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A EUROPEAN PEACE ORDER AND THE GERMAN QUESTION: LEGAL AND POLITICAL ASPECTS

*Jost Delbrueck**

I. INTRODUCTION: THE PROBLEM OF A EUROPEAN PEACE ORDER IN HISTORICAL PERSPECTIVE

The post-World War II political setting in Europe was marked by the stable posture of two tightly structured opposing bloc-systems. In military terms, the Warsaw Pact and the North Atlantic Treaty Organization, and in the economic sphere, the Eastern European Council for Mutual Economic Cooperation and the Western European Economic Communities, represented the stark distinctions of the Cold War. This stable posture has definitely come to an end. Due to the rapid decline of the Communist regimes in Eastern Europe, there is a growing concern in various political quarters about an emerging political instability in Eastern and Central Europe brought about by the Eastern European States' reassertion of their political independence. The primary source of concern over a possible instability in Central Europe — and elsewhere — is, however, the issue of an imminent (re-)unification of Germany. This concern has a special sense of urgency about it because the re-emergence of a unified Germany, now taken for granted, might come about so rapidly as to not allow for a careful restructuring of the European state system. Such restructuring is necessary in order to avoid the risks of general political instability, and the risk of a renewed threat to the security of the European nations in particular, on the part of a unified Germany. As the emphasis on a *renewed* German threat already indicates, the problem of a European Peace Order which safeguards the security of all European states and accommodates German interests in gaining or simultaneously re-establishing a unified national state, is not a new one. In order to get a clear and sober assessment of the needs which a lasting European Peace Order must meet in the light of historical experience, including a solution to the notorious "German Question," a short review of the

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problem of a European Peace Order may be helpful as a prelude to the following discussion of the possible course of events, and the adequate strategies to influence that course.

1. *The European State System as a Peace Order after the Breakdown of the Holy Roman Empire*

In 1815, the Congress of Vienna was faced with the restructuring of the European State System. The Holy Roman Empire had disintegrated following Napoleon's failed attempts to build a European Order under French hegemony at the turn of the 19th Century. The result was a balance of power system which came to be known as the Concert of Europe which was, in a sense, the non-institutionalized forerunner of the League of Nations system.¹ The Concert of Europe system basically rested on the guarantees and responsibilities of the then existing Great Powers (France, Britain, Russia, Austria and Prussia), and successfully secured a stable order in Central Europe for over half a century. It did not, however, provide for a unified Germany as part of the system, despite strong national ambitions on the part of the rising German bourgeois class. The German Confederation (*der Deutsche Bund*) created by the Vienna Congress fell far short of creating a united German nation-state. Revolutionary attempts by the liberal bourgeoisie and more radical groups in 1848-49 to set up a united Germany under a constitutional monarchy which, once established, would have had to be a part of the Vienna Congress system, did not succeed either. Although an impressive Constitution was drawn up by an elected National Assembly (the so-called *Frankfurter Paulskirchen Verfassung*) the system could never be enforced after the political and military breakdown of the revolution. The eventual unification of Germany, excluding Austria, by Bismarck in 1870-71 came too late to accommodate the diverse interests of the European states within the framework of the Concert of Europe, and the newly created "German Reich" — formed after Bismarck stepped down — proved to be ill adapted to the ailing Concert system.

Later developments are well known: Europe plunged into the abyss of the First World War — with Germany playing a major role — which proved so fatal to the European Order and the political status of the European powers.

1. See Delbrueck, I, in G. DAHM, J. DELBRUECK, R. WOLFRUM, 1 VOELKERRECHT 13 (2d ed. 1989) (citing I. CLAUDE, SWORDS INTO PLOWSHARES: THE PROBLEM AND PROGRESS OF INTERNATIONAL ORGANIZATION (1956)).

