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Legal Aspects of East-West German Relations

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LEGAL ASPECTS OF EAST-WEST GERMAN RELATIONS†

BRUNO SIMMA*

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I. INTRODUCTION

Since World War II the countries divided by the line separating the hostile systems in East and West have been trouble spots on the political map of the world. On several occasions they have developed into something far more dangerous. For this reason, not only the political but also the juridical "management" of relations within such pluri-system nations deserve to be analyzed and compared very closely. Among such relations, the "German question" has, without a doubt, stimulated political as well as legal thought to the highest degree. Some of the legal constructs by which German doctrine and practice have tried to reconcile goals and necessities can perhaps serve as model or inspiration for other cases.¹

† Paper delivered at the Conference on Contemporary Issues of International Law, June 26-28, 1984, in Taipei.

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1. A. BERNARDINI, LA QUESTIONE TEDESCA NEL DIRITTO INTERNAZIONALE (The German Question in International Law) (1973); Bernhardt, *Deutschland nach 30 Jahren Grundgesetz* (Germany After Thirty Years of the Basic Law), 38 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (Publications by the Union of German Constitutional Law Teachers) 7 (1980); D. BLUMENWITZ, WAS IST DEUTSCHLAND? STAATS-UND VÖLKERRECHTLICHE GRUNDSÄTZE ZUR DEUTSCHEN FRAGE UND IHRE KONSEQUENZEN FÜR DIE DEUTSCHE OSTPOLITIK (What is Germany? Principles of Constitutional and International Law Relating to the German Question and Their Consequences for German Ostpolitik) (1982); H. BÜCKING, DER RECHTSSTATUS DES DEUTSCHEN REICHES (THE LEGAL STATUS OF THE GERMAN REICH) (1979); ZEHN JAHRE DEUTSCHLANDPOLITIK. DIE ENTWICKLUNG DER BEZIEHUNGEN ZWISCHEN DER BUNDESREPUBLIK DEUTSCHLAND UND DER DEUTSCHEN

II. THE GERMAN QUESTION 1945-1972: THE RISE OF TWO GERMAN STATES

The international legal problems of the "German question" began with the unconditional surrender of the German armed forces² and the Potsdam Declaration of June 5, 1945, by which the four Allied Governments assumed "supreme authority with respect to Germany," adding however, that this did not effect an annexation and that the boundaries and the status of Germany would be determined later.³ The intention thus declared has since

DEMOKRATISCHEN REPUBLIK 1969-1979 (Ten Years of Deutschlandpolitik. The Development of Relations Between the FRG and GDR 1969-1979) (Bundesministerium für innerdeutsche Beziehungen (Foreign Ministry for Intra-German Relations) ed. 1980); H.M. CATUDAL, JR., THE DIPLOMACY OF THE QUADRIpartite AGREEMENT ON BERLIN. A NEW ERA IN EAST-WEST POLITICS (1978); G. DOEKER & J. BRÜCKNER, 1-3 THE FEDERAL REPUBLIC OF GERMANY AND THE GERMAN DEMOCRATIC REPUBLIC IN INTERNATIONAL RELATIONS (1979); Geck, *Germany and Contemporary International Law*, 38 TEX. INT'L L.J. 263 (1974); J. HACKER, DER RECHTSSTATUS DEUTSCHLANDS AUS DER SICHT DER DDR (The Legal Status of Germany as Seen by the GDR) (1974); Freiherr von der Heydte, *Die Entwicklung der deutschen Rechtslage* (The Development of the German Legal Situation), 11 JAHRBUCH FÜR INTERNATIONALES RECHT (Yearbook for International Law) 137 (1962); Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945); Mann, *Germany's Present Legal Status Revisited*, 16 INT'L & COMP. L.Q. 760 (1967); Meyrowitz, *Les deux états allemands* (The Two States of Germany), 16 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (French Yearbook of International Law) 85 (1970); Münch, *Die völkerrechtliche Grundlage des Status Deutschlands* (The International Basis of Germany's Status) INTERNATIONALES RECHT UND DIPLOMATIE (International Law and Diplomacy) 143 (1971); 1 DOKUMENTE DES GETEILTEN DEUTSCHLAND (Documents of Divided Germany) (I. von Münch ed. 1968); 2 DOKUMENTE DES GETEILTEN DEUTSCHLAND (Documents of Divided Germany) (I. von Münch ed. 1974); N. POUNDS, DIVIDED GERMANY AND BERLIN (1962); G. RESS, DIE RECHTSLAGE DEUTSCHLANDS NACH DEM GRUNDLAGENVERTRAG VOM 21 DEZEMBER 1972 (The Legal Status of Germany After the Basic Treaty of December 21, 1972) (1978); K. SCHMID, DIE DEUTSCHE FRAGE IM STAATS- UND VÖLKERRECHT (The German Question in Constitutional and International Law) (1980); R. SCHUSTER, DEUTSCHLANDS STAATLICHE EXISTENZ IM WIDERSTREIT POLITISCHER UND RECHTLICHER GESICHTSPUNKTE 1945-1963 (Germany's Existence as a State in the Clash of Political and Legal Views 1945-1963) (1963); 1-11 DOKUMENTATION ZUR DEUTSCHLANDFRAGE (Documents on the German Question) (H. Siegler ed. 1961-1979); K. Skubiszewski, *The Great Powers and the Settlement in Central Europe*, 18 JAHRBUCH FÜR INTERNATIONALES RECHT (Yearbook for International Law) 92 (1975); K. WILKE, BUNDESREPUBLIK DEUTSCHLAND UND DEUTSCHE DEMOKRATISCHE REPUBLIK. GRUNDLAGEN UND AUSGEWÄHLTE PROBLEME DES GEGENSEITIGEN VERHÄLTNISSSES DER BEIDEN DEUTSCHEN STAATEN (FRG and GDR. Fundamentals and Selected Problems of the Relationship Between the Two German States) (1976); FÜNF JAHRE GRUNDVERTRAGSURTEIL DES BUNDESVERFASSUNGSGERICHTS (Five Years After the Judgment of the Federal Constitutional Court on the Basic Treaty) (G. Ziegler ed. 1979).

2. Act of Military Surrender, May 7 and 8, 1945, 59 Stat. 1857, Executive Agreement Series 502, *reprinted in* 39 AM. J. INT'L L. 169 (Supp. 1945).

