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Arbitrary European Borders and Population Transfers: International Law and the Oder-Neisse Line

I. INTRODUCTION

During the end of the twentieth century, post-war Europe has changed dramatically. One example of such change is the reunification of Germany. Reunification corrected some of the wrongs committed after World Wars I and II, and allowed the majority of Germans to share a single homeland. Many Germans, however, were not a part of reunification because the agreements following World Wars I and II removed them from their homeland. Consequently, the reunification of East and West Germany did not affect them. Article 23 of the Federal Constitution of Germany, however, includes these displaced Germans. As a result the German government has a duty to protect their rights, and return them to their proper homeland.¹

This Comment examines the legality of the current border between Germany and Poland.² This Comment first examines the historical composition of the Eastern Territories of Germany, and the Polish claim to these territories. Second, it analyzes the creation and establishment of the German-Polish border from the years immediately following World War I, through World War II and the War Conferences. Third, this Comment applies international legal principles to the annexation of territory and the right of self-determination. In conclusion, this Comment will highlight the modern developments in territorial sovereignty, and will suggest ways to correct the injustices of the past.

II. BACKGROUND: THE HISTORICAL COMPOSITION OF THE EASTERN TERRITORIES OF GERMANY

The Eastern Territories of Germany, or Oder-Neisse Territories,³ are those areas that were within German borders as of December 31,

1. DJURA NINČIĆ, *THE PROBLEM OF SOVEREIGNTY IN THE CHARTER AND IN THE PRACTICE OF THE UNITED NATIONS* 107 (1970).

2. The current German-Polish border runs from the city of Swinemünde on the Baltic Sea, to just west of the city of Stettin, and down the Oder and Western Neisse rivers to the Czech Republic.

3. For a detailed representation of the exact boundaries of each of these territories, see

1937. The Allied Powers placed these areas under Polish administration following World War II.⁴ This Comment will focus primarily on the territories of Silesia, East Prussia, and Pomerania, although it will also discuss West Prussia and Posen as part of the historic German Eastern Territories.⁵

Germanic peoples originally inhabited East Prussia in the late Bronze Age.⁶ Over the next several centuries Prussia incorporated this territory into its empire.⁷ When the Teutonic Knights conquered the Prussians in the Middle Ages, they settled the area in great number.⁸ Despite several changes in territorial administration, the German population of East Prussia continued to grow.⁹

Even though the Poles defeated the Teutonic Order in 1466, the territory did not become part of Poland.¹⁰ Prussia again incorporated the area into its Kingdom in 1620, and it remained under Prussian rule until the unification of the German Empire in 1871.¹¹ East Prussia, although separated from the rest of Germany by the Treaty of Versailles in 1919,¹² maintained roughly the same population and boundaries throughout history until 1945.¹³

Silesia and Pomerania do not have the same history of undivided German occupation that East Prussia has. Both Slavs and Germans migrated from Eurasia into these areas in about 2000 B.C.¹⁴ There is some controversy, however, over which group first settled the territo-

map facing page 233 in U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS: THE CONFERENCES AT MALTA AND YALTA 1945 (1955).

4. *Id.*

5. The Treaty of Versailles gave West Prussia and Posen to Poland in 1919. PHILIP A. BÜHLER, THE ODER-NEISSE LINE: A REAPPRAISAL UNDER INTERNATIONAL LAW 3 (1990).

6. "Excavations of prehistoric material have revealed that in about the tenth century B.C., the original Germanic culture in the North German coastlands spread eastward as far as the lower Vistula [river]." THE GERMAN EAST 9 (Karl Pagel ed., 1954). See also GERMANY'S EASTERN TERRITORIES: A EUROPEAN PROBLEM 40 (Peter Aurich ed., 1961) [hereinafter GERMANY'S EASTERN TERRITORIES] (Ever since the so-called transmigration of peoples, East Prussia had been the home of that Baltic people known as the Prusses.).

7. BÜHLER, *supra* note 5, at 8.

8. *Id.*

9. Dr. Herbert Kraus, The Status Under International Law of the Eastern Territories of Germany 46 (February, 1963) (unpublished manuscript, Göttingen Research Committee).

10. *Id.*

11. BÜHLER, *supra* note 5, at 8-9.

12. *Id.* at 9.

13. *Id.* at 6.

14. *Id.*

ries.¹⁵ The majority of evidence indicates that the Slavs encountered Germans when they migrated to Central Europe.¹⁶ Despite a second Slavonic influx into Silesia and Pomerania in the sixth century A.D., these areas remained under German influence.¹⁷ Polish ethnological groups never completely inhabited Silesia and Pomerania.¹⁸

In the Middle Ages, Pomerania and Silesia fought bitterly against Polish expansion attempts.¹⁹ Pomerania formed several independent duchies where Germans settled.²⁰ During the Middle Ages, Pomerania remained under German administration and Silesia²¹ aligned with the King of Bohemia.²² This link with Bohemia made Silesia an integral part of the medieval German Empire.²³ Later, it incorporated into the Habsburg Empire, from which it fell under the Prussian crown in 1742.²⁴ When Prussia integrated into the German Empire in the unification of 1871, each of the Oder-Neisse Territories of Germany united under a single German authority for the first time.²⁵

Polish nationalists of the twentieth century, however, do not view the historical settlement with sympathy towards the German population.²⁶ For example, J.M. Winiewicz, one of the leading Polish writers on the Oder-Neisse border, believes that "the Oder was a natural barrier separating Germany from the state of Poland, which had arisen at the end of the [tenth] century."²⁷ Winiewicz bases his position on a statement by the German Emperor Frederick Barbarossa,

15. *Id.*

16. BÜHLER, *supra* note 5, at 6. See also GERMANY'S EASTERN TERRITORIES, *supra* note 6, at 6 (Silesia was originally settled by Germanic tribes, from one of which it takes its name).

17. "[I]t may also be recalled that before the Slavs began to wander westward towards eastern and central Germany in the 6th century A.D., these areas were inhabited by Germanic tribes." Kraus, *supra* note 9, at 46.

18. "The Province of Pomerania was inhabited by the Pomeranian tribe, which was . . . Slavonic, but did not belong to the Polish ethnological group. Large parts of Silesia were in early historical times also inhabited by Slavonic, but not by Polish ethnological groups." *Id.*

19. *Id.* at 46-47.

20. The Duke of West Pomerania was made a German Imperial Prince by Emperor Friedrich Barbarossa in 1180. *Id.* at 47.

21. *Id.*

22. Kraus, *supra* note 9, at 47.

23. *Id.*

24. *Id.*

25. BÜHLER, *supra* note 5, at 9.

26. J.M. WINIEWICZ, THE POLISH-GERMAN FRONTIER 11 (1945).

27. *Id.*

regarding the Prussian invasion of Poland in 1157.²⁸ The statement reads: "On August 22nd [1157], despite the opposition of the Poles who were lying in wait, with our entire army we crossed the river Oder, which, like a wall, surrounds that State; and, sweeping through the bishoprics of Breslau and Poznan, we laid waste the whole country with fire and sword."²⁹

In any case, historical analysis does not usually bend to the will of either partisans or nationalists. No one had suggested that the Oder river serve as a boundary between Germany and Poland until the Teheran Conference of 1943. The German empire in 1157 included the territories east of the Oder, specifically East and West Prussia, Posen, Pomerania, and Silesia.³⁰ While the Poles administered both Breslau and Posnan during the Middle Ages, the German population had greatly increased by the time of the Emperor's invasion.³¹ Indeed, just two centuries later, the Kingdom of Poland officially recognized the territories as part of the Kingdom of Bohemia.³²

III. HISTORICAL ANALYSIS

A. World War I and After

The events following World War I set the stage for modern German-Polish relations.³³ The Treaty of Versailles ("Treaty"),³⁴ which officially ended World War I in 1919, established a new boundary between Germany and Poland. In establishing this boundary, the Treaty awarded several German territories to Poland.³⁵ Theoretically, the Allied Powers claimed to have given Poland only those ter-

28. *Id.*

29. *Id.*

30. "All the German territories lying east of the river Oder are distinguished by being very thinly populated, by being economically on a much lower standard than the rest of Germany, and finally by a continued tendency on the part of the population to abandon these areas and wander off to the west of Germany." Although these conclusions are untrue, this statement does show that Winiewicz recognizes Germany in the Middle Ages as including territories east of the Oder. *Id.*

31. Kraus, *supra* note 9, at 47.

32. *Id.* In the Treaty of Trentschin (1335), the King of Poland "finally renounced his claim to Silesia in favor of the King of Bohemia." *Id.* See also THE MARTYRDOM OF SILESIAN PRIESTS 1945/46 6 (Kirchliche Hilfsstelle ed., 1950).

33. "Neither Polish nor German ambitions can be blamed for the outbreak of World War I — yet its settlement in the Treaty of Versailles created the basis for Polish-German tensions that have continued to the present day." FRIEDRICH VON WILPERT, THE ODER-NEISSE PROBLEM 122 (1964).

