

The New Polish-German Treaties and the Changing Political Structure of Europe

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Germany. In the Preamble the parties emphasize their intention to conclude the “final settlement with respect to Germany.” The definitive settlement of the borders is called an “essential element of the peaceful order in Europe” (Article 1(1)). This terminology makes clear that on March 15, 1991, the “peace settlement” foreseen in the Potsdam Protocol of 1945 and other international treaties and instruments was finally reached.<sup>60</sup> That other states hold this view was confirmed by Austria and Finland. Both countries—the one by an exchange of notes with the four powers, and the other by a unilateral declaration—characterized the resolution of the German question as having made several of their treaty provisions obsolete (the Austrian State Treaty and the treaty between Finland and the Soviet Union, respectively).<sup>61</sup>

Since unification, some states have raised the issue of reparations. Of course, immediately after the war a considerable amount of reparations were taken from Germany. The exact quantity has never been calculated. Since reparations are generally determined by agreement in a peace treaty or similar international agreement, there is no legal basis for requesting reparations from united Germany. Nevertheless, states can be expected to turn to Germany as responsible for violations of international law, for instance by confiscating property, that took place during the existence of the GDR.

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#### THE NEW POLISH-GERMAN TREATIES AND THE CHANGING POLITICAL STRUCTURE OF EUROPE

The bilateral treaties concluded by Poland and Germany on November 14, 1990, and June 17, 1991, are an ideal illustration of the political and social changes in Central Europe. They were intended to constitute a turning point in the relations between the two neighbors, enemies for centuries that are now starting to construct a common future.

##### *The Boundary Treaty*

The first, and perhaps most important, problem was to settle the boundary dispute between the two states, which had lasted since the end of World War II. The dispute concerned the interpretation of part IX(B) of the Potsdam Agreement,<sup>1</sup> which deals with the eastern boundary of Germany. Under that provision, the final delimitation of the western frontier of Poland was to await a peace settlement. Pending this final determination, the former German eastern territories (Silesia, Pomerania and East Prussia) were to remain under Polish administration and were not to be considered part of the Soviet occupation zone in Germany.

<sup>60</sup> See note 21 *supra*.

<sup>61</sup> See documents in 51 ZAÖRV 520–28 (1991).

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<sup>1</sup> Report on the Tripartite Conference of Berlin, Aug. 2, 1945, United Kingdom–USSR–United States, 3 Bevans 1224, 1234, [1945] 2 FOREIGN RELATIONS OF THE UNITED STATES 1499, 1509.

Nearly every passage of this provision provoked debate between Polish and German statesmen and international lawyers. The German legal position<sup>2</sup> held that the German Reich survived the military surrender and collapse of the German state in 1945 and continued to exist as a “passive” subject of international law. Not being party to the Potsdam Agreement, it was not bound by it, in accordance with the rule *pacta tertiis*. Although the Federal Republic of Germany (FRG) was identical with the former German state—if territorially and temporally limited—it could not on its own legally conclude any treaty ceding the former eastern territories. Sovereignty could be transferred to Poland only by concluding a peace treaty with the reunified all-German state (or German Reich); in the meantime, the territorial competence of Poland was merely administrative. Neither the Treaty of Görlitz of July 6, 1950, between Poland and the Democratic Republic of Germany (GDR),<sup>3</sup> nor the Warsaw (Normalization) Treaty of December 7, 1970, between Poland and the FRG<sup>4</sup> was a treaty of cession and would be binding on reunified Germany.

The Polish position<sup>5</sup> viewed the Potsdam decision on the transfer of sovereignty as final (the Agreement refers to the “former German territories under Polish administration”). The Potsdam Agreement was not *res inter alios acta* in respect of Germany because the Allied powers had reserved the right to define the status, territory and boundaries of Germany in the Berlin Declaration of June 5, 1945,<sup>6</sup> and they then implemented this right in the Potsdam Agreement. It was not necessary to conclude a peace treaty with Germany because the questions usually at issue in peace negotiations had already been resolved, and the peace settlement required by the Potsdam Agreement had therefore been achieved. According to the majority of Polish authors, the German Reich collapsed after World War II and no longer existed as a state. Any act undertaken by the FRG in the name of the Reich, notwithstanding its claimed identity with the Reich, was contrary to international law, as the FRG and the GDR were both successors of Germany.

The events of November 1989 in East Germany, together with the changes in the foreign policy of the Soviet Union, opened the way to German unity. At first, Federal Chancellor Helmut Kohl issued several ambiguous statements about the boundaries of reunified Germany that caused a certain nervousness in Warsaw. The Polish Government decided to participate in the negotiations known as the “two-plus-four” conference, which dealt with the boundaries of Germany and

<sup>2</sup> See Frowein, *Legal Problems of the German Ostpolitik*, 23 INT'L & COMP. L.Q. 105 (1974); Arndt, *Legal Problems of the German Eastern Treaties*, 74 AJIL 122 (1980); Bernhardt, *Deutschland nach 30 Jahren Grundgesetz*, in VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER, No. 38, 1980, at 7; Blumenwitz, *Die territorialen Folgen des Zweiten Weltkrieges für Deutschland*, 23 ARCHIV DES VÖLKERRECHTS 1 (1985). For a current German position, see Frowein, *The Reunification of Germany*, *supra* p. 152, 156–57.

