improving relations with the East. This was formally adopted by NATO and eventually in nearly all east- focused western European polities. [2 Democracy and its Discontents] DENNIS L. BARK & DAVID R. GRESS, A HISTORY OF WEST GERMANY 20-21, 85, 192-93, 272 (2nd ed. 1993) [hereinafter *HISTORY OF WEST GERMANY, Vol. 2*]; FRITSCH-BOURNAZEL, *supra* note 3, 39-41; Gelberg, *supra* note 7, at 119.

[32] *Ost* is the German word for East, '*Ostpolitik*' is literally 'East-Politics,' but more implies a political policy geared to cater to Eastern interests.

the two Germanies referred to generally as the *Ostpolitik* Treaties in the 1970's.[33] These treaties improved relations between the East and West substantially.

[33] The *Ostpolitik* was begun in the end of Adenauer's reign but solidified under the leadership of Willy Brandt, his successor. Examples of some of the *Ostpolitik* Treaties or *Ostverträge* are the Moscow Treaty, Aug. 12, 1970, F.R.G.-U.S.S.R.; Warsaw Treaty, Dec. 7, 1970, F.R.G.- Pol., Quint, *supra* note 9, at 603; *also* the Basic Treaty (*Grundlagenvertrag*), Dec. 21, 1972, F.R.G.- G.D.R., Jeffares, *supra* note 13, at 539; and the Prague Treaty, Dec. 11, 1973, F.R.G.- Czech. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 170-73, 175, 186-89; FRITSCH-BOURNAZEL, *supra* note 3, at 42-44.

The most significant of the *Ostpolitik* Treaties for purposes of Reunification was the Warsaw Treaty[34] of December 7, 1970, which West Germany signed with Poland to confirm the Potsdam Oder-Neisse border. This was done despite the fact that the Western Allied nations were desirous of limiting Soviet controlled territory. The F.R.G., however, did not completely give up on the idea of contesting the border.[35] Article IV of the treaty made reference to other treaties concerning the border that potentially could affect its validity, saying that they would not be superseded by this latest agreement. This provision was aimed mostly at the Potsdam Agreement. Because this implicated the rights held by the four Allied powers, the F.R.G. could argue that the question of the Oder-Neisse line was not finally determined despite this agreement.

[34] Warsaw Treaty, *also called*, the Treaty on Normalization of Their Mutual Frontiers, Dec. 7, 1970, F.R.G.- Pol. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 170-71, 186-89; FRITSCH-BOURNAZEL, *supra* note 3, 106-08; *see also*, Quint, *supra* note 9, at 603; *see generally*, Gelberg, *supra* note 7; Frowein, *supra* note 8, at 156; Czaplinski, *supra* note 8, at 164.

[35] Conditional reservation of validity of the Warsaw Treaty based upon validity of the Potsdam Agreement. Gelberg, *supra* note 7, at 125-127; Frowein, *supra* note 8, at 156.

The West German government also reserved official doubt as to whether the Görlitz and the Warsaw Treaties would be binding should Germany ever unite.[36] In support of this claim they cited the possibility that the original changes to the border with Poland were illegal because they were carried out without either Germany's or Poland's consent.[37] Another argument was the *Alleinvertretungsansprach*, the claim that only West Germany was the true and sole representative of the German people. This was cited to propose that either the consent of the *citizens* of the G.D.R. was needed to concur in a change of this manner, or even if the G.D.R.'s Görlitz indeed carried any legal significance that it was invalid because the G.D.R. was unable to bind the whole of Germany in such a decision.[38] A third argument was based on the official findings of the German High Constitutional Court, the *Bundesverfassungsgericht*, that the Reich "continued" to exist and that it merely had its state offices severed; it was unable to execute any official state functions, and any official changes needed to be done with its permission. Because the border change was not done with consent from any German delegate, the border change was therefore invalid.[39] All three arguments are generally recognized as contrary to accepted principles of international law and would not have been upheld in a court of international justice were West Germany to ever actually stand behind one of them and protest. Probably this was employed more to rally German citizens together or pacify the population that their government was actively

[36] The West Germans argued that neither the Görlitz nor the Warsaw Treaties were treaties of cession and would not be binding on a unified Germany. Czaplinski, *supra* note 8, at 164.

[37] *See*, Gelberg, *supra* note 7, at 125-26.

[38] *Alleinvertretungsansprach* was really a question of continuity and sovereign identity and seems to have been only used as an argument when it was beneficial and the opposite argued when it was not. *See*, Gelberg, *supra* note 7, at 123; Quint *supra* note 9, at 604.

[39] The Argument based on the theory of Continuity of the Reich was official West German governmental policy until the end of the Cold War. 36 BVerfGE 1, 16 (1974); Gelberg, *supra* note 7, at 120; Czaplinski, *supra* note 8, at 164.

fighting to further German interests within the international community. The West German government actually must have known that the decision to reunite did not fall under the influence of such legal arguments, but rather, within the realm of *Realpolitiks*.

This resistance to the post-war exercise of Allied power by the German political community is understood by many observers to be a sign of unrepentant Nazi arrogance. This fails to take into consideration that many Germans felt as victimized by Adolph Hitler and the terrible destruction that was brought to the whole world by Germany in the conflict. The burden of guilt the German people carried for letting such atrocities happen manifested itself very often in the kind of belligerence demonstrated by post war German politicians and lawmakers in such state policies as the *Alleinvertretungsprach.* The broken Germany was forced to face the world after having allowed the Holocaust and World War to happen. They could not hide from the destruction, but had to live with the most hellish memories and not give up the fight to live it down. In this context, such behavior is understood not as arrogance or obstinance, but rather as humiliation.

E. The Fall of the Iron Curtain

The collapse of the U.S.S.R. was imminent to observers by the mid to late 1980's. The heavy handed control the Soviet Union depended upon to maintain Imperial integrity over the republics that constituted the Iron Curtain was waning dangerously low. Partly because the republics could not rely on the Union for the economic support they once received, and partly because the willingness to use military force to keep the republics from going West was lacking, the republics soon began to break away. The impact of these events for Germany were not directly

apparent until the Berlin Wall collapsed, overnight, on November 9, 1989.[40] When Gorbachev introduced *perestroika*[41] and *glastnost*[42] this definitely marked the end of the era where the Brezhnev Doctrine [43] controlled U.S.S.R.'s foreign policy toward the Soviet republics. Possibly it ended, or maybe more accurately, it filled the vacuum left by the abandonment of the Brezhnev Doctrine, but the Cold War clearly was ending and the path to German reunification was set.

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[40] Christoph J. Partsch, *Constitutions and Revolutions: The Impact of Unification and the Constitutions of the Five New German States on the Amendment of the Constitution of the Federal Republic of Germany*, 21 Denv. J. Int'l L. & Pol'y 1, 4 (1992).

[41] *Perestroika*, meaning economic restructuring, but also included a recognition of the right of self determination. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 469; FRITSCH-BOURNAZEL, *supra* note 3, at 85.

[42] *Glastnost*, meaning literally "openness" but more accurately "making public what everyone knows but no one dares to say aloud," HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 467; FRITSCH-BOURNAZEL, *supra* note 3, at 31-32.

[43] Brezhnev Doctrine, also called Socialist Internationalism. Named after Leonid Brezhnev, Soviet leader during the invasion of Czechoslovakia in 1968 that ended the "Prague Spring" period of liberalization within Czechoslovakia. According to this Doctrine it was the Soviet Union's obligation and right to use military force to intervene with any regime within the "socialist commonwealth" to enforce Moscow's policies. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 110; Blay, *supra* note 3, at 279, *generally* 283-87.

Citizen demonstrations and sympathetic leadership within the G.D.R. government also helped to accelerate this process.

Helmut Kohl, the fourth chancellor of the F.R.G., preemptively sought cooperation with the East in reconstructing Germany's future, knowing their exclusion would be most probably disastrous.[44] He initiated dialogues with several Eastern states, and devised his Ten Point Plan that outlined the steps that would be necessary to accomplish the reunification.[45]

[44] The Bush-Kohl and Gorbachev-Kohl Declarations on "common purpose" of May 31, resp. June 13, 1989 are published in EUROPA-ARCHIV, issue 13/1989.

[45] Kohl's Ten Point Plan. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 705-07; FRITSCH-BOURNAZEL, *supra* note 3, 18-20.

Other events in Eastern Europe contributed to the change in the atmosphere between the two Germanies. The walls that held the Warsaw Pact together showed signs of weakening. Many G.D.R. citizens congregated at the F.R.G. embassy in Hungary during the summer of 1989. Hungary was a very popular vacation destination for the East Germans so these people had traveled there under the guise of being on vacation and then demanded to be let across the border.[46] Pressure was building and Hungary was warned by the other Warsaw Pact States that to give in to the people's demands would be a breach of their duties under the Warsaw Pact and subject Hungary to possible punishment. Despite the threat of retaliation Hungary opened its borders to Austria in late August, allowing a flood of G.D.R. citizens to cross into the West.[47] The Eastern governments recognized that if they did not act quickly to stop the exodus by reforming the government first and the social conditions immediately thereafter, their Iron Curtain would most assuredly suffer a fatal leak. What made this possible was not U.S.S.R.'s decision to forego remedial measures, but instead its complete inability to do anything about it at all. The military had weakened so drastically that they were unable to force their will upon the Iron Curtain republics any longer.

Reunification was becoming a reality quicker than anyone expected. The Soviet Government of the G.D.R. resigned just as it was giving way to internal democratic pressures.[48]

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[46] The opening of Hungary's border to the West. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 588-613; FRITSCH-BOURNAZEL, *supra* note 3, at 133-34; Quint, *supra* note 9, at 485; Jeffares, *supra* note 13, at 540; Partsch, *supra* note 40, at 4.

[47] *Id*.

[48] Hans Modrow was the last Soviet leader of the G.D.R. He was a communist who turned and supported the citizen demonstrations who initiated some reforms himself, albeit halfheartedly, and not fast or drastic enough to please either the West or the citizens of the G.D.R. On February 13, 1990 he visited Bonn to request 15 Billion DM in Financial Aid, which request Kohl denied for fear that it would prolong the life of the crumbling communist regime under Modrow's control and complicate reunification. He was the last unelected leader of the G.D.R. and before he left, he

Before this happened however, the first free elections ever were held on March 18, 1990. They were held to replace the one house Parliament with a multi-party, truly democratic legislative body. The political party that dominated the election stood for the pursuit of political and economic reunification with West Germany as quickly as possible. Lothar de Maiziere was the chairman of the majority party and so became the last leader of the G.D.R.[49]

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held the G.D.R.'s first real free, democratic elections on March 18, 1990. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 704, 719; Quint, *supra* note 9, at 496-506; Jeffares, *supra* note 13, at 540-41.

[49] Lothar de Maiziere, the political party he belonged to was the Eastern version of the largest political party in West Germany, the Christian Democratic Union (C.D.U.). HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 729, 732, 738; Quint, *supra* note 9, at 501-02.

West German Chancellor Helmut Kohl, was only willing to invest money in the G.D.R. if it was going to move the two states closer to full reunification. The financial aid plan that Kohl offered de Maiziere's government in May of 1990, was $100 billion Deutsche Marks (DM) more than Modrow had previously requested.[50] This was also not the one time, shot in the arm that Modrow had asked for, but a more involved form of aid, the Treaty of Monetary Union.[51] This was the first truly irrevocable step toward reunification, and from the reforms that were being instituted, even the citizens of the G.D.R. knew by this time that reunification was imminent.