2. *The Inter-War Period*

The question of a European Peace Order was again the subject of an international forum comparable to the Vienna Congress during the Versailles Peace Conference of 1919. This conference, however, never intended to create a new order for Europe which would include Germany as an integral part of a respective political system. Rather, the Versailles Conference took two different directions. First, inspired by the ideas of the peace movement emerging at the end of the 19th Century and leading to, among others, the Hague Peace Conferences of 1899 and 1907, the diplomats at Versailles established the League of Nations. The League was designed as a universal institution for the maintenance of international peace. This step represented the first attempt by the international community of states to internationalize responsibility for the maintenance of peace among states under the auspices of an international organization.² Second, the Versailles Conference provided for a separate legal regime over Germany — the actual peace treaty arrangements.

The defects of these two different decisions (*i.e.*, setting up the League system and, separately, the peace settlement for Germany), formally forged together in one treaty instrument,³ were manifold and proved to be disastrous in the end. Although, in theory, the League at that time probably best resembled the Confederation of the Republican States envisaged by Immanuel Kant in his tract *Perpetual Peace*,⁴ in practice, only a small number of its members proved to be “Republican States” in the Kantian sense. Furthermore, the League was neither universal in membership nor in political perception. In fact, it was, for the most part, Eurocentric. Yet, the League excluded from its ranks and agenda the geographical center of Europe — Germany — which was not to become a member of the League during the first years of its existence.⁵ A temporary trend toward redressing some of

2. For a more detailed analysis of these developments see *id.* at 13; see also Delbrueck, *Peace Through Emerging International Law*, in *THE QUEST FOR PEACE: TRANSCENDING COLLECTIVE VIOLENCE AND WAR AMONG SOCIETIES, CULTURES AND STATES* 127 (R. Vaeyrynen ed. 1987).

3. See Treaty of Peace with Germany (Versailles Peace Treaty), 66th Cong., 1st Sess., SEN. DOC. NO. 85 (1919). For the official German source, see 1919 REICHSGESETZBLATT (OFFICIAL GAZETTE OF THE GERMAN REICH) 688 (texts in the authentic English and French languages as well as in the official German translation).

4. See I. KANT, *PERPETUAL PEACE* 59 (L.W. Beck ed. 1959).

5. The lack of universality was due, first, to the fact that the United States — though one of the major initiators of the League — did not become a member because the U.S. Senate refused to agree to the ratification of the Versailles Peace Treaty, and secondly, the newly established Soviet Union — the first Socialist state to come about — was not yet recognized internationally. It was, therefore, not admitted to League membership. Thus, three large powers were not part of the League system at the outset.

these defects, evidenced by admitting Germany (1926) and the Soviet Union (1934), as well as tying the United States to the League System through the Pact for the General Renunciation of War (Briand/Kellogg Pact) of 1928,⁶ did not persist. In the mid-1930s, the League rapidly declined in political relevance and did not even function as an effective control mechanism over an ever more menacing former enemy state — Hitler's National-Socialist Germany.⁷

The institutional approach taken by the Versailles Conference to solve the problem of how to safeguard international peace under the responsibility of the international community of states was a sound one. Yet, the political realization failed. No effective European Peace Order was established in the Inter-War Period, let alone a universal one. The German Question essentially remained unsettled since the Versailles Peace Treaty regime, separated as it was from the League System, was no substitute for a European Peace Order which should have determined the status of a unified German national state as an integral part of the overall system. Germany, content to proceed on its own, started World War II, which ended with an unconditional surrender to the victorious Allied Powers and with the country's division into two separate states in the wake of the emerging Cold War.

II. POST WORLD WAR II ATTEMPTS AT A EUROPEAN PEACE ORDER

1. *Early post war moves toward a new European Peace Order*

In the months and years immediately following the end of World War II, grass-root European movements aimed at the creation of a federal union of European states gained widespread support. The underlying idea was to overcome the traditional concept of the nation-state as the prevailing form of political organization in the international system, which was held to be responsible for the outbreak of wars. Several organizations furthering the cause of this movement were created. In 1946, the Union of European Federalists was founded, followed by the International Committee of the European Movement in 1947, later to become the private organization of the "European Movement." These organizations represent only a few of

6. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S. 57. For a short survey on the background and critical analysis of the Kellogg-Briand Pact, also known as the Pact of Paris, see Wallace, *Kellogg-Briand Pact*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 236 (Bernhardt ed. 1982).