<sup>3</sup> Agreement concerning the Demarcation of the Established and Existing Polish-German State Frontier, 319 UNTS 93.

<sup>4</sup> Agreement concerning the Basis for Normalization of Their Mutual Relations, 830 UNTS 327.

<sup>5</sup> Skubiszewski, *The Great Powers and the Settlement in Central Europe*, 18 GER. Y.B. INT'L L. 92 (1976); Janicki, *Rechtsgrundlagen der Staatsgrenze an der Oder und Lausitzer Neiße*, in FESTSCHRIFT FÜR C. ARNDT 71 (1987); see also Schreuer, *The Legal Status of the Polish Boundaries*, in THE CHANGING POLITICAL STRUCTURE OF EUROPE: ASPECTS OF INTERNATIONAL LAW 79 (Vierdag, Fitzmaurice & Lefeber eds. 1991).

<sup>6</sup> Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, and the Provisional Government of the French Republic, 60 Stat. 1649, TIAS No. 1520, 68 UNTS 189.

security guarantees for its neighbors. This Polish initiative was often sharply criticized. Poland, however, simply wanted to avoid a repetition of Yalta, where matters basic to its interests were decided without its participation.<sup>7</sup>

Foreign Minister Krzysztof Skubiszewski represented Poland at the Paris "two-plus-four" meeting in July 1990, which agreed on five principles to be applied to the final settlement of the territorial aspect of German unification. These principles were later incorporated in the Moscow Treaty on the Final Settlement with Respect to Germany,<sup>8</sup> concluded on September 12, 1990, as a result of the "two-plus-four" negotiations. It bears emphasizing here that, by the time of the Paris meeting, all ambiguity with respect to the boundary question had been eliminated, thanks to several statements by Federal President Richard von Weizsäcker during his official visit to Poland in May 1990, and the declarations by the parliaments of the two German states of June 21, 1990. These declarations referred expressly to the existing boundary between Poland and Germany, as defined in the Treaties of Görlitz and Warsaw.<sup>9</sup>

The territorial and boundary questions are dealt with in Article 1 of the Moscow Treaty. The provisions of this article enunciate the five principles established at the Paris meeting. They state (1) that united Germany shall comprise the territories of the FRG, the GDR and Berlin; (2) that the external borders of the two German states shall constitute the external boundaries of Germany;<sup>10</sup> (3) that the boundary between Poland and Germany shall be confirmed by a treaty between them; (4) that united Germany renounces territorial claims against all other states; and (5) that it shall ensure that its constitution does not contain any provision incompatible with these principles.

The last provision requires some comment. After the conclusion of the Warsaw Treaty in 1970, the FRG interpreted this Treaty as if the German Reich continued to exist within its frontiers of December 31, 1937.<sup>11</sup> It did so by keeping in force municipal regulations that treated part of Polish territory (the former German eastern territories) as still belonging to the German Reich and not as "foreign territory" (*Ausland*). Under Article 23 of the Basic Law (the West German Constitution), these territories were entitled to join the FRG. In addition, a large number of Polish nationals were treated as "Germans" within the meaning of Article 116(1) of the Basic Law. This situation led to major tensions in Polish-West German relations.<sup>12</sup>

<sup>7</sup> The problems connected with the transit of Soviet troops stationed in East Germany show that the caution of the Polish Government was justified.

<sup>8</sup> 29 ILM 1187 (1990).

<sup>9</sup> Notes 3 and 4 *supra*, respectively.

<sup>10</sup> The western boundary of the FRG was established by the occupation powers on March 26, 1949; they made its final determination subject to a future peace settlement. 3 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 398 (1964). The same clause on the final delimitation was used in the Polish-Soviet Boundary Treaty of August 16, 1945, 10 UNTS 193. However, in a declaration to that Treaty, the parties stated that the boundary between the USSR and Poland was final.

<sup>11</sup> The basis for this interpretation was formulated by the Federal Constitutional Court. See Judgment of July 31, 1973, 36 Bundesverfassungsgericht [BVerfGE] 1 (1973) (Treaty between the FRG and the GDR); Judgment of July 7, 1975, 40 BVerfGE 141 (1975) (Treaties between the FRG and the USSR and Poland); Judgment of Oct. 21, 1987, 77 BVerfGE 137 (1987) (*Teso* case).

