LEGAL ADVICE FOR FOREIGN POLICY IN GERMANY

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I. INTRODUCTION

Legal advice on foreign policy issues played a special role in Germany after 1949, when the Federal Republic of Germany was established. At that time the whole of Germany was under foreign occupation. The three western zones of occupation became the territory of the Federal Republic of Germany which, however, lacked the full authority of a sovereign state. The Federal Republic of Germany could exercise jurisdiction only insofar as the three Allied Powers permitted. The Soviet zone of occupation soon became the territory of the German Democratic Republic. The German Democratic Republic, which never had any democratic legitimacy, existed for roughly forty years. It was one of the states of the Eastern Bloc. In 1989, when the system of the Eastern Bloc disintegrated and the wall in Berlin opened on November 9, 1989, the final period of the German Democratic Republic began. On October 3, 1990, the German Democratic Republic acceded to the Federal Republic of Germany.[1]

During the period from 1949 to 1955, the foreign policy of the newly established Federal Republic of Germany was under tight control by the Allied Powers. On May 5, 1955, the Treaty on Germany entered into force between the Federal Republic of Germany and the Allied Powers. Article I of this treaty provided as follows:

> 1. On the entry into force of the present Convention the United States of America, the United Kingdom of Great Britain and Northern Ireland and the French Republic . . . . will terminate the Occupation regime in the Federal Republic, revoke the Occupation Statute and abolish the Allied High Commission and the Offices of the Land Commissioners in the Federal Republic.

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[1] *See* Jochen A. Frowein, *The Reunification of Germany*, 86 AM. J. INT'L L. 152, 152–63 (1992).

> 2. The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs.[2]

From then on, the Federal Republic could act almost totally as a sovereign state. From the legal point of view, however, it was clear that the Allied Powers had reserved to themselves in Article 2 the rights and the responsibilities relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement.[3] In that respect, a complicated legal structure existed, which greatly influenced German foreign policy. It was necessary to clarify the position and the legal status of the Allied Powers' rights and responsibilities in many details. It was also necessary to respect the rights of the Soviet Union as the fourth state having assumed responsibility for Germany by the Declaration of June 5, 1945.[4]

Until reunification on October 3, 1990, and the lifting of the specific rights and responsibilities of the Allied Powers, the German situation was unique in the world. Therefore, international

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[2] Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Schedule I, art. 1, Oct. 23, 1954, 6 U.S.T. 4117, 4121.

[3] Article 2 states:

> In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement. The rights and responsibilities retained by the Three Powers relating to the stationing of armed forces in Germany and the protection of their security are dealt with in Articles 4 and 5 of the present Convention.

Id. art. 2.

[4] This Declaration read in part:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not effect the annexation of Germany.

Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, June 5, 1945, 60 Stat. 1649, 1650, 68 U.N.T.S. 189, 190.

legal considerations probably played a more important role in the preparation of German decisions than those of most other countries.

II. The Organized System of International Law Advice

A. The Legal Adviser in the Foreign Ministry

In the German Foreign Office, the legal department is large. Its members, however, are normal diplomats. There is no specialization required for lawyers in the Foreign Ministry. All those in the Legal Department in the Foreign Office are career diplomats and will stay in the Legal Department for a limited period of time. They are trained in law during university studies but do not have experience practicing law other than the short Referendar-period. Frequently, the diplomats will stay in the Legal Department only for three or four years. This means that, compared with other systems, the British one in particular, the German members of the legal department are at a clear disadvantage. They will not have followed developments continuously and thus will not be able to gain the sort of long experience necessary to the field.

For our purposes, it should be noted that the first head of the Legal Department in the newly established Foreign Office in 1951 was Hermann Mosler, already at that time a well-known international lawyer as a professor at Frankfurt University. After his time in the Foreign Office, he became the director of the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg and later Judge at the International Court of Justice. He certainly influenced the first phase of international legal advice given in the Foreign Office in a very specific way. He personally took part in the negotiations for the Coal and Steel Community Treaty, the first treaty of integration in the European system.