34. U.S. DEP'T OF STATE, THE TREATY OF VERSAILLES AND AFTER 209 (1968).

35. *Id.*

ritories with an indisputably Polish population.³⁶ But in fact, “the treaty awarded to Poland, in defiance of ethnographic considerations, numerous strongly German towns and districts for military or economic reasons.”³⁷ For example, despite the fact that Posen and West Prussia contained 22% more Germans than Poles, and that West Prussia was overwhelmingly German, the Allied Powers gave both areas to Poland without an historically adequate justification.³⁸ Additionally, Poland received portions of Pomerania “without the slightest ethnographical justification.”³⁹

Some areas with mixed nationalities, such as East Prussia and Silesia, held plebiscites⁴⁰ in order to determine whether their territory should be placed under German or Polish administration.⁴¹ The average vote in these territories favored German administration by 78%, and Polish administration by 22%. East Prussia strongly favored German control with 95% of the population voting to remain German.⁴² Silesia had a larger Polish population than East Prussia, but still retained a German majority of 60%.⁴³ Although the majority of Silesians decided in favor of fusing with Germany,⁴⁴ the Treaty of Versailles gave those portions of Silesia with an almost exclusively Polish composition to Poland, while allowing the remaining territory to stay in Germany.⁴⁵

Despite the percentage of Germans in these territories, duress of hunger and defeat forced Germany to officially recognize the Treaty of Versailles. The relevant portion of the agreement states:

Germany, in conformity with the action already taken by the Allied and Associated Powers, recognizes the complete independence of Poland, and renounces in her favour all rights and title over the territory bounded by the Baltic Sea; the eastern frontier of Germany as laid down in Article 27 of Part II (Boundaries of Ger-

36. *Id.*

37. *Id.*

38. *The Paris Peace Conference*, 6 FOREIGN REL. 832 (1919).

39. U.S. DEP'T OF STATE, *supra* note 34, at 209.

40. A plebiscite is a vote of the people that expresses their choice for or against a proposed law or enactment, which, if adopted, will work a change in the constitution that is beyond the powers of the regular legislative body. BLACK'S LAW DICTIONARY 1153 (6th ed. 1990).

41. Visuvanathan Rudrakumar, *The "Requirement" of Plebiscite in Territorial Rapprochement*, 12 HOUS. J. INT'L L. 23, 28 (1989).

42. U.S. DEP'T OF STATE, *supra* note 3, at map facing 233.

43. *Id.*

44. BÜHLER, *supra* note 5, at 10; Rudrakumar, *supra* note 41, at 28.

45. BÜHLER, *supra* note 5, at 10.

many) of the present Treaty up to a point situated about 2 kilometres to the east of Lorzendorf, then a line to the acute angle which the northern boundary of Upper Silesia makes about 3 kilometres north-west of Simmenau, then the boundary of Upper Silesia to its meeting point with the old frontier between Germany and Russia, then this frontier to the point where it crosses the course of the Niemen, and then the northern frontier of East Prussia as laid down in Article 28 of Part II aforesaid.⁴⁶

The cession of German territory to Poland, although accepted in the Treaty of Versailles, did not have unanimous support in Europe. Rather, the settlement "sowed the seeds of discord in [C]entral Europe."⁴⁷ France supported Poland's claim to the territories, with the aim of shrinking Germany as much as possible. In response to France's support of Poland's claim, however, President Woodrow Wilson commented that "[t]he only real interest of France in Poland is in weakening Germany by giving Poland territory to which she has no right."⁴⁸ British, Italian, and other world leaders added that the enlargement of Poland at the expense of Germany was an error full of menace for the peace of Europe.⁴⁹ These warnings, unfortunately, fell on deaf ears, and the agreement which was intended to be final merely ensured the necessity of future agreements.⁵⁰

B. World War II

1. Unconditional Military Surrender

Germany ended its involvement in World War II when it signed the Act of Military Surrender ("Act").⁵¹ The Act stated: "We, the undersigned, acting by the authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force and simultaneously to the Soviet High Com-

46. Article 27 of Part II defines the new German-Polish border including the so-called "Polish Corridor." Article 28 describes the Polish boundary with East Prussia, to the east of the Corridor and to the north of Poland, which had formerly been under Russian jurisdiction. U.S. DEP'T OF STATE, *supra* note 34, at 208.

47. The border settlement in the Treaty of Versailles furthered resentment among Germany, Poland and France. VON WILPERT, *supra* note 33, at 123.

48. *Id.*

49. *Id.*

50. Isaiah Bowman, *The Strategy of Territorial Decisions*, 24 FOREIGN AFF. 177, 180 (1946). "The economic arrangements were bad and the subsequent failure was inevitable, whatever boundaries were delimited." *Id.* See also George F. Kennan, *For the Defense of Europe: A New Approach*, N.Y. TIMES, Sept. 12, 1954, at 68.

51. HERBERT FEIS, BETWEEN WAR AND PEACE 14 (1960).

mand all forces on land, sea, and in the air who are at this date under German control.”⁵² The Act provided only for military surrender.⁵³ It did not grant the Allied Powers supreme power over Germany,⁵⁴ nor did it provide for an unconditional political surrender.⁵⁵

On February 22, 1944, Winston Churchill explained Germany’s surrender in his statement to the House of Commons:

The term ‘unconditional surrender’ does not mean that the German people will be enslaved or destroyed! It means however that the Allies will not be bound to them at the moment of surrender by any pact or obligation. There will be, for instance, no question of the Atlantic Charter applying to Germany as a matter of right and barring territorial transferences or adjustments in enemy countries Unconditional surrender means that the victors have a free hand. It does not mean that they are entitled to behave in a barbarous manner nor that they wish to blot out Germany from among the nations of Europe. If we are bound, we are bound by our own consciences to civilization. We are not to be bound to the Germans as the result of a bargain struck. That is the meaning of ‘unconditional surrender.’⁵⁶

According to Churchill, the terms of surrender do not give the victorious powers unlimited license to act in any manner that suits their purposes. Therefore, the Allied Powers had no right to delineate new eastern German frontiers.⁵⁷

The provisions of the Atlantic Charter (“Charter”)⁵⁸ clearly applied to Germany. The signatories of the Charter did not indicate an

52. *Id.*

53. Philip E. Mosely, *Dismemberment of Germany*, 28 FOREIGN AFF. 487, 496 (1950).

54. *Id.*

55. Kraus, *supra* note 9, at 12.

56. 4 WINSTON CHURCHILL, THE SECOND WORLD WAR 618 (1950), *in* Kraus, *supra* note 9, at 115-16.

57. Kraus, *supra* note 9, at 115-16.

58. Articles 1-4 of the Atlantic Charter of August 14th, 1941, read as follows:

Joint declaration of the President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty’s Government in the United Kingdom, being met together, deem it right to make known certain common principles in the national policies of their respective countries on which they base their hopes for a better future for the world.

First, their countries seek no aggrandizement, territorial or other; Second, they desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned; Third, they respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.

ATLANTIC CHARTER arts. 1-4.

intention to exclude Germany.⁵⁹ Indeed, some of the signatories expressed the belief that the Charter applied to Germany as a matter of right.⁶⁰ The evidence clearly does not support the contention that the Charter does not apply to Germany, but only to those who signed it.⁶¹ Further, the signatories of the Charter incorporated the right of self-determination into the post-war international order, and they gave those living in the Oder-Neisse Territories the right to choose their national identity.⁶²

2. The War Conferences

The Big Three Powers, consisting of the United States, the United Kingdom, and the Soviet Union, held three War Conferences during and following World War II. Each conference purported to establish a plan for the resolution of the war, the settlement of territories and the agreement of reparation issues. The first conference took place in Teheran from November 28 through December 1, 1943; the second, from February 4 through 11, 1945, at Yalta; and the third and final conference from was July 17 through August 2, 1945, at Potsdam. Neither Germany nor Poland participated in any of the War Conferences.

a. Teheran

At the Teheran Conference, the Big Three Powers set forth their individual plans for peace and settlement of territory. During the Conference, Soviet Premier Josef Stalin suggested that the Oder river be the western boundary of Poland.⁶³ The Neisse river, however, was not a part of this package.⁶⁴ The Soviet Union took a large portion of the eastern Polish territory, drawing the border at the Curzon Line,⁶⁵ and attempted to move Poland as a whole approximately 200 miles west of its historic location.⁶⁶ "The Soviet motive was both to 'compensate' and strengthen Poland and to weaken Germany."⁶⁷ Church-

59. CHURCHILL, *supra* note 56, in Kraus, *supra* note 9, at 115-16.

60. *Id.*

61. BÜHLER, *supra* note 5, at 19.

62. NINČIĆ, *supra* note 1, at 221.

63. BÜHLER, *supra* note 5, at 21.

64. THE GENESIS OF THE ODER-NEISSE LINE 69 (Gotthold Rhode & Wolfgang Wagner eds., 1959) [hereinafter GENESIS].

65. The Curzon Line is the original name for the current border between Poland and the former Soviet Union.

66. WOLFGANG WAGNER, DIE ENTSTEHUNG DER ODER-NEISSE-LINIE 56-57 (1953).

67. *Id.* at 61.

ill, on behalf of the Western Allies, agreed to a compromise border package in order to retain his influence with the Soviets.⁶⁸ Philip Bühler discusses the idea that in return for Poland giving up its territory east of the Curzon Line, the Big Three would support Polish claims for land at Germany's expense.⁶⁹

The "compensation theory" has no basis in prior state practice, except possibly in friendly treaties where all of the parties involved negotiated and agreed to the settlement for mutual benefit. The westward movement of Poland was decided upon without the participation of either Poland or Germany, the two nations that would lose territory. As a legal argument it is almost devoid of weight.⁷⁰

Although the Big Three Powers agreed in principle to the border package, they reached no formal agreements at the Teheran Conference.⁷¹ Churchill, for example, stated clearly to Stalin that neither he nor President Franklin D. Roosevelt had the power to define any frontier lines.⁷² Thus, Teheran merely set the stage for future negotiations at Yalta and Potsdam.⁷³

b. Yalta

The Yalta Conference marked a major shift in Anglo-Russo-American relations. At Teheran, the Big Three Powers only discussed general possibilities for potential borders. At Yalta, however, the Soviets attempted to expand those previous discussions and give them binding force. Soviet Foreign Minister Andrei Molotov out-

68. BÜHLER, *supra* note 5, at 21.

69. 1157 - and all that, THE ECONOMIST, May 3, 1947 at 662. According to THE ECONOMIST:

Compensation implies a legal or moral right to that for which compensatory payment is to be made . . . [A]ccording to the Soviet view, Poland had no right whatever to the eastern territories [now in Russia], which had been brutally seized from their rightful owners by Polish reactionaries and imperialists. How then has Poland a just claim to compensation for the loss of something to which it never had any right at all?

