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## CONTINUITY AND SUCCESSION OF STATES: THE FATE OF PRE-WAR GERMANY AND ITS IMPLICATIONS FOR THE 1970 TREATY OF WARSAW

**Abstract:** *This article explores whether the Federal Republic of Germany (FRG) is identical with pre-war Germany. The question is relevant for the understanding of the 1970 Treaty of Warsaw, because in the event it is identical, the FRG would be the predecessor State of Poland with regard to the former German territories east of the Oder-Neisse line and, therefore, competent to renounce any territorial title. By contrast, in the case of non-identity the FRG would only have been a third State with regard to these territories. However, even in case of identity, the scope of the Treaty of Warsaw seems ambiguous due to Allied reservations. Hence, it was wise to confirm the transfer of sovereignty in 1990.*

**Keywords:** German Reich, Oder-Neisse line, annexation, incorporation, separation

### INTRODUCTION

Is pre-war Germany dead? A State ceases to exist when its entire territory becomes the territory of one or more other States.<sup>1</sup> For the purposes of this article, four parts of pre-war Germany must be distinguished:

1. The western occupation zones, where the Federal Republic of Germany (FRG or the Federal Republic) was established in 1949;

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<sup>1</sup> See G. Gornig, *Der völkerrechtliche Status Deutschlands*, Wilhelm Fink Verlag, München: 2007, p. 6.

2. The Soviet occupation zone, which became the German Democratic Republic (GDR);
3. Berlin – or at least West Berlin – where the Allied Powers retained ultimate control until 1990; and
4. The territories east of the Oder-Neisse line, which now belong to Poland and, insofar as the region of Königsberg/Kaliningrad is concerned, to Russia.

Today, three of these territories belong to the Federal Republic of Germany and the fourth mostly to Poland and partly to Russia. Hence, pre-war Germany is dead unless the Federal Republic of Germany is identical with pre-war Germany.

For the purposes of this article, it is not necessary to consider the status of the Saar region, which came under the jurisdiction of the Federal Republic as of 1957.<sup>2</sup> Nor is it necessary to establish the exact status of East Berlin.<sup>3</sup> In fact, the eastern part of Berlin either basically shared the special status of the western part, as Art. 1(1) of the 2 + 4 Treaty<sup>4</sup> suggests by referring to “the whole of Berlin”, or it became part of the GDR, as the latter claimed.<sup>5</sup>

Whether the FRG is identical with the German Reich that evolved from the North German Confederation in 1870/1871,<sup>6</sup> or whether it is a successor State is relevant for understanding the legal implications of the Treaty of Warsaw.<sup>7</sup> If the Federal Republic, which concluded the Treaty of Warsaw in 1970, was not identical with pre-war Germany, it could not decide on the status of the territories beyond the Oder-Neisse line because the Federal Republic, as a new State, would never have had any control over these territories. It would have been a third State both with regard to the border between Poland and the GDR and the status of territories formerly belonging to pre-war Germany. Hence, the Federal Republic could only have promised not to raise any claims with regard to these territories; claims which would have been manifestly ill-founded anyway. The situation is more complex if the Federal Republic was identical with pre-war Germany. In this case, all parts of the pre-war German territory would belong to the Federal Republic unless and

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<sup>2</sup> See Gesetz über die Eingliederung des Saarlandes of 23 December 1956, Bundesgesetzblatt 1956 I, p. 1011.

<sup>3</sup> For an overview see J.A. Frowein, *Berlin (1945-91)*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2009, available at: <https://doi.org/10.1093/law:epil/9780199231690/e1257> (accessed 30 June 2022), para. 12.

<sup>4</sup> Treaty on the Final Settlement with respect to Germany (signed on 12 September 1990), 1696 UNTS 115.

<sup>5</sup> See generally R. Scholz, *Der Status Berlins*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I, *Grundlagen von Staat und Verfassung*, C.F. Müller, Heidelberg: 1987, pp. 363-366 (paras. 9, 28-35).

<sup>6</sup> Regarding continuity between the North German Federation of 1866/1867 and the German Reich, see Gornig, *supra* note 1, pp. 15-16.