Today, the Department is headed by the Federal Government's Legal Adviser for international law matters. This position was created and added to Head of the Legal Department in the early 1970s. It did not really change the position of the Head of the Legal Department in the Foreign Office. The Head of the Legal Department, like other civil servants, is a routine diplomat

who occupies that post for a limited period of time. A recent example shows, for instance, that a Legal Adviser came from the Legal Department, stayed in the office for four years and then became the German Ambassador to the United Nations. His successor had been the Chef de Cabinet of the Foreign Minister and became Ambassador to the Vatican after completing four years as Head of the Legal Department. The successor came from the European Law Department in the Foreign Office and had earlier been seconded to the Federal Parliament for European matters.

It is clear that only by accident will legal advisers have particular qualifications and experience as international lawyers. This author has worked with the Foreign Office in international legal matters since 1970. In fact, he had an offer to become Legal Advisor in 1970. Over the course of 35 years, he has encountered only two Heads of the Legal Department with full international legal qualification. One later became Judge at the International Court of Justice. The other, a friend of this author since both studied at the Free University of Berlin in 1953, had qualified himself as an international lawyer before and while pursuing the career of a diplomat. He was a student of Tom Franck. After being Legal Adviser, he became ambassador to the United Nations, where he presided over the Security Council.

B. The Advisory Council for International Law Issues

In 1972, the Foreign Office established a specific advisory council for international law issues composed of five to seven professors of international law. This author was a member of this council from its establishment until the summer of 2004 when he turned seventy. The council meets three to four times a year for one full day. It discusses specific legal problems, from issues of general international law to matters of United Nations law and problems of German constitutional law in relation to international law.

It is frequently confirmed by members of the Legal Department of the Foreign Office that the procedure of advice established with the *Völkerrechtswissenschaftlicher Beirat* is of importance for the operative procedures. It is, however, rather rare that one can see a direct influence of deliberations in the Advisory Council on foreign policy matters. This author is able

to refer to one specific instance where a proposal had a direct influence on treaty negotiations. The matter concerned the Prague Treaty of 1972 which dealt with the very tricky issue of the Munich Agreement and its legal status.

C. The Role of Experts

The German Foreign Office asks for expert advice in various circumstances. On the one hand, experts may be asked to provide specific advice for cases brought before the Federal Constitutional Court or international tribunals against the Federal Republic or the Federal Government raising issues of international law. This author has been involved in many cases before the Federal Constitutional Court dealing with international law matters.

It is rather rare that expert advice is sought for bilateral treaty negotiations or other operative matters. This author was asked in 1970 to be an independent adviser to the foreign minister's delegation when the negotiations took place in Moscow and Warsaw for the so-called eastern treaties, forming part of the *Neue Ostpolitik* of the government of Chancellor Brandt and Foreign Minister Scheel. The author, who had worked on matters of non-recognised entities such as the German Democratic Republic, was asked to look into the problems of the status of the GDR on the one hand and the compatibility of the Eastern Treaties with the specific legal situation of Germany on the other.[5]

As far as multilateral treaty negotiations are concerned, the Federal Government has frequently called on experts from the academic community to take part in these negotiations and influence the outcome by their expertise. This was true for the negotiations on the Geneva Protocols to the Red Cross Conventions in which Professors Partsch, Bothe and Ipsen took part. For the UN Law of the Sea Convention negotiations, expert advice was given by Professors Jaenicke and Wolfrum. In several of the environmental negotiations, experts from the Max-Planck-Institute for Comparative Public Law and International Law, in particular Professor Wolfrum and his collaborators, took part.

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[5] *See* Jochen A. Frowein, *Legal Problems of German Ostpolitik*, 23 Int'l & Comp. L.Q. 105 (1974).