Id.

70. BÜHLER, *supra* note 5, at 23.

71. "The declaration issued at the conclusion of the Teheran Conference made no mention of any territorial agreements, specific or general, formalising the obvious lack of agreement among the Big Three." *Id.* at 21. See also President Franklin D. Roosevelt, Address of the President of the United States Before a Joint Session of the Senate and the House of Representatives on the Subject of the Yalta Conference (Mar. 1, 1945), in 79 CONG. REC. 1619 (1945) (Among the civilian leaders at Teheran, . . . [n]o political arrangements were made, and none was attempted).

72. GENESIS, *supra* note 64, at 63.

73. WAGNER, *supra* note 66, at 65-66.

lined his country's position on Poland's frontiers at the opening of the conference:

1. . . . that the Curzon Line should be the eastern frontier of Poland, with adjustments in some regions of five to eight kilometers in favour of Poland.
2. . . . that the western frontier of Poland should be drawn from the town of Stettin (which would be Polish), and thence southwards along the river Oder and Western Neisse.⁷⁴

Molotov suggested that the conferees agree on "the return to Poland of her ancient frontiers in East Prussia and on the Oder."⁷⁵ He was unsuccessful, however, in persuading Roosevelt and Churchill.⁷⁶ Stalin then withdrew the Soviet proposal.⁷⁷

This shift in positions was due, in large part, to the interpretation of events occurring between the two conferences. In 1943, Henry Morgenthau, the United States Treasury Secretary, proposed a plan to President Roosevelt and his Cabinet which gained wide attention in Congress and in the United States and British press.⁷⁸ The "Morgenthau Plan" called for the destruction, not merely the demilitarization, of postwar Germany.⁷⁹ The plan was "just barely above the level of 'steriliz[ing] all Germans,' " and "would reduce Germany from a pre-war industrial giant to a fourth-rate nation of small farms."⁸⁰ The main objectives of the plan were:

1. Removal from Germany of all industrial machinery which any liberated country wants; obliteration of the rest of German industry.
2. Permanent closing of all German mines - if any are left after territorial changes.
3. Cession of the Saar and other Rhineland industrial areas to France; cession of East Prussia to Poland.

74. BÜHLER, *supra* note 5, at 24.

75. VON WILPERT, *supra* note 33, at 53.

76. Churchill and Roosevelt responded with the following dialogue:

President Roosevelt asked how long it had been since these lands were Polish.

Mr. Molotov replied: Very long ago, but they had once been Polish.

Said the U.S. President, laughing, to the British Prime Minister: 'Perhaps you would want us back?'

Replied the British Prime Minister: "Well, you might be as indigestible for us as it might be for the Poles if they took too much German territory."

Id.

77. *Id.*

78. *The Policy of Hate*, TIME, Oct. 2, 1944, at 19.

79. *Id.* See, e.g., DOUGLAS BOTTING, FROM THE RUINS OF THE REICH 194 (1985).

80. *The Policy of Hate*, *supra* note 78.

4. Breakup of all large land holdings into small farms.
5. Withholding of any economic aid whatsoever to Germany; no food, clothing or other relief supplies to be furnished to the German people; no reconstruction of railroads or factories within Germany to be permitted.
6. Prolonged occupation by Russian, British and American troops, perhaps for a generation.
7. No reparations - since Germany would have nothing to pay them with, and would be allowed in no way to earn payments in the future.⁸¹

Although the plan horrified British Foreign Secretary Anthony Eden, United States Secretary of State Cordell Hull, and United States Secretary of War Henry Stimson,⁸² the Soviets believed that President Roosevelt was leaning toward Morgenthau's agenda,⁸³ and therefore had an improved bargaining position at Yalta. The United States, however, in accordance with its traditional policy, had not committed itself to any position prior to Yalta.⁸⁴

At Yalta, Churchill and Roosevelt clearly refused to agree on the enlarged Polish claim.⁸⁵ Indeed, the Report of the Crimea [Yalta] Conference showed their desire not to create any binding agreements.⁸⁶ By including the Western Neisse in their proposal, the Soviets now incorporated into Polish territory an area that included several million Germans and very few Poles.⁸⁷ These Germans would face expulsion from their traditional homeland as a result of this proposal. As a result, the Allies found it to be an absolutely unacceptable

81. *Id.*

82. *Id.*

83. *Id.*

84. U.S. DEP'T OF STATE, *supra* note 3, at 215. See also Edward Stettinius, *United States Policy Toward Poland*, in DEP'T ST. BULL., (Dec. 24, 1944), at 836, reprinted in U.S. CONG., A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS 1941-49 1195 (1950) (The United States Government continues to adhere to its traditional policy of declining to give guarantees for any specific frontiers.).

85. VON WILPERT, *supra* note 33, at 68.

86. The Report of the Crimea [Yalta] Conference, issued by the Big Three Powers on February 11, 1945, set forth the following provisions for the frontiers of Poland:

The three Heads of Government consider that the Eastern frontier of Poland should follow the Curzon Line . . . and that the *final delimitation of the Western frontier of Poland should thereafter await the Peace Conference* (emphasis added).

BÜHLER, *supra* note 5, at 25.

87. VON WILPERT, *supra* note 33, at 67. See, e.g., 1157 - and all that, *supra* note 69, at 662-63.

principle for both moral and legal reasons.⁸⁸

c. Potsdam

The aim of the Potsdam Conference was to ensure the complete demilitarization of Germany.⁸⁹ Additionally, the conferees reconfirmed the agreements that the Big Three Powers reached at Yalta, namely that the final delimitation of the western frontier of Poland should await the peace settlement.⁹⁰ The Big Three Powers stated that they "desired not to destroy or enslave the German people but rather to give them the opportunity to reconstruct their country and their lives on a democratic and peaceful basis."⁹¹ Further, according to Articles 34, 35, and 36 of the Vienna Convention on the Law of Treaties,⁹² any decisions made by the Big Three at Potsdam could not have binding force on Germany, because Germany was not present at the Conference.⁹³

During the Conferences, however, the Soviet Union and Poland had already begun the process of settling Poles in Eastern Germany and removing the German population from these territories.⁹⁴ Indeed, the Soviet Union had placed most of the Oder-Neisse area under Polish administration *prior* to the Potsdam Conference.⁹⁵ Dr. Józef Kokot describes the Soviet-Polish position on the Potsdam agreements as follows:

At the Potsdam Conference, in the opinion of the Big Powers, Germany, as a state, and the German people, as those responsible for the Nazi rule and as those who will eventually have to form a new government (a sovereign authority) on a democratic basis, were fully and entirely contained within the territory of the four zones

88. The Second and Third paragraphs of the Atlantic Charter specifically forbid arbitrary population expulsions. See ATLANTIC CHARTER, *supra* note 58.

89. *Plan for a Continent*, TIME, Aug. 13, 1945, at 28. See, e.g., *Report on the Tripartite Conference of Berlin*, 13 DEP'T ST. BULL. (Aug. 5, 1945), at 155 [hereinafter *Tripartite Conference*].

90. Kraus, *supra* note 9, at 22. See, e.g., MICHAEL FREUND, FROM COLD WAR TO OSTPOLITIK 114 (1972).

91. LUCIUS D. CLAY, DECISION IN GERMANY 40 (1950).

92. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34-36, U.N. DOC. A/CONF. 39/27 (entered into force Jan. 27, 1980).

93. Claus Arndt, *Legal Problems of the German Eastern Treaties*, 74 AM. J. INT'L L. 122, 129 (1980).

94. THE EXPULSION OF THE GERMAN POPULATION FROM THE TERRITORIES EAST OF THE ODER-NEISSE LINE 82 (Theodor Scheider et al., eds. & Vivian Stranders trans., 1961) [hereinafter *EXPULSION*].

95. BÜHLER, *supra* note 5, at 28 (emphasis added).

of occupation under the authority of the Control Council and within frontiers defined (in the case of the eastern frontier) by the agreement then reached.⁹⁶

Alfons Klafkowski, a leading Polish writer on the subject of the Oder-Neisse border, claimed that “[t]he provisions of the Potsdam Agreement regarding the delimitation of the Polish-German frontier are binding not only on the two German states but on all others as well.”⁹⁷ Klafkowski, however, fails to explain why the Potsdam provisions should have binding force.