<sup>7</sup> Agreement between Poland and Federal Republic of Germany concerning the basis for normalization of their mutual relations (signed on 7 December 1970), 830 UNTS 327.

until they had become the territory of another State. In this hypothesis, the Federal Republic would be the predecessor of Poland with regard to the territories east of the Oder-Neisse line, and it would have been competent to renounce any claim to these territories; unless it would have been hindered from doing so by Allied reservations dating back to the unconditional surrender of 1945.

Different theories on the fate of pre-war Germany and the status of the Federal Republic and the German Democratic Republic have been developed after 1945.<sup>8</sup> Some of them are deeply rooted in a specific historical and political context. Viewed against the background of the entire history since 1945 and the current state of international law, only two theories seem realistic. One of them is a tale of identity; and the other a tale of discontinuity. According to the former, the Federal Republic is identical with pre-war Germany; while according to the latter the Federal Republic is a new State, pre-war Germany having ceased to exist at some date after 1945. This article traces both theories against the background of post-war history and considers their impact on the understanding of the Treaty of Warsaw. In the end, the question remains whether the entire controversy still matters.

In principle, the transfer of territorial sovereignty from one State to another State must be assessed according to the rules in force at the time when the transfer of sovereignty takes, or took, place.<sup>9</sup> However, the necessary assessment is not limited to the application of objective criteria. Rather, the perception of the States concerned and the degree of recognition by other States also play an important role.<sup>10</sup> Where a legal situation remains unclear for a long time before being settled, an ex-post analysis may help to analyse what actually happened.

The personal background of the author may influence this legal analysis,<sup>11</sup> and therefore it seems appropriate to make explicit that the author of this article was born in the western part of Berlin, where he passed his first legal State examination in 1990. In his youth, he used stamps of the *Deutsche Bundespost Berlin*, which were different from the stamps issued by the *Deutsche Bundespost*, and his first identity card was not the grey one of the Federal Republic but a green, “provisional” one<sup>12</sup> issued by the authorities of Berlin.

<sup>8</sup> For an overview see R. Bernhardt, *Die Rechtslage Deutschlands*, 26(11) *Juristische Schulung* 839 (1986), pp. 841-843.

<sup>9</sup> J. Crawford, *Brownlie's International Law*, Oxford University Press, Oxford: 2019, p. 207.

<sup>10</sup> See also W. Czaplinski, *La continuité, l'identité et la succession d'Etats – Evaluation de cas récents*, 26(2) *Revue Belge de Droit International* 374 (1993), p. 379.

<sup>11</sup> For more on this problem, see also L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR*, Martinus Nijhoff, Leiden: 2003, pp. XXX-XXXI.

<sup>12</sup> German: “behelfsmäßiger Personalausweis”.

## 1. 1945-49

### 1.1 Continuity of pre-war Germany as a State without a Government

In 1945, Germany was defeated but it did not disappear. The unconditional surrender of 8 May 1945 did not mark the end of German statehood. Although the creation of a new State requires effective government, a temporary loss of government does not affect existing statehood. In this situation, continuity trumps effectiveness.<sup>13</sup> Even without effective government, a State continues to exist unless its entire territory is incorporated by one or more other States. State continuity in the absence of effective government has been confirmed in recent history by the cases of Somalia, Afghanistan, and Iraq, which continue to exist even though they lost effective government in the 1990s and the early 2000s, respectively.<sup>14</sup> The contrary theory, espoused by Hans Kelsen in 1945,<sup>15</sup> has not asserted itself.<sup>16</sup> Hence, Germany did not become *terra nullius* in 1945.

It is commonly assumed that the Allies would have had the power to annex Germany in 1945.<sup>17</sup> In fact the UN Charter, which is considered to outlaw any annexation today, was concluded after the unconditional surrender and after the Berlin Declaration of 5 June 1945,<sup>18</sup> and it entered into force after the Conference of Potsdam.

It may be taken for granted that today the prohibition against annexing foreign territory does not apply only to aggressors, but also to States invading another State in legitimate self-defence.<sup>19</sup> However, this broad reading of the prohibition of annexation can hardly be extended to the time before the entry into force of Art. 2(4) of the UN Charter. Rather, insofar as regards the time between 1932 and 1945 one must distinguish between annexations grounded on aggression and annexations by States acting in self-defence. The first have not been recognized as valid after 1945. This is true not only for Germany's annexation of the territories of, *inter alia*, Czechoslovakia and Austria, but also for the Soviet Union annexing

<sup>13</sup> J. Wouters et al., *International Law*, Hart, Oxford: 2019, p. 217.