[50] Concerning Modrow's visit to Bonn to request 15 million DM in economic aid, Chancellor Kohl refused to help Modrow's government to the surprise of many East Germans who took this as a sign of the West's reluctance to proceed with reunification, *see*, *supra* note 48.

[51] Treaty of Monetary Union, *also called*, the Currency Reform, *also called*, the State Treaty, May 18, 1990, F.R.G.-G.D.R. *See*, 29 I.L.M. 1108 (*text*). The Treaty was signed on May 18, 1990 and went into force on July 1, 1990. The West DM replaced the currency in the G.D.R. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 732-38; FRITSCH-BOURNAZEL, *supra* note 3, 137-38; Ludlow, *supra* note 28, at 19; Quint, *supra* note 9, at 502, 516-524; Jeffares, *supra* note 13, at 541.

In order to unify, the G.D.R. would have to be dissolved and have their constitution revoked which required a two thirds vote of the Parliament. The West German Basic Law anticipated reunification since its inception and even provided two articles by which reunification could occur: article 23 and article 146.[52] On August 23, 1990, the G.D.R. held a referendum on reunification to decide whether the people wanted to proceed. The overwhelming decision was to go forward, revoke the constitution and unify with the F.R.G. via the avenue provided under article 23 of the F.R.G. Basic Law.[53] It was also decided that it was in everyone's best interest to create a treaty in order to establish some transitional measures and among other more technical reasons to preserve some of the positive aspects of the G.D.R. that would be lost otherwise. On August 31, 1990, the Unification Treaty was signed and went into effect on October 3, 1990, when the G.D.R. dissolved, its constitution was revoked, the F.R.G. Basic Law was amended, and the former five *Länder* of the G.D.R. were assumed by the F.R.G.[54]

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[52] Article 23 provided that the Basic Law would remain intact and be extended to govern any acceding *Länder*, including the French held Saarland and all the *Länder* of the G.D.R. Later a modification of the Basic Law could be undertaken once things settled down. The other article was article 146, whereby the Basic Law would be replaced by a new constitution adopted by the free decision of the people of both German States. Quint, *supra* note 9, at 506-516.

[53] G.D.R. Referendum vote for Reunification. Quint, *supra* note 9, at 507, 512.

[54] Unification Treaty, Aug. 31, 1990, F.R.G.- G.D.R. 30 I.L.M. 457 (*text*); HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 737-40; FRITSCH-BOURNAZEL, *supra* note 3, at 122; Ludlow, *supra* note 28, at 19-20; Quint, *supra* note 9, at 530-549; Randelzhofer, *supra* note 1, at 125-28; *see generally*, Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 85 Am. J. Int'l L. 539 (1991); Jeffares, *supra* note 13, at 541; Blay, *supra*

F. The Ottawa Talks and Final Settlement

note 3, at 306.

Talks had begun in February in Ottawa, Canada, that were later dubbed the "Two Plus Four" talks because they involved the two German and the four Allied nations.[55] The purpose was to tie up all the loose ends concerning the German Question. These talks led to the signing of several preliminary treaties and protocols and eventually cumulated in the signing of the Treaty on the Final Settlement with Respect to Germany on September 12, 1990, in Moscow.[56] This treaty terminated Allied authority reservations over Germany, and among other things it defined Germany's borders when unified. Reunification occurred before this could be ratified so the Declaration Suspending the Operation of Quadripartite Rights and Responsibilities was signed as an interim measure that suspended Allied Power until the Final Treaty could be ratified.[57] According to the Unification Treaty, the border with Poland required a final treaty valid in international law between unified Germany and Poland in order to be finalized. Reminiscent of the Potsdam, this confirmation was also requested by Poland to end the ambiguity that accompanied the border since the end of WWII. The Treaty Between the Republic of Poland and

[55] Ottawa Two-Plus-Four Talks. *See generally,* Ludlow, *supra* note 28; HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 722-23; Quint *supra* note 9, at 611; Randelzhofer *supra* note 1, at 130-31. Other rounds were later conducted all over there world that culminated with the signing of the Treaty on Final Settlement. *See*, Czaplinski *supra* note 8, at 164-65.

[56] Treaty on Final Settlement with Respect to Germany, Sept. 12, 1990. F.R.G. - G.D.R. - Fr. - U.S.S.R. - U.S. - U.K. 29 I.L.M. 1186 (text). This Treaty has ten articles that contained several notable provisions. It defined Germany's borders but required a final treaty between united Germany and Poland before it was official. It settled several issues pertaining to Germany's military status and occupation by foreign troops. It terminated the rights and responsibilities held by France, the U.S.S.R., the U.K. and the U.S. and it also gave united Germany full sovereignty over its affairs, both internal and external. FRITSCH-BOURNAZEL, *supra* note 3, at 100-04; Ludlow, *supra* note 28, at 25-27; David Spence, *German Unification and the European Community, in* GERMAN UNIFICATION IN EUROPEAN PERSPECTIVE 15, 29 (Wolfgang Heisenberg, ed., 1st ed. 1991); Quint, *supra* note 9 at 611-21; *see also*, Randelzhofer, *supra* note 1, at 130-31; Frowein, *supra* note 8, at 154-57; Czaplinski, *supra* note 8, at 165; Partsch, *supra* note 40, at 2.

[57] Declaration Suspending the Operation of Quadripartite Rights and Responsibilities, *also called*, the Joint Declaration, Oct. 1, 1990. U.S.- U.K.- Fr.- U.S.S.R.- F.R.G. 30 I.L.M. 555 (1991). To be enforced on Oct. 3, to ratify the "Final Settlement" by suspending the Allied rights until formal ratification. Attached to the Unification Treaty as Attachment III. Quint, *supra* note 9 at 544; Randelzhofer, *supra* note 1, at 130-31; Frowein, *supra* note 8, at 155 n.17.

the F.R.G. on the Confirmation of the Existing Border Between Them was signed on November 14, 1990.[58]

III. GERMANY'S RIGHT IN INTERNATIONAL LAW TO UNIFY

[58] Treaty Between the Republic of Poland and the F.R.G. on the Confirmation of the Existing Border Between Them, Nov. 14, 1990, F.R.G.- Poland. For the text, *see*, Rzeczpospolita, No. 266, Nov. 15, 1990; 1990 Bulletin des Presse- und Informationsamtes der Bundesregierung 1394. Frowein, *supra* note 8, at 155; Czaplinski, *supra* note 8, at 163, 166.

One might find it an odd question to ask: Did the two German States have the right, in international law to unify? Who could stop them? If one wanted to, how would they go about it without a full scale military campaign? Far from being an issue confined to the internal affairs of the two German states, the reunification implicated the future of world peace, as well as the futures of several prominent international alliances.[59] This is not to forget the myriad of trade and economic agreements that linked the stability of Germany's political and economic status to the rest of the world.[60] With all of the shared risks the international community as a whole had in the maintenance of peace and the status quo, it begins to pique the interest and raise several questions: What would have happened if both German states demanded reunification and the other nations of the world demanded they remain separate? Would Germany have had the legal right in international law to unify? An equally appropriate question in the converse could be asked, whether any other state or alliance of states could have legally prevented Germany's reunification?

[59] For instance, the COMECON group, Warsaw Pact, NATO, and the European Union. *See*, *supra* notes 1-4.

[60] Due to the sheer volume of such treaties and agreements only those that have a significant impact on the issue will be mentioned.

This section analyzes these questions in international law. Due to the gap of concrete authority we find our answers somewhere between the contrast of the two main sources from which evidence of international law comes. The first source is the realm of what is called Public International Law, which is comprised of positive treaties, international agreements and declarations. These are among the most explicit and obvious examples of law in the international genre. The second source is the realm of custom and general principles of law where the issue of self determination as a possible political right emerges. These non-positive sources of law include *jus cogens*[61] which are principles that can be enforced against a state without its consent to be so bound. This section begins with an examination of the respective rights held by the Western Allied Powers, the Soviet Union and Germany in Public International law and whether those treaties that bear on the issue are valid. Noting the evolution of the doctrine of self determination, I will propose that we are in the midst of the doctrine's third stage of modern development and describe what characterizes this new period. I will show that Germany had a conditional right in Public International Law to unify. Concerning the underlying issue of self determination, I will demonstrate that although it may arise in limited contexts, it will never attain the status of an unqualified right in international law, and therefore, was of no avail to aid Germany in their quest to achieve political reunion.

A. The Nature of International Law and the Law of Secession

[61] *Jus cogens*. When a principle is considered *jus cogens*, it is deemed to be so fundamental that when a treaty is contracted in contravention to it, the treaty is deemed to be invalid. These are usually rights that can't be alienated, and are mostly but not always tied to some notion of human rights. They also often concern basic legal principles like *pacta sunt servanda*. Although there really is no primacy of law in the international realm, the concept of *jus cogens* seemingly presents just such a rule. JANIS, *supra* note 15, at 34-35, 62-66.

Compared to domestic law, international law might seem relatively undeveloped. There is no equivalent principle of *stare decisis* in international law. Nor are there clear rules of primacy of law. Unlike domestic law that comes purely from the decisions of the Judicial and Legislative branches, however they may function in a particular nation, the sources from which international law comes are much different. These sources are: (1) treaties, or positive law derived from the actions of lawmakers; (2) state custom among civilized nations which itself is evidenced by state practice and the writings of jurists and scholars; (3) general principles of law, or natural law derived from common human reason, including *jus cogens*; and finally (4) equity.[62]

[62] JANIS, *supra* note 15, at 4-6, 9-14, 41-82.

A major difference that can be drawn between these sources is the difference between positive and non-positive law. Positive law being law that is based on consent for its authority. Positive law does not necessarily trump non-positive law. In fact, in some narrowly defined situations, a fundamental non-positive concept having the power of *jus cogens* would trump a treaty. This would include many of the fundamental principles that constitute the very fabric of civility that holds the international community together. Without which there would be no way to foster trust, cohesion or cooperation in the international realm.[63]

Positive law serves the same purpose, generating international cohesion and cooperation, but it does so in a different way. If a nation enters into an agreement then backs out of it, they would lose credibility and respect in the international community. A non-positive rule, however, because it does not depend on consent, can be enforced against a state even over its express objection. This makes it seem that positive law is less effective and powerful than non-positive law. This might be so if there was a greater consensus as to what these fundamental rules are and also if enforcement were not such an obstacle in and of itself. Also, not every fundamental rule is as animated as human rights, piracy and war. Mostly they are just mundane principles of fraud, duress or mistake and are not really the type of issues that steer most international relationships. Instead we find that treaty law is the most widespread, predictable and efficacious.

[63] Some international legal scholars greatly contest the validity of these non-positive sources of law, but their existence is generally accepted and serves an important function in international law. In the absence of such universally enforceable rules there would be no justification for stopping a rogue state from legalizing crimes against humanity like torture or piracy. *Id.*

The international law of state secession deals with the questions that arise concerning whether and how a territory that desires to alter its sovereign identity may do so within the bounds of international law. This issue arises when a territory breaks away from its parent or predecessor state or merges with another territory or state. There are two conflicting interests that polarize the law of secession: the doctrine of self determination; and the conservative interest of maintaining territorial integrity.[64] Self determination is defined generally as the right of a "people" to freely decide their own socio-political destiny.[65] Rooted in democratic political philosophy and modern concepts of human rights, self determination naturally has a larger acceptance among the advocates of political liberty than those advocates and practitioners of other less democratic, more authoritarian forms of government. One should not think that the interest of maintaining national territorial integrity is simply a justification for oppression espoused by authoritarian governments

[64] Andrew M. Beato, *Newly Independent and Separating States' Succession to Treaties: Considerations on the Hybrid Dependency of the Republics of the Former Soviet Union*, 9 Am. U. J. Int'l L. & Pol'y 525, 538 (1994).