The Soviet-Polish position clearly contradicted the Four Power Declaration and Statement Regarding Germany at Berlin, which Great Britain, the United States, the Soviet Union, and France issued on June 5, 1945.⁹⁸ The declaration made clear that Germany’s frontiers exist for all purposes as of December 31, 1937.⁹⁹ Further, the Western Allies made clear at Potsdam that “the final delimitation of the Western frontier of Poland *should await the peace settlement*; that Germany’s Eastern Territories were being placed ‘under the *administration* of the Polish state’ and that the Oder-Neisse boundary was in effect ‘*pending the final determination* of Poland’s western frontier.’”¹⁰⁰ The Western Allies were outraged by the Soviet-Polish position.¹⁰¹ United States President Harry Truman, for example, wrote the following to his Secretary of State, James Byrnes, on January 5, 1946: “At Potsdam we were faced with an accomplished fact and were by circumstances almost forced to agree to Russian occupation of Eastern Poland and the occupation of that part of Germany east of the Oder River by Poland. It was a high-handed outrage.”¹⁰²

96. JÓZEF KOKOT, *THE LOGIC OF THE ODER-NEISSE FRONTIER* 48 (Andrzej Potocki trans., 2d ed. 1959).

97. ALFONS KLAFKOWSKI, *THE POLISH-GERMAN FRONTIER AFTER WORLD WAR II* 23 (Edward Rothert trans., 1972).

98. BÜHLER, *supra* note 5, at 28.

99. *Focus on Germany*, N.Y. TIMES, Apr. 26, 1948, at 22.

100. VON WILPERT, *supra* note 33, at 76. *See, e.g., Tripartite Conference, supra* note 89, at 159; Kraus, *supra* note 9, at 172-76; FREUND, *supra* note 90, at 117; HEINZ DRÖGE, ET AL., *THE FEDERAL REPUBLIC OF GERMANY AND THE UNITED NATIONS* 36 (Deutsche Gesellschaft Für Auswärtige Politik ed., 1967).

101. BÜHLER, *supra* note 5, at 28.

102. GENESIS, *supra* note 64, at 278.

IV. THE LEGAL STATUS OF THE EASTERN TERRITORIES OF GERMANY

A. Annexation and the Violation of International Law

Annexations¹⁰³ are illegal according to existing international law.¹⁰⁴ In fact, the International Law Commission considers international aggression to be a crime.¹⁰⁵ Additionally, both the Atlantic Charter¹⁰⁶ and the Charter of the United Nations forbid the aggressive acquisition of territory.¹⁰⁷ While United Nations Resolutions do not constitute binding law,¹⁰⁸ the United Nations may formulate principles of international law which exist or develop independently of those resolutions.¹⁰⁹

Hersch Lauterpacht, a distinguished international legal scholar, identifies two such general principles of international law: first, that "it is competent for one State to pronounce judgement on the legality of the acts of another and to determine the validity of a new title acquired by such acts,"¹¹⁰ and second, that "the principle *ex injuria jus non oritur* [an illegality cannot become a source of right to the

103. The term annexation is used here to refer to "the usurpation of foreign sovereignty over a territory . . . [which] implies forcible violation of the territorial integrity of a state." Kraus, *supra* note 9, at 66.

104. *Id.* at 73.

105. Article 19 of the Draft Articles states:

3. [O]n the basis of the rules of international law in force, an international crime may result, *inter alia*, from

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression.

Draft Articles of the International Law Commission, in IAN BROWNLEE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY I 289 (1983) [hereinafter Draft Articles].

106. ATLANTIC CHARTER, *supra* note 58.

107. Articles 1(1) and 2(4) of the U.N. Charter state:

Article 1

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. CHARTER art. 1, para. 1, art. 2, para. 4. *See e.g.*, COVENANT OF THE LEAGUE OF NATIONS art. 10.

108. DRÖGE ET AL., *supra* note 100, at 72-73.

109. *Id.*

110. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 413, 420 (1947).

wrongdoer] is one of the fundamental maxims of jurisprudence.”¹¹¹ Under the first principle, Germany can find Poland’s incorporation of its territory invalid. According to Lauterpacht: “States themselves are both entitled and constrained to pass judgment upon the legality of actions by other States; the inescapable alternative would be for them to treat such acts invariably as valid and as establishing legal rights.”¹¹²

Under the second principle, “acts contrary to international law are invalid and cannot become a source of legal rights for the wrongdoer.”¹¹³ Aggressive acquisition of territory is illegal, as it violates principles of territorial sovereignty.¹¹⁴ Annexations, therefore, do not transfer legal title to territory.¹¹⁵ Lauterpacht explains:

[T]o admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become . . . a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative.¹¹⁶

If Poland had continued to merely administer the German Eastern Territories, rather than officially and unilaterally incorporate them, it would not have violated international law, as administration is a recognized type of legal entity in international law.¹¹⁷

1. The Annexation of Eastern Germany

Under international law, the legal determination of the status of the territories between the Oder river (the current “border” between Germany and Poland) and the 1937 border rests on the legal definition of nationality.¹¹⁸ The principle of self-determination, which has governed the recognition of national integrity since World War I, is grounded in ethnic habitation and historical and cultural continuity.

Since the twelfth century, Germans have resided in the disputed

111. *Id.* at 420.

112. *Id.* at 413.

113. *Id.* at 420.

114. *Id.* at 421.

115. *Id.*

116. LAUTERPACHT, *supra* note 110, at 421.

117. BÜHLER, *supra* note 5, at 38. *Cf.* LAUTERPACHT, *supra* note 110, at 58 (A state cannot acquire title to territory by acquisitive prescription if it merely administers territory belonging to another state.)

118. Woodrow Wilson, *Fourteen Points*, in 4 FRANK H. SIMONDS, *HISTORY OF THE WORLD WAR IV* 334, 335 (1919).

Eastern Territories.¹¹⁹ Census records of the inter-war era establish the German composition of the people in the Territories.¹²⁰ The 1931 census indicates the following percentages of German population in lands ceded to Poland at Potsdam: East Prussia, 98%; Danzig/Memel, 90%; East Pomerania/East Brandenburg, 99%; and Silesia, 97%.¹²¹

The United Nations recognized the status of these lands as ethnic homelands to the Germans and the status of its inhabitants as refugees from their historic habitation after the expulsions in 1980.¹²² In Resolution 124 of 11 December 1980, the General Assembly recognized the plight of those ethnic Germans who had lost legal status and were expelled.¹²³ This Resolution reaffirms the "right of refugees to return to their homes in their homelands."¹²⁴ It states that "massive flows of refugees may not only affect the domestic order and stability of receiving States but also jeopardize the stability of entire regions and thus endanger international peace and security."¹²⁵ It also invites all "[m]ember States to convey to the Secretary-General their comments and suggestions on international co-operation to avert new flows of refugees and to facilitate the return of those refugees who wish to return."¹²⁶

Dr. Herbert Kraus sets forth a three-part test to determine whether a nation has annexed territory in violation of international law. First, annexation requires a forcible action, which can include an official action by the state.¹²⁷ Second, the annexation must display an intention to annex, and demonstrate its aspiration to another's territorial sovereignty.¹²⁸ Finally, the annexing nation must physically occupy the territory.¹²⁹ Dr. Kraus' test finds support in the Treaties, Charters, and general international legal principles discussed above.¹³⁰

119. See *supra* notes 8-20 and accompanying text.

120. Fritz Peter Habel, *Deutsche im östlichen Europa: Zur Vorgeschichte der Vertreibung*, reprinted in *GEFLOHEN UND VERTRIEBEN* 68-69 (Rudolf Mühlfenzl ed., 1981).

121. *Id.*

122. *Id.* at 46.

123. *International Co-Operation to Avert New Flows of Refugees*, G.A. Res. 124, U.N. G.A.O.R. 35th Sess., U.N. Doc. A/35/124 (1980).

124. *Id.*

125. *Id.*

126. *Id.*

127. Kraus, *supra* note 9, at 70.

128. *Id.*

129. *Id.*

130. See *supra* notes 105-07 and accompanying text.

Poland and the Soviet Union unilaterally annexed the Eastern German Territories. The July 10, 1951 edition of the *New York Times* states:

The fact is that of the pre-war Germany, whose 1937 borders have been acknowledged as legal in the four-power military agreement of June 5, 1945, pending a peace settlement, the Soviets and Poland have unilaterally annexed 24 percent, that the Soviets control another 24 percent in the Soviet zone, and that the Federal Republic constitutes only 53 percent of pre-war Germany.¹³¹

Klafkowski, in his explanation of the official Polish position, states that Poland does not treat the Oder-Neisse Territories as German land under Polish administration, but rather as belonging to the Polish state.¹³² Others share this view as well, writing that "Poland proceeded to expel the German inhabitants from the territories brought under its administration and to incorporate parts of these territories, and eventually all of them, into the Polish state."¹³³

Poland clearly intended to exercise its sovereignty over the Oder-Neisse Territories. Poland has displayed all the activities of a state that maintains territorial sovereignty over the Territories.¹³⁴ Poland's December 13, 1945, Decree of Administration of the Recovered Territories stated the following regarding activities belonging to the territorial sovereign:

With the installation of the civil administration, the Recovered Territories were fused with the remaining area of the Polish state on a basis of complete equality. From then on all laws and regulations passed for the whole Polish state became binding in the Recovered Territories as well. All laws and regulations inconsistent with the legal order recognized by the Polish state, however, ceased to apply. . . . This principle is implicit in the very concept of sovereignty.¹³⁵

Since Poland has also physically occupied the Eastern Territories of Germany, its actions towards the Territories qualify as an illegal annexation.

131. *Toward Peace With Germany*, N.Y. TIMES, July 10, 1951, at 26.