7. For a concise historical overview of the League's development and performance, see Parry, *League of Nations*, in 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 192 (Bernhardt ed. 1983).

the activities taking place on the non-governmental level at that time.⁸ The rapidly intensifying Cold War and the ensuing ideological and political division of Europe, followed by the building of tightly structured military and political blocs in Eastern and Western Europe, did not let these aspirations for an all-European institutionalized order come to pass. The political situation simply would not allow for the establishment of a new European Peace Order including East and West, North and South.

Nevertheless, some far-sighted statesmen like Winston Churchill, Robert Schuman, Jean Monnet, and Alcide De Gasperi (a group later joined by Konrad Adenauer), despite the odds against a general European Peace Order, took initiatives towards reviving the institutional approach to the task of maintaining peace, particularly in Europe. The outcome of these initiatives, which were strongly supported by the European Movement, was the creation of the Council of Europe in 1949, the creation of the European Coal and Steel Community in 1951, the establishment of the European Economic Community and Euratom in 1957, and the expansion of the Western European Union as part of the Western military alliance system to include the Federal Republic of Germany.

While the economic institutions and the Western European Union restricted their membership to Western European democratic countries, the Council of Europe, although similarly committed to democratic government, was from the very beginning designed to serve as an institutional nucleus of a broader European Order.⁹ However, the intensifying Cold War did not permit realization of that goal. Military bloc-thinking dominated Europe well into the 1960s and beyond.

Yet, in the 1960s, the notion of *détente* was introduced into European politics for the first time. The aim was to overcome the political and ideological division of Europe on the basis of the existing power blocs guaranteeing the military stability of the region. Their existence was considered to be an essential prerequisite for reaching out beyond bloc borders. In accordance with this understanding of *détente*, a great number of rather comprehensive schemes, plans, and models —

8. See A. ZUERCHER, *THE STRUGGLE TO UNITE EUROPE 1940-1958*, at 1757 (1958) (an historical account of the contemporary European Movement from its origin in the Pan-European Union to the drafting of the treaties for Euratom and the European Common Market). For a short summary, see Puttkamer, *Europäische Einigung*, in 1 *WOERTERBUCH DES VOELKERRECHTS* 451 (Schlochauer ed. 1960).

9. For this reason, the Council of Europe was continuously introduced into various model plans for a European Security System as one of the constituent structural elements of such a system. See Delbrueck, *In Search of a Lasting System of European Security — Chances and Hazards of Some Models of European Security System*, in 1972 *EUR. Y.B.* (Council of Eur.) 70, 77.

both official and unofficial — for a new European Security System were aired during this decade.¹⁰

While not always at the center of concerns, the German Question was one of the major issues addressed by the various plans and models for European security. The issue was approached by these plans from two different basic premises. First, the continued division of Germany was assumed. The underlying reason for this posture was either a) resignation that, for the foreseeable future, no fundamental restructuring of the political landscape of Europe would take place which could bring about German unity, or b) distinct security considerations that Europe was most secure only if Germany remained divided, regardless of any future restructuring of the existing bloc-configuration.

Alternatively, models and plans on the establishment of a lasting European Security system were developed which considered eventual (re-) unification of Germany — if not necessarily desirable — to be inevitable, and, therefore, a problem to be adequately solved within the context of an overall European Security system. Most of these plans envisaged the establishment of a European Security system in terms of a prolonged process of merging Eastern and Western Europe. This merger was to be fostered by political and legal (treaty) steps and would eventually bring about German unity incidentally rather than in one dramatic step.