[65] Self determination as a political right has arisen in situations where it has an application both internally and externally. Internal self determination commonly refers to the right of a territory within a larger nation to secede in which case more often than not a state of civil war erupts. External self determination is the application of the doctrine to whole states, not splitting up an existing state, rather merging two territories together. There may even be some cases in which the situation might be considered a combination of both, such as the reversion of Hong Kong to China's control after the termination of England's lease. Let it suffice to identify that the forces that would affect the ultimate outcome of such disputes differ slightly in practice, but as an introduction to the area of law and the legal-political debate the general right of self determination is the same in both situations, the right of a "people" to decide freely their own political destiny. Randelzhofer, *supra* note 1, at 132; *see generally*, Blay, *supra* note 3; *see also generally*,

like the former U.S.S.R. Instead it is obvious that without some force holding a state comprised of several identifiable ethnic, cultural or geographic groups together, the world would devolve into a chaos of civil wars, similar to what recently engulfed the former Yugoslavia. To allow self determination to justify such world terror is plainly counterintuitive and contrary to the basic principles of international relations aimed at keeping the peace on both a global and local scale.

Mitchell A. Hill, *What the Principle of Self-Determination Means Today,* 1 I.L.S.A. J. Int'l & Comp. L. 119 (1995).

Conventional international law places no restrictions on a territory wishing to secede, or territories to merge, so long as such action is not in breach of any international agreements. But this general rule is swallowed up by the exceptions, especially in Germany's case. Several agreements were signed[66] that gave the Allied nations authority concerning Germany's reunification, and left both German states powerless to do anything to help themselves. If there were some independent international law right that Germany could have relied upon instead, like a principle carrying the weight of *jus cogens* for example, then they might find a legitimate way out of otherwise binding treaties. This, of course, is the precise question this section attempts to answer.

[66] *See*, the Berlin Declaration, *supra* note 11; the Occupation Statute, *supra* note 17; the General Treaty, *supra* note 19; and the Paris Protocol, *supra* note 26.

Before we can ask what right a territory has to secede, we need to determine whether a territory needs to attain some prerequisite attributes before it can be a state in international law. Are certain territories unable to declare independence or is it a theoretical possibility for any region? For a territory to become an international state it must exhibit four characteristics: land; a population; a government; and the ability to enter into international agreements.[67] These elements are not statutory requisites but basic attributes without which the territory simply cannot function as an international entity. A related fifth issue is the recognition of that territory's statehood by other members of the international community. Unlike the other four factors this is not a requirement for statehood.[68] There is neither a duty to recognize a state nor a requirement to be recognized by any other state to attain the status of statehood. There is however, a generally accepted duty in international relations to not recognize a state when either it lacks the attributes

[67] These characteristics were expressed as such in the "Montevideo" Convention on the Rights and Duties of States Dec. 26, 1933, article 1. 49 Stat. 3097; T. S. No. 881; 164 L.N.T.S. 19. *See*, Lynn Berat, *Genocide: the Namibian Case Against Germany*, 5 Pace Int'l L. Rev. 165, 199 n.158 (1993).

[68] There is actually some debate whether or not recognition is an element of statehood. According to what is called the constitutive theory it is required, according to the declaratory theory, it is not. JANIS, *supra* note 15, at 183-86; *see also*, Blay, *supra* note 3, at 294; *see generally*, Phillip M. Brown, *The Legal Effects of Recognition*, 44 Am J. Int'l L. 617 (1950); *see also*, TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION (L.C. Green ed., 2d ed. 1951); *see also generally*, The Tinoco Arbitration (U.K. v. Costa Rica), 1 U.N.R.I.A.A. 369 (1923); Russian Socialist Federated

of statehood, is an illegal creation or a rebel territory in the unresolved process of secession.[69]

It should be becoming clear than state secession in international law is not a purely legal issue. State secession actually exists as a political question, and self determination is a quasi political right without a solid foundation in law. This is not to say that as a political question the right to secede is determined at the polls for it is usually up to the discretion of national executive powers, or on the other extreme by revolutionaries. Nor is this to say that such issues are decided without the use of military force, for in these matters, he who has the stronger army very often has the most persuasive argument. What this is meant to say is merely that as a political issue, to try and solve it using purely legal methods is an exercise in futility and frustration. Political questions can't be properly defined, manipulated or governed by applying an objective rule of law. This conundrum would discourage lawyers and legal scholars only familiar with domestic law, but law in the international realm comes much closer to the political arena than domestic law. Curbing the discord between hundreds of states exercising their conflicting political wills is one of the primary functions international law serves. International law will always be more predictable and consistent the farther away it gets from issues of a political nature, but choosing our battles in such

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Soviet Republic v. Cibrario, 139 N.E. 259 (1923).

[69]The withholding of premature recognition for a territory in the unresolved process of secession merely recognizes that to recognize a seceding territory prematurely is an interference with the parent or predecessor state's internal affairs. Once a parent state is either unable or unwilling to exercise control over the rebel territory then recognition is permissible, but not before. *Supra* note 68; *see*, 1 LASSA OPPENHEIM, INTERNATIONAL LAW 127-28 (8th ed. 1955); *see also*, Blay, *supra* note 3, at 294.

a way is not a luxury we can afford. The issue of state secession being so close to the political arena, the development of an inconsistent and unpredictable system was all but inevitable. This is the nature of much of international law and is something we can't change and so are forced to accept and work with.

B. Germany's Right to Self Determination under Public International Law

At the close of World War II a series of treaties were signed that transferred authority over Germany's government to the four Allied powers. The most express was the Berlin Declaration.[70] Soon thereafter, due in part to disputes over how Germany was to be administered, the Cold War began between the Soviet Union and the democratic capitalist nations of the West. The two states were carved out of the decapitated Reich, one communist which came to be known as East Germany, and one capitalist which came to be known as West Germany.

[70] The Berlin Declaration, *supra* note 11.

When Lenin wanted to entice the nations of Eurasia to join what was being promoted as a constitutional federation of independent states he promised that any state deciding to join would have the right to self rule within the federation and the right to secede at any time.[71] These same principles were later incorporated into the Soviet Constitution of 1936 and the Declaration of the Rights of the Peoples of Russia.[72] Several of the nations that joined the Union, both consensually and otherwise, still harbored strong separatist sentiments. Military force was frequently used to ensure these republics would use their "free will" to remain in the Union. Moscow's strong arm policy toward the constituent nations of the Union was called the Brezhnev Doctrine[73] by the West but the legitimate sounding Socialist Internationalism by the Soviets. According to this political doctrine each member state of the "socialist commonwealth," a designation imposed on a state by Moscow, was under a duty to have a Soviet modeled socialist government and remain a member of the Warsaw Pact. It was also their duty to stop any other socialist nation from entertaining any contrary notions, like capitalism or democracy, and subject them to forceful military intervention, if necessary, to bring them back into the fold should they attempt to stray.

[71] Lenin's recruiting of the Soviet Republics. Blay, *supra* note 3, at 284-85.

[72] Declaration of the Rights of the Peoples of Russia. *Id*. at 285-86.

[73] Brezhnev Doctrine, s*upra* note 43.

The promise of empowering the constituent republics with the right to self determination, although official state doctrine, was completely a fabrication in the Soviet Union until Gorbachev introduced *perestroika*[74] and *glastnost*[75] into the already dying Union. He also led the reform process that redefined the Communist Party of the Soviet Union's political attitude toward the member republics.[76] The reform included an official relationship of peaceful coexistence between the Union and the republics, a policy of non-intervention in their internal affairs, and the right of the member republics to determine their own political destiny independently (self determination).[77] The Soviet infrastructure suffered from years of neglect and economic depression. Bankrupt and apathetic, they were becoming less able to use military power to enforce their socialist rules of oppression. Republics began to leave and the decision to recognize their right to do so was probably an effort to save face in light of the inevitable.[78]

Moscow was now making a greater effort to accommodate and respect the basic human

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[74] *Perestroika*, *supra* note 41.

[75] *Glastnost*, *supra* note 42.

[76] Gorbachev's 'New Thinking' Reforms. HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 469-71, 541, 569-70; FRITSCH-BOURNAZEL, *supra* note 3, at 33-35, 139; Quint, *supra* note 9, at 484; Blay, *supra* note 3, at 288-91; Sari T. Korman, *The 1978 Vienna Convention on Succession of States in Respect of Treaties: An Inadequate Response to the Issue of State Succession*, 16 Suffolk Transnat'l L. Rev. 174, 174 n.1 (Fall, 1992).

[77] Blay, *supra* note 3, at 287-89.

[78] In 1991 the attempt to overthrow the government in Moscow, which has been since called the August Coup, in a twist of ironic fate dealt the death blow to the military and political authoritarianism that the very rebels who had masterminded the Coup had sought to reestablish. Immediately following this event the three Baltic States, Estonia, Latvia, Lithuania, finally achieved their independence. These states had persisted in the condemnation of the control the Soviet Union exercised over them from the beginning. In fact they had expressed their desire to exercise their right of self determination since before the non-consensual annexation of their states by Germany and then the U.S.S.R. during World War II and immediately thereafter. By the time the Soviet Union fell apart the German Question was already resolved, but the struggle for independence goes on for other republics even until today. Blay, *supra* note 3, at 288-89; Gregory H. Fox, *Self-Determination in the Post-Cold War Era: a New Internal Focus?*, 16 Mich. J. Int'l L. 733, 744 (1995) (reviewing YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY (1994)); Korman, *supra* note 76, at 174.

rights of the ethnic groups that comprised the empire. This was quite a change from the Union's former policy of employing torture, murder and genocide to discourage any ideas that could get in the way of total allegiance to the Communist Ideal, particularly affiliations of a religious or ethnic nature. However, judging from the way Moscow dealt with the secessionist conflict with the Republic of Chechnya it is apparent that they never embraced the fullness of the doctrine.[79]

[79] Chechnya's war of secession. Fox, *supra* note 78, at 741.

When East Germany was given the status of independent statehood in 1954, according to the Paris Protocol, the Soviet Union reserved the right to decide questions pertaining to the reunification with West Germany.[80] There were no conditions that gave the Union any obligation to act should certain favorable circumstances arise. According to the terms of the protocol the Soviet Union's power to keep East Germany from unifying could be exercised in perpetuity. Although the actual degree of independence and participation the Soviet controlled republics exercised in their international relations was greatly suspect, a state in East Germany's position would still have difficulties in voiding the treaty that gave them their limited freedom. In order to have a treaty voided because it was not entered into consensually by the nation bound by its terms, the treaty would have to have been entered into while this condition of incapacity existed.[81] The power the U.S.S.R. had over East Germany directly resulted from the resolution of the War. Later treaties between the satellite and Soviet government may have had this fatal flaw, but in effect they granted East Germany more autonomy, not less. Without some justification based on *jus cogens* or similarly persuasive international law, East Germany had no legal right to assert to unify with West Germany against the U.S.S.R.'s wishes. Barring some major military intervention, it seemed that until a few weeks before the Berlin Wall fell, Germany would never unite.

[80] Paris Protocol and Soviet power reservation over East Germany, *supra* notes 25, 26.

[81] Vienna Convention on the Law of Treaties, May 23, 1969, arts. 50, 51; 1155 U.N.T.S. 336; Janis *supra* note 15, at 32-39.