For the negotiations of the Rome Statute for the International Criminal Court, the Max-Planck-Institute for Comparative and International Criminal Law in Freiburg and the Max-Planck-Institute for Comparative Public Law and International Law in Heidelberg assigned experts to the German delegation who influenced the final text of the treaties. This was particularly true of the participation of Professor Albin Eser, the director of the Freiburg Max-Planck-Institute. He was responsible for important provisions of the general part in the Rome Statute. Dr. Andreas Zimmermann, now Professor Zimmermann, from the Heidelberg Max-Planck-Institute was influential concerning issues of jurisdiction.

III. Special Legal Issues Arising After 1970

A. Four-Power Rights and Responsibilities

When the newly elected government of Chancellor Brandt and Foreign Minister Scheel decided in 1970 to conclude treaties with the Soviet Union and Poland, the special legal situation of Germany played a key role. It was clear that both treaties would not be concluded without specifically addressing of the frontier issue. In the Non-Aggression-Treaty signed at Moscow on August 12, 1970, the Federal Republic and the Soviet Union agreed as follows in Article 3:[6]

> In accordance with the foregoing purposes and principles the Federal Republic of Germany and the Union of Soviet Socialist Republics share the realization that peace can only be maintained in Europe if nobody disturbs the present frontiers.
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> They undertake to respect without restriction the territorial integrity of all States in Europe within their present frontiers;
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> They declare that they have no territorial claims against anybody nor will assert such claims in the future; and
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> They regard today and shall in future regard the frontiers of all States in Europe as inviolable such as they are on the date of signature of the present Treaty, including the Oder-

[6] Non-Aggression Treaty, F.R.G.-USSR, art. 3, Aug. 12, 1979, 9 I.L.M. 1026.

> Neisse line which forms the western frontier of the People's Republic of Poland and the frontier between the Federal Republic of Germany and the German Democratic Republic.

It was clear that this formal treaty commitment raised difficult issues as far as the German legal position was concerned. Germany had always taken the view that the German borders were not yet formally fixed and had to await a peace settlement for final confirmation. In the Moscow Treaty, the Oder-Neisse border was formally qualified as "the western frontier of People's Republic of Poland." It was difficult to avoid the conclusion that Germany had, in fact, changed its position and no longer disputed that this line, established by the so-called Potsdam Protocol, had become a legally valid frontier. In the treaty between the Federal Republic and Poland signed on December 7, 1970, the issue of the so-called Oder-Neisse frontier was even more important. Article I of the treaty read:[7]

> The Federal Republic of Germany and the People's Republic of Poland state in mutual agreement that the existing boundary line the course of which is laid down in Chapter IX of the Decisions of the Potsdam Conference of 2 August 1945 as running . . . shall constitute the western State frontier of the People's Republic of Poland.

Again, the only possible conclusion was that that Germany recognised the legal validity of that frontier without binding itself concerning the legal development by which this line had become a frontier. Although Germany was prepared to take this step and to use the language which became part of the treaties, it was unwilling to give up the claim that the German issue had not been settled in the Potsdam Agreements. Therefore, the Federal Republic informed the Allied Powers about the conclusion of these treaties and added the following formula regarding the Warsaw Treaty:[8]

> In the course of the negotiations which took place between the Government of the Federal Republic of Germany and

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[7] Treaty Concerning Basis for Normalizing Relations, F.R.G.-Pol., art. I, Nov. 18, 1970, 10 I.L.M. 127.

[8] *Id.* at 128.

> the Government of the People's Republic of Poland concerning this Treaty, it was made clear by the Federal Government that the Treaty between the Federal Republic of Germany and the People's Republic of Poland does not and cannot affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the United States of America as reflected in the known treaties and agreements. The Federal Government further pointed out that it could only act on behalf of the Federal Republic of Germany.

The Allied Powers answered the German note with identical formulations and confirmed that they shared the position that the Treaty between the Federal Republic of Germany and the People's Republic of Poland does not and cannot affect the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, and the United States of America as reflected in the known treaties and agreements.[9]

During the negotiations with Poland, the Federal Government had formally asked the Allied Powers to confirm that their rights and responsibilities would still cover the territory east of the Oder-Neisse up to the German border of 1937, a request to which the Allied Powers acceded.