3. Potsdam Declaration, June 5, 1945, 60 Stat. 1649, T.I.A.S. No. 1520, 68 U.N.T.S.

been corroborated by Allied practice,⁴ and has supported the German doctrine that the German Reich survived the events of 1945 and that German statehood continued to exist, albeit under a regime of belligerent occupation unparalleled in its comprehensiveness.

The outbreak of the Cold War, however, fostered the readiness of the occupying powers to grant increasing internal autonomy to the German authorities in their respective zones. In 1949, both the Basic Law (*Grundgesetz*)⁵ of the Federal Republic of Germany and an East German constitution came into force,⁶ giving birth to two dependent states, each of which claimed identity with the still existing German Reich. By the Convention on Relations between the Three Powers and the Federal Republic of Germany (*Generalvertrag*) signed on October 23, 1954, the régime of occupation was terminated and the Federal Republic of Germany granted "the full authority of a sovereign State over its internal and external affairs."⁷ The Western Allies — France, England and the United States — retained, however, "the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement."⁸ All signatories agreed that a reunified Germany was their common aim. The sovereignty of the Federal Republic of Germany (FRG) was thus viewed as being subject to substantial reservations and its existence considered as a merely provisional arrangement. In the same year, the German Democratic Republic (GDR) achieved Eastern-type sovereignty with second thoughts.⁹ Within a few months the two German states carried out their part of the bargain by joining NATO and the Warsaw Pact,¹⁰ respectively.

At about this time, official GDR doctrine abandoned the theory of identity in favor of the idea of "two states in Germany." Since 1956 the GDR has regarded itself as one of two successor states of a German Reich extinguished as a subject of international law through the unconditional

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4. 1 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 333 (1963).

5. The Basic Law is to govern the FRG until unification occurs. At such time the Grundgesetz will be superseded by a Constitution approved by the people of a unified German state. Hobson, *The European Community and East-West German Relations*, 19 VA. J. INT'L L. 45 (1978).

6. 3 A. PEASLEE, *CONSTITUTIONS OF NATIONS* 361, 334 (rev. 3d ed. 1968).

7. Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, art. I, para. 2, 6 U.S.T. 4117, 4121, T.I.A.S. No. 3425; see also Bishop, *The "Contractual Agreements" with the Federal Republic of Germany*, 49 AM. J. INT'L L. 125 (1955).

8. *Id.*, art. II, para. 1, at 4122.

9. 1 G. DOEKER & J. BRÜCKNER, *supra* note 1, at 160.

10. 2 G. DOEKER & J. BRÜCKNER, *supra* note 1, at 32.

surrender of 1945.¹¹

The Federal Republic of Germany, on the other hand, continued to uphold the doctrine of its identity with the Reich as it existed within the frontiers of December 31, 1937. The Bonn government considered itself the only legitimate government of Germany as a whole, and only *de facto* prevented from exercising jurisdiction in the "Soviet-occupied zone," as the GDR was called, by a sort of cold civil war. The Western Allies agreed that Bonn was "entitled to speak for Germany as the representative of the German people in international affairs,"¹² but never went as far as recognizing the Federal Government as the *de jure* government of all Germany.¹³

Despite this rejection, Bonn used every means at its disposal to come as close to *Alleinvertretung* (sole representation) as possible. It declared itself bound by the pre-war treaties of the German Reich as well as by all other obligations and was ready to pay both the debts of the Reich and reparations.¹⁴ It considered only one German citizenship to exist—a doctrine which in the 1950's was relatively easy to sustain because until 1967 nationality questions were governed by one and the same law, of 1913, in both parts of Germany.¹⁵ With respect to conflicts of law, the GDR was treated, at least in principle, as being part of the legal order of the FRG. According to the so-called Hallstein Doctrine, the establishment of diplomatic relations with the GDR by states with whom the Federal Republic of Germany entertained such relations, was considered an unfriendly act in disregard of the right of self-determination of the German people, to be answered with

11. D. BLUMENWITZ, *supra* note 1, at 29; J. HACKER, *supra* note 1, at 154; J. PECK, DIE VÖLKERRECHTSSUBJEKTIVITÄT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (The International Legal Personality of the GDR) 16 (1960); R. SCHUSTER, *supra* note 1, at 166; K. WILKE, *supra* note 1, at 56.

12. F. A. MANN, STUDIES IN INTERNATIONAL LAW 694 (1973).

13. C. ARNDT, DIE VERTRÄGE VON MOSKAU UND WARSCHAU. POLITISCHE, VERFASSUNGSRÉCHTLICHE UND VÖLKERRECHTLICHE ASPEKTE (The Treaties of Moscow and Warsaw. Political, Constitutional and International Legal Aspects) 128 (2d ed. 1982); R. SCHUSTER, *supra* note 1, at 188; I. M. WHITEMAN, *supra* note 4, at 916; K. WILKE, *supra* note 1, at 73.

14. Hoenicke, *Die Fortgeltung von Verträgen des deutschen Reiches in der BRD und der DDR* (The Continuance of Treaties by the German Reich in the FRG and the GDR), 14 REIHE ALLGEMEINES VÖLKERRECHT (General International Law Series) 129 (1972); Rumpf, *Die deutsche Frage und die Reparationen* (The German Question and Reparations), 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES-ÖFFENTLICHES RECHT AND VÖLKERRECHT (Journal of Foreign, Public and International Law) 344 (1973); London Agreement on German External Debts of 1953, T.I.A.S. No. 2792, 333 U.N.T.S. 3.

15. Zieger, *Das Problem der deutschen Staatsangehörigkeit* (The Problem of German Citizenship), in FÜNF JAHRE GRUNDVERTRAGSURTEIL DES BUNDESVERFASSUNGSGERICHTS (Five Years After the Judgment of the Federal Constitutional Court on the Basic Treaty) 189 (G. Zieger ed. 1979).

the rupture of diplomatic relations and the closing of the purse.¹⁶

Of course, such persistence was not without effect. As late as 1966, the House of Lords in *Carl Zeiss Stiftung v. Rayner & Keeler* regarded the GDR "not as a sovereign State, but as an organisation subordinate to the U.S.S.R.," and emanations of the East German authorities as acts of subordinate bodies of the U.S.S.R.¹⁷ Apart from such demonstrations of loyalty, however, the West German policy of denying the GDR international respectability on the political level and a clearcut status on the legal level, became less and less successful. What it did achieve was a total paralysis in intra-German relations.