Under the impact of the rather intensive public debate over the various détente proposals, there was a growing consensus among European governments and political parties that a new European Peace Order or Security System had to be approached from an insitutional angle. A satisfactory settlement of the German Question had to be an integral part of such an order. In the Federal Republic of Germany, the debate also led to the further consensus that the establishment of a European security arrangement would have to have priority over German unity since German division was the result of, rather than the cause of, the division of Europe. As obvious as this might seem, it took a considerable length of time to reach this consensus. Since the view that German unity should have priority over any all-European settlement had become deeply entrenched in West German thinking during the years immediately after the founding of the Federal Republic, reaching consensus on this reverse order of priorities subjectively amounted to a major policy shift, especially for the Christian Democratic Party.

There was no consensus, however, as to the future status of Ger-

10. See E. HINTERHOFF, *DISENGAGEMENT* (1959); see also Delbrueck, *supra* note 9.

many as a whole, or the two German states within the framework of an overall European setting. Although the continuing Four Power Responsibility with regard to Germany as a whole was recognized in East and West (in the East with varying intensity over the years, however), there was a sharp division of opinion between East and West with regard to German (re-)unification. The three western Great Powers (United States, Great Britain, and France) were committed to the aim of German reunification by the Treaty of Paris of 1952 (amended in 1954).¹¹ The Soviet Union, on the other hand, insisted on the permanent division of Germany as a result of the war.

Although détente policies led to significant improvements in the inter-bloc communications of European states, including the two German states, attempts at creating a new European Peace Order were not undertaken until the early 1970s. The Federal Republic of Germany had initiated a new Eastern policy ("*Neue Ostpolitik*") under the chancellorship of Willy Brandt and with the support of the junior partner in the then-existing Social Democratic/Liberal government coalition, the Free Democratic Party.¹² The path to holding a broadly attended Conference on Security and Cooperation in Europe (CSCE) was cleared by the conclusion of the bilateral treaties between the Federal Republic of Germany and the Soviet Union, Poland, Czechoslovakia, and the German Democratic Republic, as well as by the conclusion of the Quadripartite Agreement on Berlin.¹³ In the fall of 1972, preparatory negotiations on the holding of CSCE were started and led to the convening of the Helsinki Conference in July, 1973. After lengthy negotiations, the Final Act of the Helsinki Conference on Security and Cooperation in Europe was adopted on August 1, 1975.¹⁴ In the present context, two aspects of the Helsinki Accord are important. First,

11. Convention on Relations Between the Three Powers and the Federal Republic of Germany, 26 May 1952, as amended by Schedule 1 to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, 23 October 1954), 331 U.N.T.S. 327; see also Schedule 1, *id.* art. 7, paras. 1, 2, at 253.

12. The Free Democratic Party was headed at this time by Walter Scheel, the Foreign Minister in the Brandt Cabinet. Scheel was later to become the fourth President of the Federal Republic of Germany (1974-79).

13. Treaty Between the Federal Republic of Germany and the Union of Soviet Socialist Republics of 12 August 1970, 2 BUNDESGESETZBLATT 354 (1972); Agreement Concerning the basis for Normalization of Mutual Relations, 7 December 1970, Poland — Federal Republic of Germany, 830 U.N.T.S. 332; Treaty on Mutual Relations (with exchange of letters and related letter), 11 December 1973, Federal Republic of Germany — Czechoslovakia, 951 U.N.T.S. 355; Quadripartite Agreement, 3 September 1971, Final Quadripartite Protocol, 3 June 1972, 880 U.N.T.S. 115.

14. Conference on Security and Co-operation in Europe: Final Act, 14 I.L.M. 1292 (1975). For a concise overview and analysis of the Final Act see Coccia, *Helsinki Conference and Final Act on Security and Cooperation in Europe*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 216 (Bernhardt ed. 1987).

the agreement led to a continuing East-West dialogue and CSCE has become an established negotiation forum including the Eastern and Western bloc-members as well as the so-called non-aligned European countries. Second, the Final Act was perceived by the West as an instrument of change, of the gradual transformation of the East-West division of Europe. It was perceived by the East as the consolidation of the political and territorial status quo as it had evolved following the Second World War. As recent history has shown, the Western evaluation of the Final Act proved to be more realistic. Although the dramatic changes happening in Eastern Europe cannot be reduced to one causal factor, the widespread distribution of the Helsinki Agreement, with its statements on Human Rights and the solemn intentions of all states participating in the Helsinki process to further the cause of a European Peace Order, certainly added to a growing sense of an emerging opportunity to overcome the division of Europe. Increased inter-bloc interactions marked the post-Helsinki developments, notwithstanding some serious political set-backs in the process which, starting with the Soviet intervention in Afghanistan, put a cold chill on détente.