The position of the Western Allied Powers with respect to Germany's reunification was markedly different for two prominent reasons. The democratic legacy from which the Allied nations have come; and the General Treaty they signed, that created certain international legal obligations. Concerning the democratic legacy, it is generally accepted that the historical development of democratic practice in the modern era owes most of its success to the work of both America and France. The United States has stood behind the ensign of self determination for the underlying premise behind its foreign policy for years, especially with respect to authoritarian regimes.[82] We are also reminded of the battle cry of the French Revolution for *Liberté, Égalité, Fraternité*, that has left the most pronounced and lasting impact for liberal politics to this day. This evidence of support for self determination is not merely to show how we predict these governments would act, it does much more than that. Where a state has a history of following a

[82] For evidence of support for self determination in U.S. foreign policy see President Woodrow Wilson's Congressional Address of May 1917, as well as the French Revolution's Declaration of the Rights of Man, and the American Federalist Papers. Early American political philosophy is rich with evidence that self determination was the quintessential axiom of their struggle. For example the American Declaration of Independence states, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." Although American revolutionaries did not use the term 'self determination' in their political rhetoric, the principles they founded America upon are clearly identical.

certain agenda, even when it has been against that state's interests to do so, this is evidence in international law of what is called *opinio juris*.[83] If this evidence were admitted in an international tribunal it would likely be enough justification for the court to apply equitable principles of estoppel to preclude the Allied nations from denying the application of the right for Germany.

[83] *Opinio juris*, is a term in international law that refers to the belief by a state that their actions are governed by some perceived legal obligation, whether or not one actually exists. JANIS, *supra* note 15, at 46-48.

The second reason, barring any unexpected legal loopholes, is all but determinative in Public International Law. This right comes from article 7 of the General Treaty that was signed in 1952 soon after the F.R.G. was established as an independent nation.[84] Article 7 quieted fears commonly held among F.R.G. citizens at the time that either the Allies would get fed up with taking care of Germany and ignore their deepest concern, or keep the state in limbo as a continuing memorial to the atrocities of War. Article 7, paragraph 2 gave them the assurance they wanted. The Allies declared that they "...will cooperate to achieve, by peaceful means, their common aim of a unified Germany enjoying a liberal-democratic constitution, like that of the Federal Republic, and integrated within the European community."[85] Peter Quint writing for the Maryland Law Review on the subject commented that several German scholars held the belief that by agreeing to this language the Western Allies were giving assurance that they would not use their reserved rights to deny consent to reunification should the opportunity arise.[86] It is not clear, however, whether any other nation gave this argument any credence.

[84] General Treaty power reservation, *supra* note 21.

[85] *Id*. Art. 7, para. 2, This was also reflective of the concerns most West Germans had that they might fall under Soviet control should the West not provide them with the proper support. Frowein, *supra* note 8, at 153.

[86] Quint, *supra* note 9, at 594.

Whatever the collateral rights that this treaty indicated, it unequivocally granted West Germany the legal right in international law to unify with East Germany *vis à vis* Western Allied attempts to prevent it, should the conditions stated in the agreement come to pass. Article 7 of the General Treaty did not convey an absolute right in itself but rather a conditional right, upon the event that reunification could be carried out on favorable terms for the Allies.[87] Once the U.S.S.R. began to fall apart and East Germany was given the freedom to choose its own political future, the East Germans held their first truly democratic vote since the collapse of the Weimar Republic. A new, pro-unification government was voted in.[88] Then in a landslide referendum, the people voted to unify with West Germany. Over the past four decades the West had expended a tremendous amount of energy trying to cope with the tensions created between the Soviet Union especially concerning East Germany. This new development was completely unexpected and arose almost overnight. It was now clear to the world that the conditions of Germany's qualified right to self determination according to the General Treaty that triggered the Allied obligation to grant them permission to unify were finally met. Indeed, reunification occurred within a matter of just a few months.

C. Self Determination as a Right in International Law

[87] General Treaty s*upra* note 21.

[88] The Reform process and elections of the G.D.R., *supra* notes 48-54; Quint, *supra* note 9, at 487, 495-97, 500-02, 508; Frowein, *supra* note 8, at 152.

Self determination on its face encompasses the right of a "people" to self rule.[89] Taken to its furthest logical extension this implicitly stands for the idea that it is the right of a "people" who occupy a territory under the governmental control of another "people" to secede from that political entity. To say that a "people" has the right to secede also implicitly means that a government does not have to right to stop them from leaving. There are other ways self determination can manifest, but in the international realm it is for the right of complete independence that it is most often advanced.[90] Due to the inconsistent support one finds for the doctrine pertaining to the right to secede, it is still much better suited as a humanitarian plea than as an operative legal right.[91] For to recognize the right to secede as a legitimate rule of international law would mean that it would be the right of any "people" to cast off the rule of government merely because they constitute a distinct and discernable demographic. This definition is so broad that it could apply to almost anyone who wants to oppose the invisible and ubiquitous "they" or "them" who run *any* government. A rule of law of this character would sound the death knell for every large pluralist nation and perpetual civil wars would become be the status quo. Essentially, any warlord would

[89] See the explanation of Self determination, *supra* note 65.

[90] Some of the alternatives to secession that also satisfy self determinative aspirations range in degree of severity from the establishment of local mayors who represent minorities, to regional councils, to parliamentary representatives, to colonial governments run in part by native officials to the creation of a federation of independent states. The creation of Native American Indian Reservations is an example of how America dealt with the problems when faced with it. Also some individuals when faced with this situation would rather choose to flee the country, but while seeking refuge in another country may be a common occurrence and is an alternative to secession, the rights of an individual and the rights of the "people" from where such individual refugee comes are not dealt with the same in international law.

[91] Some are willing to say that self determination has emerged as an operative right in international law. Blay, *supra* note 3, at 275; Hill, *supra* note 65, at 120; Fox, *supra* note 78, at 733. However, the fact that there is no evidence of a decided stance on the issue should be reason enough to postpone such premature recognition of it as a Right. There is no agreement in the entire corpus of international law on self determination from which we can say with certainty that such a right exists or not, what it implies or when it applies. The three best examples of this are the United Nations Charter, the Charter of the Organization of African Unity and the Helsinki Accords. All of which reflect a variable standard that appears to be based on political discretion rather than a legal standard.

be able to launch a coup that would be backed by international law merely by claiming that his "people" are not properly represented by the ruling authority. To elevate secession as an international law right would be a justification for destruction and the reason why when self determination is used to promote the right of secession as a means of preserving a "people's" identity it is fundamentally irreconcilable to the goal of maintaining national integrity. There may be a season for everything, a time to break apart and a time to gather together, a time for war, and a time for peace, a time to secede and a time to prevent secession. However, deciding which interest to promote at which time should not be done in law, rather these things must be left to the political process.

The application of self determination to a given situation has changed according to the way the term "people," to whom the right to assert self determination applies, is defined in international law. Not surprisingly, the two recognized periods in which this principle was applied and developed in the modern period have coincided with both World Wars. The third and present period of self determination comes now at the end of Cold War.

The first period was adeptly referred to as the Period of Nationalism by Mitchell Hill, writing for the International Law Students Association on self determination.[92] As he pointed out President Woodrow Wilson's Fourteen Point address to Congress made it clear why America was participating in World War I: to free the trapped nationalities from the oppressive rule by the Germans and Russians.[93] The Allies in WWI, however, did not consider themselves to be under

[92] Period of Nationalization. Hill, *supra* note 65.

[93] President Wilson's address reflected the general opinion that it was the right of a people under an oppressive government to be free, but not the right of every people to be free. Also that there was a moral duty to aid the struggle of these oppressed peoples with the use of military force. *Id*. at 121-22.

any obligation to free any of the colonies that they held themselves. In this primal stage, the "people" who had the right to assert self determination were the people under the oppressive imperial dominion of either the German or Russian empires, but none other.

The end of World War II marked the start of the second period of self determination which has been universally called the Period of Decolonization. It was at this time that the right of self determination became synonymous with the process of decolonization. This arguably helped end self determination's longevity as a political agenda once the process of decolonization ended. It was in this period that the U.N. adopted several resolutions and promulgated several conventions and documents, including the U.N. Charter that embodied the right of self determination for any and all colonial territories.[94] Although the U.N. stood firmly behind its commitment to self determination in the colonial context, there were two ways in which their policy was decidedly curtailed. First, they did not support the application of the right in a non-colonial context.[95] Second, they refused to apply the principle to allow ethnic groups across colonial borders to unite by changing their colonial borders.[96] The colonial borders were established by foreign nations without regard as to ethnic divisions, so many small but distinct races were separated across three or more political units. The U.N.'s policy was to force these now free colonies to abide by the preexisting borders which precluded the members of a cultural or ethnic group that lived on both sides of a border from uniting into a single self ruled territory.

This confinement of self determination in the colonial context to an internal application

[94] U.N. Charter, G.A. Res. 1516. Blay, *supra* note 3; *see also, supra* note 65.

[95] This was the U.N.'s self defined stance, limiting the right to a manageable number of subjects. Blay, *supra* note 3; *see also, supra* note 65.

[96] The U.N.'s position of not recognizing an ethnic group's right to unify. Blay, *supra* note 3; *see also, supra* note 65.

reveals political mentality during the Post World War II period. More emphasis was generally placed on maintaining territorial integrity than ethnic community at the direct cost of ethnic cohesion and unity. This forced many hostile ethnic groups to live together among each other under a government controlled by the majority race, to the discrimination of other minorities.[97] The incomplete solution employed by the international community is a direct cause of the recent unrest that we have seen across the globe from India, and Africa to Eastern Europe.

[97] This was not just the opinion of the U.N., but also of the Organization of African Unity (O.A.U.) that took over regional oversight of the process of the decolonization of Africa. *See*, Blay, *supra* note 3, at 280.

Legal justification for this was based on a modification of the notion of *uti possidetis*, a term in international law that stands for the notion that territory which was acquired by force during a war should remain in that nation's possession.[98] Political justification had more to do with the concern that if every ethnic group were allowed to redefine their political borders to surround themselves with people of only their ethnicity that the fragmentation that would inevitably ensue would have plunged the world into an intense bloodbath of territorial wars. Therefore the solution would not be determined by any legal or political process, but by military might. It is clear that where rights are meted out by military force, no justice can be assured, and whatever hopes there were of preserving ethnic identity would be lost. For this reason, the decisions of the U.N. at the time were seen as intuitive, but hindsight has proven them to be only a treating of immediate symptoms, and not a full remedy at all. This partial solution set the stage for the third period of self determination, where these trapped and divided ethnic groups are asserting their rights to self determination, not based on the former definition of "peoples" according to any political border, but purely according to cultural and ethnic identity.

The third period is marked by the end of the Cold War. I believe it may be called the Cultural, Ethnic or even Minority Rights Period in the development of the doctrine of self determination because it is only now that the fear of recognizing the rights of religious, cultural or ethnic groups to politically associate is truly being overcome. Especially since the collapse of the Soviet Union we are witnessing this growing recognition among the increasing number of democratic nations that ethnically distinct "peoples" should be afforded the right to self rule. This trend may be a response to the horrific examples of ethnic oppression that have scarred our recent

[98] *Uti possidetis.* BLACK'S LAW DICTIONARY 1546 (6th ed. 1990).

history. What we are also learning in this modern period is that states comprised of hostile ethnic groups are the most unstable, and possibly pose the largest threat to world peace based on frequency of internal strife alone.

