

Dividing the Indivisible:

Cold War Sovereignty, National Division, and the German Question at the United

Nations

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Abstract:

Divided Germany became one of the focal points for international disputes over sovereignty in the late 1960s and early 70s. In a period that is commonly associated with West German Ostpolitik and the diplomatic recognition of German division, the international community disputed how the sovereignty of “divided nations” should be framed under international law. The German-German battle over the terms of détente unfolded within these politics of sovereignty surrounding conflicts over “national divisions” along Cold War front lines as well as the simultaneous confrontations over postcolonial sovereignty. At the United Nations (UN), the issues of German and Chinese division converged at the height of decolonization. East German concepts of sovereignty challenged the UN’s foundational principle of “one nation, one seat” rooted in ethnic nationality. Eventually, the UN accepted a German exceptionalism in admitting both German states as members in 1973 based on historical rather than legal explanations for divided German sovereignty while conflicts around “divided countries” in Asia remained unresolved.

Keywords: sovereignty, self-determination, divided nations, United Nations, Germany, China, Korea, Vietnam

At the height of public conflicts surrounding Ostpolitik negotiations in 1971, the legal scholars Eberhard Menzel and Rudolf Geiger clashed in the pages of the *Zeitschrift für Rechtspolitik* (Journal of Legal Politics) over the nature of German sovereignty. Menzel, the director of the Institute for International Law at the University of Kiel, outlined his view of German sovereignty, national division, and Allied extraterritorial rights in Germany after 1945. A controversial figure due to his early career in the Third Reich, Menzel bemoaned the Western Allies’ acceptance of the “two state theory” that the German Democratic Republic (GDR) had advocated since the late 1950s. He saw the Bonn government’s support for a “roof thesis” (*Dach-These*) waning that postulated a unified German sovereignty in succession to the German Reich still existed in law. Menzel argued that the roof thesis had to be defended at all cost as it outlined that the Bonn government exercised this all-German sovereignty as well as West German sovereignty. Menzel and many other West German legal scholars had been instrumental in establishing this legal framework in the 1950s. In his view, the roof thesis allowed a complete rejection of the argument that the GDR had any legitimate international

sovereignty.¹ In Menzel's eyes, Ostpolitik now seriously threatened this "double sovereignty" that the Federal Republic of Germany (FRG) had claimed after the foundation of the two German states in 1949.² Geiger, at the time a judge at the Higher State Court in Munich and later a professor of law at Leipzig after German unification in 1990, in response pointed to international law and comparative examples such as India's signature of the Versailles Treaty when it had still been part of the British Empire or the UN membership of Ukraine and Belarus while being part of the Soviet Union to dismantle Menzel's argument that a "double sovereignty" based on the current West German terms of a complete legal non-recognition of the GDR had to be defended to retain options for unification.³ His examples showed, Geiger argued, that "parts" of a greater legal entity (*Teilordnung*) could be fully recognized members of the international community and still be seen as part of another higher-level legal entity.⁴ This scholarly controversy over German sovereignty mirrored broader conflicts over the international postwar order. Ostpolitik coincided with international disputes over the question whether this order, which had remained a North Atlantic order when it came to many leading international law doctrines, should be superseded by legal norms emanating from the United Nations (UN).

Menzel and Geiger's exchange encapsulated how the politics of sovereignty surrounding German division had changed due to shifts in UN debates on the sovereignty of

¹ For this legal argument see: Jens Hacker, *Der Rechtsstatus Deutschlands aus Sicht der DDR* (Köln: Verlag Wissenschaft und Politik, 1974).

² Eberhard Menzel, "Wie souverän ist die Bundesrepublik?", *Zeitschrift für Rechtspolitik* 4,8 (1971): 178-89, here 186-8.

³ *Ibid.*, 104. The Soviet leadership first attempted to have all Soviet republics recognized by the UN to even the odds in its favour against the Western bloc's voting advantage within the early UN. See: Mark Mazower, *Governing the World. The History of an Idea* (London: Allan Lane, 2012), 207.