132. KLAFKOWSKI, *supra* note 97, at 56. "The exercise of government in the Recovered Territories is carried out by Poland in its own name; accordingly it is no longer a question which belongs to the province of international law, but is a matter of Polish national legislation, constitutional and administrative." *Id.*

133. James K. Pollock, *American Policy Toward Germany*, 23 FOR. POL. RPTS. 199 (1947).

134. MANFRED LACHS, *THE POLISH-GERMAN FRONTIER* 39 (1964).

135. KLAFKOWSKI, *supra* note 97, at 60. *See also* Kraus, *supra* note 9, at 71.

Poland also claims that Germany and Poland had a contract of cession, transferring the sovereignty of the Eastern Territories to Poland.¹³⁶ However, no contract of cession exists between Germany and Poland.¹³⁷ The German Federal Government has never transferred title to the Oder-Neisse Territories, as evidenced by the following statement of German Chancellor Konrad Adenauer on July 9, 1950:

The decision on the Eastern German Territories at present under Polish and Soviet administration cannot and will not be [made] until a peace treaty is concluded with a united Germany. The German Federal Government, as the spokesman for the entire German nation, will never accept the annexation, contrary to every principle of law and humanity, of these purely German territories.¹³⁸

By failing the three-pronged test for annexation, and never obtaining Germany's agreement to a transfer of sovereignty, Poland clearly annexed the Oder-Neisse Territories in violation of international law.

B. *The Right of Peoples to Self-Determination*

Self-determination is a foundational and inviolable principle in international law. It originated in the teachings of Erasmus of Rotterdam, and was adopted in the works of the "three great classical teachers of international law, Grotius, Pufendorf and Vattel."¹³⁹ During the nineteenth century European revolutions, self-determination gained great notoriety, incorporating the principle of nationality derived from the Italian non-interventionist school.¹⁴⁰ Subsequently, it appeared in the Draft Articles of the International Law Commission, the Atlantic Charter, and the Charter of the United Nations.¹⁴¹ Dr.

136. According to Klafkowski, "[t]his part of the territory of the German Reich which the Potsdam Agreement allotted to Poland, is an object of particular cession." Kraus, *supra* note 9, at 139-40.

137. *Id.* at 70.

138. VON WILPERT, *supra* note 33, at 87-88. See also Konrad Adenauer, *Statement to the Bundestag on Foreign Policy* (Oct. 20, 1953), in GERMAN CONSTITUTIONAL DOCUMENTS SINCE 1871 227 (Louise Holborn et al. eds., 1970) (the German people will never recognize the so-called Oder-Neisse frontier).

139. Kraus, *supra* note 9, at 101.

140. "[T]he principle of nationality consisted in the demand that each nation should be recognized the right to form its own sovereign state and, more generally, to decide its own destiny — in other words, to determine itself." NINČIĆ, *supra* note 1, at 219 (emphasis in original).

141. ILC Draft Article 19 states:

3. [O]n the basis of the rules of international law in force, an international crime may result, *inter alia*, from . . .

(b) a serious breach of an international obligation of essential importance for

Kraus provides a definition of the right of peoples to self-determination:

Self-determination in the sense used here and in the usual sense means that a nation, or specific national groups, should be given the last word in deciding whether they should continue to belong to their mother country or whether they should refuse this, unless it is a case of constituting a state of their own, of amalgamating with another state or associating with its population or part of the same for the purpose of establishing a new state.¹⁴²

Self-determination can be the right of a group wishing to separate from a country (positive self-determination), as well as the right of a group wishing to maintain their connection with a country (negative self-determination).¹⁴³

A further source of the right of self-determination is found in natural law.¹⁴⁴ Dr. Kraus quotes the German Federal Supreme Court:

Military conquest does not give the victor the right to deprive the conquered people of their national sovereignty, which has been handed down in history and which the nation wishes to preserve within the system of international order. This is a peremptory rule of natural law which has already been widely recognized in specific international law as the right of self-determination of peoples. It

safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination.

Draft Articles, supra note 105, at 289-90. Articles 1(2) and 55 of the U.N. Charter read:

Article 1

The Purposes of the United Nations are:

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER arts. 1, para. 2; 55. ATLANTIC CHARTER, *supra* note 58, arts. 1-3. *Cf. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970) ("The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it").

142. Kraus, *supra* note 9, at 96.

143. *Id.*

144. *Id.* at 105-06.

would be logical to extend this principle also to inroads upon territory.¹⁴⁵

Given the debate over the legal status of the United Nations Charter provisions,¹⁴⁶ natural law plays a fundamental role in establishing the legal right of self-determination.

Under natural law, self-determination not only gives a mother country the right to protect its national groups, but imposes the affirmative duty to do so.¹⁴⁷ For example, Article 116 of the Basic Law for the Federal Republic of Germany provides both citizenship and protection for all Germans within its borders as of December 31, 1937.¹⁴⁸ Additionally, the Preamble states that the German people, in enacting the Basic Law, have acted on behalf of those Germans denied participation in the political process, thus fulfilling the country's duty to the residents of the Eastern Territories.¹⁴⁹ Germany's adherence to the validity of the 1937 borders, therefore, goes beyond its desire for territory: it recognizes its positive duty under the natural law principle of self-determination to protect the rights of its citizens in the Eastern Territories.

The plebiscites held in the Eastern Territories following World War I resulted from the recognition of the right to self-determination.¹⁵⁰ Indeed, the concept of plebiscite is one of the three theoretical bases to the principle of self-determination.¹⁵¹ For example, President Woodrow Wilson stated in a message to the United States Senate that "[p]eoples are not to be handed about from one sovereignty to another as if they were property," a sentiment that other Allied leaders echoed.¹⁵² The results of these plebiscites showed a clear German

145. *Id.* at 155.

146. "Even if the absence of a definition of self-determination does not impair the legally binding nature of the relevant Charter provisions, it does . . . preclude it from constituting a norm of international law as distinct from a legal principle." NINČIĆ, *supra* note 1, at 245. *But see* DRÖGE, *supra* note 100, at 72-73 (Resolutions adopted by the General Assembly which contain comments on legal questions do not in themselves constitute binding law but may formulate a norm of general international law).

147. Kraus, *supra* note 9, at 107.

148. BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (Constitution) art. 116 para. 1, 2 (F.R.G.) [hereinafter BASIC LAW].

149. BASIC LAW pmb1.

150. Rudrakumaran, *supra* note 41, at 28.

151. *Id.* at 37. *Cf. Universal Declaration of Human Rights*, art. 15, G.A. Res. 217, U.N. Doc A/810, at 73 (1948) (No one shall be arbitrarily deprived of his nationality.).

152. Rudrakumaran, *supra* note 41, at 36 ("Prime Minister Lloyd George of Great Britain asserted that the general principle of national self-determination is 'as applicable in their cases of German colonies as in those of occupied European territories.'").

majority in most of the Eastern Territories and an overall desire to remain in Germany.¹⁵³ However, following World War II, the Allied leaders attempted to retain influence with the Soviet Union by disregarding the wishes of the people (in violation of Article 2 of the Atlantic Charter)¹⁵⁴ and formed borders based on political compromise. The Eastern Territories have held no plebiscites under Polish administration, a fact which unfortunately has no explanation.

The issue of the Oder-Neisse border is primarily one of self-determination.¹⁵⁵ Political considerations should not mitigate shifting Poland's border westward, when such an action intrudes upon the right of people to live at peace in their homeland.¹⁵⁶ A modern and democratic world cannot subordinate human rights in favor of political considerations.¹⁵⁷

C. *International Law and Human Rights*

Natural law provides the foundation for the protection of human rights,¹⁵⁸ in recognizing that certain rights are inherent in the individual.¹⁵⁹ A state can neither grant nor rescind these rights; rather, it can only protect against their violation.¹⁶⁰ These rights are imposed by a superior legal order, transcending state boundaries.¹⁶¹ Natural law protects the individual from the state, through both domestic and international legal norms, and provides individuals with international legal safeguards.¹⁶² Natural law "endow[s] individuals with a certain personality in, and eventually makes them into subjects of, international law."¹⁶³

Several recent charters and treaties have codified the natural law

153. See *supra* notes 42-44 and accompanying text.

154. ATLANTIC CHARTER, *supra* note 58, art. 2.

155. Herbert Marzian, *Die Oder-Neisse-Linie Im Lichte Des Volkerrechts, in DEUTSCHLAND UND POLEN 1772-1945* 211 (Helmuth Fechner ed., 1964).

156. ERNST R.B. HANSEN, POLENS DRANG NACH DEM WESTEN 31-33 (1927).

157. *International Treaty on Civil and Political Rights, reprinted in VERLETZUNGEN VON MENSCHENRECHTEN* 115 (Kulturstiftung der deutschen Vertriebenen ed. 1985). See, e.g., HERBERT KRAUS, *DIE ODER-NEISSE-LINIE* 14 (1954).

158. NINČIĆ, *supra* note 1, at 193. See, e.g., HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 112 (1950).

159. NINČIĆ, *supra* note 1, at 193.

160. *Id.*

161. *Id.*

162. *Id.* at 193-94.

163. *Id.* at 194. "Traces of these ideas are to be found in Grotius, Pufendorf and in a more precise form, in Hefter, Fiorea, Bluntschli, and, in more recent times, in Westlake, Lapradelle and others." *Id.* at 194 n.1.

concept of human rights, defining those rights "inherent in the individual."¹⁶⁴ For example, one of the main goals of the United Nations Charter is "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."¹⁶⁵ Subsequent articles in the Charter list several of these rights, such as self-determination, freedom from discrimination based on race, sex, language or religion, social and economic progress and development, and freedom from aggression.¹⁶⁶ The Atlantic Charter also incorporates these rights into its provisions.¹⁶⁷

In order to further codify and secure the rights of the individual in positive international law, the United Nations proclaimed the Universal Declaration of Human Rights in 1948,¹⁶⁸ and enacted the International Bill of Human Rights in 1976.¹⁶⁹ The Universal Declaration provides a comprehensive list of the rights of the individual protected under international law. Among these protections are the rights that "[n]o one shall be subjected to arbitrary arrest, detention or exile,"¹⁷⁰ that "[n]o one shall be arbitrarily deprived of his nationality,"¹⁷¹ and that "[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."¹⁷²

The Universal Declaration was codified in the 1976 International Bill of Human Rights ("The Bill"). The Bill contains three separate instruments: (1) The International Covenant on Economic, Social and Cultural Rights; (2) The International Covenant on Civil and Political Rights; and (3) The Optional Protocol to the latter Covenant.¹⁷³ Each instrument provides all peoples with the right of self-determination and the right to freely determine their political status and pursue economic, social, and cultural development.¹⁷⁴ Under the Civil and

164. U.N. CHARTER pmbi.

165. *Id.*

166. U.N. CHARTER arts. 1, paras. 2, 3; 2, para. 4; 68.

167. ATLANTIC CHARTER, *supra* note 58.

168. *Universal Declaration of Human Rights*, *supra* note 151.