III. THE BASIC TREATY: 1972

From 1969 on, the new *Ostpolitik* — a policy of détente — of Federal Chancellor Brandt, attempted to break this deadlock in German relations. On December 21, 1972, the FRG and the GDR signed an intra-German treaty, the *Grundvertrag* (Basic Treaty),¹⁸ which entered into force on June 21, 1973. The premises of this treaty, in Bonn's view, were: (a) the continued existence of Germany as a whole; and (b) the presence of "two states in Germany" that are "not foreign to each other."

A. *Background of the Treaty*

A review of West German policies since the Second World War and prior to 1969 will provide a more accurate idea of the difference this treaty made. In the first phase, neither the Federal Republic nor the GDR was officially regarded as a state in the full sense of the word, so as not to diminish the chances for reunification. For this reason, the young Federal Republic was officially described as an entity *ad interim*, so to speak, a *Zweckverband nur administrativer Qualität*, a body corporate of merely administrative nature, and it chose to be governed not by a constitution, but merely by Basic Law, *Grundgesetz*.¹⁹

16. Cortese & Papini, *De la doctrine Hallstein à la "Ostpolitik"* (From the Hallstein Doctrine to "Ostpolitik"), 73 *REVUE GENERALE DE DROIT INTERNATIONAL* (General Review of International Law) 124 (1969).

17. *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, [1967] R.P.C., 497 (H.L.), 43 I.L.R. 23, 49 (1971).

18. Treaty on the Basis of Intra-German Relations, Dec. 21, 1972, Federal Republic of Germany-German Democratic Republic, 1973 *Bundesgesetzblatt*, Teil II [BGBl II] 421, translated in 12 I.L.M. 16 (1973). [Hereinafter cited as the Basic Treaty.]

19. Matz, *Entstehungsgeschichte der Artikel des Grundgesetzes. Überschrift des Grundgesetzes* (Origins of the Articles of the Basic Law. Headings of the Basic Law), 1 *JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART* (Yearbook of Contemporary Public

During the second phase, the Federal Republic of Germany was considered to fulfill all the preconditions of statehood *pleno sensu* while the same quality was denied to the Democratic Republic. Proponents of this view oscillated between two arguments. One argument emphasized the principle of effectiveness.²⁰ The other argument overloaded with heavy doses of legitimacy the prerequisites of statehood developed in traditional international law, which the Eastern authorities could not display. Examples of such legitimacy would be Bonn's claims to the realization of democracy and self-determination by free elections.²¹

It is noteworthy, however, that in the years preceding the new *Ostpolitik*, West German international legal doctrine took considerable pains to reconcile the early dogmatism with the facts of both intra-German and international life. For example, it brought up to date the doctrine on unrecognized states and governments and developed it further into the more sophisticated legal construct of the "stabilized" or "pacified *de facto*-regime."²² The resulting doctrine describes the international legal status of all entities exercising effective control over a certain territory without being recognized *de jure*, without having to strain the traditional civil war scenario. It was demonstrated, for instance, that in state practice after World War II, such stabilized *de facto* regimes had not only taken part in multilateral treaties but had also concluded all kinds of bilateral agreements without necessarily being recognized thereby by the other contracting parties. More importantly, this also demonstrates that the territorial integrity and political independence of these *de facto* entities are as much protected by article 2(4) of the U.N. Charter as those of states proper.²³ Scholarly analysis of this kind certainly helped pave the way to the third stage in intra-German legal relations — that of Western acceptance of the full statehood of the GDR — because it showed very clearly how the "all-or-nothing" concepts formerly used to diminish the standing of the GDR in international law had become obsolete in more recent state practice, and that the step of concluding a treaty like the one of 1972 did not prevent Bonn from maintaining the basic legal premises of its *Deutschlandpolitik*.

Law) 14 (1951). See also *supra* note 5.

20. The effectiveness of the GDR was only "borrowed" from the Soviet Union. Cf. Carl Zeiss Stiftung v. Rayner & Keeler Ltd.

21. R. SCHUSTER, *supra* note 1, at 49.

22. "Stabilized *de facto* regime" is the author's as well as Verdross' preferred term.

23. Cf. J. FROWEIN, *DAS DE FACTO REGIME IM VÖLKERRECHT* (The De Facto Regime in International Law) (1968); A. VERDROSS & B. SIMMA, *UNIVERSELLES VÖLKERRECHT. THEORIE UND PRAXIS* (Universal International Law in Theory and Practice) § 404 (3d ed. 1984).

B. *The Text of the Treaty*

The Basic Treaty itself, together with its supplementary instruments, is a fascinating document in that it incorporates a peculiar give and take.²⁴ The treaty provisions proper apparently grant to the GDR more or less what it had long wanted. In article 1, the two German states promise to develop "normal good-neighbourly relations with each other on the basis of equal rights."²⁵ In article 2, they agree to be guided by the purposes and principles of the U.N. Charter.²⁶ According to article 3, they oblige themselves to settle their disputes exclusively by peaceful means, to refrain from the threat or use of force and reaffirm the inviolability of the border existing between them.²⁷ In articles 4 and 6, they accept that neither of the two states can represent the other internationally or act in its name and that the jurisdiction of each of the two states is confined to its own territory, and they further undertake to respect each other's independence and autonomy in internal as well as external affairs.²⁸ In article 7, the two parties

24. Blumenwitz, *Der Grundvertrag zwischen der Bundesrepublik Deutschland und der DDR* (The Basic Treaty between the FRG and GDR), 207 *POLITISCHE STUDIEN* (Political Studies) 3 (1973); Frowein, *Legal Problems of the German Ostpolitik*, 23 *INT'L & COMP. L.Q.* 105 (1974); Mahnke, *Rechtsprobleme des Grundlagenvertrages* (Legal Problems of the Basic Treaty), 7 *DEUTSCHLAND-ARCHIV* (German Archives) 130 (1974); Kewenig, *Die Bedeutung des Grundvertrages für das Verhältnis der beiden deutschen Staaten* (The Significance of the Basic Treaty for the Relations of the Two German States), 25 *EUROPA-ARCHIV* 37 (1973); G. RESS, *supra* note 1; Simma, *Der Grundvertrag und das Recht der völkerrechtlichen Verträge* (The Basic Treaty and the Law of Treaties), 100 *ARCHIV DES ÖFFENTLICHEN RECHTS* (Archive of Public Law) 4 (1975); K. WILKE, *supra* note 1, at 121.