These were the political and legal conditions which had shaped the positions of the European States and the superpowers when the Berlin Wall was opened on November 9, 1989. This single event is undoubtedly the most dramatic event of what has come to be called the "Gorbachev Era" which, along with the Helsinki process, must be considered the most significant factors in the changing political system of Europe.

III. PROSPECTS FOR A NEW EUROPEAN PEACE ORDER AND THE GERMAN QUESTION

1. *Elements and Strategies for the Building of an Institutionalized European Peace Order*

The Gorbachev Era is marked by the initiating and fomenting of an ever increasing process of political, ideological, and social change. On the positive side, outweighing any negative aspects by far, this change has brought about an unprecedented surge of democratization to the countries of Eastern Europe, as well as an immediate further relaxation of East-West tensions and a strong sense of a new (or old) European identity. However, the breathtaking speed of change has also introduced into the European scene an element of potential and actual instability, and a resurgence of national animosities which have already made some people rather wary of the changes. Ironically,

even a sentimental nostalgia for the "clear cut stable order" of the Cold War is being voiced. While such sentiment may not be meant seriously, there is definitely a sense of urgency with regard to establishing a new and stable order in Europe. This is particularly true in view of the imminent (re-)unification of Germany. Concerning the various implications of these recent changes in the European political landscape, what are the immediate and long term demands which the desired new European Peace Order must meet?

A. The military/security needs

Despite an obvious, dramatic decrease of the likelihood of a military confrontation in Central Europe — a considerable change from the period five years ago when at least some political quarters considered war to be almost inevitable¹⁵ — Central Europe is still an area of strong concentrations of military potential. Although the existence of weapons potentials in a given area is not, in itself, necessarily an element of tension, these weapons stockpiles (nuclear and conventional) are potentially dangerous in an increasingly volatile political environment such as the one evolving in Central and Eastern Europe. Thus, there is a strong need for stabilizing the present military-security posture in this area. Considerable arms reductions are required in both the nuclear and conventional fields. Carefully designed arms control measures, expressly including confidence building measures, are also needed. Furthermore, institutional structures are necessary to safeguard against any "military adventures" and possibly to provide for rational conflict resolution mechanisms. One must also consider, however, the problem of how to avoid a power vacuum in the European setting. Such a vacuum might be considered an advantageous posture locally, by implying a regime of far-reaching demilitarization, but could also prove to be an element of instability in the long run. The minimum required to avoid such a power vacuum in central Europe, in the immediate future, would be the continued involvement of the Great Powers in the forthcoming new order.

B. The political needs

Probably the most urgent political and legal step needed for the smooth transformation of the crumbling post-war setting is the reaffirmation of the Helsinki Final Act with regard to the inviolability or

15. During the "cruise missile deployment crisis" in 1983-84, the German peace movement took a very gloomy outlook on the future of East-West relations and was genuinely concerned about an outbreak of a major war between the Superpowers which would be fought mainly on German soil.

sanctity of international borders in Europe. Specifically, this could be accomplished by a formal recognition of the territorial integrity of the states participating in the Helsinki process under the changed conditions of full political independence of the Eastern European countries vis-à-vis the Soviet Union, and particularly in view of the forthcoming unified Germany. Although one can argue that the still existing two German states could not legally make their respective recognition of the present Western border of Poland binding on Germany as a whole, it is a fact that both German states have renounced any territorial claims vis-à-vis Poland.¹⁶ Furthermore, the Four Allied Powers, while deferring a final determination of the western Polish border to the conclusion of a peace treaty with Germany in the Potsdam Agreement,¹⁷ have never indicated that they would be willing to engage in any renegotiation of the border issue. All of the Four Powers have acquiesced in the *formal* inclusion of the formerly German eastern territories into Poland, which was not to occur before the conclusion of a peace treaty with Germany. Moreover, these Powers have continuously made it clear that they recognize the existing Polish western border as final. Thus, a joint statement by the governments of the two German states to the effect that they are prepared to accept a firm border guarantee to be included in the legal document finalizing German unification would not only constitute a major contribution to the desired end of establishing a stable European Peace Order, but it would also expedite the process of German unification.