⁴ Rudolf Geiger, "Die Souveränität der Bundesrepublik", *Zeitschrift für Rechtspolitik* 5,4 (1972): 104.

divided nations and politics of détente. In projecting sovereignty beyond West German borders by claiming to represent the sovereignty of the “German Reich in its borders of 1937” as part of the FRG’s “double sovereignty,” law and rights languages had become paramount for West German Cold War politics after 1949 to underpin the diplomatic isolation of the GDR later labelled the Hallstein Doctrine.⁵ While both Menzel and Geiger avoided direct references to the shifts in international controversies over the nature of legal and political sovereignty since 1949, their exchange mirrored how the specially German tradition of *Staatsrecht* that provided legitimacy for Menzel’s and many other leading West German legal minds’ reading of German legal sovereignty had come under pressure by global clashes over the concepts of sovereignty and self-determination. While many territorial disputes in Africa as part of decolonization or the Israel-Palestine conflict showed similarities with the German-German situation, it was “national divisions” along similar territorial, historical, and ideological frontiers that particularly challenged West German sovereignty doctrines. This article explores how West German legal languages of sovereignty clashed with the international politicking around “divided countries” acknowledged in UN politics. In particular the shifts in UN debates on Chinese division had a significant impact on the waning of West German legal frameworks of sovereignty. Menzel tried to defend the notion that German division as a legal problem should be strictly negotiated between the four Allied powers and the two German governments at a time, when a growing number of international observers saw German division as directly comparable to Chinese, Vietnamese, and Korean division. At a deeper level, this also raised the question whether Cold War sovereignty should be determined by legal traditions and

⁵ See: Sebastian Gehrig, “Recht im Kalten Krieg. Das Bundesverfassungsgericht, die deutsche Teilung und die politische Kultur der frühen Bundesrepublik,” *Historische Zeitschrift* 303, no. 1 (2016): 64-97..

thought originating outside of Europe and supersede earlier ideas of conceptual separations of European from colonial sovereignty.⁶

Historical scholarship on German sovereignty after the Second World War and Ostpolitik has so far mainly discussed the politics of sovereignty as internal West German conflicts over the recognition of the GDR as well as a diplomatic battle between the two German states over the terms of détente.⁷ Such perspectives in some ways reproduced hegemonic views within West German academic circles and jurisprudence during the Cold War. How German postwar sovereignty and national division presented a problem to international law politics has attracted less attention.⁸ In the field of legal and rights history, meanwhile, the impact of Third World interpretations of a right of self-determination of

⁶ See XXX's article in this special issue.

⁷ For legal disputes around Ostpolitik see: Klaus Joachim Grigoleit, *Bundesverfassungsgericht und deutsche Frage. Eine dogmatische und juristische Untersuchung zum judikativen Anteil an der Staatsleitung* (Tübingen: Mohr-Siebeck, 2004). For West German domestic conflicts over Ostpolitik see: Werner Kilian, *Die Hallstein-Doktrin. Der diplomatische Krieg zwischen der BRD und DDR 1955-1973* (Berlin: Duncker & Humblot, 2001); Andrea Grau, *Gegen den Strom. Die Reaktion der CDU/CSU-Opposition auf die Ost- und Deutschlandpolitik der sozial-liberalen Koalition 1969-1973* (Düsseldorf: Droste, 2005). For international perspectives on Ostpolitik see: M.E. Sarotte, *Dealing with the Devil. East Germany, Détente and Ostpolitik 1969-1973* (Chapel Hill: University of North Carolina Press, 2001); William Glenn Gray, *Germany's Cold War. The Global Campaign to Isolate East Germany, 1949-1969* (Chapel Hill: University of North Carolina Press, 2003); Carole Fink and Bernd Schaefer (eds), *Ostpolitik 1969-1973. European and Global Responses* (Cambridge: Cambridge University Press, 2009). At the same time, East German foreign policy is still predominantly characterized as being entirely dependent on the Soviet Union. See: Hermann Wentker, *Außenpolitik in engen Grenzen. Die DDR im internationalen System 1949-1989* (Munich: Oldenbourg, 2007).