25. The Basic Treaty, art. 1.

26. The Basic Treaty, art. 2 states:

The Federal Republic of Germany and the German Democratic Republic will be guided by the aims and principles laid down in the United Nations Charter, especially those of the sovereign equality of all States, respect for their independence, autonomy and territorial integrity, the right of self-determination, the protection of human rights, and non-discrimination.

27. The Basic Treaty, art. 3 states:

In conformity with the United Nations Charter the Federal Republic of Germany and the German Democratic Republic shall settle any disputes between them exclusively by peaceful means and refrain from the threat or use of force.

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

28. The Basic Treaty, articles 4 and 6, respectively, state:

The Federal Republic of Germany and the German Democratic Republic proceed on the assumption that neither of the two States can represent the other in the international sphere or act on its behalf.

The Federal Republic of Germany and the German Democratic Republic proceed on the principle that the sovereign jurisdiction of each of the two States is confined to its own territory. They respect each other's independence and autonomy in their internal and

state "their readiness to regulate practical and humanitarian questions in the process of the normalization of their relations," and promise to conclude a series of subsequent agreements, *inter alia*, in the fields of economic relations, science and technology, traffic, juridical relations, posts and telecommunications, health, culture, sport, and environmental protection.²⁹ Finally, in article 8 they lay the basis for the exchange of permanent missions at their respective seats of government.³⁰

In light of these provisions, the FRG appears at first glance to have "given" to the extent of a complete "sell-out" of its former legal position. The "taking back" begins right in the preamble where the parties state that they both proceed "from the historical facts and without prejudice to the different views of the Federal Republic of Germany and the German Democratic Republic on fundamental questions, *including the national question.*"³¹ This crucial point is further emphasized in the so-called "Letter on German Unity," in which the Federal Republic stated that the Basic Treaty "does not conflict with the political aim of the Federal Republic of Germany to work for a state of peace in Europe in which *the German nation will regain its unity* through free self-determination."³²

Article 9 of the Basic Treaty itself follows the same direction, providing that the treaty "does not affect the bilateral and multilateral international treaties and agreements already concluded by them [the two German states] or relating to them."³³ This formula stresses the "non-affectability" of not only the inter-Allied wartime agreements on Germany and the results of the Potsdam Conference, but also the 1954 Convention on Relations (*Generalvertrag*) in which a Western style German reunification is a com-

external affairs.

29. The Basic Treaty, art. 7 states:

The Federal Republic of Germany and the German Democratic Republic declare their readiness to regulate practical and humanitarian questions in the process of the normalization of their relations. They shall conclude agreements with a view to developing and promoting on the basis of the present Treaty and for their mutual benefit cooperation in the fields of economics, science and technology, transport, judicial relations, posts and telecommunications, health, culture, sport, environmental protection, and in other fields. The details have been agreed in the Supplementary Protocol.

30. The Basic Treaty, art. 8 states:

The Federal Republic of Germany and the German Democratic Republic shall exchange Permanent Missions. They shall be established at the respective Government's seat.

Practical questions relating to the establishment of the Missions shall be dealt with separately.

31. (Emphasis added). The Basic Treaty, preamble.

32. I G. DOEKER & J. BRÜCKNER, *supra* note 1, at 397.

33. The Basic Treaty, art. 9.

mon aim of the contracting parties.³⁴ Further, in a statement relating to the treaty, officially labelled a "reservation," the Federal Republic declared that "questions of nationality have not been regulated by this Treaty"; while in a corresponding statement the GDR took the view that the solution of the question of nationality would be facilitated by the Treaty.³⁵

To summarize, the Basic Treaty, together with the supplementary protocols, letters, and statements, presents a textbook illustration of the various devices which can soften the substance of a treaty in order to make it acceptable, and which can reach as far as embodying an agreement to disagree on the very central question of principle, namely the national question. Yet, not even this Swiss-cheese design was able to reassure the conservative opposition in the Federal Republic. On May 28, 1973, while the Basic Treaty was under parliamentary consideration, the Bavarian State Government applied to the Federal Constitutional Court for a declaratory judgment to the effect that the federal law expressing parliamentary approval of the treaty was not in conformity with the Basic Law (*Grundgesetz*) and was therefore void.³⁶

IV. THE CONSTITUTIONAL COURT INTERVENES

About six weeks after the treaty had come into force internationally, the Constitutional Court declared on July 31, 1973, that the law concerning the treaty had just made it to the shores of constitutionality, but only as interpreted in the opinion of the Court. In an unprecedented step, the Court designated its whole reasoning, including those parts which do not refer to the content of the treaty itself, as *ratio decidendi*, binding all West German authorities with the force of law. Thus, an accurate understanding of the legal ground on which Bonn must base its relations with East Berlin cannot be gained without reading the Basic Treaty in conjunction with the judgment of the Constitutional Court.

In the Court's view, the Basic Law (*Grundgesetz*) — and not merely a doctrine of international and constitutional jurisprudence — assumes that the German Reich outlasted the collapse of 1945 and perished neither with the capitulation nor with the exercise of foreign governmental authority in Germany by the Allied Powers nor at any later time. Accordingly, Ger-

34. "Non-affectibility" is a point that was emphasized in identical notes transmitted by the two German foreign ministries to the Four Powers.

35. Zusatzprotokoll zum Vertrag über die Grundlagen der Beziehungen Zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik (Supplemental Protocol to the Treaty on the Basis of Relations Between the FRG and the GDR) BGBI II 426 (1973) (W. Ger.); 1973 Gesetzblatt der DDR, Teil II [GBI. DDR] 27 (E. Ger.).

36. Wilk, *Federal Republic of Germany Case Note*, 70 AM. J. INT'L L. 147 (1976).

many as a whole continues to exist and still has legal personality, although it lacks the capacity to act. The establishment of the Federal Republic did not create a new West German state but rather reorganized a part of Germany. The Federal Republic is seen as identical with the state "German Reich", although its territorial extent is only partly identical to that of the Reich. The Democratic Republic equally belongs to Germany and cannot be regarded as a foreign country in its relations with the Federal Republic.