Through this procedure, the Federal Republic of Germany, by using a rather complicated legal situation, could on the one hand accept that the Oder-Neisse-Line had become the State frontier of Poland but confirm on the other hand that a final decision of the Allied Powers was still outstanding. This would have to be taken into account, according to the German position, when a peace settlement was reached. Although many Germans, including this author, doubted that a peace settlement would ever come about, the legal issue remained unresolved. It was clear that as soon as reunification with the GDR became possible the problem would have to be faced. Germany concluded a treaty confirming the Oder-Neisse frontier with Poland on November 14, 1990.

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[9] *Id.* at 129.

Similarly, the "frontier between the Federal Republic of Germany and German Democratic Republic" was mentioned as covered by the rule that frontiers are inviolable in Art. 3 of the Moscow Treaty.[10] This was a clear recognition that a frontier existed. Therefore, it was essential that the Soviet Union accept the letter on German unity. According to that letter, "this Treaty does not conflict with the political objective of the Federal Republic of Germany to work for a state of peace in Europe in which the German nation will recover its unity in free self-determination."[11] The same procedure was used when the Intra-German Treaty was concluded. The Federal Republic indirectly confirmed its aim of German reunification without putting into question the inviolability of the frontier between the two German states.[12] Indeed, it was of great importance that, after the period of the new Ost-Politik, the Federal Republic of Germany could always underline that it had not waived its intention to bring about, if possible, a peaceful reunification of Germany as soon as the GDR-Government and its people were willing to unite with the Federal Republic of Germany.

B. The Issues Concerning the Munich Agreement

Since 1945, Czechoslovakia had argued that the Munich Agreement of September 29, 1938 should be considered null and void because of the threat of force exercised by Nazi-Germany to conclude that treaty.[13] The Federal Republic of Germany had always taken the position that it could not, for itself, declare a treaty null and void which was concluded not only by Czechoslovakia and Germany but by other powers, namely France, the United Kingdom and Italy. However, it became clear during the negotiations for a treaty on normal relations between the Federal Republic of Germany and Czechoslovakia that Czechoslovakia was unwilling to accept any qualification other than that the Munich Agreement was null and void.

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[10] Non-Aggression Treaty, *supra* note 6.

[11] *Id.* at 1027.

[12] The preamble of the Treaty referred to the different views of the parties on "the national question." Everybody knew what that meant. Treaty on the Basis of Intra-German Relations, F.R.G.-G.D.R., Dec. 21, 1973, 12 I.L.M.16.

[13] *See* Theodor Schieder, *Munich Agreement, in* 3 Encyclopedia of Public International Law 482, 483–84 (Rudolph Bernhardt ed., 1997).

This author proposed, during the discussions of these issues in the Advisory Council for international law in the Foreign Office, that one should accept the notion of "void" but tie it formally to the German-Czechoslovak Treaty so that no independent consequences could flow from the recognition of the treaty as void. This was the solution finally adopted. According to Article I of the Treaty signed on December 11, 1973, the Federal Republic of Germany and the Czechoslovak Socialist Republic declared that the Munich Agreement was void in respect to their mutual relations according to the provisions of the present treaty ("nach Maβgabe dieses Vertrages").[14] The article reads that "the Federal Republic of Germany and the Czechoslovak Socialist Republic, under the present Treaty, deem the Munich Agreement of 29 September 1938 void with regard to their mutual relations."[15]

Article 2 confirmed that the "present Treaty shall not affect the legal effects on natural or legal persons of the law as applied in the period between 30 September 1938 and 9 May 1945" in the territories then under German jurisdiction.[16] Article 2, paragraph 2 stipulated that the Treaty "shall not affect the nationality of living or deceased persons ensuing from the legal system of either of the two Contracting Parties."[17] Article 2, paragraph 3 laid down that the "Treaty, together with its declarations on the Munich Agreement, shall not constitute any legal basis for material claims by the Czechoslovak Socialist Republic and its natural and legal persons."[18] The formula used in the text of the German-Czechoslovak Treaty was able to bridge the different views of the parties and meet the important consideration, on the German side, that no individual rights be jeopardized by the treaty.