169. *Id.*

170. *Id.* art. 9.

171. *Id.* art. 15.

172. *Id.*

173. *Id.*

174. *International Covenant on Economic, Social and Cultural Rights*, art. 1, para. 1, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966).

Political Covenant, individuals who are lawfully in the territory of a party to the covenant may "be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security require, be allowed to submit the reasons against [their] expulsion and have [their] case reviewed by . . . the competent authority."¹⁷⁵ Each covenant also provides that its provisions shall extend to all parts of Federal States such as Germany without any limitations or exceptions.¹⁷⁶

Germany accepted the United Nations Declaration of Human Rights in its Constitution. The relevant sections of the Basic Law for the Federal Republic of Germany state:

Article 1

(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace and of justice in the world.

(3) The following basic rights are binding on the legislature, on the executive and on the judiciary as directly valid law.¹⁷⁷

The German public accepts the United Nations Declaration of Human Rights as providing moral principles for the conduct of all countries in national and international affairs.¹⁷⁸ Additionally, Germany's participation in the European Convention for the Protection of Human Rights and Fundamental Freedoms demonstrates its commitment to the international safeguarding of human rights.¹⁷⁹

1. The Expulsion of Germans from the Eastern Territories

The German population began to flee from the Eastern Territories to escape the Red Army in 1944.¹⁸⁰ Upon occupation of the territories, the Soviets invited the Polish government to move into East Prussia, Pomerania, and Silesia.¹⁸¹ According to Alfred de Zayas, one of the world's chief scholars on German expellees, "[e]victions of

175. *International Covenant on Civil and Political Rights*, art. 13, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

176. *International Covenant on Economic, Social and Cultural Rights*, *supra* note 174, art. 28; *International Covenant on Civil and Political Rights*, *supra* note 175, art. 3.

177. BASIC LAW art. 1, paras. 1, 2, 3. *See, e.g.*, Kraus, *supra* note 9, at 106.

178. DRÖGE ET AL., *supra* note 100, at 66.

179. *Id.* at 65-66.

180. EXPULSION, *supra* note 94, at 106-08.

181. ALFRED M. DE ZAYAS, NEMESIS AT POTSDAM: THE EXPULSION OF GERMANS FROM THE EAST 104-05 (1988).

the native Germans followed and frequent excesses by members of the Soviet and Polish armed forces drove many of the Germans who had not yet been evicted from their homes to abandon everything and flee west."¹⁸² Additionally, the Polish government expelled those who tried to stay, "regardless of the lack of any existing international sanction for the expulsion."¹⁸³

The fanatical anti-German author, Ilya Ehrenburg, provides an example of Soviet excesses in the territories in his book entitled *The War*, distributed to the Red Army in East Prussia.¹⁸⁴ Ehrenburg writes:

The Germans are not human beings We shall not speak anymore We shall kill. If you have not killed at least one German a day, you have wasted that day If you cannot kill your German with your bullet, kill him with your bayonet. If there is calm on your part of the front, or if you are waiting for the fighting, kill a German in the meantime If you kill one German, kill another - there is nothing more amusing to us than a heap of German corpses Kill the German that is your motherland's loud request. Do not miss. Do not let through. Kill.¹⁸⁵

This genre of propaganda, although denied by Stalin as part of official Soviet policy,¹⁸⁶ led to the eventual expulsion of nearly 12 million Germans from the Eastern Territories.¹⁸⁷ As the August 13, 1945 issue of *Time* reported:

In what was once eastern Germany, an anguished tide of humanity, one of the greatest mass movements of Germans in history, flowed toward the borders of the shrunken Reich. At least 10,000,000 hungry Germans were being uprooted from their old homes in East Prussia, Pomerania, Silesia . . . by the new Polish . . . and Russian owners.¹⁸⁸

182. *Id.* at 105.

183. VON WILPERT, *supra* note 33, at 68 (emphasis added).

184. DE ZAYAS, *supra* note 181, at 65-66.

185. *Id.*

186. *Id.* Stalin claimed, "Sometimes we hear silly talk about the Red Army intending to exterminate the German people and to destroy the German state. This is, of course, a stupid lie." *Id.* at 66.

187. GERMANY'S EASTERN TERRITORIES, *supra* note 6, at 24. Peter Aurich states: One-fourth of Germany including in all some 12,000,000 people was affected by the compulsory expulsions that began in 1945. Their focal point was the area bordering on the Baltic Sea and the borders of the Sudetenland. The same edict abolished boundaries that had endured for half a millennium: namely, the borders denoting East Prussia, Lithuania and Poland in the north as well as those between Silesia and Poland.

188. *Forced Migration*, TIME, Aug. 13, 1945, at 36.

Malcolm Proudfoot, in his study of European refugees, adds that “[t]hese Germans, in varying degrees, experienced pillage and arson, manslaughter, murder, rape, work in labour gangs, and imprisonment in concentration camps.”¹⁸⁹

The inhumanity of Poland and the Soviet Union was nothing new. During the Teheran Conference of 1943, Stalin and Churchill had the following dialogue: “Stalin said . . . that he wanted to round up fifty thousand German officers after the war and shoot them. Winston Churchill was violently angry. ‘I would rather be taken out in the garden here and now to be shot myself than sully my own and my country’s honor by such infamy.’”¹⁹⁰ Many political, academic and religious figures denounced the 1945 expulsions. Churchill, for example, in his famous “Iron Curtain” speech, stated that “The Russian-dominated Polish government has been encouraged to make enormous and wrongful inroads upon Germany, and mass expulsions of millions of Germans on a scale grievous and undreamed of are now taking place.”¹⁹¹ Bertrand Russell also spoke against the expulsions, asking the rhetorical question: “Are mass expulsions crimes only if they are ordered by our foes in wartime - but reasonable measures toward a new social order if our allies order them in times of peace?”¹⁹² Additionally, Pope Pius XII proclaimed that “[e]very human being has a right to his ancestral homeland, and provided he has not disqualified himself by some personal wrong-doing, it is unjust to expel him,”¹⁹³ a sentiment also echoed by the Catholic Bishops of Germany.¹⁹⁴

189. MALCOLM J. PROUDFOOT, *EUROPEAN REFUGEES: 1939-52 A STUDY IN FORCED POPULATION MOVEMENT* 369-71 (1957).

190. JAMES BACQUE, *OTHER LOSSES* 5 (1991).

191. Winston Churchill, *Alliance of English-Speaking People, Delivered at Fulton College* (Mar. 5, 1946), in 12 *VITAL SPEECHES OF THE DAY* 329, 331 (1946).

192. GERMANY’S EASTERN TERRITORIES, *supra* note 6, at 25.

193. *Id.*

194. CATHOLIC BISHOPS OF GERMANY, *THE TRAGEDY OF SILESIA 1945-46* (foreword) (Johannes Kaps, ed., 1952/53) The following is an excerpt from the Jan. 30, 1946 proclamation by the Catholic Bishops of Germany:

We, the Catholic Bishops of Germany, feel we can no longer keep silent on the subject of the terrible fate which has befallen more than ten million people in the German Eastern Territories, . . . people whose ancestors for the most part settled in this territory seven and eight centuries ago and introduced civilization there. This dreadful fate has already befallen millions, indeed, in Silesia alone several millions. Their expulsion has been effected with horrible brutality and regardless of all human rights and feelings. We implore and beseech the world to remain silent no longer. Those in power must prevent might from coming before right and the seeds of hatred from being sown which will only cause more evil.

Id.

The expellees responded to this injustice by proclaiming the Charter of the German Expellees in 1950.¹⁹⁵ In the Charter, the expellees renounce any attempts at revenge or retaliation.¹⁹⁶ They additionally state their desire for all nations to work together in a spirit of brotherly conciliation.¹⁹⁷ However, the Charter also expresses that to separate a man from his native land by force is to kill his soul.¹⁹⁸ The Charter demands that all nations recognize, as one the basic rights of man, the right to the native land of the German expellees.¹⁹⁹ Finally, the Charter states: "Nations must realize that the fate of the German expellees, just as that of all refugees, is a world problem, the solution of which calls for the highest sense of moral responsibility and the stern necessity of making a tremendous effort."²⁰⁰

Forced transfers of population, under any circumstances, are illegal under international law.²⁰¹ As the United Nations, in its International Treaty on Prisoners and Refugees, states: "[i]t is the absolute right of all refugees to return to their homelands from which they were driven."²⁰²

Poland is a signator of the United Nations Declaration of Human Rights.²⁰³ The policies of Poland towards the Eastern Territories of Germany, however, clearly violate both the spirit and letter of the Declaration.²⁰⁴

V. MODERN DEVELOPMENTS

Poland and East Germany signed the Treaty of Görlitz in 1950, recognizing the Oder-Neisse Line as their official boundary.²⁰⁵ Supporters of the Polish Claim often cite this treaty as conclusive evidence of Germany's acquiescence to the Oder-Neisse Line as a legal boundary.²⁰⁶ It was the Soviet third of a divided Germany that signed

195. THE GERMAN EAST, *supra* note 6, at 150.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. THE GERMAN EAST, *supra* note 6, at 151.