The Court then went on to say:

The GDR is a state in the sense of international law and, as such, a subject of international law. This statement is independent of any recognition of the GDR under international law by the FRG. Such recognition has not only never been formally pronounced, but on the contrary has repeatedly been expressly refused, by the FRG. If one evaluates the conduct of the FRG in the course of its policy of détente toward the GDR, and in particular the conclusion of the Treaty, as factual recognition, then it can be understood only as a factual recognition of special kind.

What is special in this Treaty is that it is a bilateral treaty between two states to which the rules of international law apply and which has the force and validity like any other treaty under international law, but between two states that are parts of a comprehensive state of all Germany which still exists, even though it is incapable of acting because it is not yet reorganized, with a unitary population, within borders which it is not necessary here to define more precisely. From this there results the special legal closeness of the two states to each other; . . .

The special character of the Treaty in this respect may also be suggested by the formula that it regulates '*inter se* relations.' But it does not regulate exclusively such relations and, therefore, does not fall outside of the order of general international law; that is to say, it does not belong to a particular legal order of a specific character that would have been created only by the Treaty and limited as to subject matter. That kind of construction is precluded by Articles 2 and 3 of the Treaty which expressly name the Charter of the United Nations as essential for the relationship between the partners. The Treaty thus has a *double* character; generically, it is a treaty in international law; in its specific content, it is a treaty which regulates primarily *inter se* relations. Regulation of *inter se* relations by a treaty of international law can be necessary especially in the absence of a constitutional legal order, as here because of the disorganization of the comprehensive state. Even in a federal union, relations between the member states are governed, in the absence of regulation by the federal constitution, by the

rules of international law. The view that any 'two-states model' would be incompatible with the order of the Basic Law is thus incorrect.³⁷

With regard to the border between the two contracting states, the Court took the view that:

[t]here are borders of different legal quality: administrative borders, demarcation borders, borders of spheres of interests, a border for the area of application of the Basic Law, the borders of the German Reich as of December 31, 1937, borders under municipal constitutional law, and among the latter those embracing the nation as a whole and those separating member states within the nation (e.g., the *Länder* of the FRG) from each other. That Article 3 (2) refers to a border of *constitutional* law results unambiguously from the rest of the Treaty. For the question whether recognition of the border between the two states as a *state border* is compatible with the Basic Law, it is decisive to qualify it as a constitutional border between two states whose 'peculiarity' it is that they exist on the foundation of the still existing state 'Germany as a whole', hence to treat it as a constitutional border similar to those running between the *Länder* of the FRG.³⁸

Concerning German nationality, the Court observed:

If the Treaty had to be understood to the effect that the citizens of the GDR may no longer be treated as Germans within the area of application of the Basic Law . . . , it would be in clear contradiction to the Basic Law. In order to conform to the constitution, the Treaty . . . requires the interpretation that, notwithstanding any rule in the law of nationality of the GDR, the FRG will treat any citizen of the GDR who enters the area of protection of the FRG and of its constitution as a German . . . like any citizen of the FRG.³⁹

As to the effects of the full knowledge on the part of the GDR of the legal discussion surrounding the Basic Treaty and of the proceedings before the Constitutional Court, the judgment concluded:

These circumstances serve in international legal discussion, particularly vis-à-vis the treaty partner, to give the Treaty that interpretation which

37. Wilk, *supra* note 36, at 151-52.

38. *Id.* at 152-53.

39. *Id.* at 153.

is required according to the Basic Law. This is in accord with a rule of general customary international law which has significance in the practice of states when the question arises whether exceptionally one party to a treaty may claim as against the other party that the latter could and should have perceived that the treaty in a particular interpretation is opposed by domestic constitutional law.⁴⁰

V. REACTION TO THE COURT'S DECISION

This decision gave rise to an uproar in the GDR and Eastern Europe. It was also severely criticized in West German legal doctrine, and by the Federal Government, whose policies suffered, although it had nominally won the case. The Court imposed a legal straitjacket on a considerable part of the freedom of action Bonn had intended to create through the conclusion of the treaty.⁴¹ Indeed, the judgment contains strong language and content, especially for the international lawyer, such as the legal qualification of the intra-German border or the last-quoted (above) paragraph on the opposability to the GDR of the treaty content as seen from Karlsruhe.⁴² In any case, it is a remarkable fact that — as the basis of relations between

40. *Id.* at 154.

41. Bernhardt, *Völkerrechtliche Bemerkungen zum Grundvertrags-Urteil des Bundesverfassungsgerichts* (International Legal Comments on the Decision of the Federal Constitutional Court Regarding the Basic Treaty), in RECHT IM DIENST DES FRIEDENS, FESTSCHRIFT FÜR E. MENZEL (Law in the Service of Peace. Festschrift for E. Menzel) 109 (J. Delbrück, K. Ipsen & D. Rauschnig eds. 1975); DER STREIT UM DEN GRUNDVERTRAG (The Controversy Regarding the Basic Treaty) (E. Cieslar, J. Hampel & F. Zeitler eds. 1973); Koenig, *Le traité fondamental entre les deux républiques allemandes et son interprétation par le tribunal constitutionnel fédéral* (The Basic Treaty Between the Two Republics of Germany and its Interpretation by the Federal Constitutional Court), 19 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (French Yearbook of International Law) 147 (1973); Mahnke, *Der Vertrag über die Grundlagen der Beziehungen zwischen der Bundesrepublik und der DDR. Anmerkungen zum Urteil des Bundesverfassungsgerichts* (Treaty on the Basis of Relations Between the FRG and the GDR. Comments on the Federal Constitutional Court's Decision), 6 DEUTSCHLAND-ARCHIV (German Archives) 1163 (1973); G. RESS, *supra* note 1; Tomuschat, *Auswärtige Gewalt und verfassungsgerichtliche Kontrolle. Einige Bemerkungen zum Verfahren über den Grundvertrag* (Foreign Relations and Constitutional Control. A Few Comments on the Proceedings concerning the Basic Treaty), in DIE ÖFFENTLICHE VERWALTUNG (The Public Administration) 179 (1973); K. WILKE, *supra* note 1, at 137; Völkel, *Zur Reaktion der DDR auf das Karlsruher Urteil zum Grundlagenvertrag* (The Reaction of the GDR to the Decision in Karlsruhe Regarding the Basic Treaty), 7 DEUTSCHLAND-ARCHIV (German Archives) 140 (1974); Wilke & Koch, *Außenpolitik nach Anweisung des Bundesverfassungsgerichts?* (Foreign Policy by Directive of the Federal Constitutional Court?), 30 JURISTENZEITUNG (Jurists' Journal) 233 (1975).

