External Security and Military Aspects of German Unification

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I. Introduction

Next to protection of the "legitimate trade interests" of the major foreign trading partners of the former German Democratic Republic (GDR), i.e. the member states of the Council for Mutual Economic Assistance, and in particular the Soviet Union[1], future security and defense was the other main external issue relating to Germany's unification. The particular difficulty of the military questions which had to be solved in the process of unification is easily apparent from the fact that the two German states were members of not only different, but clearly confronted military alliances, NATO and the Warsaw Pact. Although it was rather clear from the outset that the GDR would cease to be a member of the Warsaw Pact according to the laws of state succession with respect to treaties[2], while

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Abbreviations: AdG = Archiv der Gegenwart; BGBl. = Bundesgesetzblatt; BR-Drs. = Drucksachen des Bundesrates; BT-Drs.= Drucksachen des Bundestages; EPIL Inst. = R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment; FAZ = Frankfurter Allgemeine Zeitung; ILM = International Legal Materials; LNTS = League of Nations Treaty Series; NZWehrr = Neue Zeitschrift für Wehrrecht; UNTS = United Nations Treaty Series; UST = United States Treaties and Other International Agreements.

[1] Cf. S. Oeter, German Unification and State Succession, at III.5, *supra* p.349 et seq.

[2] It is worthwile to note that the GDR, when signing the Warsaw Treaty on May 14, 1955, filed a declaration according to which "a re-united Germany would be free from obligations entered into by one part of Germany before unification in treaties and agreements of a military and political nature" (cf. Dokumente zur Außenpolitik der Regierung der Deutschen Demokratischen Republik, Vol.II, 231, no.33). The Federal Republic of Germany made no such declaration when acceding to the NATO Treaty.

the Federal Republic's membership in NATO would not be legally affected by unification *per se*, the political question remained whether the future membership of a united Germany in NATO would be acceptable for all the states concerned. Early statements from political and military leaders in the Soviet Union rather pointed to the contrary[3].

Another problem which had to be solved was the fact that armed forces of the Western allies as well as a considerable number of Soviet troops would remain stationed in Germany at least for the years to come.

The following section will deal with the solutions found for Germany's future membership in NATO (II), with the arms control and reduction agreements reached in connection with the unification process (III), and with the legal basis for and the status of foreign troops stationed in Germany, either temporarily or permanently (IV).

II. Germany's Membership in NATO

The original demand made by the Soviet Union that a united Germany not remain a member of NATO was unacceptable for a variety of reasons. Although it is not inconceivable that both military alliances could be dissolved in the future[4] and replaced by a regional system of mutual collective security, time was definitely too short to reach agreement upon such a new security and defense structure before the day of unification.

A unilateral withdrawal from the NATO Treaty, in principle possible under its Art.13[5], would have required Germany to abandon the prospect[6] of collective defense in case of aggression. This was unacceptable for Germany in view of the unreduced strength of Soviet forces at the time, although extended warning time and the virtual removal of possibilities for a short-warning attack after the fundamental changes in the whole of Eastern Europe have reduced the risk considerably.

The prospect of German armed forces not being integrated into the

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[3] AdG no.34410 A.

[4] The military structure of the Warsaw Pact was dissolved on February 25, 1991; see FAZ of February 27, 1991, 6.

[5] Art.13 provides: "After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America ...".

[6] Art.5 of the NATO Treaty; since each party remains free to take such action as it deems necessary, including the use of force, in order to assist the party attacked, there is no strict "guarantee" of collective military defense.

Western alliance was also not appealing to Germany's western neighbours. One has to bear in mind that the idea of creating a European Defense Community in 1952, which finally stranded in the French National Assembly[7], as well as the manner in which the Federal Republic of Germany subsequently acceded to the NATO Treaty and the Brussels Treaty (West European Union)[8], were also expressions of the desire not to see German armed forces left entirely uncontrolled[9].

The alternative of a complete demilitarization of Germany, never seriously proposed, would have been neither acceptable for Germany as a, now[10], fully sovereign state, nor attractive for Germany's neighbours, because it would have created a power vacuum in the very centre of Europe. The same holds true for a partial demilitarization, i.e. of the territory of the former GDR after the complete withdrawal of Soviet armed forces. This could only have been considered in case of a similar demilitarization on the other side of Germany's eastern borders, a proposal which would have been unacceptable for Poland and Czechoslovakia for obvious reasons.

The solution which was finally found and written into the Treaty on the Final Settlement with respect to Germany[11], confirms "the right of the united Germany to belong to alliances, with all the rights and responsibilities arising therefrom" (Art.6); thus, the "NATO geographic area"[12] is extended to the territory of the former GDR, and the "guarantee"[13] of collective defense also applies to that territory.

But Art.5 of the Treaty on the Final Settlement provides for certain restrictions: Until the complete withdrawal of the Soviet armed forces from the territory of the former GDR and of Berlin, only German territorial defense units which are not integrated into the alliance structures

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[7] Cf. W. Münch, European Defense Community, in: EPIL Inst.6 (1983), 149.