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[14] Treaty Establishing Normal Relations Between the Two Countries, Czech.-F.R.G., Dec. 11, 1973, 13 I.L.M. 19.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

IV. Foreign Policy and the Federal Constitutional Court

In Germany many important foreign policy decisions have been brought before the Federal Constitutional Court to test their compatibility with the constitution. Important treaties such as the Warsaw Treaty and the Intra-German Treaty were challenged before the Constitutional Court.[19] The decision of the Federal Government to permit the stationing of Pershing Missiles on German territory on the basis of respective NATO decisions also was brought before the Court.[20] The existence of chemical weapons under the control of the United States Forces was reviewed by the Constitutional Court.[21] The decisions of the Federal Government to use German armed forces under U.N. Mandate were challenged as being contrary to the federal constitution.[22] The NATO strategy of 1999 was brought before the Federal Constitutional Court in particular under the argument that this doctrine should have been adopted as a formal treaty.[23]

In all the above cases, the Federal Constitutional Court found in favor of the Federal Government. In many of the cases, it was necessary to inform the Court in detail about issues of public international law. This author presented the cases mentioned, except the one on the Infra-German Treaty, to the Court and argued them on the basis of international law and constitutional law. Some of the issues will be briefly discussed.

In the case concerning the stationing of US Pershing Missiles on German territory, the Federal Government informed the Court about the rules concerning nuclear weapons. The same had to be done in the dispute concerning chemical weapons. In the latter case, the Court formally stated that it had the same opinion

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[19] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 31, 1973, 36 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 1974 (Intra-German Treaty); BVerfG July 7, 1975, 40 BVerfGE 141, 1976 (Warsaw Treaty).

[20] BVerfG Dec. 18, 1984, 68 BVerfGE 1, 1985 [hereinafter Pershing Missile Decision].

[21] BVerfG Oct. 29, 1987, 77 BVerfGE 170, 1988 [hereinafter Chemical Weapons Decision].

[22] BVerfG July 12, 1994, 90 BVerfGE 286, 1994 [hereinafter 1994 Deployment Decision].

[23] BVerfG Nov. 22, 2001, 104 BVerfGE 151, 2002 [hereinafter 2002 NATO Strategy Decision].

as the Federal Government —that a lawful use of chemical weapons was, at that time, not completely excluded.[24] Concerning nuclear weapons, the Court limited itself to say that it was within the discretion of the Federal Government to analyse the consequences of stationing new nuclear missiles.[25]

As far as peacekeeping operations under United Nations mandate were concerned, the Court engaged in a detailed analysis of a provision in the Federal Constitution of 1949 about systems of collective security. The Court held that this provision enabled the Federal Republic to participate in UN peacekeeping operations.[26]

The Court also held that the NATO strategy of 1999 could not be interpreted as a treaty because no country participating in its drafting considered the strategy to be a binding document.[27] The Court discussed the difficult borderline between treaty interpretation, even dynamic interpretation, on the one hand, and formal amendment of treaties on the other.[28] This line is, of course, decisive for the competence of the parliament to be involved again after the conclusion of the original treaty. The applicants had argued that the German Federal Diet should have been asked to give a formal consent to the new NATO strategy. However, the Court rejected that argument.[29]

V. The Use of Armed Force

In recent years, German armed forces have participated in several missions not covered by a mandate of the United Nations Security Council. The most important examples were the armed action against Yugoslavia regarding Kosovo and the participation in the U.S. action "Enduring Freedom" in Afghanistan. Concerning Kosovo, the legal justification is, of course, under heavy debate in circles of public international law. The German Government has practically refused to give any clear legal explanation justifying the Kosovo mission. It was frequently stated

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[24] Chemical Weapons Decision, *supra* note 21, at 232.