⁸ For a rare example of a diplomatic history that highlights the UN as a battleground for German-German Cold War politics see: Mathias Stein, *Der Konflikt um Alleinvertretung und Anerkennung in der UNO. Die deutsch-deutschen Beziehungen zu den Vereinten Nationen von 1949 bis 1973* (Göttingen: V&R unipress, 2011).

peoples to secure sovereignty from colonial rule has been transformed in a long-standing controversy over whether the right of self-determination represents a human right.⁹ If we look beyond this controversy and ask how self-determination as a legal and political concept that underpinned claims to international sovereignty has changed international politics, we discover the crucial role of anti-colonial movements not just for the history of decolonization, but also for frameworks of national division and sovereignty during the Cold War.¹⁰

Underneath a doctrinal language of law, politics and interpretations of historical developments guided West German claims for the unique legal nature of German division that set postwar Germany apart from other divided countries' sovereignty. While the two German governments negotiated the terms of détente from the late 1960s into the early 1970s, and West German legal scholars such as Menzel very much pretended that German sovereignty was an “internal” German-German affair and legal issue that only concerned the Allied powers, UN politics of sovereignty surrounding decolonization had a crucial impact on how legal notions

⁹ For critical perspectives on self-determination as a human right see: Samuel Moyn, *Last Utopia. Human Rights in History* (Cambridge, MA: Belknap Press, 2010), 84-119; Jörg Fisch, *The Right of Self-determination of Peoples. The Domestication of an Illusion* (Cambridge: Cambridge University Press, 2015), 190-217. For a discussion of self-determination in context of radical proposals to reconfigure international governance as part of decolonization see Adom Getachew, *Worldmaking after Empire. The Rise and Fall of Self-determination* (Princeton: Princeton University Press, 2019), 71-106. For a recent intervention that stresses the competition between ideologically competing visions of human rights see: Roland Burke, Marco Duranti and A. Dirk Moses, ‘Introduction: Human Rights, Empire, and After’, in *ibid.* (eds), *Decolonisation, Self-determination, and the Rise of Global Human Rights Politics* (Cambridge: Cambridge University Press, 2020), 1-31.

¹⁰ Before the controversy over self-determination within human rights historiography erupted, Antony Anghie had already argued that international law and “sovereignty doctrine” can only be understood if we acknowledge its roots as “the attempt to create a legal system that could account for relations between Europeans and non-European worlds in the colonial confrontation”. See: Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 3.

of German division were reframed in the late 1960s and early 1970s. By this time, West German diplomats could no longer ignore how national division as a legal problem for sovereignty doctrine in international law was treated at the UN. While Western powers had supported West German legal and political non-recognition of the GDR in the 1950s, changing geopolitical interests of the US, the UK and France made West German sovereignty doctrine an obstacle to politics of détente in the 1960s. The shift in Chinese UN representation from the Republic of China (ROC) to the People's Republic of China (PRC) in 1971 further transformed UN politics of sovereignty on the issue of divided nations. While West German legal and judicial elites would attempt to resist these shifts in international politics of sovereignty in the aftermath of Ostpolitik, they could no longer simply ignore international legal norms of sovereignty and self-determination that Geiger championed in his reply to Menzel's defence of *Staatsrecht*. When the Allied framework as the sole determining factors of German legal sovereignty and political claims to the representation of Germany as a whole came under pressure in the 1960s, negotiations over détente questioned the mid-century's legal logics that had guided the initial occupation regime and early Cold War politics of sovereignty within the divided Germany. The question was now to what extent international legal standards developing at the UN since 1945 would replace the legal legitimacy of West German sovereignty claims first made on the basis of German *Staatsrecht* after 1945.