[8] Cf. W. Kewenig, Bonn and Paris Agreements on Germany (1952 and 1954), in: EPIL Inst.3 (1982), 56.

[9] See also D. Mahncke, Ein wiedervereinigtes Deutschland außerhalb der Militärallianzen in Europa?, in: J. Hacker/S. Mampel (eds.), Europäische Integration und deutsche Frage (1989), 53 et seq.

[10] Cf. Art.7 para.2 of the Treaty on the Final Settlement with respect to Germany: "The united Germany shall have accordingly [i.e. after the termination of the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole; Art.7 para.1] full sovereignty over its internal and external affairs". The treaty has been published in BGBl. 1990 II, 1317, and in ILM 29 (1990), 1186; see also Annex A.1.

[11] *Ibid.*

[12] Art.6 of the NATO Treaty.

[13] Cf. note 6.

may be stationed on that territory. During that period, armed forces of other (NATO) states may not be stationed on that territory or carry out any other military activity there. After the complete withdrawal of Soviet armed forces from German soil, NATO-assigned German forces may also be stationed in the former GDR, but without nuclear weapon carriers. Foreign armed forces and nuclear weapons or their carriers may not be stationed in that part of Germany or deployed there.

This compromise (i.e. membership of the entire united Germany in NATO and extension of the NATO geographic area to the German borders in the east, but exclusion of future stationing or deployment of other NATO-forces on the territory of the former GDR) respects in particular, if not solely, the wishes of the Soviet Union; neither Poland nor Czechoslovakia would have objected to the stationing of non-German NATO forces at their borders; i.e. between them and German armed forces[14].

This compromise is reflected in Art.11 of the Unification Treaty and the corresponding annex[15], as well as in the exchange of notes between the German Government and the Governments of those member states of NATO who have armed forces stationed in Germany[16]. It results from the Unification Treaty that the NATO Treaty applies to the territory of the former GDR. This is not the case for those agreements which govern the legal status of allied forces stationed in Germany, namely the NATO Status of Forces Agreement (NATO-SOFA) of June 19, 1951, and the Supplementary Agreement (SA) of August 3, 1959[17]. The territorial application of the Convention on the Presence of Foreign Forces in the Federal Republic of Germany of October 23, 1954[18], is, likewise, not extended to the territory of the former GDR[19]. The exchange of notes re-

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[14] Until unification the eastern borders of the Federal Republic were covered by allied, not by German units.

[15] The Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity of August 31, 1990, provides in Art.11 that international treaties and agreements to which the Federal Republic is a contracting party, shall also relate to the territory of the former GDR. Annex I, ch.1, sec.1, however, excludes certain agreements from this principle (BGBl.1990 II, 885; cf. also Keesings, Vol.36, no.10, 37832).

[16] Exchange of Notes of September 25, 1990, BGBl. 1990 II, 1250, see Annex D.2.

[17] BGBl. 1961 II, 1183.

[18] BGBl. 1955 II, 253.

[19] Cf. the exchange of notes between the German Government and the Governments of Belgium, Canada, France, the Netherlands, the United Kingdom and the United States of September 25, 1990, BGBl. 1990 II, 1390, see Annex D.1.

lating to the NATO-SOFA and SA provides that the territorial scope of application of these agreements is not affected by the establishment of German unity, and that any act of a sending force and the members thereof which is done on the territory of the former GDR in the performance of official duty requires the prior and explicit permission by German authorities. Until the complete withdrawal of Soviet forces the German authorities are prevented under Art.5 para.1 of the Treaty on the Final Settlement from granting such permission.

The fact that, on the one hand, Germany is and will remain a full member and partner in NATO, and that, on the other hand, NATO's military activities in Germany are subject to selective restrictions, gives rise to some questions: Although NATO's military strategy is being currently revised and will possibly reveal a transition from "forward defense" to "forward presence", forward deployed forces in the future being smaller, with greater emphasis on mobility and versatility than in the current NATO structure, NATO remains committed to the defense of the entire NATO geographic area. The defense of any given geographic area will have to concentrate on, and involve training with respect to the defense of its external borders. One question, consequently, is whether the restrictions contained in the Treaty on the Final Settlement allow for joint German-allied manoeuvres (field exercises) on the territory of the former GDR following the Soviet withdrawal; there is no doubt that any such manoeuvres are excluded for the time-period that the Soviets are still present[20]. Once the withdrawal of Soviet armed forces is completed, non-German armed forces may not be "deployed" on the territory of the former GDR[21].

Whether allied field exercises, which would be limited in time, would amount to "deployment" in the sense of that provision, became controversial at the last moment of the "Two plus Four" negotiations which led to the Treaty on the Final Settlement. The solution was found by way of an Agreed Minute[22], according to which decisions in this regard will be made "by the government of the united Germany in a reasonable and responsible way taking into account the security interests of each contracting party". The correct interpretation of this Agreed Minute seems to be that the decision as to whether temporary manoeuvres will be permit-

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[20] Art.5 para.1 of the Treaty on the Final Settlement (note 10): "... armed forces of other states will not carry out any other military activity there".