<sup>14</sup> See also J. Crawford, *Creation of States*, Oxford University Press, Oxford: 2007, pp. 694-695.

<sup>15</sup> H. Kelsen, *The Legal Status of Germany According to the Declaration of Berlin*, 93(3) *American Journal of International Law* 518 (1945), pp. 520-523.

<sup>16</sup> See also Czaplinski, *supra* note 10, p. 377.

<sup>17</sup> O. Dörr, *Die Inkorporation als Tatbestand der Staats sukzession*, Duncker & Humblot, Berlin: 1995, pp. 95-102; K. Skubiszewski, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, 23(1/2) *Archiv des Völkerrechts* 31 (1985), p. 32.

<sup>18</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, and the provisional Government of the French Republic, signed in Berlin on 5 June 1945, 68 UNTS 190.

<sup>19</sup> R. Hofmann, *Annexation*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2020, available at: <https://doi.org/10.1093/law/epil/9780199231690/e1376> (accessed 30 June 2022), para. 24.

the Baltic States.<sup>20</sup> By contrast, there is no evidence that annexing territories of the German aggressor State would have been unlawful.

But even if the Allied Powers *could have* annexed the entire German territory, it clearly results from post-war documents that they did not do so. According to the Berlin Declaration,<sup>21</sup> they assumed “supreme authority with respect to Germany” while making clear that this did “not effect the annexation of Germany”. Thus, Germany became “occupied”.<sup>22</sup>

## 1.2 The fate of German territories east of the Oder-Neisse line

Since pre-war Germany was not extinguished in 1945, Poland did not acquire *terra nullius*. Rather, it took over the territories east of the Oder-Neisse line from pre-war Germany. German consent was not required for this transfer. Having the power to annex Germany as a whole, the Allies also had the power to annex part of the German territory, be it for themselves or in favour of a third State, i.e. Poland.<sup>23</sup> In fact, the Berlin Declaration asserts the power to “determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory.”

It is less clear whether they really did so in 1945. This has been the object of a long controversy between the Federal Republic and Poland and their respective legal scholars.<sup>24</sup> The Potsdam Agreement<sup>25</sup> seems ambiguous on this point. Chapter VIII B of the Potsdam Agreement placed these territories “under the administration of the Polish State” while reserving “the final delimitation of the western frontier of Poland” for a “peace settlement”. On the other hand, the context made clear that the transfer was intended to become permanent. This is shown, in particular, by the expulsion and deportation of the German population from the Oder-Neisse

<sup>20</sup> Mälksoo, *supra* note 12, pp. 24 et seq.; K. Marek, *Identity and Continuity of States in Public International Law*, Librairie Droz, Genève: 1968, pp. 283-330, 338-416; for the Baltic States *see also* Czaplinski, *supra* note 11, pp. 386-387.

<sup>21</sup> *See supra* note 18.

<sup>22</sup> *See* Crawford, *supra* note 10, p. 120.

<sup>23</sup> *See* Skubiszewski, *supra* note 17, pp. 32-33.

<sup>24</sup> For Poland *see e.g.* J. Barcz, *The Federal Republic of Germany's Confirmation of the Polish-German Boundary as the Basis for New Relations between Poland and United Germany*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, Elipsa, Warszawa: 2011, pp. 135-144; J. Kranz, *Polish-German Legal Controversies – an Attempt at Synthesis*, in: W.M. Góralski (ed.), *Breakthrough and Challenges*, Elipsa, Warszawa: 2011, pp. 422-423; K. Skubiszewski, *La frontière polono-allemande en droit international*, 61 *Revue générale de droit international public* 242 (1957), pp. 242-258; Skubiszewski, *supra* note 17, pp. 31-41. For the FRG, *see e.g.* J.A. Frowein, *Die Verfassungslage Deutschlands im Rahmen des Völkerrechts*, 48 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 7 (1990), pp. 16-17; Gornig, *supra* note 1, pp. 50-65; O. Luchterhandt, *Die staatliche Teilung Deutschlands*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I: *Historische Grundlagen*, C.F. Müller, Heidelberg: 2003, p. 460 (§ 10, para. 76).