<sup>12</sup> Janicki, *Legal Problems Involved in the Realization by the FRG of the Treaty with Poland dated 7th December 1970*, 18 POLISH W. AFF. 75 (1977); Barcz & Czaplinski, *Les Problèmes juridiques actuels de la normalisation des relations entre la Pologne et la RFA*, 15 REV. D'ALLEMAGNE 2 (1983). The West German practice of treating the 1970 Warsaw Treaty as a "quantité négligeable" has also been criticized lately by some German authors, e.g., C. TOMUSCHAT, *DIE STAATLICHE EINHEIT DEUTSCHLANDS: STAATS- UND VÖLKERRECHTLICHE ASPEKTE* 24 (1990).

The Polish authorities found these practices to be contrary to general international law (according to Article 27 of the Vienna Convention on the Law of Treaties, no state can invoke its municipal law to avoid implementing international agreements). To prevent similar problems from arising under the new Treaty, Poland proposed that it include special guarantees in this respect. Many potential sources of tension were eliminated by the Unification Agreement between the two German states of August 31, 1990,<sup>13</sup> which changed the Preamble to the Basic Law and abrogated Article 23. Nevertheless, the controversial provision on German nationality (Article 116(1)) remains in force.

Poland and united Germany had important legal interests in concluding a treaty confirming the existing Oder-Neisse boundary line. Poland wanted to obtain a clear determination, freely negotiated with a democratic German Government, despite its legal position that the delineation in the Potsdam Agreement was intended as final. Germany was ready to conclude such an agreement as a treaty of cession; some authors treated it as simply confirming the earlier agreements,<sup>14</sup> while others saw it as having constitutive effect.<sup>15</sup> The Treaty between the Republic of Poland and the Federal Republic of Germany on the Confirmation of the Existing Border between Them was concluded on November 14, 1990.<sup>16</sup> It consists of a preamble, three substantive clauses and one formal clause. In Article 1, the parties confirm the existing boundary between them as defined in the Treaty of Görlitz of 1950 and subsequent implementation agreements,<sup>17</sup> as well as in the Treaty of Warsaw of 1970. This wording corresponds to that of the aforementioned resolutions of the parliaments of the FRG and the GDR of June 21, 1990. It also seems to confirm the Polish view as to the exclusively declarative character of the 1990 Treaty, because both Treaties—the first with the GDR,<sup>18</sup> and the second with the FRG—refer to the boundary line defined in the Potsdam Agreement. The solution agreed upon by the parties conforms to customary rules on the succession of states with respect to boundary treaties in the case of a merger of states.<sup>19</sup> Other provisions of the Treaty on the Polish-German frontier proclaim

<sup>13</sup> Agreement with Respect to the Unification of Germany, 1990 Bundesgesetzblatt, Teil II, at 889, translated and reprinted in 30 *ILM* 457 (1991).

<sup>14</sup> C. TOMUSCHAT, *supra* note 12, at 24; Frowein, *Rechtliche Probleme der Einigung Deutschlands*, 45 *EUROPA ARCHIV* 233, 236 (1990).

<sup>15</sup> Klein, *An der Schwelle zur Wiedervereinigung Deutschlands*, 1990 *NEUE JURISTISCHE WOCHENSCHRIFT* [NJW] 1065, 1072; Hailbronner, *Völker- und europarechtliche Fragen der deutschen Wiedervereinigung*, 45 *JURISTENZEITUNG* 449, 452 (1990). In their view, the validity of Polish administrative acts enacted with respect to the territories concerned cannot be doubted.

<sup>16</sup> For the text, see Rzeczpospolita, No. 266, Nov. 15, 1990; 1990 Bulletin des Presse- und Informationsamtes der Bundesregierung 1394.

<sup>17</sup> The most important one is the 1989 treaty on the delimitation of maritime areas in the Bay of Pomerania, which put an end to the most serious remaining territorial dispute between former Communist states. See Czaplinski, *Reunification of Germany—International Legal Issues*, 27 *CO-EXISTENCE* 225, 229–30 (1990).

<sup>18</sup> The FRG has often questioned the legality and validity of this agreement, as the GDR allegedly did not have competence to conclude a treaty on cession. However, from the perspective of the West German legal position, even if the relations between the two German states were of a “special” character within the still-extant German Reich, the GDR enjoyed the full international legal personality of a state in its relations with third states. Its acts, including those concerning the boundaries, should therefore have been opposable to any state. Interestingly, the Görlitz agreement referred to the Oder-Neisse line as the border between Poland and Germany, not as that between Poland and the GDR.

<sup>19</sup> See *Free Zones of Upper Savoy and the District of Gex* (Fr./Switz.), 1932 *PCIJ* (ser. A/B) No. 46, at 144 (Judgment of June 7); *Temple of Preah Vihear* (Cambodia v. Thailand) (Merits), 1962 *ICJ REP.*

the inviolability of the boundary and oblige the parties to respect each other's sovereignty and territorial integrity (Article 2) and to renounce any territorial claims (Article 3).