Is it wrong to encourage peoples with differences to shun each other and make their own smaller nations or should we force them to work together and get along? I think this is the wrong question and does not recognize the heart of the problem. There may alawys be a little room to negotiate but where it is not possible to talk sense to a ruling class, the only viable solution to save oppressed classes from persecution may be to give them their own nation. When internal ethnically motivated conflict arises it is usually a majority oppressing a minority. However, we have also seen cases where it is the other way around and the minority is oppressing the majority, either by military strength, or as in South Africa with Apartheid which was a form of political racist oppression.

The emergence of the term 'ethnic cleansing' as a descriptive word for civil wars should alert us to this problem. Rwanda exploded in such a conflict directly attributable to the fact that the colonial border dissected several hostile minority ethnic groups and put them in very close proximity within a single political entity. Majority government laws discriminated against the trapped minorities. This acted as a catalyst, coupled with the tension of inequalities in economic distribution that plagues much of Africa, a civil war was practically a matter of time. What was so disturbing about the incident was the fact that the war was not fought to divide up the land but to exterminate racially different people from it. If the Rwandans had been encouraged by the international community to divide their nation before hostilities flared up as they did, it may have given them a much better option for everyone involved. If each ethnic group seeks to ensure the

survival of their unique way of life when it is threatened, secession may be a worthwhile option to explore. Particularily when the alternative is to leave them to fight amongst themselves within an arbitrary border for space to preserve their identities. If this internal conflict is repeated all over Africa where many of the same ethnic groups are divided among different nations in varying proportions, there would be an enormous loss of life amidst the chaos and savagry. The true tragedy of such an outcome is that it would be completely avoidable. What we must remember is that for much of the world, national pride is not nearly as important as cultural or ethnic heritage. In such cases where a people feel that the continued existence of their cultural group is threatened due to their present national or political affiliation, there may be no other acceptable solution, in their minds, than to let them establish their own state. The dissolution of Yugoslavia is another manifestation of the same inter-racial stress that erupted in Rwanda and has now spilled over into Zaire. Still other examples are the flight of the Kurds; in a way South Africa's abandonment of Apartheid; the creation of the Palestine nation to attempt to calm hostilities between them and Israel; the independence of Kashmir and Sir Lanka from India and now the continued fighting between the Hindu Tamils and the Buddhist Sinhalese on that island. Another, more benign example is the attempted secession of Quebec province from Canada. And finally, the until recently unanswered German Question. The underlying reason behind German Reunification was simply the desire of the ethnic German people to all live together in one state.

It is not that the right of secession is going to be any more accepted now than in the past. It is only that where it is recognized, it will not be limited to a politically centered subdivision as it was before. There will then be the same minor but necessary redefinition of the validity that secessionist claims are afforded. When secession was only justified in law in the colonial context,

and only allowed within the existing political boundaries, there was a great curtailing of the exercise of the right. When this restriction is loosened to allow a minority group within a larger nation more freedom to exercise self determination, there will be a corresponding increase in acceptance of the right to change that nation's borders.

This may not be such a stark departure from the former policy. The right is still going to be focused within a nation and not until several neighboring nations that have each severed a part of an ethnic group all undergo a similar division would the smaller pieces join together into a single, ethnically homogenous nation.[99]

[99] Such application may very well find its largest but not exclusive audience in Africa. This would be the best process to employ to redefine the national borders to settle ethnic friction. Whether this should be aggressively pursued, maybe begs the question. If the "peoples" of Africa decide to redefine their borders to finally shed the lingering control of their colonial masters, then it can happen two ways: orderly according to these legal guidelines, or chaotically according to civil war. The more imminent the possibility of another outbreak of war hostilities, the more aggressively such a solution should be pursued. But in the absence of a distinct need, it would probably only serve to disturb an otherwise peacefully coexisting pluralist nation.

The largest obstacle to this movement will not however come from those advocating the interest of maintaining territorial integrity as one might expect. When a nation is in the throes of a civil war any meddling by a foreign nation is considered a violation of international law as an interference in another sovereign's internal affairs.[100] Even so much as recognizing a rebel territory as an emerging independent state while the parent state is still either able or willing to bring them back under national control again is regarded as illegal intervention. For the international community to step in and halt the war, granting the rebel territory the right to secede in order to stop the vioolence is contrary to presently accepted world politics. While this may be the direction in which we move in the future, as it does seem to satisfy some sense of justice and diplomacy, it is more likely that other alternatives to secession will be employed, like applying the doctrine of federalism as America did, and as Russia pretended to do, for example. But even if the right to secede does have its day, larger nations should not be so fearful because an equilibrium will eventually be reached where the interests of self rule and submission to a larger nation will be balanced. There are arguments both for and against a territory wanting to secede. For example having a stronger national defense, more national resources, freedom of movement within a larger area, and a larger and more stable economy are all reasons why a larger national entity would be desired over smaller segregations. If people can work and live together the benefits will outweigh those had the territories remained separate.[101]

This is not a new problem we are only now experiencing in the modern period. These

[100] JANIS, *supra* note 15, at 179-83.

[101] In circumstances where a minority group is undecided it is probably a better idea to encourage an alternative to secession, like establishing a federalist structure. However, in many cases, especially where a group is being mistreated, such compromises are just not going to help.

problems have always been with us. In the past, these issues were solved by wars and genocide which is the very reason why international law is intervening, to prevent such horrific solutions from ever being resorted to. What is sure to differentiate this third period from the former is confirmed in the knowledge that the way we once tried to quiet self determinative aspirations did not work then, and cannot even begin to solve the problem we face now. In order to address the problems that these trapped minorities represent we will have to adapt our rules of self determination to meet the present situation. If this means giving more latitude to secessionism, this may not be such a bad thing taken in moderation. Not that I am advocating the international community give credence to all secessionist claims. Some cases will be more compelling than others, as where a minority group is subject to racially motivated violence. This is merely to say that the present view of self determination rights will necessarily evolve to finally recognize that the fulcrum of group cohesion, cultural identity, is too strong a force to continually suppress in the name of temporary political stability.

International law in respect to self determination does not provide us with any clear answers for a state in Germany's position. If the General Treaty were not signed there would have been very little help from other areas of international law in support for Germany's position. This is not to say that the Western Nations would have fought the merger, but they would have been under no international legal obligation to do anything positive to help them. They could have let East Germany develop as a free nation, keeping it separate from the West, for this was still within the gambit of Allied of power had the General Treaty not specifically provided otherwise. But with the General Treaty in force, had the Allies resisted once East Germany was given freedom to rule itself and voted to rejoin with its western half, the Allied treaty obligations could have been

enforced to allow reunification to proceed in an international legal forum, possibly by the European Community itself or by the greater international community in general.

IV. GERMANY'S BORDERS

The status of Germany's borders is an issue worthy of particular attention. Although to the untrained mind it may seem like a futile observation, as an illustrative example of how these and related matters are addressed in international law is a noteworthy and invaluable lesson of the working of international law. All cultures across the globe at some level have a strong tie of identity to the physical land on which they have lived. This is true even if those people have only occupied that place for a relatively short span of time. The post war Allied action that generated the most controversy, especially among Germans, was the changing of Germany's borders.

Weakened by the extreme post World War I desperation and hyper-inflation the German people were undermined by the very Regime that promised them a return to world prominence. While the German people watched their hopes of future security die in vain as their homeland was completely destroyed. Following the Third Reich's total and unconditional surrender the German people then had to endure harsh treatment by the justifiably unsympathetic Allies. Possibly nothing could have struck deeper at what little remaining self respect the German people retained after the war than the severance of four of Germany's *Länder*: Silesia; Pomerania; East Prussia in the East that were ceded to Poland; and the Saarland in the West that was ceded to France. Although the Berlin Declaration that was the instrument which transferred ultimate authority to the Allied Powers was generally recognized as a legitimate document in international law by most Germans, and although the German people knew well beforehand that the Allied Powers were

intending to change their borders, accepting this decision has proven to be something else altogether. This section will address the question whether the changes made to Germany's border should be regarded as valid and binding on a united Germany. The primary source of international law that controls this issue comes from the Allied treaties that divided the German Empire and established the Allied occupation. The legality of the original change may have become a moot point in light of the concessions made by West Germany in the name of the *Ostpolitik* and finally reunification,[102] but as was suggested, the German border disputes teaches us several valuable lessons about the workings of international law and policy.

A. Germany's Border with Poland

[102] *Ostpolitik* concessions. S*ee, supra* note 33.

The idea of moving Germany's border with Poland to the west to conform with the Oder and Neisse Rivers was originally conceived well before the end of the War. The Big Three met to discuss these and related matters at the Yalta and Tehran Conferences, where the idea was born.[103] Germany's unconditional surrender early in May 1945 was followed in one month by the signing of the Berlin Declaration on June 5. This document gave the victorious Allied nations supreme authority over Germany but did not effectuate any changes to the border in itself.[104] The subsequent Potsdam Conference was soon held where most of the War's matters in need of diplomatic resolution were discussed jointly by several members of the international community. A consensus was reached that was reduced to writing in what was called the Potsdam Agreement of August 2, 1945.[105] This instrument embodied the Allied intention to change the German borders by cutting off three *Länder* from Germany that were then added to the territory of the Republic of Poland. These were the *Länder* of :(1) Silesia, (2) Pomerania, and (3) East Prussia. This shift that made the border conform to the Oder and Neisse Rivers was intended to be a permanent war retribution, and was not a part of the London Protocol's division of Germany into administrative sectors.[106] The Potsdam Agreement also provided for the relocation of the German

[103] Yalta and Tehran Conferences. *See, supra* note 7.

[104] Berlin Declaration. *See*, *supra* note 11.

[105] Potsdam Agreement, *see supra* note 13.

[106] The London Protocol was the first document to make mention of the fact that the Allied were going to disregard the territory acquisitions that the Reich made during the war by referring to "Germany" as the Germany according to it borders in 1937. This does not mean that the Reich 'continued' as the F.R.G. had argued in the early years after the war which would have preserved the territorial integrity to include the G.D.R. in the F.R.G.'s legal and actual territory. This was merely an attempt by the F.R.G. before the period of their official *Ostpolitik* to discredit the legitimacy and sovereignty of the G.D.R. as an independent and separate nation. *Supra* note 9.

population within those *Länder* which was carried out at a tremendous loss of life.[107]

[107] Out of the eleven million relocated German citizens who left Poland and the other territories controlled by Germany during the war, over two million disappeared without trace. It is greatly suspected that they fell victim to post war acts of vigilante retribution. *Supra* note 14.

Whereas the changing of the borders of a conquered nation is recognized in the international law of war as one of the victor's rights, the dispute in Germany's case is over the procedure by which this power was exercised. The Potsdam Agreement is claimed to have a fatal flaw because due to its own terms "the final delimitation of the western frontier of Poland should await the peace settlement."[108] This subsequent peace settlement was never made, which gave credence to the controversy over whether the border was actually final and fueled their hopes that they would someday reclaim these lost lands. The West Germans were initially very adamant that this technicality invalidated the permanence of the new Polish border. The official response of the East German government, however, was plainly eager to legitimize the change.[109] Most suspect the reason for the G.D.R.'s political stance was only due to Moscow's influence which merely desired to enlarge the firm bounds of the Russian Empire.

There are several reasons, however, why the Potsdam's border change might be considered valid in spite of the apparent deficiency in its provisions: (1) the clause that required the final

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[108] *See*, Potsdam Agreement, *supra* note 13; this was also reiterated in article 7 of the General Treaty, *supra* note 19.