<sup>25</sup> Protocol of the Proceedings of the Berlin Conference, 1 August 1945, available at: <https://history.state.gov/historicaldocuments/frus1945Berlinv02/d1383> (accessed 30 June 2022).

territories, which was organized in part by the Allied powers themselves under Chapter XII of the Potsdam agreement.<sup>26</sup> However, since the peace settlement envisaged in 1945 was not realised, doubts remained.

## 2. 1949-1990: THE FRG AND GDR AS TWO GERMAN STATES

### 2.1 Initial concurring claims for continuity

During the early period of the Post-Second World War relations, both German governments stuck to the idea of German unity and both claimed to be the true representative of the German people.<sup>27</sup> This comes closer to a dispute over who is the genuine German Government than to the creation of two new, independent States. It resembles to the situation in China after 1949, when the Governments in Beijing and in Taipei both claimed to be the legitimate representative of the single Chinese State.<sup>28</sup> As long as both Governments claim continuity with the former State, there is no ground for the *de jure* creation of a new State.

The original version of the Basic Law adopted by the FRG on 23 May 1949<sup>29</sup> clearly showed the West German continuity claim. According to the preamble, the German people in the Western German Länder had acted also on behalf of those Germans who could not participate. According to its former Article 23, the Basic Law would apply at first only to the Western German Länder, whereas it should enter into force in other parts of Germany after their accession.

As for the GDR, the Treaty of Zgorzelec of 1950, which fixed the border between Poland and the GDR, equally refers to the idea of German unity.<sup>30</sup> In fact, Art. 1 of the agreement confirms the “State frontier between Germany and Poland”, not between the GDR and Poland. Moreover, the Preamble refers to the German people, thus showing that the GDR claimed to speak for Germany as a whole.<sup>31</sup>

<sup>26</sup> See Skubiszewski, *supra* note 17, p. 32.

<sup>27</sup> For the FRG, see Luchterhandt, *supra* note 25, p. 458 (§ 10, para. 74); For the GDR, see J. Hacker, *Der Rechtsstatus Deutschlands aus der Sicht der DDR*, Verlag Wissenschaft und Politik, Köln: 1974, pp. 105-115; see also Czapliński, *supra* note 10, p. 380.

<sup>28</sup> See L. Chen, *An Introduction to Contemporary International Law*, Oxford University Press, Oxford: 2015, pp. 48-51.

<sup>29</sup> Bundesgesetzblatt 1949, p. 1.

<sup>30</sup> Agreement concerning the demarcation of the established and existing Polish-German State frontier (signed on 6 July 1950), 319 UNTS 93.

<sup>31</sup> R.W. Piotrowicz, S.K.N. Blay, *The Unification of Germany in International and Domestic Law*, Rodopi, Amsterdam: 1997, p. 52.

## 2.2 The fate of the GDR as a separate State

The GDR soon abandoned its claim for continuity and considered itself to be a new State, pre-war Germany having ceased to exist in 1945.<sup>32</sup> It has already been shown that the assumption that German statehood ended in 1945 cannot be upheld. Rather, the GDR's claim of independence must be interpreted as the establishment of a new State on part of the territory of pre-war Germany.<sup>33</sup> This separation from pre-war Germany was definitely concluded when the GDR and the Federal Republic were both admitted to the United Nations and thus recognized as independent States by the international community in 1973.<sup>34</sup>

The GDR existed until 1990, when it acceded to the Federal Republic of Germany by unilateral declaration, an option provided for by the original Article 23 of the FRG Basic Law,<sup>35</sup> which was still in force at that time. There can be no serious doubt that German unification constituted an incorporation of the GDR into the Federal Republic.<sup>36</sup> Hence the GDR, which had been established in 1949 by way of separation from pre-war Germany, ceased to exist in 1990, while the identity of the Federal Republic remained unchanged.