42. Simma, *supra* note 24, at 17.

the two German states — they have to make do with a treaty which is in conformity with the constitution of one contracting state only if most of its provisions are given a meaning and applied in a way which the other contracting state opposes vehemently and which it regards as a breach of the treaty.

It is difficult to judge the precise degree of acceptance of this judgment in the legal doctrine of the Federal Republic of Germany. But it is safe to state that today a significant part of West German international and constitutional lawyers do not follow the Federal Constitutional Court's view that the German Reich continues to exist forty years after the collapse of its institutions. According to these authors, the German Reich lacks the minimum prerequisites necessary to be qualified as a state under international law. The German Democratic Republic is regarded as having completed — or almost completed — the process of secession from the Reich. This is so although there is at least one obstacle in the way of its complete severance from the all-German background, as well as from the Federal Republic, namely the continuing rights and responsibilities of the Four Powers relating to Germany as a whole.⁴³ Other influential authors see the German Reich as a sort of juridical roof (Reichsdach) under which the two German states have been, and still are, developing from the status of stabilized *de facto* regimes towards full sovereignty, but nevertheless remaining bound together in a way comparable to the British Commonwealth under the Westminster Statute.⁴⁴

The German Democratic Republic, of course, considers such a view to be in clear contradiction with general international law and the Basic

43. Bernhardt, *supra* note 1, at 13; Kimminich, *Das Urteil über die Grundlagen der staatsrechtlichen Konstruktion der Bundesrepublik Deutschland* (The Decision over the Basis of the Constitutional Construction of the FRG), *Deutsches Verwaltungsblatt* (German Administrative Newspaper) 657 (1973); Tomuschat, *Die rechtliche Bedeutung der Vier-Mächte-Verantwortung* (The Legal Significance of the Four-Power Responsibility), in *FÜNF JAHRE GRUNDVERTRAGSURTEIL DES BUNDESVERFASSUNGSGERICHTS* (Five Years After the Judgment of the Federal Constitutional Court on the Basic Treaty) 78 (G. Zieger ed. 1979).

44. See generally A. BLECKMANN, *GRUNDGESETZ UND VÖLKERRECHT* (The Basic Law and International Law) (1975); Klein, *Zur Rechtslage Deutschlands und der Deutschen nach dem Beschluss des BVerfG zu den Ostverträgen* (The Legal Situation of Germany and Germans After the Decision of the Federal Constitutional Court Regarding the Treaties with the East), 25 *JAHRBUCH DER ALBERTUS-UNIVERSITÄT ZU KÖNIGSBERG/PREUßEN* (25 Yearbook of the Albertus-University for Königsberg/Preußen) 29 (1975); G. RESS, *supra* note 1, at 214; K. WILKE, *supra* note 1, at 77; Zieger, *Zwei Staaten in Deutschland. Eine Betrachtung zur Rechtslage Deutschlands nach dem Grundvertrag* (Two States in Germany. An Observation on the Legal Situation of Germany After the Basic Treaty), in *IM DIENST AN RECHT UND STAAT. FESTSCHRIFT FÜR WERNER WEBER ZUM 70. GEBURTSTAG* (In the Service of Law and State. Festschrift for Werner Weber on his 70th Birthday) 127 (H. Schneider & V. Goetz eds. 1974).

Treaty.⁴⁵ It is important to note, however, that the GDR position becomes less dogmatic the more the Federal Republic sweetens the special relationship it claims with economic advantages. To give an example, the GDR has never thought of sacrificing the benefits which it is drawing from the so-called intra-German trade, that is, the understanding between the Federal Republic of Germany and the other members of the EEC according to which the Community customs barrier does not extend to trade between the two German states.⁴⁶

VI. THE ADDITIONAL PROBLEM OF BERLIN

To complete the legal picture of intra-German relations, one must examine the role and status of the former capital of the German Reich — Berlin.⁴⁷

Between 1945 and the beginning of the seventies, the international legal status of Berlin, especially of West Berlin, was a nightmare. What developed was more or less a permanent tug-of-war between the Western Powers, which have persistently maintained that Berlin in its entirety is still under Four Power occupation and administration,⁴⁸ and the Soviet Union which repeatedly attempts to remove the legal ground from under the feet of the Western presence and to develop Berlin into an "independent political unit", something close to a third German state.⁴⁹ Parallel to this, on the intra-German level, the Federal Republic claims Berlin as one of its *Länder*,⁵⁰ while the GDR regards East Berlin as an integral part of its own

45. Cf. J. HACKER, *supra* note 1, at 419.

46. Protocol Relating to German Internal Trade and Connected Problems, Mar. 25, 1957, 1957 [BGBI] II 984, 298 U.N.T.S. 131; for a discussion of the protocol see Hobson, *supra* note 5.

47. Bathurst, *Legal Aspects of the Berlin Problem*, 38 BRIT. Y.B. INT'L L. 255 (1962); H.M. CATUDAL, JR., *supra* note 1; see generally D. MAHNCKE, *BERLIN IM GETEILTEN DEUTSCHLAND* (Berlin in Divided Germany) (1973); see generally A. RIKLIN, *DAS BERLIN-PROBLEM. HISTORISCH-POLITISCHE UND VÖLKERRECHTLICHE DARSTELLUNG DES VIERMÄCHTESTATUS* (The Berlin Problem. A Historical, Political and International Legal Description of the Four-Power-Status) (1964); see generally H. SCHIEDERMAIR, *DER VÖLKERRECHTLICHE STATUS BERLINS NACH DEM VIERMÄCHTE-ABKOMMEN VOM 3. SEPTEMBER 1971* (The International Legal Status of Berlin According to the Quadripartite Agreement of September 3, 1971) (1975); see generally E.R. ZIVIER, *THE LEGAL STATUS OF THE LAND BERLIN. A SURVEY AFTER THE QUADRIPARTITE AGREEMENT* (1980).

48. D. MAHNCKE, *supra* note 47, at 40.

49. *Id.* at 48.