A new world of nation-states and the legacies of empire

German-German clashes over legal sovereignty unfolded against the backdrop of postwar shifts towards frameworks of global governance rooted in languages of equality. While colonial rule put such a scholarly and political shift into sharp relief after 1945, American Cold War politics gave rise to political realism and decisively shaped debates on the politics of sovereignty in Western countries. In 1948, Hans J. Morgenthau formulated a seemingly simple

truth in the pages of the *Columbia Law Review*. A leading proponent of the realist project, he stated that “sovereignty over the same territory cannot reside simultaneously in two different authorities, that is, sovereignty is indivisible.”¹¹ Shortly after the end of the Second World War, Morgenthau articulated an opinion that was universally accepted among Western experts of international law. Since the turn of the twentieth century, Lassa Oppenheim and others had argued that state sovereignty was essential for the recognition by other sovereign states and membership in the “family of nations”. At the time, however, this family still only included “civilized nations” and excluded colonial peoples. While Western legal scholars fought over the relationship between sovereignty of the state and the institutions that exercised power within a state, the level of sovereignty of federal states within a country, and the division of sovereign powers between the executive and legislative, the idea that sovereignty in the international sphere was indivisible had remained uncontested in Western legal thought.¹²

Despite anti-colonial challenges to such Western views that refused to grant full sovereignty to colonial peoples, this hegemonic opinion among Western international law

¹¹ Hans J. Morgenthau, “The Problem of Sovereignty Reconsidered,” *Columbia Law Review* 48, 3 (1948): 342-65, here 350.

¹² Lassa Oppenheim, *International Law: A Treatise*, vol. 1: Peace (London: Longmans, Green, and Co, 1905), 99-114. Oppenheim describes sovereignty of states as legal personas under international law as follows: “Sovereignty is supreme authority, an authority which is independent of any other earthly authority. Sovereignty in the strict and narrowest sense of the term includes, therefore, independence all around, within and without the borders of the country.” *Ibid.*, 101. For Oppenheim’s approach to international law and lasting impact over the last century see: Benedict Kingsbury, “Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law”, *EJIL* 13 (2002): 401-36; Mathias Schmoeckel, “The Story of Success: Lassa Oppenheim and his ‘International Law’”, *East Asian and European Perspectives on International Law*, ed. Michael Stolleis and Yanagihara Masaharu (Baden-Baden: Nomos, 2004), 57-134.

scholars had not altered until the end of the Second World War.¹³ The state, not people, remained firmly established as the central object of legal international sovereignty and subject of international law.¹⁴ In the same year, in which Morgenthau reaffirmed the idea of indivisible international sovereignty over territory, Leo Gross set this notion in stone for the nascent academic discipline of international relations, which was on the rise in a period of academic enthusiasm for globalism after the end of the Second World War.¹⁵ Commemorating the three hundred year anniversary of the Peace of Westphalia, Gross' reading of the implications rather than the actual terms of the peace settlement of the Thirty Years War in 1648 promoted nation-state sovereignty and sovereign equality as the new central criteria in the organization of

¹³ See: Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 115-95.

¹⁴ Against Oppenheim's positivist position, John Westlake had promoted the necessity of the consent of the people to allow for valid legal rule. However, Westlake only included people he saw as part of European and American civilization. See: John Westlake, *Collected Papers* (1914), 78. Yet, Oppenheim's position prevailed. After 1945, Hersch Lauterpacht and others attacked Oppenheim for stifling the greater possibilities of international law and advocated a return to the Grotian tradition of integrating law and ethics. See: Hersch Lauterpacht, "The Grotian Tradition in International Law", *British Yearbook of International Law* 23, 2 (1946): 1-53. There were first attempts to frame the individual as a legal persona under international law, but those remained far from being implemented. See: Natasha Wheatley, "New Subjects in International Law and Order", in *Internationalisms: A Twentieth Century History*, ed. Glenda Sluga and Patricia Clavin (Cambridge: Cambridge University Press, 2017), 265-86. Stephen Wertheim has examined the failure of the League of Nations to provide a legal, court-centred organization open to civil society groups. See: Stephan Wertheim, "The League of Nations: A Retreat from International Law?", *Journal of Global History* 7 (2012): 210-32. For a conceptual history of statelessness see: Mira L. Siegelberg, *Statelessness. A Modern History* (Cambridge, MA: Harvard University Press, 2020).