## 2.3 The FRG's claim for continuity

Whereas the GDR, which existed between 1949 and 1990, had appeared as a new State on the international stage, the Federal Republic did not abandon its claim of continuity with pre-war Germany.<sup>37</sup> The most striking evidence of this claim can be found in the West German citizenship law. In fact, the people is a constitutive element of any new State. If the Federal Republic of Germany had been a new State, established on the western territories of pre-war Germany, citizenship could not have extended in principle beyond the German population living on the territory of the new State. Granting FRG citizenship *ipso jure* to all German inhabitants of the GDR would have been unlawful. The Federal Republic, however, continued to

<sup>32</sup> Hacker, *supra* note 28, pp. 116-132; *see also* Czapliński, *supra* note 10, pp. 380-381; Piotrowicz, Blay, *supra* note 32, p. 25.

<sup>33</sup> *See* Crawford, *supra* note 14, pp. 457-458.

<sup>34</sup> *Ibidem*, p. 458; R. Bernhardt, *Deutschland nach 30 Jahren Grundgesetz*, de Gruyter, Berlin: 1980, pp. 13-14; *see also* Czapliński, *supra* note 10, p. 382.

<sup>35</sup> *See* Protocol of the Proceedings of the Berlin Conference, *supra* note 29.

<sup>36</sup> Crawford, *supra* note 14, pp. 674, 686; Czapliński, *supra* note 10, p. 383; R. Dolzer, *Die Identität Deutschlands vor und nach der Wiedervereinigung*, in: Isensee, Kirchhof (eds.), *supra* note 25, pp. 676-677 (§ 13 para. 12); Dörr, *supra* note 17, pp. 148-151, 399-404; *see also* J. Barcz, *Das Pariser Protokoll vom 17. Juli 1990 und die Grenze zwischen Polen und dem vereinten Deutschland*, in: Ch. Koch (ed.), *Politik ist die Praxis der Wissenschaft vom Notwendigen*, Martin Meidenhauer Verlagsbuchhandlung, München: 2010, p. 325; Barcz, *supra* note 25, pp. 146, 154.

<sup>37</sup> *See* Memorandum of the Foreign Office of the FRG of June 1961, reprinted in J. Jurina, *Völkerrechtliche Praxis der Bundesrepublik Deutschland im Jahre 1961*, 23 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 405 (1963), pp. 452-458.

apply the *Reichs- und Staatsangehörigkeitsgesetz* of 1913, i.e. the pre-war citizenship law, according to which all pre-war German citizens and their descendants were and continued to be FRG citizens.<sup>38</sup> This corresponds to an identity tale. If the FRG were identical with pre-war Germany, the loss of territory east of the inner-German border would not automatically entail the loss of citizenship for Germans living east of the new border.<sup>39</sup> Hence, the Federal Republic could in principle apply its unchanged pre-war citizenship law at least as a kind of an “open door”<sup>40</sup> for GDR citizens.

Therefore, the West German Federal Constitutional Court was able to declare in its 1987 *Teso* decision that the Federal Republic of Germany had held itself to be identical with the German Reich right from the beginning.<sup>41</sup> At the same time however, even official statements of the West German authorities remained ambiguous about German identity.<sup>42</sup> In 1973, the same Federal Constitutional Court had introduced an equivocal concept of partial and non-exclusive identity.<sup>43</sup> The idea that two different States could both be identical with the same original State finds no support in general international law. Moreover, the identity claim is incompatible with the Court’s further statement that both German States were parts of a still existing, overarching German State without functioning institutions, which was therefore unable to act.<sup>44</sup> If the Federal Republic of Germany was identical with pre-war Germany, the latter would have been able to act through the institutions of the Federal Republic. Hence, Władysław Czapliński has called the German position “confused”,<sup>45</sup> and this view has been shared by a series of West German legal scholars.<sup>46</sup>

It is true that international law is flexible. However, the concept of partial identity has never been either broadly recognized by the international community, nor is it

<sup>38</sup> See R. Grawert, *Staatsvolk und Staatsangehörigkeit*, in: J. Isensee, P. Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. II: *Verfassungsstaat*, C.F. Müller, Heidelberg: 2004, p. 129 (§ 16, para. 45); Luchterhandt, *supra* note 25, p. 461 (§ 10, paras. 77-78).

<sup>39</sup> See R. Jennings, A. Watts, *Oppenheim’s International Law*, Vol. 1, Oxford University Press, Oxford: 2008, p. 224; *cf. also* Art. 6 of the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession of 19 May 2006, Council of Europe Treaty Series No. 200; *but see also* Crawford, *supra* note 9, pp. 418-421.