*The Treaty on Good Neighborliness and Friendly Cooperation*

The Treaty on the boundary resolved the most important dispute between Poland and Germany. However, both parties expect that it will play the same role in Polish-German relations as the Elysée Treaty of 1963 has played in German-French ones. They therefore decided to draw up a general treaty (one that is similar to the Elysée Treaty but much broader) that would constitute the basis for friendly relations between former traditional enemies. After long negotiations, the Treaty on Good Neighborliness and Friendly Cooperation was concluded on June 17, 1991.<sup>20</sup> The Treaty is composed of thirty-eight sections dealing with nearly all aspects of the relations between the two states. An exchange of letters between Polish Foreign Minister Skubiszewski and German Foreign Minister Hans-Dietrich Genscher completes the Treaty.

Rather than describe the Treaty in detail, we shall indicate here only the most important matters covered. For example, the Treaty states that Poland and Germany are interested in cooperating in international security affairs. They thus agreed to hold regular consultations of their prime ministers and foreign ministers to develop their mutual relations and to elaborate common positions on the most important international issues. The parties also renounced the use of force in their mutual relations and declared their will to resolve all disputes by peaceful means. The documents elaborated in the Helsinki process were to constitute a general framework for this bilateral cooperation. Although important steps toward strengthening the security of Central Europe were taken in the Treaty on the Final Settlement with Respect to Germany (like the limitation on stationing NATO troops in eastern Germany and the general reduction of the German armed forces), Poland still manages its own security. Even if it does not join NATO in the near future,<sup>21</sup> Poland would like to broaden its cooperation with the Western military alliance. This intention is expressed in Articles 6 and 7 of the Treaty on Good Neighborliness.

Poland is continuing its negotiations with the Commission of the European Communities on an association treaty. Like other Central European states, Poland is interested in eventually joining the Communities, though the authorities are aware that it would require vast political and economic changes. The negotiations are difficult, as Poland wishes to develop trade relations in sectors that are traditionally protected by the EC regulations (the steel and textiles industries and agriculture). It should therefore be noted as a positive sign that the FRG agreed to the inclusion in the Treaty of a clause (Article 8) supporting the accession of

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6 (Judgment of June 15); Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, Art. 11, 3 UNITED NATIONS CONFERENCE ON SUCCESSION OF STATES IN RESPECT OF TREATIES, OFFICIAL DOCUMENTS, UN Sales No. F.79.U.10 (1979), *reprinted in* 17 ILM 1488 (1978).

<sup>20</sup> For the text, see Rzeczpospolita, No. 142, June 20, 1991.

<sup>21</sup> In its negotiations with the USSR on a bilateral general relations treaty, Poland did not accept any limitations on its right to join international organizations. Recent developments in the USSR have forced the three Central European states to act with a view toward establishing institutional links with NATO.

Poland to the European Communities as soon as necessary preconditions are met. Subsequent sections of the Treaty establish general conditions for cooperation as regards the economy, social security, technical and scientific endeavors, and protection of the environment.

Relations between the Polish and German nations are still full of prejudices and stereotypes that must be challenged. The Treaty establishes the conditions for cooperation on the social level, including direct contacts between the populations of the two countries and the development of cultural relations. A youth exchange system similar to that between Germany and France is provided for, so as to create a basis for increased knowledge and friendly cooperation.

The provisions of the Treaty on Good Neighborliness are general, more of a political than an international legal character.<sup>22</sup> However, Articles 20–22 deal with a special problem: the rights of the ethnic minorities in the two states. Together with the boundary problem, the very existence and rights of the German minority in Poland constituted the most important subject of dispute between Poland and the FRG after World War II.

The Allied powers decided in the Potsdam Agreement that the population of German origin should be transferred from Poland (including the newly acquired former German eastern territories), Czechoslovakia and Hungary to Germany. The intention was to create homogeneous national states in Central Europe free of German minorities, which had played a disruptive role during the Sudeten crisis of 1938 in Czechoslovakia and the German invasion of Poland in 1939. The major part of the German population left Poland and the former eastern territories; they either were evacuated by the Wehrmacht or were trying to escape capture by the Red Army.<sup>23</sup> The remaining inhabitants of German origin were resettled to Germany<sup>24</sup> (or expelled, in German terminology<sup>25</sup>); the number of resettled persons was estimated by the Control Council as 3.5 million.<sup>26</sup> The

<sup>22</sup> It should be emphasized, however, that Polish-German relations were so complicated in the past that even, e.g., provisions dealing with cultural cooperation, have a specific context and involve international legal questions. Under Article 28(3) of the Treaty, the parties shall resolve, "in a spirit of reconciliation and understanding," certain questions regarding art objects and archives. Germany wishes to obtain important collections from the Prussian Library that were stored in a Silesian coal mine during the war, discovered afterward by the Soviets and given to the Polish Government as reparations for losses of Polish cultural objects (restitution in kind). The collections (which contain manuscripts by Beethoven and Goethe, among others) certainly belong to German culture. For its part, Poland wants to obtain rich archives on the Polish western territories.