¹⁵ For British and American visions of globalism after 1945 see: Or Rosenboim, *The Emergence of Globalism: Visions of World Order in Britain and the United States, 1939-1950* (Princeton: Princeton University Press, 2017).

international affairs.¹⁶ Such notions papered over the realities of empire in elevating a universal “ideology of sovereignty” and grounded this new framework in the myth of a centuries-old Westphalian state system shaped by sovereignty, territoriality, equality between states, and non-intervention. However, this reading of the evolution of the international state system encapsulated much more the hopes for the future than gave an accurate account of the historical development of sovereignty.¹⁷ It was an endorsement of nation-state sovereignty as the new universal standard on which future international politics should rest. Yet, international politics looked still rather different in 1948.

German division one year later in 1949, the divisions of China and Korea as well as the partition of former colonies with independence complicated such theories of indivisible sovereignty rooted in ideas of nationality until the mid-1950s. In the hegemonic logics of Western international law and international relations theory of the early decades after the Second World War, only one government should represent one nationality. This divergence of theory and reality of sovereignty triggered an intense politicization of sovereignty as part of

¹⁶ Gross’ article was quickly labelled “seminal” and “timeless” and subsequently reprinted in influential collections. See: Leo Gross, “The Peace of Westphalia, 1648-1948”, *American Journal of International Law* 42, 1 (1948): 20-41. For the subsequent myth of Westphalia in IR see: Andreas Osiander, “Sovereignty, International Relations and the Westphalian Myth”, *International Organisations* 55, 2 (2001): 251-87, here 264-66. See also: Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (London: Verso, 2003). In contrast to the Westphalian myth, it seems more appropriate to root the rise of international law and with it modern legal theories of nation-states in the second half of the nineteenth century as Martti Koskenniemi has argued. See: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), 17, 41.

¹⁷ Osiander uses the term “ideology of sovereignty” in describing how external sovereignty and equal indivisible sovereignty of nation-states in the international system became the hegemonic view in IR after centuries of debate on sovereignty centred on domestic aspects of sovereignty and the division of power within states. See: Osiander, “Sovereignty, International Relations and the Westphalian Myth”, 281f.

the Cold War between the two German states that first fiercely competed over the question which state legitimately represented German sovereignty.¹⁸ This conflict affected broader international law debates on the nature of sovereignty once the GDR leadership decided to break away from German legal tradition and began to advocate for an independent East German sovereignty.¹⁹ The “division” of countries after 1945 clashed with the underlying principles that structured UN membership politics. The UN’s mantra of “one nation, one seat” quickly brought to light divergences in what James S. Sheehan has called the “relationship between the abstract and the concrete” in sovereign theory and sovereign practice.²⁰ At the same time, it foreshadowed a crisis in notions of territoriality and sovereignty established through “the control of bordered political space” as “the framework for national and ethnic identity”.²¹

Universal standards and unequal realities

The utopia of the UN as a new political space that would create equality amongst states in international governance was tainted from the beginning by the supreme powers of the Security Council and attempts by colonial powers to perpetuate empire into the postwar era.²² Contemporaries first saw the issue of “population exchanges” in Europe, Palestine and India as part of a peace settlement at the end of the Second World War as connected issues under the label of “partitions” that ought to secure peace. Yet, the acceleration of ideological conflicts

¹⁸ Hacker, *Der Rechtsstatus Deutschlands aus Sicht der DDR*, 78-115.

¹⁹ See: Sebastian Gehrig, *Legal Entanglements. Law, Rights, and the Battle for Legitimacy in Divided Germany, 1945-1989* (New York: Berghahn Books, 2021), 68-102.

²⁰ James S. Sheehan, “‘The Problem of Sovereignty in European History’, *American Historical Review* 111, 1 (2006): 1-15, here 1.

²¹ Charles S. Maier, “Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era”, *American Historical Review* 105, 3 (2000): 807-31, here 808.

²² Mazower, *Governing the World*, 191-243.

between the wartime Allies after 1945 quickly prompted political observers and legal scholars to discuss the issue of German sovereignty and conflicts at the Cold War frontlines in Asia in a language of “division”.²³ The UN’s direct involvement into the Korean War made “Korean division” after the armistice of 1953 a hot button issue within the General Assembly. With the end of the Korean War, three “divided countries” had emerged along the Iron and Bamboo Curtain: Germany, China, and Korea.