50. 7 BVerfGE 1, 7 (1958); Schröder, *Der Berlin-Status oder die gegenwärtigen Grenzen der verfassunggebenden Gewalt des Deutschen Volkes* (The Status of Berlin or the Present Limits of the German People's Constitutional Power), in *FÜNF JAHRE GRUNDTVETRAGSURTEIL DES BUNDESVERFASSUNGSGERICHTS* (Five Years After the Judgment of the Federal

and its capital.⁵¹ The Western Powers have rejected both of these views;⁵² while the Soviet Union has rejected that of the Federal Republic.⁵³

Only if this complicated legal *ménage à quatre* is fully grasped can the weight of the Quadripartite Agreement of September 3, 1971,⁵⁴ be appreciated. This treaty, signed just one year prior to the Basic Treaty, has consolidated the formerly fragile *status quo* into international law without prejudicing the legal positions of the Four Powers. The decisive concessions on the part of the Soviet Union lie: (a) in the provision that "the situation which has developed in the area . . . shall not be changed unilaterally" (Part I, Point 4); and (b) in the promise that the transit traffic between the Federal Republic and West Berlin "will be facilitated and unimpeded" (Part II A and Annex I).⁵⁵ The Western *quid pro quo* found its expression in Part II B, according to which the three Western contracting parties, while reaffirming that the ties between the Western Sectors of Berlin and the Federal Republic will be maintained and developed, take into account "that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it".⁵⁶ The transit and com-

Constitutional Court on the Basic Treaty) 294 (G. Zieger ed. 1979).

51. D. MAHNCKE, *supra* note 47, at 54; H. SCHIEDERMAIR, *supra* note 47 at 14.

52. D. MAHNCKE, *supra* note 47, at 77.

53. *Id.*

54. Quadripartite Agreement, Sept. 3, 1971, 24 U.S.T. 283, T.I.A.S. No. 7551, ____ U.N.T.S. ____ reprinted in 10 I.L.M. 895 (1971).

55. The Quadripartite Agreement, Part II A states:

A. The Government of the Union of Soviet Socialist Republics declares that transit traffic by road, rail and waterways through the territory of the German Democratic Republic of civilian persons and goods between the Western Sectors of Berlin and the Federal Republic of Germany will be unimpeded; that such traffic will be facilitated so as to take place in the most simple and expeditious manner; and that it will receive preferential treatment.

Detailed arrangements concerning this civilian traffic, as set forth in Annex I, will be agreed by the competent German authorities.

Annex I, section 1 states:

1. Transit traffic by road, rail and waterways through the territory of the German Democratic Republic of civilian persons and goods between the Western Sectors of Berlin and the Federal Republic of Germany will be facilitated and unimpeded. It will receive the most simple, expeditious and preferential treatment provided by international practice.

56. The Quadripartite Agreement, Part II B states:

B. The Governments of the French Republic, the United Kingdom and the United States of America declare that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

Detailed arrangements concerning the relationship between the Western Sectors of

munication provisions of the quadripartite treaty were implemented by several agreements concluded between the FRG and the GDR, as well as between the West Berlin and East Berlin authorities.⁵⁷

The fundamental dispute over the status of Berlin is left untouched by the quadripartite treaty system of 1971. This dispute found its legal expression in a number of deliberate ambiguities in the Quadripartite Agreement. Noted above is Part II B, in which the Western powers declared "that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed."⁵⁸ In the other authentic texts of French and Russian the words *liens*, and *svjazy* are used. The English and French expressions imply social ties (in German: *Bindungen*), in the sense of binding West Berlin and the Federal Republic together in some sort of political unity. The Russian word *svjazy*, however, refers only to links (in German: *Verbindungen*) in the sense of traffic and other communications.⁵⁹ This discrepancy not only led to suitably different wordings in the official translations of the agreement in the Federal Republic of Germany on the one side and the GDR on the other, but also to recurring practical difficulties between the two German states in matters of transit traffic. Still more astonishing for an observer uninitiated in the political subtleties of the German question is the absence in the official title of the Quadripartite Agreement of the clause "on Berlin", because the Four Powers could not come to an agreement on the territorial scope of the treaty for the reasons just explained. The "general provisions" of Part I thus refer only to the "relevant area." The controversial issue of whether the Eastern sector be-

Berlin and the Federal Republic of Germany are set forth in Annex II.

57. Protokoll über Verhandlungen zwischen einer Delegation des Bundesministeriums für das Post- und Fernmeldewesen der Bundesrepublik Deutschland und einer Delegation des Ministeriums für Post- und Fernmeldewesen der Deutschen Demokratischen Republik vom 30.9.1971 (Protocol on Negotiations between Ministry of Post and Telecommunications Delegations from the FRG and the GDR on Sept. 9, 1971); Vereinbarung über die Errichtung einer farbtüchtigen Richtfunkstrecke zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik vom 30.9.1971 (Agreement on the installation of a Color-Capable Microwave Line Between the FRG and the GDR on Sept. 30, 1971); Abkommen über den Transitverkehr von zivilen Personen und Gütern (Agreement on Transit Traffic of Civilian Persons and Goods), Dec. 17, 1971, FRG-GDR, 11 FOREIGN AFF. BULL. 35 (1971), reprinted in 11 I.L.M. 5 (1972); Vereinbarung über Erleichterungen und Verbesserungen des Reise- und Besucherverkehrs (Arrangement Facilitating and Improving the Traffic of Travelers and Visitors), Dec. 20, 1971, FRG-GDR, reprinted in 11 I.L.M. 11 (1972) (all agreements were concluded on behalf of the FRG by the Federal Minister for intra-German Relations.)

58. Part II B of the Quadripartite Agreement, *supra* note 56.

59. Doeker, Melsheimer & Schröder, *Berlin and the Quadripartite Agreement of 1971*, 67 AM. J. INT'L L. 44, 59 (1973). The English, French, and Russian texts appear (respectively) in 24 U.S.T. 287, 307, 325.

longs to the GDR is later left open by referring to communications between the Western Sectors of Berlin "and areas bordering on these Sectors" on the one hand, and "those areas of the German Democratic Republic which do not border on these Sectors" on the other.⁶⁰

Despite these ambiguities, Berlin has become safer and life there easier, at least politically speaking, as a result of the Quadripartite Agreement.⁶¹ For the West Berliners, the legal justification for the presence of the Western Powers — continuing military occupation even forty years after the war — is a mixed blessing. They cherish, of course, the feeling of security suggested by the presence of the Allied troops.