201. HABEL, *supra* note 120, at 46-47.

202. *Id.*

203. *Universal Declaration of Human Rights*, *supra* note 151.

204. *Id.*

205. OTTO KIMMINICH, *ENCYCLOPEDIA OF INTERNATIONAL LAW* 269 (1990). *See also* Kraus, *supra* note 9, at 66 (purpose is to mark the already established, existing, and inviolable peace and friendship frontier on the Oder and Lausitz Neisse).

206. LACHS, *supra* note 134, at 36. *See also* KLAFKOWSKI, *supra* note 97, at 25 (Görlitz Agreement as the legal basis which regulated the Polish-German frontier).

the treaty, however, an ironic fact considering Soviet Foreign Minister Molotov's statements following the Potsdam Conference.²⁰⁷ Some Polish writers also attempt to support their position by claiming that the most interested and directly concerned parties have consented to the Görlitz Treaty.²⁰⁸ The United States Department of State released the following statement on June 8, 1950: "[O]n no occasion has the Government of the United States recognized the Oder-Neisse Line. Nor is the present arrangement between the Polish Government and the East German administration recognized by the Government of the United States."²⁰⁹ This statement followed a similar declaration by the British Foreign Office on June 7 which claimed that "the British Government considers the Oder-Neisse Line, delineated at Potsdam in June 1945, as only the provisional border between East Germany and Poland, as long as the border has not been determined by the peace conference. Great Britain does not take the view that this line is final."²¹⁰ Along with the United States and British statements, the French and West German governments also declared their opposition to the Görlitz Treaty.²¹¹

No peace treaty of any kind can be concluded between nations still at war.²¹² When East Germany and Poland signed the Görlitz Treaty, a state of war still existed between the Western Powers and Germany.²¹³ The Allied Powers did not officially end the state of war with Germany until 1955.²¹⁴ Thus, the German Democratic Republic did not have the power to negotiate agreements on behalf of all of Germany.²¹⁵ As Dr. Kraus states:

[T]he chief argument against the legality of the Görlitz Treaty is that the Soviet zone has no legal capacity in international law (international legal subjectivity) and its de facto Government set up by an outside power holds no capacity to act in international law. An important condition for subjectivity in international law is that

207. "We are naturally in principle in favor of concluding a peace treaty with Germany; but before such a treaty can be concluded a single German Government must be formed" BÜHLER, *supra* note 5, at 48.

208. LACHS, *supra* note 134.

209. GERMANY'S EASTERN TERRITORIES, *supra* note 6, at 3.

210. *Id.* at 4.

211. VON WILPERT, *supra* note 33, at 86-88. *See also* WOLFRAM E. HANREIDER, THE STABLE CRISIS 89 (1970) (The Bonn government adamantly refused to regard the territorial status quo in that area as anything but provisional and subject to revision.).

212. BÜHLER, *supra* note 5, at 49.

213. *Id.*

214. *Id.*

215. DE ZAYAS, *supra* note 181, at 154-55.

a country should have a government of its own and not be under orders from an outside power (sovereignty).²¹⁶

The United States reaffirmed this position on October 12, 1949, one year before the signing of the Görlitz Treaty:

The United States government considers that the so-called [German Democratic Republic] established on October 7 in Berlin, is without any legal validity or foundation in the popular will The eastern government rests on no constitution written by democratic representatives of the states of the Soviet zone Such a government cannot claim by any democratic standard to speak for the German people of the Soviet zone; much less can it claim to speak in the name of Germany as a whole The United States government and the governments associated with it will . . . continue to give full support to the government of the [Federal Republic of Germany] at Bonn in its efforts to restore a truly free and democratic Germany.²¹⁷

A. 1970 Warsaw Agreement

The Warsaw Treaty of 1970, signed by West Germany and Poland, establishes clear international obligations binding the two nations.²¹⁸ The pertinent text of the Warsaw Treaty reads:

The Polish People's Republic and the Federal Republic of Germany, . . . Conscious of the fact that the inviolability of the frontiers of all European States and respect for their territorial integrity and sovereignty within their present frontiers are a basic condition for peace, . . . have agreed as follows:

Article I

1. The Polish People's Republic and the Federal Republic of Germany agree that the existing frontier line, which, in accordance with chapter IX of the decisions of the Potsdam Conference of 2 August 1945, runs from the Baltic Sea immediately west of Swinemünde along the Oder River to the point of junction with the Lausitzer Neisse River and along the Lausitzer Neisse River to the frontier with Czechoslovakia, constitutes the western State frontier of the Polish People's Republic.

2. They confirm the inviolability of their existing frontiers, now and hereafter, and pledge absolute respect for each other's territorial integrity.

216. Kraus, *supra* note 9, at 42-43.

217. Dean Acheson, *Statement on the Illegality of the East German Government* (Oct. 12, 1949), reprinted in GERMAN CONSTITUTIONAL DOCUMENTS, *supra* note 138, at 11.

218. KIMMINICH, *supra* note 205, at 270.

3. They declare that they have no territorial claims against each other and will advance none in the future

Article IV

This Agreement shall be without prejudice to any bilateral or multilateral international agreements which the Parties have previously concluded or which affect them.²¹⁹

While the Warsaw Treaty clearly establishes international obligations on behalf of each nation, it does not define the terms of the obligations. The context surrounding the Warsaw Treaty better explains its scope and meaning.

Poland contends that the Warsaw Treaty contains Germany's official and binding recognition of the Oder-Neisse Line as the permanent western boundary of Poland.²²⁰ Indeed, this conclusion might follow from the language of the Warsaw Treaty. A general rule of customary international law, however, holds that "a state succeeds to the territorial limits of her predecessor: she gains no more and no less territory upon succession."²²¹ The Allied Powers of World War II kept the German Reich alive in the form of its delegates, which were the Federal Republic of Germany and the German Democratic Republic.²²²

For the purposes of international law and the consummation of treaties, the Reich still exists. The German unification confirmed the integrity of a unified Reich, and the Reich has not since entered into any treaties renouncing claims to territory.²²³

The German government interprets the Warsaw Treaty as applying to its frontiers as of December 31, 1937.²²⁴ Wladyslaw Czaplinski, a Senior Researcher at the West Institute of Poznan, sets forth the German position as follows:

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 Con-

219. Agreement Concerning the Basis for Normalization of Their Mutual Relations, Dec. 7, 1970, F.R.G. - Pol., 830 U.N.T.S. 329, 334 [hereinafter Agreement].

220. Ludwik Gelberg, *The Warsaw Treaty of 1970 and the Western Boundary of Poland*, 76 AM. J. INT'L L. 119, 128 (1982). See also KIMMINICH, *supra* note 205, at 270 (the territorial questions connected with the Oder-Neisse line are settled by the Warsaw Treaty).

221. BÜHLER, *supra* note 5, at 81.

222. *Id.* at 80.

223. *Id.*

224. Wladyslaw Czaplinski, *The New Polish-German Treaties and the Changing Political Structure of Europe*, 86 AM. J. INT'L L. 163, 165 (1992).

stitution), these territories were entitled to join the [Federal Republic of Germany]. In addition, a large number of Polish nationals were treated as "Germans" within the meaning of Article 116(1) of the Basic Law.²²⁵

This position not only is consistent with the above-mentioned principles of international law, but also with Article IV of the Warsaw Treaty.²²⁶ The Treaty clearly states that it does not overrule any prior agreements affecting the two nations.²²⁷ As discussed above, the Allied Powers used the 1937 German-Polish frontier as a basis for negotiations. Furthermore, Germany's intention in signing the Treaty was to improve German-Polish relations, without giving up its legal claim to the Oder-Neisse Territories.²²⁸

B. 1975 Helsinki Accord

In 1975, the United States, Canada, and each nation in Europe entered into the Conference on Security and Cooperation in Europe, held in Helsinki, Finland ("Helsinki Accord").²²⁹ The Final Act of the Conference, signed by all participants, contained provisions on sovereignty, frontiers, territorial integrity and self-determination.²³⁰ The Helsinki Accord affirmed the principles expressed in both the Charter of the United Nations and the Universal Declaration of

225. *Id.*

226. Czaplinski states that Polish authorities consider the German position as contrary to international law under Article 27 of the Vienna Convention on the Law of Treaties (no state can invoke its municipal law to avoid implementing international agreements). The Warsaw Treaty, however, allows bilateral and multilateral agreements affecting Germany and Poland to stand. The Allied Powers created the document that became the West German Constitution (Basic Law), and any decisions pursuant to that law are valid. *Id.* at 166.

227. Agreement, *supra* note 219.

228. BÜHLER, *supra* note 5, at 84-85.

229. *Id.* at 83.

230. The pertinent sections of the Act are as follows:

I. Sovereign Equality, Respect for the Rights Inherent in Sovereignty

The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence

Within the framework of international law, all the participating States have equal rights and duties They consider that their frontiers can be changed, in accordance with international law, by peaceful means and by agreement.

III. Inviolability of Frontiers

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.