[109] This dichotomy is also reflected in the differences between their respective constitutions. The F.R.G. employed what they called the Basic Law instead of a constitution to express their belief that the separation of the G.D.R. territories was temporary. The Basic Law contained clauses that reserved official doubt about the validity of the separation; proposing to confer F.R.G. citizenship to all people of German descent living in other countries contrary to accepted norms of sovereign rights; and also claiming the F.R.G. to be the sole representative of the true German state. The *Alleinvertretungsanspruch*, *see*, *supra* note 30. The G.D.R. constitution on the other hand was called a constitution and reflected the G.D.R. position that the post war changes were permanent. G.D.R. Constitution, *see*, *supra* note 24.

peace settlement was merely rhetorical; (2) consent of the affected states was not required; (3) the international community accepted the change as valid; (4) the decision was immediately effected with irreversible action. West Germany conceded this issue in the end in the name of diplomatic strategy looking toward greater goals, but possibly also because the weight of persuasive arguments tipped clearly in favor of maintaining the new border.

The first argument is that the clause that required the final peace settlement was similar to the ones in the armistice agreements with Italy, Hungary and Finland where it was more of a formality than a prerequisite for finalization.[110] This is further supported by the fact that all hostilities had already ceased and the German Reich as a political entity was essentially decapitated and defunct. Although some historians opine that the Reich officially continued to exist until 1949 when the F.R.G. was created, but was merely existing without an Executive, Legislative, or Judicial branch and was incapable of any such activity.[111] Either way it is looked

[110] Gelberg, *supra* note 7, at 123.

[111] It was also the official finding of the German High Constitutional Court, the *Bundesverfassungsgericht*, that the Reich "continued" to exist and that it merely had its state offices severed; it was unable to execute any official state functions, and any official changes needed to be done with its permission. The border change was not done with consent from any German delegate, the border change was therefore invalid. 36 BVerfGE 1, 16 (1974); Gelberg, *supra* note 7, at 120; Czaplinski, *supra* note 8, at 164.

The F.R.G. used this official position to object to the validity of any G.D.R. treaties and decisions that effected any of F.R.G.'s interests, especially the G.D.R. - Pol. Görlitz Treaty, signed to confirm the Potsdam Oder - Neisse border. *See, supra* notes 22, 24, 30. This policy eventually lost acceptance in the F.R.G. during the period of

at, it is undisputed that the Berlin Declaration transferred complete power to the Allies and that a further peace settlement was not absolutely necessary. Therefore, this should not be a hindrance to the validity of the Potsdam Agreement nor the new Polish border.

The second argument concerns whether these border changes would be valid without Germany's consent. Common sense and historical precedent shows us that this is not likely the case. Border changes, especially ones of this magnitude, are usually carved out by force during military operations, consent being a non-issue. Typically smaller, less disrupting border changes are the result of diplomatic negotiation and concluded with a treaty in public international law to embody the new, equally beneficial demarcation. The difference between these two circumstances may be merely one of degree, however, it seems Germany's changes were of a nature that they fell somewhere between the two examples.

Ostpolitik. To accept this position as true one would have to ignore Germany's unconditional surrender, the Berlin Declaration, the Allied occupation, several years of post war policies and decisions, not to mention the iron will of the U.S.S.R. who insisted that all the G.D.R.'s agreements were valid.

The Allies took away a large percent of Germany's pre-war land that was carried out in resolution of the war by the victorious nations according to the use of multi-lateral treaties that were intended to exist in the realm of public international law. Before Germany surrendered, the leaders and people alike were fully aware that the Allies intended to move the border with Poland westward.[112] Although the Potsdam Agreement was instituted without Germany's express consent, the Berlin Declaration expressly mentioned in its preamble that one of the powers the Allies were assuming over the conquered empire was the right to redetermine its borders.[113] Poland's consent was also missing, but they of course never contested this change that added a large section of productive land to their republic. If we analyze this from the standpoint of the law of war, the principle of *uti possidetis* would validate the exercise of authority over Germany. If we analyze this from pure public international law as a treaty right we have an unresolvable question. Either the Berlin Declaration established powers and any treaty, for example the Potsdam Agreement, that was conducted within the bounds laid out by that document is valid. Or on the other hand we recognize that such power was forced on Germany under duress and a peace time treaty conducted in this manner is invalid. We must not fall into this trap of false logic. The nature of these treaties are very particular in that they bridge the gap from war to peace. Therefore they do not require the same safeguards as peace time treaties, yet are recognized as valid and enforceable in the realm of public international law.

[112] Not that the Germans were in any position to negotiate, but they knew from the start that this was something that was contemplated by the Allies in a situation where they held supreme power over the state.

[113] STARES, *supra* note 9, at 40-45.

The third argument is based in customary international law, which finds its source in the consensus of practice among international states. No other nation besides the F.R.G. ever objected to Poland's exercise of administrative authority over the former German territories following the Potsdam Agreement's decision to change the border and the corresponding expulsion of the German nationals who lived there. From this acquiescence by the international community there emerges presumptive evidence of state opinion that this change was valid and permanent. Even if there were some technical deficiency in the original agreements this action would actually remedy it.

This brings us to the fourth and most persuasive issue. Poland began to exercise its administrative authority over what was referred to in the Potsdam as the "former German territories" as soon as the decision was made to move the border.[114] The Germans who lived in those territories were relocated as Polish settlers moved in and replaced them.[115] This was clearly intended to be an irreversible decision as part of Germany's war reparations. If it were decided that this change was invalid, undoing it would cause even more grievous chaos and disorder, it would raise very complicated property ownership issues and would cause a large percent of Poland's population to suddenly find themselves homeless, jobless and would be likely to plunge the integrated economy of Europe and the world into a terrible recession. This shows that not only was the change originally intended to be permanent, but it would be too complicated to undue for the sake of a technicality.

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[114] German Expellees from Poland. *See*, *supra* note 13.

[115] This was all in accordance with the Potsdam Agreement, s*upra* note 13.

The G.D.R. was first to recognize the border along the Oder and Neisse rivers when on July 6, 1950 they signed the Treaty of Görlitz with Poland.[116] This was merely a declaratory treaty which had no significant binding effect. Nevertheless, this memorialized the G.D.R.'s intention of accepting the border change as permanent and relinquishing all contrary claims.

Much later, once the F.R.G. realized the importance of improving East - West relations, a conditional concession in the Warsaw Treaty of December 7, 1970 was made.[117] They agreed that if the Potsdam Agreement was valid then they would not contest the border. It also follows from this statement however that if the Potsdam Agreement was not valid then neither was the border.[118] This was agreed to with a firm belief on behalf of the F.R.G. that the absence of the peace treaty and other problems would surely invalidate the Potsdam's border change should they ever have their day of being heard. Because of its conditional language, this *Ostpolitik* concession was still tentative and just as unable to effectuate a proper recognition of the change as the Görlitz Treaty. We would have to wait another twenty years before a final decision was made to settle the issue with the Treaty on Final Settlement.

B. The Saarland

[116] Görlitz Treaty. *Supra* note 22.

[117] Warsaw Treaty. *Supra* note 34.

[118] Article 1 stated that the treaty was inviolate whereas article 4 stated that it would not serve to have any affect any other treaties, *ie*. the Potsdam. *Id*.

The fourth *Land* that was severed from the German Empire after the war was the Saarland, a major center of the coal and steel industries.[119] It was officially separated from the main area of the French administration sector and instead was administered directly from Paris as a wholly French territory.[120] Unlike the new Polish territories, the population of the Saarland remained. The effect this had on the outcome of the issue was that after several years of debate the matter of who should own the Saarland was determined bilaterally between France and the F.R.G. according to a referendum held in October 1955, whereby the citizens of the Saarland determined which political affiliation they would have. The overwhelming results were that the citizens wanted to return to be a part of the German state.[121] The transfer was effected in 1956, a full seven years after the rest of western controlled Germany was given qualified sovereignty when the F.R.G. democratic state was created.

This is another example of self determination in practice. What caused France to acquiesce is convoluted and subject to debate. It could have been a matter of their political or diplomatic agendas, deference to human rights, an effort to heal the scars of war, or a combination of things. In any case there was no clear obligation for France to do so, despite some question as to whether they ever acquired legal possession of this *Land*, it not having been provided for in the documents resolving the war. As a matter of diplomacy it settled a lot of unrest in the region and possibly prevented a future uprising. Other nations in France's position have not exercised the same amount of restraint. Its ironic that here we have one of the most peaceful examples of self

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[119] FRITSCH-BOURNAZEL, *supra* note 3, at 181; HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 102, 333-34, 427.

[120] The Agreement on Control Machinery *and also* the Potsdam Agreement; STARES, *supra* note 9, at 5, 36-39, 46-57; HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 102.

[121] Saarland Referendum. HISTORY OF WEST GERMANY, Vol. 1, *supra* note 7, at 334.

determination and it passed almost without historical notice. These situations should be given more attention as how problems should be resolved. But for our purposes it is not only a poor example of current international practices, because it is so rare, but it is also a poor case study of international law. So we also have to only mention it in passing.

C. The Final Settlement

Poland was caught in the middle of this debate between the Allies and Germany. When the prospects of reunification improved towards the end of 1980's Poland sought a reaffirmation of the permanence of the border by a united and free Germany in case there was a chance they were going to formally contest the validity of the former treaties and launch an effort to reclaim their alienated territories.[122] Since the Görlitz Treaty was entered into on behalf of the citizens of the G.D.R. by the puppet government set up by the U.S.S.R. if formally contested, there stood an appreciable chance that the border could be questioned. The Warsaw Treaty might be avoided if it could be shown that the consent of the citizens of the G.D.R. would have been needed to legitimately cede the territories in question to Poland. Both treaties were more declaratory in nature than effectual in any case, but it was the mere possibility of a problem that Poland wanted to avoid.

[122] Polish desire for reaffirmation of the border with Germany. Czaplinski, *supra* note 8, at 166.

In February 1990, the "two plus four" talks at Ottawa ensued. These talks were between Germany, Poland and the four Allied Nations. Germany ran the talks in contrast to the last convention which followed on the heels of World War II in which the Allies dominated the talks and where Germany was a voiceless participant. This time Poland was also represented during the negotiations to prevent their interests from being decided in their absence, as was the case at Yalta.[123] This meeting, however, was not just to discuss the border with Poland, but to tie up all lose ends and extinguish the power reserved by the Allied nations in respect to Germany.[124]

Before the final settlement was arrived at, several preliminary issues had to be decided. One of these decisions was made on July 17, 1990 in Paris where a five point agreement was signed setting the "definitive nature of Germany's frontiers." The five things that were agreed upon were: (1) United Germany shall consist of the territory of the G.D.R. and the F.R.G. and Land Berlin; (2) the present external borders of the two German states shall constitute the external borders of United Germany; (3) the border between Poland and Germany shall be confirmed by a subsequent treaty valid in international law; (4) United Germany renounces all territorial claims against all other states; and (5) the German constitution will not have any provisions against these

[123] Absence of Polish input at the Yalta Conference. *Supra* note 7.

[124] HISTORY OF WEST GERMANY, Vol. 2, *supra* note 31, at 722-23, 738; FRITSCH-BOURNAZEL, *supra* note 3, at 69, 79, 100-03; STARES, *supra* note 9, at 1-2; Ludlow, *supra* note 28, at 25-27; Czaplinski, *supra* note 8, at 165-66; Randelzhofer, *supra* note 1, at 130.

decisions.[125] This thorough agreement served to define the borders of Germany if and when the two halves became united.