<sup>40</sup> See Luchterhandt, *supra* note 25, p. 461 (§ 10 para. 77).

<sup>41</sup> Bundesverfassungsgericht, Decision, 21 October 1987 – 2 BvR 373/83, 77 Entscheidungen des Bundesverfassungsgerichts 137 (1988), p. 155.

<sup>42</sup> See also Crawford, *supra* note 14, p. 682.

<sup>43</sup> Bundesverfassungsgericht, Judgment, 31 July 1973 – 2 BvR 1/73, 36 Entscheidungen des Bundesverfassungsgerichts 1 (1974), p. 16; *see also* W. Geiger, *Zur Rechtslage Deutschlands*, 36(41) Neue Juristische Wochenschrift 2302 (1983), pp. 2302-2304.

<sup>44</sup> Bundesverfassungsgericht, *supra* note 44, p. 23.

<sup>45</sup> Czapliński, *supra* note 10, p. 380: “position ... confuse”; *see also* p. 382.

<sup>46</sup> E.g. R. Bernhardt, *Die deutsche Teilung und der Status Gesamtdeutschlands*, in: Isensee, Kirchhof (eds.), *supra* note 5, p. 339 (§ 8, Rn. 32); Luchterhandt, *supra* note 24, pp. 458-459 (§ 10, para. 74).



necessary in order to explain what happened between 1945 and 1990. Whilst the GDR, which held per-war Germany to be extinguished in 1945, clearly contradicted the FRG continuity claim, other States – including the western Allies – were more cautious. Even the 1990 4+2 Treaty avoids any clear statement in favour of FRG continuity with pre-war Germany.<sup>47</sup> This led James Crawford to conclude in 2006 that the FRG had not been identical with the German Reich, at least until 1990.<sup>48</sup>

### 3. THE STATUS OF WEST BERLIN

The status of West Berlin is a touchstone for the FRG's identity claim. Until 1990, the three western Allies had retained ultimate control over the western part of Berlin, although its status had been largely assimilated to that of a Land of the Federal Republic.<sup>49</sup> West Berlin had been part of pre-war Germany, and if the Federal Republic had been identical with pre-war Germany West Berlin would have been part of the Federal Republic while still under Allied occupation. The Federal Republic would simply have regained full control over this part of its territory on 3 October 1990. If, by contrast, the Federal Republic was a new State, West Berlin would not have been part of it until 1990 for lack of effective control. In this case Berlin, or at least West Berlin, would have been the only part of pre-war Germany subsisting until 1990;<sup>50</sup> all the other parts having been incorporated into the FRG, the GDR, Poland and – insofar as the region of Kaliningrad is concerned – the USSR. In this case, pre-war Germany would have ceased to exist on 3 October 1990, when the last part of its territory was incorporated into the Federal Republic.

In the Quadripartite Agreement on Berlin, France, the USSR, the United Kingdom and the United States agreed on 3 September 1971 that West Berlin “continue[d] not to be a constituent part of the Federal Republic of Germany and not to be governed by it”.<sup>51</sup> Whilst the latter assertion is compatible with both views on the status of Berlin, the former suggests that the city was a part of a pre-war Germany distinct from the Federal Republic. Hence, the Federal Republic would not have been identical with pre-war Germany. The 2 + 4 Treaty does not settle whether West Berlin had been part of the Federal Republic before 1990, but it does provide some

<sup>47</sup> Crawford, *supra* note 15, pp. 686-687.

<sup>48</sup> *Ibidem*, pp. 466, 684; but see Czapliński, *supra* note 10, pp. 381-382 with a preference for the continuity claim.

<sup>49</sup> For more on the special status of Berlin, see Luchterhandt, *supra* note 25, pp. 444-446 (§ 10 paras. 45-51); C. Pestalozza, *Berlin – ein deutsches Land*, 23(4) *Juristische Schulung* 241 (1983), pp. 241-254; H. Sandler, *Berlin – juristisch betrachtet aus der Sicht eines richterlichen Praktikers*, 24(6) *Juristische Schulung* 432 (1984), pp. 432-434.

<sup>50</sup> This is the view taken by Crawford, *supra* note 14, pp. 464-466, 683-684.