While international organizations retreated from the PRC and the UN did not play a direct role in the reconstruction of Germany, the US backed both the FRG and ROC’s entry into international organizations after the escalation of Cold War conflicts. To bolster the ROC’s position not just in the UN—where the ROC took up a Security Council seat and General Assembly representation—but also its associated organizations, American support also facilitated the ROC’s entry into UNESCO in July 1950. Vocal opposition of the Hungarian, Czechoslovakian, and Indian representatives could not prevent this American-backed success within UNESCO’s Credentials Committee and General Conference.²⁴ Until 1952, the FRG gained entry to the Food and Agricultural Organization (FAO) and was awarded official UN observer status. The direct US-Soviet standoff in divided Germany did not permit full West German membership, but official accreditation as an observer state representing “Germany” now barred the GDR from UN politics as a second state representing Germany in the mid-

²³ For such a perspective on “partition” see: A. Dirk Moses, “Cutting Out the Ulcer and Washing Away the Incubus of the Past. Genocide Prevention through Population Transfer”, in Roland Burke, Marco Duranti and A. Dirk Moses (eds), *Decolonization, Self-determination, and the Rise of Global Human Rights Politics* (Cambridge: Cambridge University Press, 2020), 153-78.

²⁴ Gordon Barrett, “Between Sovereignty and Legitimacy: China and UNESCO, 1946-1953”, *Modern Asian Studies* 53, 5 (2019): 1516-42.

century logics of UN membership and international representation following the “one nation, one seat” rule.

With the exclusion of the PRC and GDR from UN affairs, the Beijing and East Berlin government started to explore different ways in trying to push their way into international affairs. While GDR diplomats and representatives—sometimes literally—bogarted the doors of UN meetings in Geneva and New York in the 1950s and 60s, the PRC Ministry for Foreign Affairs turned down an offer by the Czechoslovakian government to put forward a motion that demanded that representatives of the Chinese Communist Party (CCP) should be allowed to participate as observers at UNESCO’s Ninth General Conference in New Delhi. The CCP leadership refused to participate in events that included ROC representatives.²⁵ In this, the Beijing government decided on a similar non-recognition policy of the ROC that the FRG pursued towards the GDR.²⁶ In its drive for UN membership, the CCP leadership instead decided to promote a language of peace in the tradition of early Cold War socialist peace appeals and joined Third World calls for nuclear disarmament such as the Final Communique of the Bandung Conference, hoping that this would garner international recognition.²⁷ The notion of new universalist international organizations thus had cracks from the very beginning. When the UNESCO leadership decided to embark on the writing of a new universal world history to promote a focus on trade, travel, cultural exchange, migration, exchange of ideas and a strong disavowal of Eurocentrism, Julian Huxley who served as the first UNESCO director

²⁵ Ibid.

²⁶ For this global non-recognition policy see: William G. Gray, *Germany’s Cold War. The Global Campaign to Isolate East Germany, 1949-1969* (Chapel Hill: University of North Carolina Press, 2003).

²⁷ Elisabeth Forster, “Threatened by Peace: The PRC’s Peacefulness Rhetoric and the ‘China’ Representation Question in the United Nations (1949-1971)”, *Cold War History* (online first); Henrietta Harrison, “Popular Responses to the Atomic Bomb in China, 1945-1955”, *Past & Present* 218, 8,1 (2013): 96-118.

at the time lamented “our pretended universality” in 1953.²⁸ The clashes of the early Cold War prevented universal representation of all independent states that both organizations had promised in their foundational manifestos.