[21] Art.5 para.3 of the Treaty on the Final Settlement (*ibid.*).

[22] BGBl. 1990 II, 1328.

ted at a given time is a sovereign decision at the discretion of the German Government, which does not necessarily require consultation, let alone consensus, among the contracting parties of the Treaty on the Final Settlement. But the security interests of each contracting party have to be taken into account. While the security interests of the Soviet Union may exclude large-scale manoeuvres[23], the security interests of Germany's allies in NATO may demand that troops are trained during smaller-scale activities in all geographic areas of possible future engagement.

If allied forces may conduct temporary smaller-scale manoeuvres on the territory of the former GDR, following Soviet withdrawal, the question remains as to what would then be their legal status. The NATO-SOFA and SA apply only to the former territory of the Federal Republic. The applicability of these agreements *ratione loci* is decisive; allied manoeuvre forces would not carry their legal status with them into the territory of the former GDR, so to speak *ratione personae*. In the absence of any agreement on the observance of the laws of the receiving state, a foreign force would, at least to a great extent, only have to obey its own laws and regulations according to the so-called "law of the flag principle". Apparently in order to prevent this undesirable result, section 4 (b) of the exchange of notes on the NATO-SOFA[24] provides that a force of a sending state, its civilian component and the members thereof as well as their dependents will have the same legal status on the territory of the former GDR as on the territory of the Federal Republic before unification. The NATO-SOFA and SA apply, therefore, *de facto* also on the territory of the former GDR.

This holds true in particular for private activities of a member of a force in the former GDR, i. e. activities which do not require prior permission by German authorities[25]. An, admittedly minor, problem might arise in this context if members of a force privately travel into the former GDR while wearing uniform. Under Art.V of the NATO-SOFA, members of a force shall normally wear uniform. In the absence of any arrangement to the contrary between the authorities of the sending and receiving states, the wearing of civilian dress shall be on the same conditions as for members of the forces of the receiving state. Since members of the Ger-

[23] Cf. the Testimony of Deputy Assistant Secretary of State J. Dobbins before the US Senate Armed Services Committee, US Policy Information and Texts, no.137, October 5, 1990, 27.

[24] See note 16.

[25] Cf. sec.4 (a), *in fine*, of the exchange of notes on the NATO-SOFA (note 16).

man territorial defense units in the former GDR are not prevented from wearing uniform outside duty hours, the Federal Republic cannot prohibit members of an allied force from doing the same during private activities, if the NATO-SOFA is analogously applied in the former GDR. In order to avoid Soviet protests in relation to Art.5 para.1 of the Treaty on the Final Settlement[26], which might be provoked by the presence of allied soldiers in uniform, staff regulations of the sending forces should provide that private activities of members of a force in the former GDR should be carried out in civilian dress.

A final, and hopefully rather theoretical, remark with respect to the restrictions on the deployment of allied forces in the former GDR relates to possible future times of crisis or war. There can be no doubt that all these restrictions would become obsolete should the Federal Republic become the victim of an armed attack in the sense of Art.5 of the NATO Treaty. Obsolete either, because the inherent right of collective self-defense (Art.51 of the UN Charter) takes precedence over such treaty obligations, or because a (factual) state of war would terminate, at least partially, treaties of such nature as the Treaty on the Final Settlement[27]. The same must hold true, for all practical purposes, in times of crisis when an armed attack appears to be more or less imminent, and independent of whether or not the building up of a renewed military threat would violate the preamble of the Treaty on the Final Settlement[28]. The deployment of allied forces to the territory of the former GDR might, under such circumstances, be undertaken as political signal in order to contain the crisis.

III. Arms Control and Reduction

Apart from the (political) declaration of the – then – two German states in Art.2 of the Treaty on the Final Settlement, that "only peace will emanate from German soil", a declaration which, in substance, does not go beyond Germany's obligations under the UN Charter and under Art.26 of its Constitution[29], Art.3 of the Treaty on the Final Settlement contains

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[26] Art.5 para.1 prohibits any military activity of armed forces of the other states until the complete withdrawal of Soviet forces.

[27] Cf. J. Delbrück, War, Effect on Treaties, in: EPIL Inst.4 (1982), 310.

[28] Cf. Art.60 of the 1969 Vienna Convention on the Law of Treaties.

[29] Art.26 of the Basic Law provides in para.1: "Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable offence".

two specific and legally binding obligations of the united Germany with respect to arms limitation and reduction.

First, Germany reaffirms its renunciation of the manufacture and possession of and control over nuclear, biological and chemical weapons (Art.3 para.1). At first glance, and if only compared to Annex 1 of Protocol No.III to the 1954 Modified Brussels (West European Union) Treaty[30], this appears to be an extension rather than a reaffirmation of Germany's prior commitments. In Annex 1 the Federal Chancellor declares "that the Federal Republic undertakes not to manufacture in its territory any atomic weapons, chemical weapons or biological weapons ..."; the possession of or control over such weapons is not mentioned here. But if one adds the 1968 Treaty on the Non-Proliferation of Nuclear Weapons[31] and the 1972 Convention on the Prohibition of Bacteriological (Biological) Weapons[32], the now "reaffirmed" commitment indeed already existed with regard to nuclear and biological weapons, and not only *vis-à-vis* Germany's Western allies, but also *vis-à-vis* the Soviet Union as a contracting party to these treaties.