[125] Called the Paris Agreement. FRITSCH-BOURNAZEL, *supra* note 3, at 100-03. One reason for the fifth provision was to address the clause in the F.R.G. Basic Law that specifically contravened a provision in one of the Allied treaties and was against generally accepted international law concerning the continuance of the existence of the Reich.

This agreement in Paris was incorporated in the Treaty on the Final Settlement with Respect to Germany which was signed in Moscow on September 12, 1990.[126] The provision concerning the borders still required a final settlement in a treaty valid in international law between united Germany and Poland. Subsequently, on November 14, 1990 the Treaty Between the Republic of Poland and the F.R.G. on the Confirmation of the Existing Border Between Them was signed, ratified and went into force in January 1990.[127] It was not until the reunification in 1990 and in subsequent treaties did every one agree that the border was fixed as the Potsdam protocol set it in 1945. Whatever rights the F.R.G. had to contest the border were relinquished in the name of the greater objective of reunification.

V. THE SUCCESSION OF TREATIES

The international law of succession is more developed than the law of secession. The law of secession, as we just saw in the previous section, concerns the question of what rights a territory has to exercise self determination against the rights of a state to suppress such activity. The law of succession of treaties only becomes triggered once a territory has already undergone some alteration of its sovereign identity.[128] Succession addresses the question of which prior international obligations a territory must honor and which it may avoid,[129] and as might be

[126] The Treaty on Final Settlement. *Supra* note 56. The Treaty on Final Settlement contained ten clauses that also contained provisions limiting the number of troops Germany could maintain; managing the withdrawal of Soviet troops stationed in the G.D.R.; as well as a ban on the manufacture of weapons of mass destruction.

[127] Treaty Confirming the Border Between Poland and Germany. *Supra* note 58.

[128] This could happen when a state surrenders control, either consensually or nonconsensually, over its territory or when one state substitutes another in sovereignty over a territory.

[129] For a valuable overview of this area of law see generally, Marco A. Martins, *An Alternative Approach to the*

expected, this issue is just as politically influenced as the prior question of secession.

International Law of State Succession: Lex Naturae and the Dissolution of Yugoslavia, 44 Syracuse L. Rev. 1019 (1993); *see also*, Beato, *supra* note 64.

At the heart of the matter is what international legal scholars refer to as the question of continuity. Generally speaking, if a territory's sovereign identity "continues" after it has undergone some permutation of governmental control, then the treaty obligations of the former regime will carry over to the new government. Likewise, if the state did not continue, the obligations lapse. The decision whether a state continues is made by balancing the nearly irreconcilable interests of the state's autonomy or right to self determination and the interests of maintaining cohesion and stability in the international community. This area of law has historically been very influenced by politics which is evident by the fact that its evolution has followed the development of political ideology and therefore lacks a consistent lineage in law.[130] This section will survey the international law of succession of treaties, reflected in both conventional international law as well as customary international law. After a brief discussion of the weaknesses of the existing doctrines, it may be understandable why the Germans abandoned those precepts in favor of the custom tailored Unification Treaty and why that choice was the best way to deal with their situation.

A. Conventional International Law

Conventional international law is the set of principles that are based on agreement between states but not of the highly important political nature that they are normally addressed in the sphere of diplomatic treaty negotiations. These often deal with simple matters like international mail or navigation. Conventional international law does, however, have rules that apply generally to all

[130] For a parallel discussion of the development of these issues in international law see the above section dealing with the right of self determination, *supra* note 65.

treaties, as well as those that apply specifically to seceding states. The general rules that apply to all treaties are not conclusive as to whether or not a treaty will be upheld after secession, but they provide some idea of other ways the problem can be addressed.

There are five central classifications into which a treaty might fall whereby its disposition would be influenced by these rules of conventional international law.[131] (1) Personal Treaties - which are fundamentally contractual in nature and are more likely to be considered to have lapsed because the political, governmental or personal identity of the state regime has changed. (2) Local Treaties - which are treaties that have a local applicability and are not substantially tied to international concerns and therefore are most often upheld. (3) Dispositive Treaties - which are independent of the personality of the state and deal with issues from border demarcations to humanitarian treaties and are also more often upheld. (4) Situations calling for Rebus Sic Stantibus - the unilateral termination of a treaty if unforeseen and fundamental changes in circumstance occur that substantially alter the nature of treaty rights and obligations. In this situation the purpose of the treaty is effectively frustrated and adherence would drastically alter the conditions of the treaty's operation or would plainly be incompatible with the treaty's overall purpose or object. (5) Multilateral Treaties that aid in establishing international cooperation or some stabilizing force are desirable to maintain, but whether they will be upheld is also subject to other rules specific to secession.

[131] Martins, *supra* note 129, at 1031; Beato, *supra* note 64, at 537-38.

The rules that apply particularly to seceding states recognize two situations into which a territory may find itself: the Separating State or the Newly Independent State. According to the Separating State Doctrine which was recognized in ancient Roman legal theory,[132] a territory's identity does not change when the regional government had prior participation in its foreign relations. Therefore, the ensemble of rights passes on with the territory.[133] It maintains all former treaty rights and obligations. This is in principle recognition of the need to stabilize international accountability and does not take much consideration for the desire of the territory to shed off the past regime.

When a seceding territory is not considered to have had any participation in the pre-separation treaties that attach to its territory, it is classified as a Newly Independent State.[134] Being formally dependant upon another state, its independence transforms its identity. In what is also called negative succession, such state is given a "clean slate" in regard to pre-independence treaties. The premise is that it would be unfair and improper to require the state to be accountable for and to adhere to treaties that were nonconsensually applied to its territory. The Newly Independent State can, however, end up in a vacuum of law which can be extremely unsettling for both the inexperienced nation and the international community having to deal with their unrefined politics. Another potential hazard is the incentive this doctrine can provide for a country to get out of burdensome international treaty obligations. If a certain change of government would ensure

[132] Martins, *supra* note 129, at 1025.

[133] Some examples of pure separating states are when the Kingdom of Sweden and Norway split into the separate states of Sweden and Norway, the United African Republic dissolved into Egypt and Syria and the Austrio-Hungarian empire becoming the separate states of Austria and Hungary. *Id.*

[134] *See generally*, Martins, *supra* note 129; *see also generally*, Beato, *supra* note 64.

this clean slate, the fabricated evasion of responsibility could be politically disastrous and destabilize international relations and security.

Due to the rigidity of these bright line rules, few states actually ever followed them. Subsequently, a third option then arose out of necessity, which became known as the Optional Doctrine, or Modified Clean Slate Doctrine.[135] This is a variation of the Clean Slate Doctrine, which recognizes that while Newly Independent States do not automatically assume all the obligations of its predecessor, but rejects categorical discontinuity of all former treaties where, depending on their nature and importance, some would be kept. This was an attempt to solve the problems of the legal vacuum created by the pure application of the Clean Slate Doctrine. This was the method extensively used in Africa during its period of decolonization. Nevertheless, a territory still had to meet the criteria of being classified as a Newly Independent State to be allowed to exercise this option.[136] So as a theoretical model this may seem to be a workable paradigm but practical experience has shown that even with this concession from the hard line rules first proposed it has proven to be just as impractical.

B. Customary International Law

[135] Beato, *supra* note 64, at 542; Martins, *supra* note 129, at 1025.

[136] Some examples of this are when Israel was created out of Palestine, and Burkina Faso from France. They both were Newly Independent States but kept some treaties of their respective predecessor states to avoid the legal vacuum that would have otherwise occurred. *See*, Beato, *supra* note 64, at 542; Martins, *supra* note 129, at 1025.

Customary international law is the result of consistent and repetitive action by states over a period of time in an area where there is no established law. There is expected to be some commonality and even some repetition of the rules of conventional international law discussed above. In response to the problems that arose during the Second World War and immediately thereafter, during the period of decolonization in Africa and Asia, the United Nations created the Vienna Convention on Secession of States in Respect to Treaties (Vienna Convention) in 1978 to codify the then existing customary international law on the issue.[137] The major flaw with this document is that it was merely a collection of all the conflicting and unwieldy rules of customary international law that were used to address the problems of succession. No new rules were proposed with which to clear up the confusion and inconsistencies that have plagued this problem. Therefore, the real questions that lie at the heart of the issue were never answered. This fact helps to explain why the resulting document was never ratified. The treaty therefore does not exist as law but is nonetheless a resourceful overview of the customary international law from whence it came.

The three articles from the Vienna Convention that are most important for the discussion of German Reunification are Article 2, the Newly Independent State Doctrine; Article 15, the Moving Boundary Rule; and Article 31, The Merger Rule. Article 2, the Newly Independent State Doctrine, is similar in every way to the Newly Independent State Doctrine previously discussed under conventional international law. To reiterate, where a territory did not have any meaningful participation in the creation of the pre-separation treaties attaching to its territory, such state is

[137] Vienna Convention on Succession of States in Respect to Treaties, Aug. 22, 1978.

given a "clean slate" in regard to those obligations after that territory becomes independent.[138]

Article 15, is the Moving Boundary Rule or Rule of Movable Treaty Frontiers. When a territory is severed from its parent state and becomes attached to another, the treaties that once applied to that territory are terminated and the treaties of the enlarged state then apply to the newly acquired territory. It operates as if the border of the enlarged state were merely moved to encompass the new territory.[139]

[138] Article 2, *supra* note 137.

[139] Article 15, *supra* note 137.

Article 31 is the Merger Rule, which functions opposite to the Moving Boundary Rule. When two states merge to form a new, larger state, all pre-merger treaties of both states remain operative and applicable to the territory that they were attached to before the merger.[140] [141] Although this conceptually fits Germany's situation, due to reasons of a political nature that will become clear later, its simple application was not entirely feasible.[142]

[140] Exceptions to this standard are recognized when then two states agree otherwise and also when enforcement of the treaties would be incompatible with the object or purpose of the treaties or would in some way radically change the conditions of their operation. *See*, Beato, *supra* note 64, at 542; Martins, *supra* note 129, at 1025.

[141] If the merger can also be looked at as an absorption of one territory into the other, then article 31 stands against customary international law that provides an absorbed territory's treaties lapse. This was the case when Texas was incorporated into the United States of America, Italian principalities into Savoy-Piedmont, Baltic States into the U.S.S.R. and Austria's annexation by the German Reich. Martins, *supra* note 129, at 1030.

[142] Article 31, *supra* note 137.

The weakness of these bright line rules in both the Vienna Convention and under conventional international law are multiple and varied. First, these rules only analyze the problem from a nation-state point of view which does not provide for a situation where a state exists in a hybrid condition of existence or autonomy.[143] This oversight raises particular concern for a state such as the G.D.R.'s where there was a major discrepancy between what actual and official role the territorial government had over their own political life. Officially the G.D.R. had an elected government that made decisions independently of the will of the U.S.S.R. Actually, no such governmental independence existed. In truth the G.D.R. government was tightly controlled by threats, kidnaping, and even murder. It would be manifestly unfair to hold them to the pre-reunification treaties, entered into without the actual consent of the government or citizenry. However, to label the G.D.R. government's participation as null and void due to the fact that the U.S.S.R.'s government was fascist, no matter how truthful it may be to Western observers, would have been a slap in the face to U.S.S.R. negotiators and would have halted the productive trend of cooperation in an instant.

Second, for law makers to stand firmly behind the assumption that a state agreed to all of the international obligations attached to it before independence merely because it exercised official participation in the decision making process ignores the reality that a state dominated by another rarely ever exercises its actual free will in making policy or political decisions.