<sup>51</sup> Part II(B) of the Quadripartite Agreement on Berlin of 3 September 1971, 880 UNTS 115.

arguments against identity. According to its Art. 1(1), “[t]he united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin.” The article thus treats Berlin separately from the FRG. Hence, it could be understood to provide the Four Powers’ consent to incorporate Berlin, i.e. the last remaining part of pre-war Germany, into the Federal Republic of Germany. However, the phrasing does not necessarily contradict the idea of identity between pre-war Germany and the Federal Republic. Rather, it could simply clarify that the special status of Berlin as a territory under Allied control had come to an end.

James Crawford has tried to construe identity through some kind of merger.<sup>52</sup> However, this seems hardly convincing. German unification in 1990 was clearly framed as an incorporation of the GDR, and perhaps Berlin, into the Federal Republic. The idea that such an incorporation should establish identity between the incorporating State and another State contradicts general concepts of incorporation.<sup>53</sup> Hence, either the Federal Republic is a new State created in 1949, or it has been identical with pre-war Germany right from its beginning.

#### 4. CONSEQUENCES FOR THE ODER-NEISSE BORDER AND THE 1970 TREATY OF WARSAW

The question of the identity or non-identity of the FRG with the pre-war German State determines the scope of the Treaty of Warsaw, in which the Federal Republic of Germany accepted the western border of Poland in 1970. In fact, Art. 1 of the Treaty of Warsaw not only confirmed the Oder-Neisse line as the Western border of Poland and its inviolable character, but the Federal Republic declared in Art. 1(3) that it had “no territorial claims” against Poland and that it would “advance none in the future.”<sup>54</sup> If the Federal Republic were a new State established on the western part of the German territory, that new State had never gained effective control over the territories east of the Oder-Neisse line and these territories had never become part of the Federal Republic. Hence, the Federal Republic could confirm, of course, that it had no territorial claims on these territories, which was true anyhow, but it could not take any relevant decision with regard to sovereignty over these territories. The transfer of sovereignty from pre-war Germany to Poland did not affect the Federal Republic as a third State. At the same time, the Federal Republic, if distinct from pre-war Germany, could not have taken any decision binding upon

<sup>52</sup> Crawford, *supra* note 15, p. 688.

<sup>53</sup> See also Czapliński, *supra* note 10, p. 376.

<sup>54</sup> English translation reproduced in 830 UNTS 334.

pre-war Germany,<sup>55</sup> which continued to exist until 1990. Hence, Western Germany's implicit reservation with regard to Germany as a whole would have been correct.

If, by contrast, the Federal Republic were and had been identical with pre-war Germany, the territories east of the Oder-Neisse line would have been former territories of the State now called the Federal Republic of Germany. In this case, the Federal Republic, as the former sovereign, would be the predecessor of Poland with regard to these territories. Hence, the Federal Republic would have been able in principle to take a binding decision on the loss of its territorial title. The identity tale thus puts Poland in a better position with regard to the scope of the Treaty of Warsaw.

Even in case of identity however, the Allies' reservation with regard to Germany as a whole could have hindered the Federal Republic from taking a definite decision in 1970.<sup>56</sup> In fact, the Berlin Declaration of 1945 had asserted the Allies' power to determine the status of the territories east of the Oder-Neisse line, and the Potsdam Agreement had envisaged a peace settlement for that purpose.<sup>57</sup> According to its Art. IV, the 1970 Treaty of Warsaw does not prejudice "any bilateral or multilateral international agreements which" Germany and Poland "have previously concluded or which affect them." Both the Berlin Declaration, which was published in the United Nations Treaties Series,<sup>58</sup> and the Agreement of Potsdam can be considered to be such international agreements concerning Germany and, insofar as the territories east of the Oder-Neisse line are concerned, also Poland.<sup>59</sup> Therefore, the Four Power's reservation regarding Germany as a whole, its territory, and a final peace settlement cast doubt on the scope of the Federal Republic's undertaking, even if the Federal Republic were the predecessor of Poland.

## CONCLUSION: DOES HISTORY MATTER?

To sum up, the lack of a formal peace settlement had left the formal status of the Oder-Neisse line somewhat unclear until 1990, although there are good reasons to contend that the border had become final either in 1945 or soon thereafter, and in

<sup>55</sup> See Piotrowicz, Blay, *supra* note 32, p. 58.