<sup>23</sup> According to the German census of May 17, 1939, the population of the eastern territories was 8.8 million people (partially of Polish origin). The Polish census of February 14, 1946, showed that the number of Germans in the newly acquired Polish western territories was 2.076 million, i.e., ca. 28% of the prewar population.

<sup>24</sup> The legality of the resettlement decision has usually been questioned by some authors. See Blumenwitz, *Flucht und Vertreibung und ihre vermögensrechtlichen Folgen*, in *FLUCHT UND VERTREIBUNG* 185 (D. Blumenwitz ed. 1987); de Zayas, *Die Vertreibung in völkerrechtlicher Sicht*, in *id.* at 239. And recently, Kimminich, *Überlegungen zu einer friedensvertraglichen Regelung für ein wiedervereinigtes Deutschland unter völkerrechtlichen Gesichtspunkten*, 33 *DAS PARLAMENT* 34 (1990).

<sup>25</sup> The notion of "expelled" was abused by the German legal system, as this status was granted to persons who voluntarily left their places of residence and moved to the FRG. The Federal Administrative Court used the term "spätgeborene Vertriebene" (an expellee born after the war) for a person born in 1952 who left Hungary in 1970. Decision of Nov. 10, 1976, 51 *Bundesverwaltungsgericht* 298. Newspapers also referred to "Vertriebene auf eigenen Wunsch" (voluntary expellees). See *DER WESTPREUBE*, No. 8, 1977, at 2.

<sup>26</sup> This figure includes members of the former German minority in prewar Poland and the German population of the former German eastern territories.

resettlement was generally finished by 1950. About a million persons were certified as of Polish origin and remained in Poland.<sup>27</sup>

All those persons of Polish origin who were nationals of the former German Reich (constituting the Polish minority in Germany) were treated as Germans under German municipal law. They acquired the status of "Germans" within the meaning of Article 116(1) of the Basic Law<sup>28</sup> and were entitled to settle freely within the FRG. As the economic situation of Poland became worse and worse, many "Germans" decided to emigrate. In fact, they possessed dual nationality (Polish and German). Poland claimed that this situation violated the sovereign rights of the Polish state regarding persons in the former eastern territories by infringing the principle of "effectiveness" in nationality law. For its part, the FRG maintained that all "Germans" within the meaning of Article 116(1) were citizens of the still-existing German Reich within its frontiers of 1937, and that the Federal Republic lacked competence to change their legal status. This notion of a "German" was used by the FRG to claim the existence of a German minority of 1.1 million in Poland.<sup>29</sup> While denying all such claims, the Polish authorities felt themselves forced to adopt a repressive policy toward persons declaring themselves to be of German origin. The attitude of Poland prompted the FRG to

<sup>27</sup> The authoritative source, Legal Validity of the Undertakings concerning Minorities, Report by the Secretary-General, UN Doc. E/CN.4/367 (1950), does not mention any German minority in Poland. Various German authors agree that some people of German ethnic origin remained in Poland after 1950. However, the estimates of their number vary between 10,000 and 200,000. The vast majority left Poland on the basis of the agreement between the Polish and German Red Cross organizations of December 1955; the "Information" by the Polish Government published on November 18, 1970, in connection with the negotiations of the Polish-German Normalization Treaty; and the Protocol of August 9, 1975. It should be noted that the number of people who left Poland on the basis of these agreements amounts to 600,000.

<sup>28</sup> See Bernhardt, *Der Begriff des Deutschen und die deutsche Staatsangehörigkeit nach dem Recht der Bundesrepublik Deutschland*, in STAATSANGEHÖRIGKEIT, SOZIALE GRUNDRECHTE, WIRTSCHAFTLICHE ZUSAMMENARBEIT NACH DEM RECHT DER BUNDESREPUBLIK DEUTSCHLAND UND DER VOLKSREPUBLIK POLEN 15 (Kokot & Skubiszewski eds. 1976); Czaplinski, *Das Problem der Staatsangehörigkeit in den Beziehungen zwischen der Volksrepublik Polen und der Bundesrepublik Deutschland*, 4 PRO PACE MUNDI 77 (1988); *idem.*, *La Citoyenneté de la RDA et la nationalité allemande*, 73 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [RCDIP] 438 (1984); von Mangoldt, *La Nationalité allemande, la citoyenneté de la RDA et le statut juridique des territoires au-delà de la ligne Oder-Neiße*, 75 RCDIP 138 (1986); Piotrowicz, *Problems of Nationality as a Consequence of the Territorial Changes in Poland and Germany in 1945*, 15 REV. SOC. L. 149 (1989); Koenig, *La Nationalité en Allemagne*, 1978 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 237 (and numerous others).