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[143] An example is the separation of East and West Pakistan. When Bangladesh emerged, it did not qualify for independent status although it exercised very little control over its own affairs. Another illustration is the situation of the former Russian republics. These states existed under official, but imaginary autonomy. Still, they are classified as separating states and required by conventional international law to abide by the treaties and foreign obligations of the former U.S.S.R. For the former Russian republics this is neither completely good nor bad. With respect to nuclear non- proliferation treaties, the international community would hope these newly autonomous states consider themselves bound, however, for other treaties of a less sensitive nature discretion is encouraged. *See,* Beato, *supra* note 64, at 558 n.142.

Consequently, these classifications are only truly appropriate when applied in a purely colonial or post-colonial setting because the nature of the relationship between the colony and its parent state is much more clearly defined than the amorphous relationship between states in the process of seceding, acceding and merging, or those under deceptive authoritarian regimes.

Third, the nuances of state succession and treaty obligations are too varied, complex and numerous to be decided by a sweeping, inflexible decision. This is especially true when that pivotal decision is based not on diplomacy or its connection to the importance, delicateness or effectiveness of the treaty, but instead arbitrarily on which pre-independence administrative category the territory falls within.

These criticisms illustrate the true difficulty in dealing with the international law of succession, and in fact much of public international law. Succession is by nature a diplomatic, ideological, or political issue, not a legal issue. Yet our legal scholars and governmental representatives have been attempting to force a resolution using law for years. These rules were developed and adopted in a time where there was great need for guidance and an equally great trust in the ability of law to provide this guidance. But now in hindsight we see the real character of our mistakes. When we look to law to address problems that do not lend themselves to legal remedy we create a greater problem for both the administrator and subject alike. In United States domestic law, we have a constitutional safeguard to prevent problems of this nature, the Separation of Powers Clause,[144] but no such safeguard exists in the international realm. The result is that after the legal process takes its course, a solution is come to that then must be rejected for diplomatic reasons. In fact, the original problem we needed to solve is likely to be worsened should the

[144] U.S. Constitution, Art. 2, cl . 2.

conventional international law classification issue be resolved in favor of one side or the other. We learn there is no benefit to be gained by spending so much effort on legal reasoning, discourse and debate if in the end it will all just be rejected. Such issues should be left to the political realm from the beginning.

History has recorded more examples where these rules of international law were not followed than those in which they were.[145] The angst that we suffer as an international community during changes in the geopolitical landscape needs to be addressed somehow. In light of the fact that the existing rules are nearly worthless, the way Germany handled their reunification provides a new approach to the inadequately addressed question of succession.

C. The German Answer: the Unification Treaty

German reunification was very volatile because it was so firmly and precariously caught between the clashing egos of the Eastern and Western worlds. If the rules of conventional or customary international law were followed and the treaties of the Eastern state were to be

[145] Martins, *supra* note 129, at 1026. The logical question arises in dealing with customary international law where there are numerous deviations from the recognized trend. If there are many deviations then maybe the trend is misdefined and the deviations are the real customary rule. Codifying the rules in the Vienna Convention then may have been done in an attempt to prevent the devolution of the existing customary international law because of this slippery slope. It would serve as a means by which the disputes of succession could be kept in the international legal arena instead of allowing them to be resolved politically, or worse arbitrarily in the absence of any precedent. If this was the true purpose of codifying the rules of customary international law in the Vienna Convention then as legal scholars we may have been too critical of the weaknesses of the convention for they were not yet at a stage where they were trying to redefine the law, they were merely trying to establish law initially in the face of anarchy.

terminated in toto, it was very likely that Moscow would have completely refused to cooperate in the peace process and made reunification an impossibility. If these treaties were categorically upheld, especially those of the nature of East Germany's communist trade treaties with other Eastern Bloc nations, it would have been an unworkable administrative nightmare for the enlarged F.R.G., forcing the government to administer a half-planned, half-market economy.

The way that reunification was ultimately carried out exposed another difficulty with the application of the existing rules of international law. As Article 31 of the Vienna Convention provides, if two states merge then all treaties of both states are in force but where a territory is assumed all the treaties of the assumed territory lapse. Under article 15 the attachment of a smaller territory to a state terminates the former treaties of that smaller territory. The G.D.R., a Soviet satellite, voluntarily dissolved itself, the *Länder* were then absorbed passively by the F.R.G. which was neither a merger nor an assumption for the strict classification purposes that existing international law depends upon.

Sidestepping this whole mess the Germans did what was the most sensible thing to do. They created their own rule of law. The Unification Treaty ceased trying to fit the square peg of succession into the round hole of legalism. The Treaty's general solution to the problem of treaty succession was to exercise free and full discretion to either uphold or terminate whichever treaties they determined would politically or economically maximize the benefits and minimize the inefficiencies of merging the two opposite systems. This is most like the Modified Clean Slate Doctrine, and was done in recognition of the fact that there were some advantageous East German treaties that should be preserved. Generally, only localized treaties were, as a class, were likely to

remain in effect.[146] The Unification Treaty also created transitional measures that enabled the former G.D.R. *Länder* to be brought up, over a period of time, to attain the environmental and economic standards that were necessary for the F.R.G. to remain a member the European Union.[147] Other issues that could be not be so easily remedied or those that could wait were to be reserved for subsequent, post-reunification renegotiation with several specific objectives in mind.[148] This pragmatic approach that subjected each treaty to independent scrutiny on an ad hoc basis is straight forward, simple and makes the important decision to remove the question of secession from the legal realm and puts it squarely and securely into the control of the political machine, where it belongs. The only relation the Unification Treaty seems to have had to either the Vienna Convention or other conventional international law is its complete abandonment of their restrictive rules.

[146] For example the G.D.R. - Pol. treaty on navigation on the Oder and Neisse rivers. Frowein, *supra* note 8, at 158.

[147] The Unification Treaty changed the Basic Law article 143 and granted a period of adjustment for the returning *Länder* before they would be expected to come up to the standards of the rest of the F.R.G. Quint, *supra* note 9, at 547.

[148] For instance looking to regulate or confirm their continued application; determining if they need adjustment or should expire; the protection of confidences; state interests; compatibility with present treaty obligations of the F.R.G.; ensuring adherence to principles of a free democratic basic order governed by the rule of law; and ensuring respect for the competence of the E.U. Frowein, *supra* note 8, at 158.

The Unification Treaty can be considered a modified version of customary international law. Yet because of its novel approach of dealing with the issues of succession and secession that many consider it to be *sui generis*. The product of over a year of active negotiation between East Germany, West Germany and the Allied Powers including the Soviets, it progressed in steps by a series of several pre-reunification treaties that resolved many of the preliminary obstacles.[149] The Unification Treaty also worked in concert with the constitutional guidelines established in the F.R.G.'s temporary constitution, the Basic Law, that were created to provide an avenue by which reunification could be pursued constitutionally.[150]

It must also be borne in mind that what may seem to be a simple solution to a complex problem was employed by a nation that had the respect and well earned trust of the international community, confident that they would act in the best interests of maintaining international peace.

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[149] *See*, Treaty on Final Settlement with Respect to Germany, *supra* note 56, at 1188.

[150] The West German Basic Law that served as their temporary constitution since 1949 was created in anticipation of eventual reunification and provided two express means by which it could be achieved constitutionally. The Unification Treaty changed parts of the Basic Law to tailor their laws to fit the new situation.

There were two ways reunification could happen constitutionally, via article 23 or article 143. Under article 23 if reunification is achieved by the *Länder* consensually and unilaterally acceding into the F.R.G. the Basic Law would apply to the entire territory equally as if the F.R.G. merely expanded. This was how the Reunification was actually done and seems at first the easiest way to accomplish their goal. (This was repealed by article 4(2) of the Unification Treaty, it no longer being necessary to provide for what had already transpired. Randelzhofer, *supra* note 1, at 125-26.) An alternative avenue for reunification was provided for in article 146. When the *Länder* unilaterally acceded to the West, a new Basic Law adopted by a majority vote would be employed to the whole state of unified

Had this been an act proposed by another nation endowed with less trust, or worse, with a history of untrustworthiness, such liberty to exercise this degree of experimentation and discretion may not have been afforded. Even so many other states and alliances participated substantially in every step of the process.

Credit for the real genius behind the Unification Treaty is more attributable to necessity than academic or diplomatic foresight or prowess. The result is the same, in that the inadequate way the international community has handled questions of succession until today could be set on a totally new direction should the international legal community recognize the practicality of the German Solution. The major problems of conventional international law were avoided by employing this solution. The several hindrances that afflict a state undergoing the turbulent process of secession and then succession were in effect nullified. The problems of the nation state fixation; authoritarianism; and the subtle nuances of treaties all need to be handled by a delicate and sensitive diplomatic process. The Unification Treaty does this, and excels in its simplicity.

Scholars have been criticizing the way the present law of succession tries to force the application of inapplicable rules. Germany's example in the Unification Treaty is a viable remedy and much easier to enforce and justify than the present law. This breakthrough may have shed off the last skin of an era where every developed nation with external territorial holdings, from the U.S.A., the U.K. to the U.S.S.R., were all engaged in authoritarian imperialism, oppression and genocide to maintain their empires. The test to determine what effect the German example will have on the way succession is handled in the future may not be known for several years and by that

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Germany. This would in effect create a new state with a newly created constitution, enforced in lieu of the Basic Law.

time may no longer be clearly attributable to Germany's initiative. The example is a good one to look to for guidance regardless of the complexity of the particular situation. To let the political nature of the problem be solved politically where it may; and use *lex specialis* to remove the customary legal restraints where they are causing difficulty. This would mean allowing the rules of conventional international law that apply to all treaties to continue to be applied, but beyond that, to limit the application of existing rules of both customary and conventional international law.

VI. CONCLUSION

The example we have just seen is unique in the history of world politics. For this reason alone the legal scholar would do well to explore the intricacies and nuances that both affected and resulted from Germany's reunification. The precedent the Unification Treaty will set upon the future of world politics in regard to the rights of seceding states is sure to be noticeable. In an area of law that we have seen is weak and ineffectual in providing a clear guide to those who are looking for answers the, Unification Treaty's movement toward removing the questions of succession from the grip of law is sure to draw a lot of attention. The fact that every situation is so diverse and complex, another event similar to the German Reunification may never come again. This does put the usefulness of Germany's precedent in perspective.

The scholars, professionals and state ministers who are presently trying to predict what will be the effect of the reversion of Hong Kong to Chinese control in 1997 are presently facing this problem. Most established precedent has been the result of decolonization, other numerous examples are the cases of larger states dissolving into smaller ones. Even Germany's case was

relatively unique, putting aside the problems posed by the communist occupation of the Eastern half. Looking past the differences in each of these situations we find the first commonality is that there is no adequate precedent to follow. If this is the case then the German Answer may hold the key that the Chinese, English and Hong Kong residents are looking for: a departure from restrictive legal rules and a fully political, diplomatic solution in its place.

Quite possibly if a solution to the tribal fighting in Africa is found in redefining the borders of the former colonial territories then it is certain that the Reunification will be used as the principle ensign. Regardless of what future lawyers and politicians look to Germany's solution for, its importance to world politics in our time should not be diminished. It will be for those who lived through the existence of the Berlin Wall to forget what impact its fall had on world security. With all the tensions finally resolved; the compromises made by both the East and West; the times politicians were justified in fighting but abstained; and the fears courageously faced at each negotiation table where they forged a peace that could have failed and pulled the world into a Nuclear Holocaust; it is a wonderful feeling to put this chapter of world history to a close. We hope these lessons teach future generations how to avoid our mistakes and for this alone the German Reunification was history in the making.