As already mentioned, another necessary element of the new European Peace Order is the provision of conflict resolution mechanisms. Although the function of peaceful conflict resolution has been fulfilled quite successfully by some of the existing alliance systems, particularly by NATO and the Western European Union, and although it is quite conceivable that a politically revamped Warsaw Pact could provide for similar services, the need for some institutionalized conflict resolution mechanism overarching the existing bloc-structures remains strong. Such a system would respond more adequately to the effectiveness of the evolving new all-European Peace Order.

C. The economic needs

The establishment of a lasting peace order in Europe has an eco-

16. Agreement Concerning the Basis for Normalization of Mutual Relations, *supra* note 12, art. 1.

17. For a complete documentary coverage of the Potsdam Conference of 1945, see FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1491-92 (1960). For a concise legal analysis, see Frowein, *Potsdam Agreements on Germany (1945)*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 141 (Bernhardt ed. 1982).

conomic dimension as well. First, there are anxieties and concerns on the part of some of Germany's neighbors concerning the allegedly overwhelming economic power of a unified Germany. These concerns echo the security concerns which are being voiced with regard to the potential military threat of a unified Germany excluded from a larger security system. However, the economic concerns, understandable as they are, contain some fatal sense of economic rivalry which is more reminiscent of the traditional pre-war nation-state attitudes than a constructive perception of the need for close economic cooperation within the framework of the new European Peace Order. The real economic dimension of this new order is to be found in the profound problems faced by the European community of states in terms of the rather dramatically asymmetrical levels of economic development in the various parts of Europe, particularly between Western and Northern Europe, on the one hand, and Eastern and South Eastern Europe, on the other. These asymmetries could prove to be much more disruptive for European peace than the feared economic dominance of a unified Germany. Therefore, there is a strong need for close — preferably institutionalized — economic cooperation to reduce the existing asymmetries, thereby avoiding the real dangers of economic and social destabilization which are very likely to result in social, and ultimately political, unrest.

The ensuing political and security problems are all too well known not to be taken seriously. A new European Peace Order, therefore, must provide a framework within which existing economic development potentials could be brought to maximum use for the benefit of a more just economic situation throughout Europe. The sometimes overestimated but certainly strong economic potential of Germany could play a major role in achieving these desired ends. Expectations, especially in Eastern Europe, are running high in this respect. The objective need to bring the German economic potential to bear, together with that of the other economically strong European and non-European states, on the economic recovery of all of Europe is, however, at odds with the subjectively held distrust of this German potential. Yet, subjective notions are politically real and, therefore, the new European Peace Order must provide for solutions which could put the existing anxieties to rest without fostering the rather outdated notions of national (economic) rivalry.

D. The cultural needs

Finally, a new European Peace Order has to meet some clearly identifiable cultural needs. There is a need for increased cooperation

in cultural affairs for two reasons. After nearly half a century of political and ideological division, the still existing sense of a cultural identity of Europe must be revitalized and strengthened as an important underpinning of the new Peace Order. More specifically, this increased cultural cooperation has to serve the development of a broadly conceived common democratic socialization, a concept in which large parts of Europe have been lagging behind countries with a longstanding democratic background. The lack of a genuine democratic socialization was not the least causal factor of the failure of democracy in so many European countries in the late 19th and the first half of the 20th Century, especially in the Inter-War period.