IV. Territorial Integrity of States

Human Rights, in that sovereignty and self-determination are inviolable rights.²³¹

The Helsinki Accord, by proclaiming the inviolability of the current European frontiers, also affirmed the 1937 German borders.²³² Although the Helsinki Accord does not address the Oder-Neisse Line explicitly, the existing German frontiers at the time of the Helsinki Accord included the Eastern Territories.²³³ More importantly, however, Germany signed the agreement in order to negotiate modest improvements in intra-German relations, and to secure equal rights for the German minorities living under Polish rule.²³⁴ The Helsinki Accord clearly provides for the self-determination of the German minorities living under Polish rule²³⁵ because it grants them the right to freely determine their political status.²³⁶

The participating States will respect the territorial integrity of each of the participating States.

Accordingly, they will refrain from any action inconsistent with the purposes and principles of the Charter of the United Nations against the territorial integrity, political independence or the unity of any participating State, and in particular from any such action constituting a threat or use of force.

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal

VIII. Equal Rights and Self-Determination of Peoples

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States. By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference The participating States reaffirm the universal significance of respect for and effective exercise of equal rights and self-determination of peoples for the development of friendly relations among themselves as among all States; they also recall the importance of the elimination of any form of violation of this principle.

HUMAN RIGHTS, EUROPEAN POLITICS, AND THE HELSINKI ACCORD: THE DOCUMENTARY EVOLUTION OF THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE 185, 187-88, 190 (Igor Kavass et al. eds., 1981).

231. *Id.*

232. Although Bühler states that the existing frontiers of 1970 were those of 1945, his statement can also mean that the existing frontiers of 1975 were those of 1937, since no legally valid international agreements altered the German-Polish border during this time. BÜHLER, *supra* note 5, at 85.

233. *Id.*

234. DE ZAYAS, *supra* note 181, at 178-79.

235. Antonio Cassese, *The Helsinki Declaration and Self-Determination*, in HUMAN RIGHTS, INTERNATIONAL LAW, AND THE HELSINKI ACCORD 83, 100 (Thomas Buergenthal ed., 1977).

236. *Id.* at 102.

C. Reunification of Germany

On October 3, 1990, the German Democratic Republic joined the Federal Republic of Germany as part of a new and unified German state. The Moscow Treaty on the Final Settlement With Respect to Germany ("Moscow Treaty") describes the procedure for reunification.²³⁷ The Moscow Treaty provides:

Article 1

(1) The united Germany shall comprise the territory of the Federal Republic of Germany, the German Democratic Republic and the whole of Berlin. Its external borders shall be the borders of the Federal Republic of Germany and the German Democratic Republic and shall be definitive from the date on which the present Treaty comes into force;

(2) The united Germany and the Republic of Poland shall confirm the existing border between them in a treaty that is binding under international law.

Article 2

The parties declare that the border which exists between them is inviolable now and for the future and they agree to respect unconditionally their sovereignty and territorial integrity.²³⁸

In accordance with Article 23 of the Federal Constitution, the states of the former German Democratic Republic became part of Germany upon their accession.²³⁹ Additionally, under Article 1(2) of the Moscow Treaty, Germany and the Republic of Poland signed a separate treaty on November 14, 1990, confirming the existing border between them.²⁴⁰ The legislatures of each nation ratified this treaty in January, 1992.²⁴¹

Contrary to the treaties of Görlitz and Warsaw, and the intentions stated at Yalta and Potsdam, a unified German government signed the 1990 treaty confirming the Oder-Neisse Line as the border between Germany and Poland. As in 1970, Germany signing the 1990 treaty again showed its desire to improve German-Polish relations.²⁴² Poland subsequently agreed to pursue friendly relations with Germany, even to the extent of granting limited autonomy for the

237. Jochen Frowein, *The Reunification of Germany*, 86 AM. J. INT'L L. 152 (1992). Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 613 (1991).

238. Frowein, *supra* note 237, at 155.

239. *Id.* at 154.

240. *Id.* at 155.

241. *Id.*

242. Czaplinski, *supra* note 224, at 166.

German population in the Eastern Territories.²⁴³ The Moscow Treaty, however, contradicts the overarching principles of the United Nations Declaration of Human Rights and other established principles of international law regarding the transfer of territory.²⁴⁴

The Moscow Treaty leaves open the question of whether it incorporates the illegal annexations by the Soviet Union in World War II into its provisions. The United States Senate was unwilling to accept the annexations of the Baltic States as part of the Moscow Treaty; it should be equally unwilling to accept the legalization of Poland's Soviet-orchestrated annexation of the Eastern Territories of Germany.²⁴⁵ In his proclamation on the day of German reunification, United States President George Bush stated the following:

The achievement of German unity will also give hope to others, particularly the Baltic peoples, that a peaceful but determined struggle for national self-determination can succeed even over seemingly insurmountable obstacles. The United States remains true to its policy of nonrecognition of the annexation of the Baltic states, just as we never wavered in our support for German unity even through the darkest hours of the cold war.²⁴⁶

United States support for German unity must remain intact until all of Germany is reunified.

The central legal issue affecting such reunification is the right of refugees and expellees to return to their homelands.²⁴⁷ While the 1992 ratification of a border treaty between Poland and Germany recognizes the current boundary as a fact of political geography, these political considerations cannot forfeit the inherent legal right of living Germans to their ancestral and birth homelands.²⁴⁸ The right to self-determination does not exclude those legal inhabitants of East Prussia, Pomerania, and Silesia who now reside in the Federal Republic of Germany.²⁴⁹

In the hierarchy of considerations weighed in territorial disputes, the right to one's homeland takes precedence over political, economic

243. *Id.* at 167.

244. *See supra* notes 105-07 and accompanying text.

245. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law (World War II: German Reunification)*, 85 AM. J. INT'L L. 166-67 (1991).

246. *Id.*

247. SIEGRID KRÜLLE, *DIE VÖLKERRECHTLICHEN ASPEKTE DES ODER-NEIßE-PROBLEMS* 359-62 (1970).

248. *Id.*

249. *Id.* at 364-66.

and security considerations.²⁵⁰ This right cannot be negotiated or dismissed in the interests of political expediency.²⁵¹ The Moscow Treaty was an expediency based upon the rapid destabilization of governments in the German Democratic Republic and Soviet Union. The Moscow Treaty, like the Yalta and Teheran protocols,²⁵² did not consider the rights of displaced Germans as stated in the United Nations Charter,²⁵³ Resolutions,²⁵⁴ and Declaration on Human Rights,²⁵⁵ and thus falls into the same category as the Yalta and Teheran protocols. While the Moscow Treaty, like the Görlitz Treaty of 1950, was signed by heads of state, it does not de facto have the force of international law because it rests on contradictions of established international legal precedence.

VI. CONCLUSION

Both historically and legally, East Prussia, Pomerania, and Silesia are German territories. Germanic peoples originally settled these areas and they carry a strong German influence to the present day. The Soviet Union and Poland have attempted to annex the Eastern Territories, in violation of the international legal principles of self-determination, annexation and human rights. They have attempted to legalize this action through modern treaties. Despite the Soviet and Polish attempts, the Territories still belong to Germany. Additionally, the reunification of Germany will not be complete until the borders of 1937 are restored, and *all* German citizens are unified into a single German state.

Although the 1990 German-Polish treaty confirming their border appears permanent, nothing is final in international law. For example, Article Seven of the Moscow Treaty states: "The Four Powers terminate their rights and responsibilities relating to Berlin and to Germany as a whole Accordingly, the corresponding, related quadripartite agreements, decisions and practices are *terminated* and all related Four-Power institutions are also dissolved."²⁵⁶ If countries could make a treaty provision immune to all future international agreements, Article Seven, ratified by the United States, Soviet Union,

250. HERBERT MARZIAN, *POLITISCHER REALISMUS* 82 (1969).

251. DEUTSCHLAND UND POLEN, *supra* note 155, at 211.

252. *See supra* notes 61-71, 72-86 and accompanying text.

253. *See supra* notes 162-64 and accompanying text.

254. *See supra* notes 121-22 and accompanying text.

255. *See supra* note 170 and accompanying text.

256. Leich, *supra* note 245, at 163 (emphasis added).

France, United Kingdom, German Democratic Republic and Federal Republic of Germany could not stand. Countries remain free to change treaty provisions, and the Moscow Treaty is no exception.

Those opposed to the reunification of Germany, once considered it an impossibility. As the Polish writer, Ludwik Gelberg, wrote in 1982:

The allusion of . . . West German circles to the possibility that revision of the boundaries with their neighbors will become the order of the day if the two German states are unified must naturally keep a policy of territorial revisionism alive in the [Federal Republic of Germany]. Such attitudes can make life difficult — if not totally destroy — the already very slight, unrealistic prospects for the unification of Germany.²⁵⁷

The borders that the Allies drew in World War II aimed to create a buffer between the Soviet Union and the West, and to weaken Germany. In the current, increasingly democratic world, these policies no longer exist, and those outdated borders should no longer hold legal status. The world has repudiated all of Stalin's legacy. The Oder-Neisse Line, however, continues as a testimony to the territorial ambitions and international manipulations of this dictator.

To avoid future aggression in Europe, all nations must be treated fairly according to accepted principles of international law. The international community must repudiate forcible annexations and embrace the right of self-determination. The world must correct the grave wrongs committed under the ideas of Clemenceau and Morgenthau, so that a truly lasting peace will ensue. The nations of the world must redraw their boundaries along legal, historical and social lines. Future governments cannot accept illegal international borders merely because they happen to exist. There can be no peace without justice.

*David E. Lehman**

257. Gelberg, *supra* note 220, at 129.

* This Comment is dedicated to my family and the Rt. Rev. Dr. Samuel P. Scheibler—Danke schön für Ihre Ermutigung und Hilfe. "Mit Gott, Für König und Vaterland."