On the other hand, however, West Berlin has on several occasions had the opportunity to discover the more unpleasant aspects of being a territory governed by the rough laws of war. To give just one example, in the case of *United States v. Tiede and Ruske* before the "United States Court for Berlin" in 1979,⁶² the U.S. Government contended that the proceedings, which involved aerial hijacking, were not governed by the U.S. Constitution and that the defendants therefore did not have the right to a jury trial.

VII. INTRA-GERMAN RELATIONS TODAY

Ten years after the conclusion of the Basic Treaty (*Grundvertrag*), the basic agreement to disagree which was built into the treaty still characterizes most legal relations between the two German states. It is true that some of the bilateral agreements foreseen in article 7 of the Basic Treaty,⁶³ as well as other agreements concluded as part of the overall package of the *Ostverträge*, particularly the agreement on Transit Traffic of Civilian Persons and Goods between the FRG and Berlin (West) of December 17, 1971, and the Treaty on Traffic Questions of May 26, 1972, significantly facilitate the management of intra-German affairs.⁶⁴ In other important areas, however, treaty negotiations have come to a standstill, as with respect to cultural cooperation and exchange or on judicial assistance. Such assis-

60. The Quadripartite Agreement, Part II C.

61. Kewenig, *Entwicklungslinien des völker- und staatsrechtlichen Status von Berlin* (Lines of Development in the International and Constitutional Status of Berlin), 39 *EUROPA-ARCHIV* 271 (1984).

62. *United States v. Tiede and Ruske*, Nos. 78-001 and 78-001A (United States Court for Berlin Mar. 14, 1979), *reprinted in* 19 *I.L.M.* 179 (1980).

63. Article 7 of the Basic Treaty deals with, among other matters, public health and veterinary medicine, the transfer of certain payments, post and telecommunications, and joint action against environmental damage at the border. *See text of art. 7, supra note 29.*

64. *See the Agreement on Transit Traffic of Civilian Persons and Goods, supra note 57; the Treaty on Questions Relating to Surface Traffic, May 26, 1972, FRG-GDR, 12 FOREIGN AFF. BULL.* 15 (1972), *reprinted in* 11 *I.L.M.* 726 (1972).

tance is presently rendered without agreement and the arrangement is working relatively well.⁶⁵ Judgments of the GDR courts have to be recognized before they can have legal effects in the Federal Republic but in FRG practice such recognition has to be extended as a matter of principle, without any *exequatur* or other domestic procedure.⁶⁶

Since 1974, official relations between the two German states have been conducted by so-called "Permanent Missions." While the Permanent Mission of the Federal Republic of Germany deals with the East Berlin Ministry for Foreign Affairs, its Eastern German counterpart in Bonn communicates with the Federal Chancellor's office (*Bundeskanzleramt*). A further consequence of the *inter se* character of these relations can be seen in the fact that according to the law and practice of the Federal Republic of Germany, the 1961 Vienna Convention on Diplomatic Relations cannot be applied to these missions directly, but only by way of analogy.⁶⁷

Questions of nationality have practical repercussions which make it the most serious controversy left unresolved. The Basic Treaty (*Grundvertrag*) judgment of the Constitutional Court stressed that German nationality is the same in both German states and that, notwithstanding any rule in the nationality law of the GDR enacted in 1967, citizens of the GDR must be treated as Germans in the sense of the Basic Law (*Grundgesetz*) as soon as they reach the territory of the Federal Republic of Germany or come within its protection. On the other hand, since the Federal Republic has formally accepted the existence of the Democratic Republic as a state and subject of international law, it can no longer argue that a GDR citizenship does not exist, even though Bonn has declared that questions of nationality have been left untouched by the Basic Treaty. In the words of one observer, because of the uncompleted process of separation of the German Reich, the Federal Republic may continue to regard the legal institution of the traditional German nationality as its own nationality, and may exercise diplomatic protection for all German nationals, including citizens of the GDR.⁶⁸ In practice this leads to a so-called "open-door policy" towards citizens of the GDR arriving in third countries. The question of whether and to what extent third states should respect the right of such persons to choose by

65. Renger, *Rechtshilfeverkehr zwischen den beiden Staaten in Deutschland* (Legal Assistance Between the Two States in Germany), MITTEILUNGSBLATT DES KÖNIGSTEINER KREISES (Information Paper of the Königsteiner District) 7 (1983); K. WILKE, *supra* note 1, at 290.

66. R. ZÖLLER, *ZIVILPROZESSORDNUNG* (Law on Civil Procedure) 1697 (13th ed. 1981).

67. Protokoll über die Errichtung der Ständigen Vertretungen vom 14.3.1974, para. 4; *cf.* G. RESS, *supra* note 1, at 272; K. WILKE, *supra* note 1, at 257; STRAFFPROZESSORDNUNG [StPO] (Law on Criminal Procedure) §§ 153 c, d, amended by 1976 BGBI I 2181.

68. G. RESS, *supra* note 1, at 401.

which of the German states they wish to be protected, becomes particularly acute every time the GDR concludes a treaty on consular relations. It appears that most non-Socialist countries have accepted the "open-door" principle maintained by the Federal Republic.⁶⁹

The improvement of relations between the two German states is far less than the architects of *Ostpolitik* had hoped for. On the one hand, the transfrontier movement of persons and goods as well as transit to West Berlin is easier and safer than before. On the other hand, and this weighs heavily, the gradual changes in the political system of the GDR which Brandt, Bahr and Scheel had hoped to foster with the Basic Treaty more or less have failed to materialize. There are, of course, several reasons for this. But among these is certainly the transformation by judicial *fiat* of the Basic Treaty from an instrument designed to serve as a *modus vivendi* in order to break the deadlock between two irreconcilable dogmas, into a restatement of positions which permit little or no compromise.

69. Cf. Frowein, *Das Individuum als Rechtssubjekt im Konsularrecht* (The Individual as a Subject of Consular Law), in *INTERNATIONALES RECHT UND WIRTSCHAFTSORDNUNG. FESTSCHRIFT FÜR F.A. MANN ZUM 70. GEBURTSTAG* (International Law and Economic Order. Festschrift for F.A. Mann on his 70th Birthday) 377 (W. Flume, H.J. Hahn, G. Kegel & K.R. Simmonds eds. 1977); Zieger, *Deutsche Staatsangehörigkeit und Drittstaaten* (German Citizenship and Third Countries) *id.* at 522.