Strategies for meeting the needs discussed above should be based on the institutional approach which has, thus far, proved so successful in reshaping the political landscape of Western Europe. There are a number of existing international and supranational institutions which could be used to accomplish this goal. In the military/security field, Nato/Western European Union and the Warsaw Pact, when adapted to the new tasks by a stronger emphasis on their political roles, could be used either as separate institutions or as substructures of an overarching conflict resolution and arms control institution.¹⁸ There are still other options, however, for the realization of an institutional approach to the implementation of strategies safeguarding peace in Europe. One could envision that the Council of Europe could be empowered to deal with security matters in Europe. Such an expansion of the Council's functions could actually lead to the creation of an all-European regional organization under article 52 of the U.N. Charter in the form of a collective security system modeled after, for instance, the Organization of American States. Another way to deal with the institutionalization of the necessary security arrangements for Europe could be to establish the CSCE as a permanent international organization, again functioning as a collective security system like the Council of Europe in the preceding model.

Other existing organizations which could be used in the process of realizing a Peace Order for Europe include the EC, possibly the CMEC, the Nordic Council, and EFTA, all of which currently serve or could serve as structural elements in a coordinated effort for the close cooperation of European states towards the achievement of a stable European Peace Order.

18. Proposals for the creation of such an overarching organization have been made in the context of CSCE such as the Swiss proposal for the establishment of a European arbitration and mediation agency. For a discussion of a model of a European Security System with an overarching Security Office, see Delbrueck, *supra* note 9, at 93-94.

2. *The specific aspects of the German Question in the general context of a European Peace Order*

The final question to be addressed here is how a German peace settlement ties in with the institutional approach advocated in this paper. That German (re-)unification will take place is now a foregone conclusion, and it is clearly in conformity with the wishes of a vast majority of the German people.¹⁹ That this highly sensitive political step must be harmonized into the larger context of the European Peace Order is similarly accepted.

The imminent problem in achieving this goal is posed, however, by the rapidity of political change in Europe as well as by the fact that *de facto* German unification is actually taking place while the process of building the overall European Order is lagging behind. This development runs counter to the previously existing consensus about the priority of the European settlement over German unification. The Ottawa Agreement of February 13, 1990 between the Foreign Ministers of the Four Allied Powers and the two German States²⁰ on the procedures to be followed in the course of German unification has brought some breathing space for the careful settlement of the problems ahead. Yet, the institutional approach to the establishment of the envisaged overall European Order and the solution of the German Question could also contribute considerably to moderating, or even overcoming, the risks of an all too rapid process of change.

The two German states are actually members of most of the institutions mentioned as possible structures of the new European Order. No matter which mode of unification will be chosen, there will be no major legal obstacles to extending the existing memberships to a unified Germany. The legal procedures to be followed depend on whether the unified German state would be considered a newly created

19. This conclusion is clearly contradictory to that of A.M. Burley in her recent article; see Burley, *The Once and Future German Question*, in 1989-90 FOREIGN AFF. 65. Granted that it is easier to pronounce on the preferences of Germans after empirical data are available, this author ventures to assert that the evaluations of German political desires and ambitions made by Burley were much more informed by her own political preferences along the lines of *ceterum censeo Germaniam manere divisam* than by "informed guesses" on the actual state of mind of the Germans. Although this author does share a number of Burley's concerns, he has always held the opinion that it was not for the governments in the two German States to put the German Question to rest *normatively*, i.e., by a stroke of the pen in terms of formal recognition of the G.D.R. or renouncing German unification, without clear evidence of the will of the German people in both states. Any other course might prove to be a long term element of discontent and frustration. This author also strongly disagrees with Burley's contention that striving for an all-European setting which includes a unified Germany is but another disguise of German power aspirations. This contention is particularly offensive with regard to Foreign Minister Genscher who clearly stands for a policy aimed at finding a well-adapted political status for a unified Germany within the European Order in contrast to the abortive attempts at German dominance.