<sup>56</sup> See Bundesverfassungsgericht, Decision of 7 July 1975 – 1 BvR 274/72, 40 Entscheidungen des Bundesverfassungsgerichts 141 (1976), pp. 172-175; Bernhardt, *supra* note 8, p. 844; R. Geiger, *Grundgesetz und Völkerrecht*, C.H. Beck, München: 2010, pp. 63-64; Gornig, *supra* note 1, pp. 71-73; *but cf.* Kranz, *supra* note 25, p. 425 stressing the FRG's room for manoeuvre.

<sup>57</sup> See *supra* Section 1.2.

<sup>58</sup> See *supra* note 18.

<sup>59</sup> See also Frowein, *supra* note 25, p. 18; J.A. Frowein, *Potsdam Conference (1945)*, in: R. Wolfrum, A. Peters (eds.), *Max Planck Encyclopedia of Public International Law*, 2009, available at <https://doi.org/10.1093/law:epil/9780199231690/e379> (accessed 30 June 2022), para. 14.

any event long before 1990.<sup>60</sup> Due to Allied reservations with regard to “Germany as a whole”, the Warsaw Treaty of 1970 could not dispense all doubts even if one assumes that the Federal Republic, which relinquished any present or future claim with regard to the territories east of the Oder-Neisse line at that time, was identical with pre-war Germany. It seems wise, therefore, that the border was unequivocally confirmed in 1990 both by Art. 1 of the 2 + 4 Treaty and by the Polish-German Border Treaty.<sup>61, 62</sup> Hence, any doubts as to the legal status of the former German territories which now belong to Poland have been removed.

The idea that the Federal Republic of Germany is not identical with pre-war Germany may seem odd for German legal scholars. Nevertheless, some doubts about the identity of today’s Germany with pre-1945 Germany persist. It is true that the general presumption of continuity<sup>63</sup> corroborates Germany’s identity claim. However, continuity is not necessary to explain the Federal Republic’s undisputed ongoing responsibility for the acts of the German Reich. Assuming a case of State succession would lead to more or less the same results. If the Federal Republic of Germany, which was established in 1949, were to be considered a new State, it assumed all rights and obligations of the German Reich under the law of State succession, being the successor both of pre-war Germany and of the GDR. It is true that general international law does not provide for State succession into membership in International Organisations,<sup>64</sup> however most International Organisations were established after 1945 and pre-war Germany never had been a member of them. In 1952, there was a debate on which German State was able to ratify the International Telecommunication Convention of 2 October 1947,<sup>65</sup> but since then all questions of German membership in pre-war Organisations have been settled.

More than 50 years after the Treaty of Warsaw and more than 30 years after German unification and the German-Polish Border Treaty of 1990, there are no open issues left that would require settling the question of whether the FRG and Pre-war Germany are identical. Therefore, the fate of the German Reich in terms of identity or State succession may remain in the mist of history.

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<sup>60</sup> See also Frowein, *supra* note 24, p. 19; but see Gornig, *supra* note 1, pp. 77-83 for a constitutive transfer of sovereignty in 1990.

<sup>61</sup> Treaty concerning the confirmation of the existing Polish-German state frontier, signed in Warsaw on 14 November 1990, Bundesgesetzblatt 1991 II, p. 1329; 1708 UNTS 377.

<sup>62</sup> Cf. also Barcz, *supra* note 25, p. 326; J. Barcz, *Some Reflections on the 25<sup>th</sup> Anniversary of the Polish-German Treaty*, 11 *Przegląd Zachodni* 145 (2017), pp. 146-148.

<sup>63</sup> See Crawford, *supra* note 14, pp. 675, 701, 715; Gornig, *supra* note 1, p. 9.

<sup>64</sup> Crawford, *supra* note 10, pp. 427-428.

<sup>65</sup> International Telecommunication Union, Plenipotentiary Conference, Minutes of the second meeting held on 8 October 1952 at 16 h, Document No. 54-E, in: ITU, Documents of the Plenipotentiary Conference (Buenos Aires, 1952), available at: <https://search.itu.int/history/HistoryDigitalCollectionDocLibrary/4.8.51.en.101.pdf> (accessed 30 June 2022).