[25] Pershing Missile Decision, *supra* note 20, at 103.

[26] 1994 Deployment Decision, *supra* note 22, at 345–55.

[27] 2002 NATO Strategy Decision, *supra* note 23.

[28] *Id.* at 206–14.

[29] *Id.*

that the case could not be a precedent, which was apparently an attempt to downplay the legal significance. The Kosovo intervention can be considered lawful only if one admits that, under very limited circumstances, there is a right to use armed force to avoid mass killings or genocidal action. Germany, unlike Britain,[30] did not clearly take that position.

The basis for the use of German armed forces for the mission in Afghanistan is twofold. On the one hand, there is an important German contribution to ISAF, the force that operates under a clear United Nations mandate.[31] However, a small unit of German special forces was active from the beginning of the U.S. action "Enduring Freedom" without U.N. mandate. The legal justification for this German contribution has to be seen in the NATO decision defining the terrorist acts of September 11, 2001 as an armed attack against one NATO member state, which in turn was based on the recognition by the Security Council that a self-defense situation existed.[32] Therefore, Germany was entitled to cooperate with the United States in self defense against that armed attack.

Germany did not participate in the intervention in Iraq. However, Germany being a member of the United Nations Security Council at the time, had to take a stand on the legal issues. It did so in a strange way. The German ambassador to the United Nations expressed the view that no new mandate for armed intervention was necessary. This seemed to support the view taken by the United States and Britain. This position was not shared by the other members of the Security Council. The declaration adopted in the context of Resolution 1441 by three members of the Permanent Five, China, France and Russia, showed the disagreement very clearly.[33] Indeed, some international lawyers came

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[30] "There is increasing acceptance of the view taken in 1999 that imminent humanitarian crises justify military intervention." Attorney-General Lord Goldsmith on Apr. 21, 2004 in the House of Lords, *available at* http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds04/text/40421-08.htm.

[31] S.C. Res. 1368, U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001); NATO-Secretary General Statements (Sept. 12, 2001 and Oct. 2, 2001).

[32] S.C. Res. 1368, *supra* note 31; S.C. Res. 1373, *supra* note 31.

[33] Déclaration conjointe de la République populaire de Chine, de la Fédération de Russie et de la France [Joint Declaration of the Republic of China, the Russian

to the conclusion that Resolution 1441 was an "agreement to disagree."[34]

The danger created by unilateral interpretations of Security Council resolutions for the legitimacy of the Security Council should not be underestimated. If that practice continues, the system of collective security will be discredited.[35]

It is not excluded that the German position had something to do with U.S. military bases on German territory. It was clear from the beginning that the United States was going to use German bases, including airports, for the shipment of forces to Iraq. The German government explained that it would not refuse this sort of support. In law this is a difficult matter. If one is of the view that there was no legal justification for the armed intervention, even such indirect support must be seen as a violation of the rights of Iraq. State responsibility also arises from participation in unlawful acts.

A very tricky question comes up in that context. The United States and Britain argue that their intervention was covered by Security Council Resolutions. Could Germany argue that where two permanent members take that view it is not for Germany to judge that issue? In strict law this argument is difficult. Here, one faces the limits of what an European power in the situation of Germany could do under the circumstances. Let us hope that problems of this sort will remain rather rare.

VI. Conclusion

Advice concerning international law issues in Germany could certainly be improved. However, it seems that the system applied gives international law a prominent place in preparing decisions by the German government in matters where international law has something to say.

Federation and France], Aug. 11, 2002, *available at* http://www.un.int/france/documents_francais/021108_cs_france_irak_2.htm.

[34] Jane E. Stromseth, *Law and Force after Iraq: A Transitional Moment*, 97 Am. J. Int'l L. 628, 630 (2005).

[35] *See* Jochen A. Frowein, *Issues of Legitimacy around the United Nations Security Council*, *in* Negotiating for Peace: Liber Amicorum Tono Eitel 121, 123 (Jochen A. Frowein et al. eds., 2003).