Since there is, as yet, no treaty which bans the manufacture, possession of or control over chemical weapons and to which the Federal Republic could have acceded[33], the situation is not equally clear with regard to these weapons. In its memorandum[34] to Art.3 of the Treaty on the Final Settlement, the Federal Government apparently takes the view that the Federal Republic has already committed herself not to manufacture, possess or control chemical weapons in connection with the 1972 Convention on Bacteriological (Biological) Weapons. The Federal Government refers to a "Statement to the Press", published in Bonn, Washington, London and Moscow on the day on which the 1972 Convention was signed[35]. This statement reads: "The Federal Government declares that it will also in the field of chemical weapons not develop, acquire or store under its control those chemical agents, the manufacture of which it has already renounced. This conforms to the position already hitherto taken

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[30] BGBl. 1955 II, 256 = UNTS 211, 342.

[31] BGBl. 1974 II, 786 = UNTS 729, 161.

[32] BGBl. 1983 II, 133 = UNTS 1015, 163.

[33] The 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases (LNTS 94, 65) does not prohibit manufacture, possession of or control over such weapons which might be used for belligerent reprisal.

[34] BT-Drs.11/8024, 22.

[35] Annex 1 to the Memorandum on the 1972 Convention on Bacteriological Weapons, BT-Drs.9/1951, at 15.

by the Federal Republic". However, the wording and the form of this "Statement to the Press" suggest that it is a political commitment rather than a unilaterally legally binding act under international law[36]. If this is so, Art.3 para.1 of the Treaty on the Final Settlement is not, as far as chemical weapons are concerned, a mere declaratory provision which only reaffirms previous legal commitments.

The reaffirmation of German pledges concerning the disposal of or control over nuclear weapons does not – as hitherto – exclude that, in case of war and after nuclear release, nuclear warheads, which were kept under foreign control, may be launched also by German carriers. Art.5 para.3 of the Treaty on the Final Settlement only prohibits the stationing of foreign nuclear weapons and German nuclear weapon carriers on the territory of the former GDR[37]. When signing the Treaty on the Non-Proliferation of Nuclear Weapons, the Government of the Federal Republic declared that it "understands that the security of the Federal Republic of Germany shall continue to be ensured by NATO; the Federal Republic of Germany for its part shall remain unrestrictedly committed to the collective security arrangements of NATO"[38]. In its memorandum[39] to the Treaty on the Final Settlement, the Federal Government states that this declaration will continue to be valid for the united Germany.

Second, Art.3 para.2 of the Treaty on the Final Settlement contains a statement of a unilateral German commitment to reduce its armed forces. The form of this commitment is, to say the least, unusual. Art.3 Para.2 repeats verbatim a statement which the Federal Government made on August 30, 1990, in Vienna at the negotiations on Conventional Armed Forces in Europe (CFE), and according to which the Federal Government "undertakes to reduce the personnel strength of the armed forces of the united Germany to 370000 within three to four years", the reduction commencing "on the entry into force of the first CFE agreement".

This commitment to reduce Germany's armed forces does not only counterbalance the "gains" obtained through the integration of the former East German "National Peoples Army", but will result in reducing the

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[36] Cf. W. Fiedler, Unilateral Acts in International Law, in: EPIL Inst.7 (1984), 517. For further details cf. T. Marauhn, Der Chemiewaffenverzicht des vereinten Deutschland im »Vertrag über die abschließende Regelung in bezug auf Deutschland«, NZWehrr. 1991 (forthcoming).

[37] As has already been indicated, this prohibition will lapse anyway in case of war.

[38] UNTS 729, 278, at (4).

[39] See note 34.

united Germany's armed forces below the strength of the West German »Bundeswehr« before unification. And it is a true advance concession in the field of disarmament, because there will be, at least for the foreseeable future, no corresponding reduction commitments by other states. The first CFE agreement, to which the statement refers, does not relate to the personnel strength of armed forces, but to weapon systems (tanks, artillery, aircraft, helicopters). This first CFE agreement[40] was signed in Paris on November 19, 1990, by all 22 member states of NATO and the Warsaw Pact, and will only enter into force after all 22 instruments of ratification have been deposited (Art.XXII para.2). Whether the envisaged follow-up negotiations will result in measures to limit the personnel strength of conventional armed forces (Art.XVIII), is an open question.

The legal character of Germany's commitment to reduce its armed forces is not entirely clear. It is highly unlikely that the following interpretation could be correct: "... this statement does not entail a legally binding commitment the way other provisions of the Treaty are legally binding, it represents a political commitment that the united Germany is pledged to observe in expeditious fashion"[41]. The question is rather whether it has remained a unilaterally binding act or whether its introduction into the Treaty on the Final Settlement has converted this commitment into a treaty obligation; the legal consequences would not be entirely the same for both alternatives.