Article 116(1) of the Basic Law defines a German within the meaning of the Constitution as "a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German stock or as the spouse or descendant of such a person." The notion of a "German" is therefore political and legal (connected with a special regulation on citizenship of the FRG), not ethnic. The definition of a "person of German ethnic origin" is found in §6 of the West German law on expellees and refugees (Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge, Bundesvertriebenengesetz, May 19, 1953, 1971 BGBl.I 1566). In the light of the two definitions, not every "German" is also "a person of German ethnic origin."

<sup>29</sup> According to the Minister of State in the West German Foreign Office, A. Mertes, in 1983. See Information des Pressereferats des Auswärtigen Amtes, No. 1103/b/8 (1983).

On the other hand, according to the new Preamble to the German Basic Law, as amended by the German Unification Agreement of August 31, 1990, the German nation consists exclusively of the people living in the FRG, the GDR and Berlin. It can hardly be expected that the existence of a sizable German minority in Poland was ignored in concluding this treaty. This fact explains the Polish hesitation to recognize the existence of the German minority in Poland.



launch numerous attacks against it in various forums, including the European Parliament.<sup>30</sup>

The establishment of the Solidarity Government in Poland resulted in significant changes in its nationality policy.<sup>31</sup> The new Government recognized the existence of Byelorussian, Lithuanian, Ukrainian and German minorities in Poland.<sup>32</sup> The common declaration by Prime Minister Tadeusz Mazowiecki and Federal Chancellor Kohl of November 14, 1989, opened the way to securing the rights of the German minority. The standard for these rights is elaborated in the Polish-German Treaty on Good Neighborliness.

During the postwar period, the FRG denied the existence of a Polish minority in Germany. This group consists mostly of persons of Polish origin who are not German citizens;<sup>33</sup> they are not officially domiciled in Germany (they do not even live in one place but are dispersed all over Germany) and are only tolerated there. Another component of this minority is made up of persons declaring their Polish origin who were entitled to the status of "Germans" and left Poland claiming German nationality. The German authorities were not willing to recognize the status of these persons as a minority because they feared that corresponding minority rights would be claimed by the Turks and Yugoslavs in Germany.

Article 20 of the 1991 Polish-German Treaty defines the German minority in Poland and the Polish minority in Germany. Members of the German minority are Polish citizens who declare their German origin, language, culture and traditions; a similar formulation is used to define the Polish minority in Germany.<sup>34</sup> Persons belonging to these minorities are entitled to develop their national identity without suffering discrimination or forced assimilation. This formulation is clearly based on Article 27 of the International Covenant on Civil and Political Rights,<sup>35</sup> without prejudging any disputable question regarding this provision (in particular, so-called collective rights were not considered). The Treaty adopts a subjective approach to minorities, stating that all persons have the right to declare

<sup>30</sup> See the petition by German representatives of January 17, 1984, on the situation of the German minority in Poland, which claimed that Poland was violating their human rights. 1983-1984 EUR. PARL. DOC. (No. 1-1290) (1983); and the claims made by the FRG during the Vienna session of the Conference on Security and Co-operation in Europe on November 19, 1986.

<sup>31</sup> The changes were also connected with claims regarding the legal situation of Polish minorities in the USSR and Czechoslovakia.

<sup>32</sup> In 1990 there were 109 schools for ethnic minorities in Poland attended by 6,118 children: 3,928 attended Byelorussian schools; 882, Ukrainian schools; 670, Lithuanian schools; and 465, Slovak schools. There are faculties of Byelorussian, Ukrainian and Lithuanian philology in the Universities of Warsaw and Poznan.

The German minority was allowed to form its own organizations (the most important, the Social-Cultural Society of the German Minority in Oppeln, Silesia, had 130,000 members in 350 of 950 localities in the region). The German minority was represented in 38 local municipalities by 380 members, and it constituted a majority in 18 municipalities at the end of 1990. At the same time, German was introduced in 157 schools in Silesia, and religious services were held in German in five church regions. See *Gazeta Wyborcza*, Aug. 29, 1990, at 6; *id.*, Nov. 15, 1990, at 10.

<sup>33</sup> It is generally recognized in international law that persons belonging to a minority are citizens of the state of domicile. See Capotorti, Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, at 96 (1979).

<sup>34</sup> This formulation corresponds with the definition of a minority in the draft Convention on the Protection of Minorities, formulated on the basis of Capotorti's study, *supra* note 33. See UN Docs. E/CN.4/Sub.2/L.564, at 7 and 96 (1972), and E/CN.4/1983/66. Thus, the Polish-German Treaty constitutes an important element of international practice in this field.

<sup>35</sup> Dec. 16, 1966, 999 UNTS 171.

themselves as belonging to a minority, and that those who make such a declaration cannot incur any negative consequences for having done so (Article 21(3)).