20. N.Y. Times, Feb. 14, 1990, at A1, col. 6.

state or whether the continuity of Germany over the period of its division into two separate states would be recognized. In the former case, the law of state succession would come into play. In the latter case (which would be more in line with the state practice of the Federal Republic of Germany with regard to treaties), no question of state succession would arise. The differences in the two approaches, for all practical purposes, would be minimal, since *ipso jure* membership of a unified Germany in the respective international organizations would still require the consent of the other members because such membership would clearly affect their status. In this respect, membership in international organizations differs from being a party to a non-institutional treaty.²¹

In any case, the advantage of continued membership of Germany in the Western European Union or the overall Western Alliance network would amount to its being closely integrated into the political decision-making processes and arms control mechanisms provided by the respective treaties (including the renunciation of the acquisition or possession of nuclear and other weapons of mass destruction). In addition, such inclusion would hinder Germany from "going it alone" — the most important aspect to many European neighbors of Germany, as well as the Four Allied Powers. Economic integration of Germany would probably put to rest most of the fears regarding an emerging German economic superpower.²² With regard to a general political socialization of European states, nations, and people, cooperation in the various institutions could help in overcoming traditional antipathies, stereotypes, and rivalries.

The most likely forum to adopt the finalizing documents on German unification and related issues is the CSCE. Adoption by the CSCE would be advantageous because it would not be the traditional type of peace conference bringing the former enemies back to the table after more than forty years since the war ended. Using this approach, the settlement of the German Question would virtually be achieved within the new framework of the emerging European Peace Order, thereby avoiding the unfortunate two-track approach of the Versailles Conference. Critics may view this as yet another expression of the alleged German feeling of "being victimized," or as another piece of evidence that Germans still try to evade the full thrust of their respon-

21. Delbrueck, *supra* note 1, at 168.

22. The continued membership of Germany in the Western Alliance system was called for by the Polish Foreign Minister shortly after the Ottawa Agreement on German reunification; see *N.Y. Times*, Feb. 15, 1990, at A1, col. 5. Similar views were expressed by other East European States vis-à-vis Foreign Minister Genscher. This rationale of continued membership of Germany in the Western alliance is also shared by the Western Allied Powers.

sibility for the moral burdens of the past.²³ Such a perception would be a clear misreading of the view taken here. In providing Germany with a chance to accept the necessary fetters of its political and military discretion within a framework which does not single it out, avoiding the "special status" which the country received after World War I, Germany could not only take on a constructive role in the Peace Order of Europe, but it would have no excuses not to face up to its history in full. No sense of victimization could develop in Germany again, but acceptance of all aspects of the past as part of building a national identity based on moral responsibility, a full commitment to human rights, and peaceful cooperation within the community of democratic states could be fostered.

The foregoing argument in favor of the continued membership of a unified Germany within the Western Alliance system implies a clear rejection of a neutral status for Germany. Although the reasons for this rejection are already implicit in the preceding discussion, reports of a growing support for a neutral Germany by a large segment of the Eastern and Western German electorate after unification make it necessary to add a few comments on this issue. Neutrality, even if confined to the military status of a unified Germany, would clearly affect the country's status and role within the European Community. The discussions of a possible Austrian membership clearly illustrates that the EC does not cherish the notion of neutral members.²⁴ The issue would be even more controversial in the case of a neutral Germany, since the newly established status of neutrality would constitute a reduction of the country's political cooperation within the EC. Thus, a united Germany would not only be accorded a special status in the center of Europe in military terms, but would also become less tightly bound to the EC. The much feared spectre of a Germany "floating around" would come closer to reality than the advocates of neutrality might envision. Similarly, the fears and anxieties about a unified Germany might prove to be self-fulfilling prophecies. One can only hope that enlightened self-interest on the part of the protagonists of German neutrality will prevail in the end, and that the forthcoming negotiations between the Four Allied Powers and the two German governments will produce solutions soon enough to convince public opinion that neutrality is not a viable long term solution, either to the German Question or to the imminent task of restructuring the political landscape of Europe towards a lasting overall European Peace Order.

23. For an eloquent argument to this effect, see Burley, *supra* note 19.

24. Hoffmann, *The European Community and 1992*, 68 FOREIGN AFF. 28 (1989).