There can be no doubt that the statement made by the Federal Government during the Vienna CFE negotiations is a unilaterally and legally binding act under international law. The Federal Government has made its intention to be legally bound very clear[42]. If that part of Art.3 para.2 of the Treaty on the Final Settlement, which has been put into quotation marks, would have simply become the operative text of that paragraph, there would be, equally, no doubt that the unilaterally binding Vienna declaration had become a treaty obligation proper. But the introduction to the text in quotation marks and the fact that the other contracting

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[40] Treaty on Conventional Armed Forces in Europe, Tractatenblad 1991, no.31; German text in Bulletin no.138 of November 28, 1990, 1425. See also J. Holik, Die politische Bedeutung des Vertrages über konventionelle Streitkräfte in Europa, Europa-Archiv 1991, 111.

[41] Cf. the testimony of Deputy Assistant Secretary Dobbins (note 23).

[42] The Federal Government has published this statement under the heading »Verpflichtende Erklärung der Bundesregierung vor der VKSE« (Binding Declaration of the Federal Government at the CFE Conference), Bulletin no.106 of September 7, 1990, 1129.

parties "take note of these statements" in para.3 of Art.3[43], as well as the wording of Art.4 para.1 of the Treaty, which speaks of "the undertaking referred to in para.2 of Art.3", indicate that Germany's commitment to reduce its armed forces has remained a unilateral one.

The binding effect of unilateral acts under international law is somewhat different from that of treaty obligations. The applicable doctrine, which is not supported by much state practice, acknowledges the binding effect of a unilateral commitment if the intention to be bound of the state which commits itself is unambiguous, and if other states in their conduct have relied bona fide on that commitment[44]. Since there are, as yet, no indications that other states have reduced or will reduce the personnel strength of their armed forces because they rely on the German commitment, the latter precondition for the binding character of a unilateral commitment might, at least at present, not be fulfilled.

Unilaterally binding acts are not irrevocable; any revocation has, however, to take into account the bona fide reliance of other states, and mutual interests. In this context, a formulation contained in the statement of the Federal Government might gain importance which reads: "[The Federal Government] assumes that in follow-up negotiations the other participants in the negotiations will also render their contribution to enhancing security and stability in Europe, including measures to limit personnel strengths". This is certainly not meant to be a condition, because the German commitment would otherwise not have the intended binding effect; but if the Federal Republic should finally end up being alone in reducing the personnel strength of its armed forces, it would then be legally entitled to revoke its unilateral commitment, if it should ever wish to do so.

The Federal Republic of Germany undertakes to reduce the personnel strength of its armed forces "within three or four years", commencing "on the entry into force of the first CFE agreement". However, this time-link appears to be rather meaningless at least in the context of the Treaty on the Final Settlement. The first CFE agreement will not "enter into force" before the last of 22 instruments of ratification has been deposited. It is not to be expected that this will happen soon. NATO states

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[43] An expression of intent by the declaring state alone is not sufficient; the declaration has to be brought to the notice of the subject(s) of international law concerned (cf. Fiedler [note 36], at 521).

[44] Cf. Fiedler, *ibid.*, at 520; see also A. Verdross/B. Simma, Universelles Völkerrecht (3rd ed. 1984), §670.

soon after the conclusion of the agreement blamed the Soviet Union for already having frustrated the purpose of the CFE agreement by not dissolving three army divisions, but instead converting them (and their equipment) into Navy (marines) divisions, which are not covered by the agreement[45]. The US administration had announced that it would not, under these circumstances, present the agreement to the US Senate for advice and consent[46].

There seems to be, instead, another time-link in the Treaty on the Final Settlement which may be much more important: Art.4 para.1 provides that the withdrawal of Soviet armed forces will be completed by the end of 1994 "in connection with the implementation of the undertaking by [Germany] referred to in para.2 of Art.3 of the present treaty". This may indicate that the complete withdrawal of Soviet armed forces is made conditional upon the full implementation of the reduction of German armed forces, which could then not first begin on the entry into force of the CFE agreement, because Soviet troops would otherwise remain on German soil well beyond the end of 1994. However, Art.4 of the German-Soviet Treaty on the Conditions of the Withdrawal of Soviet Armed Forces[47], which fixes the end of 1994 as the latest date for the completion of Soviet withdrawal, does not contain any reference to the reduction of German armed forces[48]. One would certainly go too far in qualifying Art.4 of the (later) "Withdrawal Treaty" as an intended modification of Art.4 of the (prior) Treaty on the Final Settlement[49]. But one might assume, although there is no strict legal linkage between the withdrawal of Soviet troops and the reduction of Germany's armed forces, that there is definitely a factual and political connection, so that the Soviet Union could invoke the *clausula rebus sic stantibus* in case German reductions do not keep pace with the Soviet withdrawal.

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[45] See FAZ of February 27, 1991, 5.

[46] See FAZ of February 8, 1991, 1.