The parties agreed that the protection of minorities should be based on an elaborated international standard. The Treaty (in Article 20(1)) refers in this respect to the Universal Declaration of Human Rights of 1948,<sup>36</sup> the European Convention on Human Rights and Fundamental Freedoms of 1950,<sup>37</sup> the International Convention on the Elimination of All Forms of Racial Discrimination of 1966,<sup>38</sup> the International Covenant on Civil and Political Rights of 1966,<sup>39</sup> the Final Act of the Conference on Security and Co-operation in Europe (CSCE) of 1975,<sup>40</sup> the CSCE's Copenhagen Document on the Human Dimension of 1990,<sup>41</sup> and the CSCE's Charter of Paris for a New Europe of 1990.<sup>42</sup> The Copenhagen Document is of surpassing importance in this regard because of its detailed catalog of rights of persons belonging to minorities. Nevertheless, the parties decided to enumerate the most important minority rights in the text of the Treaty (Article 20(3)). It provides that members of minorities are entitled to speak their national language in public, to form organizations and societies, to practice their religion, to use their family names in foreign languages, and to contact other members of their minority and any person living abroad. The two states obligated themselves to support the activities of minorities<sup>43</sup> and to permit them to establish schools and take part in the public life of their country. To ensure the realization of these rights, the Council of Ministers of Poland created a special agency, the Council for National Minorities.<sup>44</sup>

Finally, the Treaty sets limits on minority rights. Members of minorities must be loyal to the state whose citizenship they hold.<sup>45</sup> Moreover, none of the specified rights may be implemented in such a way as to contravene the aims and purposes of the United Nations Charter or the principles of international law—in particular, the principle of the territorial integrity of states. Despite the urging of the FRG, Poland declined to recognize the dual nationality of members of the German minority in Poland (which signifies that German nationality was not recog-

<sup>36</sup> GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

<sup>37</sup> Nov. 4, 1950, 213 UNTS 221.

<sup>38</sup> *Opened for signature* Mar. 7, 1966, 660 UNTS 195.

<sup>39</sup> Note 35 *supra*.

<sup>40</sup> Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975).

<sup>41</sup> June 29, 1990, 29 ILM 1305 (1990).

<sup>42</sup> Nov. 21, 1990, 30 ILM 190 (1991).

<sup>43</sup> This provision goes further than traditional international law, which requires that minority activities be permitted, but not that they be actively supported.

<sup>44</sup> It has been suggested in political discussions in Poland that bills to protect minorities and reform elections be enacted to guarantee parliamentary representation to members of minorities. In the parliamentary elections of October 27, 1991, the German and Byelorussian minorities succeeded in gaining representation.

<sup>45</sup> That was not always the case. In October 1990, the Central Council of the German Societies in Poland gave a letter to German Foreign Minister Genscher that contained 16 principles directed at the Polish Government. They were aimed in fact at obtaining a special kind of autonomy for the German minority in Poland and sought, *inter alia*, recognition of "a right to a motherland," including freedom to settle for persons coming from Germany; cultural, linguistic, religious, economic, social and fiscal autonomy; the right to institute political parties; obligatory consultation with the Council by the Polish Government on its German policy; the right to cooperate freely with the organizations of "expelled Germans" in Germany; and recognition by Poland of the dual nationality of the German minority and of the right of the FRG to protect that minority from acts by the Polish Government. The Polish authorities rejected these political and economic proposals, and the Government of the FRG did not support them.

nized as opposable to exercises of Polish jurisdiction). Poland also rejected proposals for the use of bilingual local names.

Although the Treaty of June 17, 1991, is extremely broad and covers nearly all aspects of the relations between Poland and Germany, certain matters were expressly excluded. The most important one is the treatment of nationality under German law: the unwillingness of the FRG to abrogate Article 116(1) of the Basic Law<sup>46</sup> is fraught with difficulties. Under Article 33 of the Treaty, the parties intend to develop, intensify and simplify their international legal relations and cooperation in private law, conflict of laws and penal law. However, an agreement on judicial assistance was under negotiation for many years. It was only recently concluded because the conflict-of-laws rules of both parties are based on nationality as the main connecting factor and the construction of FRG nationality law prevented this factor from being applied in their bilateral relations.

The Treaty on Good Neighborliness also did not resolve certain financial and property questions. Poland claims indemnity for victims of the Nazi persecution during World War II. Since Poland renounced war reparations from Germany in 1953, it requested *ex gratia* payments corresponding to those granted by the FRG to Israel and West European states. It was agreed that a special foundation financed by various German sources would be set up to pay indemnities to entitled persons.

The FRG was interested in claiming indemnity for the property confiscated from German nationals resettled to Germany from Poland after the war. Poland took the position that these confiscations were made as war reparations on the basis of the legislation enacted by the Control Council for Germany (Law No. 5 of October 30, 1945, on German external assets). In the Convention on Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952 (as amended on October 23, 1954),<sup>47</sup> which dealt with problems resulting from the war and the occupation, the FRG renounced all claims to property confiscated for reparations purposes against persons, organizations or foreign governments that had acquired rights to this property. It also undertook to pay compensation to the persons whose property had been confiscated. The clauses of the agreement were effective *in favorem tertii*. The West German courts have firmly applied these rules and have refused to review the legality of foreign measures against former German property.<sup>48</sup> Instead of general international law (the prohibition on confiscations), special rules enacted by the Allied occupation authorities, in this writer's view, should be applied. Under these circumstances, Poland rejected the German claims.