[47] Treaty of October 12, 1990, BGBl. 1990 II, 1654. The Treaty has already provisionally been applied since October 3, 1990 (cf. the Exchange of Notes between the German Foreign Office and the Soviet Embassy of September 26, 1990, BGBl. 1990 II, 1254).

[48] It is noteworthy in this context that the Federal Government's memorandum on the "Withdrawal Treaty" cites Art.4 para.1 of the Treaty on the Final Settlement, but omits those words which refer to Germany's commitment to reduce its own forces (cf. BR-Drs.714/90 of October 18, 1990, 65).

[49] Cf. Art.41 of the 1969 Vienna Convention on the Law of Treaties.

IV. The Future Stationing of Foreign Armed Forces in Germany

1. Allied Forces on the Territory of the Former Federal Republic

The legal basis for the stationing of allied forces on the territory of the Federal Republic of Germany until the day of unification was primarily and for all practical purposes the "Convention on the Presence of Foreign Forces in the Federal Republic of Germany" of October 23, 1954[50]. But there existed, in addition, a residual, non-derivative right of the Three Powers to station armed forces "in Germany"[51], "relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement", a right to which Art.4 para.2 and Art.2 of the "Convention on Relations between the Three Powers and the Federal Republic of Germany"[52] refer. This residual right, the continuing existence of which was always denied in official or semi-official German statements[53], has lost practical significance ever since the French Republic reminded the German Government of its unchanged validity in 1966[54].

This residual right to station armed forces ceased to exist on October 3, 1990, the day of unification. In Art.7 para.1 of the Treaty on the Final Settlement the Three Western Powers and the Soviet Union "terminate their rights and responsibilities relating to Berlin and Germany as a whole". Since the treaty, and therefore also the termination of the Four Powers' rights and responsibilities, could not enter into force before the date of deposit of the last instrument of ratification (Art.9)[55], and because there was agreement that the united Germany should have full sovereignty over its internal and external affairs from the very day of unification, the Four Powers, by way of a declaration issued on Oc-

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[50] Cf. note 22.

[51] Not: "in the Federal Republic of Germany".

[52] Convention as amended of October 23, 1954, BGBl. 1955 II, 305.

[53] Cf., e.g., K. Dau, Streitkräfte in einem vereinten Deutschland, NZWehrr. 1991, 221 (at 225).

[54] When the French Republic withdrew unilaterally from NATO's military integration in 1966, the German Government declared that France's rights to station armed forces in the Federal Republic under the 1954 "Convention on the Presence of Foreign Forces" could no longer be exercised, and offered a new agreement. This offer was turned down by France under reference to Art.4 para.2 of the "Convention on Relations" (note 52). See the corresponding memoranda and exchange of notes in Bulletin no.60 of May 1966, 469, and no.161 of December 23, 1966, 1304.

[55] The Treaty on the Final Settlement with respect to Germany entered into force on March 15, 1991.

tober 1, 1990[56], suspended their rights and responsibilities from the day of unification until the entry into force of the treaty.

The Convention on the Presence of Foreign Forces, which was previously the sole basis for the stationing of Belgian, Canadian and Dutch armed forces, is now also the sole basis for the stationing of American, British and French forces. The further application of the Convention on the Presence of Foreign Forces, limited to the territory of the Federal Republic before unification, is the subject matter of an exchange of notes between the Federal Government and the Governments of the aforementioned states[57]. The Federal Government has not presented this exchange of notes to the Federal Diet for parliamentary approval, because it considers this exchange of notes to be merely declaratory[58]. It is, however, rather doubtful whether this is so. The Convention on the Presence of Foreign Forces could heretofore not be unilaterally terminated or denounced. It could only be reviewed upon mutual agreement among all the contracting parties in connection with a review of the Convention on Relations between the Three Powers and the Federal Republic[59]. The exchange of notes, now, not only stipulate that the "Presence Convention" shall remain in force, "following the establishment of German unity and the conclusion of the Treaty on the Final Settlement", but also provides that "any stationing party may withdraw from the Convention upon two years' notice" and that "the Federal Republic of Germany may terminate the Convention in respect of one or more parties upon two years'

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[56] BGBl. 1990 II, 1331; see Annex A.2. By way of an exchange of notes (September 27 and 28, 1990) the Federal Government and the Three Western Powers agreed that the "Relations Convention" (note 52) shall be suspended upon the suspension of the quadripartite rights and responsibilities and shall terminate upon the entry into force of the Treaty on the Final Settlement (BGBl. 1990 II, 1386); see Annex A.3. It is now a moot question whether the quadripartite rights and responsibilities would have revived had the Treaty on the Final Settlement not have entered into force for lack of ratification by all contracting parties. A strong argument against the revival of those rights is that they related to "Germany as a whole" and became obsolete after Germany was united and thus became "a whole". On the other hand, President Bush in his message to the US Senate transmitting the "Treaty on the Reunification of Germany" seems to indicate that the Four Powers' rights would terminate "irrevocably" only after the entry into force of that treaty (cf. Weekly Compilation of Presidential Documents, Vol.39, October 1, 1990, 1443 [at 1444]).