<sup>46</sup> The number of Germans coming to the FRG may impose a financial and social burden on the Federal Government. In view of the likelihood of this burden, various authors acknowledge the need to revise German nationality law to bring it into conformity with international law and political reality. See Rigaux, *La Conformité au droit international de l'article 116 §1 de la Loi fondamentale de Bonn*, in *NEW DIRECTIONS IN INTERNATIONAL LAW: ESSAYS 577* (Gutiérrez Girardot, Ridder, Sarin & Schiller eds. 1982). More recently, see also C. TOMUSCHAT, *supra* note 12, at 27-28; Zimmermann, *Rechtliche Möglichkeiten von Zuzugsbeschränkungen für Aussiedler*, 23 *ZEITSCHRIFT FÜR RECHTSPOLITIK* 85 (1991).

<sup>47</sup> Convention on Relations between the Three Powers and the Federal Republic of Germany, May 26, 1952, 6 UST 4251, TIAS No. 3425, 331 UNTS 327. See I. VON MÜNCH, *DOKUMENTE DES GETEILTEN DEUTSCHLAND* 235 (1976).

<sup>48</sup> See the decisions by the Federal Supreme Court (Bundesgerichtshof) of January 29, 1953, 1953 NJW 545 (the *Czechoslovak Nationalization Decrees* case); and December 13, 1956, 1957 NJW 217 (the *AKU* case, dealing with the Dutch measures).

*Conclusion*

The Polish-German Treaties of November 14, 1990, and June 17, 1991, are among the most important international agreements concluded up to now by the Government of united Germany, as well as by the democratic Government of Poland. They open up a new opportunity for European unity. It has been said that, just as building the European Communities would not have been possible without German-French reconciliation and friendship, so Polish-German reconciliation must serve as the foundation for building a new united Europe. The Treaties constitute a solid basis for future development toward this end, and the provisions on the status of minorities hold promise of being a model for other agreements (for example, on the Polish minorities in the various republics of the former USSR).

WLADYSLAW CZAPLINSKI\*

ELECTIONS TO THE INTERNATIONAL COURT OF JUSTICE  
AND THE INTERNATIONAL LAW COMMISSION

An election was held on December 5, 1991, to fill the casual vacancy on the International Court of Justice that resulted from the death of Judge T. O. Elias of Nigeria. Bola Adesumbo Ajibola, also of Nigeria, was elected to complete Judge Elias's term for a two-year period from January 1992.

On November 14, 1991, the United Nations General Assembly elected the full membership of the International Law Commission. The ILC consists of thirty-four members who serve for a five-year term. The following persons will serve on the new Commission: Husain M. al-Baharna (Bahrain), Awn S. al-Khasawneh (Jordan), Gaetano Arangio-Ruiz (Italy), Julio Barboza (Argentina), Mohamed Bennouna (Morocco), Derek William Bowett (United Kingdom), Carlos Calero Rodrigues (Brazil), James R. Crawford (Australia), John de Saram (Sri Lanka), Gudmundur Eiriksson (Iceland), Salifou Fomba (Mali), Mehmet Güney (Turkey), Kamil E. Idris (Sudan), Andreas J. Jacovides (Cyprus), Peter C. R. Kabatsi (Uganda), Abdul G. Koroma (Sierra Leone), Mochtar Kusuma-atmadja (Indonesia), Ahmed Mahiou (Algeria), Václav Mikulka (Czechoslovakia), Guillaume Pambou-Tchivounda (Gabon), Alain Pellet (France), Pemmaraju Sreenivasa Rao (India), Edilbert Razafindralambo (Madagascar), Patrick Lipton Robinson (Jamaica), Robert B. Rosenstock (United States), Jiuyong Shi (China), Alberto Székely (Mexico), Doudou Thiam (Senegal), Christian Tomuschat (Germany), Edmundo Vargas Carreño (Chile), Vladlen Vereshetin (USSR), Francisco Villagrán Kramer (Guatemala), Chusei Yamada (Japan), and Alexander Yankov (Bulgaria).

DISCONTINUANCE BY NICARAGUA OF CASE AGAINST THE UNITED STATES

On September 26, 1991, the International Court of Justice issued an Order recording the discontinuance by Nicaragua of the proceedings in *Military and Paramilitary Activities in and against Nicaragua* and the removal of the case from the Court's list.<sup>1</sup> Nicaragua had expressed its wish to discontinue the proceedings

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<sup>1</sup> ICJ Doc. NUS 91/3 and Ann. 2, Order of the Court (Sept. 26, 1991).