[57] Exchange of Notes of September 25, 1990, BGBl. 1990 II, 1390; see Annex D.1. Denmark and Luxembourg, which are also contracting parties to the Convention, but have no longer stationed forces in the Federal Republic, have not been included in that exchange of notes.

[58] Cf. BR-Drs.657/90 of September 25, 1990, 13, and Dau (note 53), at 227.

[59] Art.3 para.2 of the "Presence Convention" (note 18) in connection with Art.10 of the "Relations Convention" (note 52).

notice". In that respect, the exchange of notes is not only declaratory, but a modification of the convention. This modification puts the Federal Republic, at least in principle, in the same position as other NATO states which have allied forces stationed on their territory[60].

Moreover, it is not at all certain whether the "Presence Convention" would have remained in force without the exchange of notes. Art.3 para.1 of the "Presence Convention" provides that it "shall expire with the conclusion[61] of a German peace settlement"[62]. Although the Treaty on the Final Settlement is not called a "peace treaty", it is in substance a "peace settlement". Whatever was left for a peace treaty, after a number of previous agreements on the termination of the state of war[63] and on certain reparations[64], is dealt with in the Treaty on the Final Settlement, namely the military status of Germany, arms control, the final settlement of Germany's borders and the restoration of full sovereignty.

If, then, the Treaty on the Final Settlement is a "peace settlement" in the sense of Art.3 para.1 of the "Presence Convention", its conclusion would have resulted in the (automatic) expiration of the latter convention. It is also in this respect that the exchange of notes on the "Presence Convention" is not merely declaratory.

2. Allied Forces in Berlin

The stationing of American, British and French forces in Berlin was exclusively based on the remaining law of occupation. With the suspension of the quadripartite rights and responsibilities, this basis ceased to exist and had to be replaced by a contractual one, because the "Presence Convention" does not apply in Berlin.

Since it was the wish of the Federal Government that American, British and French forces remain stationed in Berlin for the duration of the presence of Soviet armed forces on the territory of the former GDR and of

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[60] Cf. the Agreements for Cooperation on Defense and Economy between the United States and Turkey of March 29, 1980, UST 32, 3323, and between the United States and Spain of December 1, 1988, Boletin Oficial del Estado of May 6, 1989, no.10178.

[61] Not: "with the entry into force".

[62] Not: "peace treaty".

[63] Cf. H. Mosler/K. Doehring, Die Beendigung des Kriegszustandes mit Deutschland nach dem zweiten Weltkrieg (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol.37) (1963), *passim*.

[64] Cf. I. Seidl-Hohenveldern, Reparations after World War II, in: EPIL Inst.4 (1982), 180.

Berlin, an agreement was concluded by way of an exchange of notes[65]. The exchange of notes contains the German request for a continued presence of allied forces in Berlin, at the current level of personnel strength and equipment, during a "limited period of time". That period of time (the duration of the presence of Soviet forces in Germany) is not specified in the exchange of notes itself, but in Art.5 para.2 of the Treaty on the Final Settlement. The agreement, which can be terminated by any Party upon one year's notice, provides for detailed rules concerning training activities of the allied forces and financial questions. A certain incongruity results from the fact that the agreement stipulates, on the one hand, that the legal status of allied forces in Berlin will be the same as in the western part of the Federal Republic, where it is governed by the NATO-SOFA and SA, and on the other hand, that all activities of the allied forces in Berlin shall be closely coordinated with the German authorities which bear the primary responsibility for the security of Berlin. The NATO-SOFA and in particular the SA do not, as yet, accord in all cases the final say to the German authorities, in particular with regard to manoeuvres.

3. Soviet Forces in the Former GDR, including the Eastern Districts of Berlin

Here, as in the western part of the Federal Republic, stationing rights which were based on occupation law, have ceased to exist with the suspension of the quadripartite rights and responsibilities. Previous agreements between the Soviet Union and the former GDR on the presence of Soviet forces and their legal status[66] have lapsed with the extinction of the GDR upon unification. These agreements do not belong to the category addressed in Art.12 of the Unification Treaty[67].

The basis for the temporary presence of Soviet forces in the former

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[65] Exchange of Notes of September 25, 1990, BGBl. 1990 II, 1252; see Annex D.3. This exchange of notes requires parliamentary approval, but has been preliminarily put into effect by governmental ordinance (BGBl. 1990 II, 1250) which, in turn, is based on the law of September 24, 1990 (BGBl. 1990 II, 1246).

[66] Treaty on the Relations between the Soviet Union and the German Democratic Republic of September 20, 1955, UNTS 226, 208; Abkommen zwischen der Regierung der DDR und der Regierung der UdSSR über Fragen, die mit der zeitweiligen Stationierung sowjetischer Streitkräfte auf dem Territorium der DDR zusammenhängen (Status of Forces Agreement of March 12, 1957), in: A. Uschakow, Der Warschauer Pakt und seine bilateralen Bündnisverträge (1987), 103.

[67] In Art.12 the contracting parties agree that, in connection with the establishment of German unity, international treaties of the GDR shall be discussed with the contracting

GDR and the eastern districts of Berlin is now the "Treaty on the Conditions for the Temporary Presence and the Modalities of the Scheduled Withdrawal of Soviet Armed Forces" of October 12, 1990[68], which requires ratification, but has been provisionally applied since October 3, 1990 (Art.27 para.1).

The conditions for the stationing of Soviet armed forces in Germany until the completion of their withdrawal are in some respects less favourable than for the allied forces in the western part of the Federal Republic under the NATO-SOFA and SA. This is partly due to the fact that some of the provisions of the "Status of Forces Agreement" of March 12, 1957, between the Soviet Union and the GDR, which have now been incorporated into the "Withdrawal Treaty", have placed greater emphasis on respect for the laws and the sovereignty of the former GDR than the corresponding provisions in the SA to the NATO-SOFA. Under the "Withdrawal Treaty", Soviet forces do not only have to "respect"[69], but also "to comply with" German laws and regulations (Art.2 para.5). Rather strict rules apply to military training (Art.6): Manoeuvres outside the assigned military premises as well as field exercises involving more than 13000 soldiers are prohibited. Exercises above the echelon of regiments require one month's notice; details of the use of military training areas have to be coordinated with the German authorities. Alert or emergency exercises which involve leaving military premises are prohibited. Air-Force training, in particular low flying, and all other military air traffic are subject to relatively strict rules (Art.7). German laws and regulations pertaining to public order and security, health and environment have to be observed within the assigned military premises (Art.8 para.1). There is, in case of concurring criminal jurisdiction, no general waiver of German jurisdiction (Art.18)[70].

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partners concerned (cf. *supra* note 15). The Status of Forces Agreement of March 12, 1957, however, is a political agreement which could not be continued (cf. BR-Drs.659/90, 65).

[68] BGBl. 1990 II, 1654. Cf. also C. Raap, Sowjetische Truppen in Deutschland, NZWehrr. 1991, 23.

[69] Art.II of the NATO-SOFA provides: "It is the duty of a force ... to respect the law of the receiving state ...".

[70] Cf. Art.VII of the NATO-SOFA and Art.19 of the SA.

V. Conclusion

External security in Europe after Germany's unification, the military status of the united Germany and the future status of foreign armed forces, temporarily or permanently stationed on German soil, were among the most difficult and politically controversial questions related to the unification process. Despite the apparent lack of time, the states participating in the "Two plus Four" negotiations have succeeded in finding adequate solutions for all these questions by way of the network of treaties and agreements described above.

Apart from the special status of Berlin, the presence of foreign forces in Germany, and in particular their status, belonged to the most visible symptoms of the fact that the Federal Republic had "full authority of a sovereign state over its internal and external affairs"[71], and that the GDR and the Soviet Union had "the same relations as between other sovereign states"[72], but that neither of the two German states was fully sovereign.

There remains one last area in which revision is necessary before "the united Germany" will have "full sovereignty" in the sense of Art.7 para.2 of the Treaty on the Final Settlement, and that is the SA to the NATO-SOFA. The SA, which not only contains implementing provisions with respect to the NATO-SOFA, but also many provisions which deviate from the basic rules laid down in the SOFA to the prejudice of German sovereignty, was described by the Federal Government at the time of its ratification as a "compromise which left many wishes unfulfilled"[73]. The NATO Council, at the time, made the accession of the Federal Republic to the NATO-SOFA dependent upon the ratification of a supplementary agreement, and the Federal Republic cannot denounce this SA unless it denounces the NATO-SOFA at the same time[74].

The Federal Republic may, however, request the review of the SA under its Art.82. In the exchange of notes on the NATO-SOFA and SA of September 25, 1990, the parties to this agreement pledged to examine

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[71] Art.1 para.2 of the "Relations Convention".

[72] Cf. the Declaration of the Government of the Soviet Union on the Granting of Sovereignty to the German Democratic Republic of March 25, 1954, in: I. v. Münch, Dokumente des geteilten Deutschland, Vol.1 (2nd ed. 1976), 329.

[73] Cf. the Memorandum on the NATO-SOFA and SA in BT-Drs.3/2146, Annex IV.

[74] Cf. Art.82 para.2(a) of the SA in connection with Art.XIX of the NATO-SOFA. See also H. Rumpf, Das Recht der Truppenstationierung in der Bundesrepublik (1969), 33.

this question and, in doing so, to take due account of the developments in Europe, of the reduction of forces and of the completion of Germany's unification. This review will have to aim at establishing the same conditions for the stationing of allied forces in the Federal Republic as apply in other NATO states. This will require the following: that the same rules apply to the allied forces that apply to the German armed forces, in particular with respect to manoeuvres; that the allied forces have to fully obey German laws and regulations; and that military premises which are used by allied forces will be, at least in principle, under the command of the receiving state. It is only after the revision of the SA that the Federal Republic of Germany will have acquired full sovereignty over its internal affairs.