In the legal world, this bias towards Western dominance continued both inside and outside of the UN. In the immediate postwar years, the evolving East German state focused on revolutionary language leading up to the official announcement of building socialism in 1952 instead of concepts of sovereignty. In the meantime, West German legal and political elites—aided by American dominance in the UN and other international bodies—shaped interpretations of Germany’s postwar status in the international arena. Legal experts within the Bonn government worked together with leading law scholars such as Rudolf Laun, Adolf Arndt, and Ulrich Scheuner. They framed German national division in a legal language that denied East German statehood entirely. Their central argument stipulated that a unified legal sovereignty of the German Reich “in its borders of 1937” (i.e. before Nazi territorial expansionism began) had survived the unconditional surrender of May 1945.²⁹ The foundation of a West German government and state was seen as a “provisional reorganization” of this German sovereignty of the Reich in the territory of the three Western occupation zones. In other words, the legal core understanding of the West German state rested on the assumption that German sovereignty was in fact not divided, but only obstructed by Soviet force through the continued occupation of their zone of occupation. Menzel would call this the “double sovereignty” of the Federal Republic in 1971. He had been among the international law experts who had propagated this assumption since the declaration made by West German international law scholars when they convened for their first meeting after the war in Hamburg in 1947 to

²⁸ Paul Betts, “Humanity’s New Heritage: UNESCO and the Rewriting of World History”, *Past & Present* no. 228 (2015): 249-85, here 266.

²⁹ Gehrig, “Recht im Kalten Krieg”, 64-97.

reconstitute their professional association. This statement became a point of self-reference in the work of Menzel and others in the decades until the 1970s to prove the doctrinal character of the assumption that the sovereignty of the “German Reich in its borders of 1937” still existed as the “roof sovereignty” above the West German state’s sovereignty.³⁰

The West German agenda of enshrining a continued existence of unified German sovereignty into international politics instrumentalized legal understandings governing the foundation of the UN. The principle of “one nation, one seat” linked nationality to territoriality represented by a single government. The West German government profited from shared interests with the ROC’s government. Chiang Kai-shek’s government on Taiwan, now a member of the Security Council, endorsed a “one China” paradigm alongside West German calls for a “one Germany” framework under international law.³¹ As long as both countries remained in the same Cold War camp and Western powers retained their dominance in framing international legal standards at the UN, so politicians in Bonn and Taipei thought, their hold on the international representation of China and Germany should remain firm. Yet, once the PRC had acquired atomic weapons in 1964 and decolonized states began to turn the tide on Western voting majorities within the UN, West German and Taiwanese hegemony over defining German and Chinese sovereignty in international affairs would slowly crumble.

³⁰ In his article from 1971, Menzel referenced the declaration and his early work as proof for these political arguments about sovereignty made in context of the early Cold War. See: Menzel, “Wie souverän ist die Bundesrepublik?”, 186fn34 and 35.

³¹ For the interplay of West German international law scholars, constitutional judges, and the Bonn government in navigating the difficulties of maintaining the idea of direct legal continuity between the German Reich and the Federal Republic while facing multiple obstacles of Allied occupation rights and national division see: Gehrig, “Recht im Kalten Krieg”, 64-97.

Decolonization and divided countries at the UN

The PRC made inroads into UN politics from the early 1960s. The growing number of decolonized countries that acceded to UN membership transformed rights debates in the corridors of the UN headquarters in New York and Geneva.³² After a long retreat from all-German frameworks during the 1950s, the GDR government at the same time surrendered the competition for the legitimate representation of German sovereignty. Weakened by the uprising of East Germans in 1953, the East Berlin leadership moved on to new legal semantics of national division. This remained a clandestine project until the building of the Berlin Wall in 1961.³³ Until the mid-1960s, the GDR government had difficulties finding a message that would garner support outside of the socialist bloc for its legal vision of a divided country. Only by rallying enough international support behind an East German interpretation of national division, GDR international law experts such as Peter Alfons Steiniger determined, could the West German position on German sovereignty be attacked. At the turn to the 1960s, conflicts surrounding decolonization suddenly seemed to present the East German government with an answer. The only coalition that was able to defeat the Western camp within the UN was a socialist alliance with the countries of the global South. While the PRC jockeyed for Third World support for its claim on Chinese sovereignty by completely denying Taiwan's independent status—which followed the same logic as the FRG's so-called Hallstein Doctrine that outlined the complete diplomatic non-recognition of the GDR—and attacked the Soviet Union's leadership of socialist countries after the Sino-Soviet split, East German ideologues instead

³² Roger Normand and Sarah Zaidi, *Human Rights at the UN. The Political History of Universal Justice* (Bloomington: Indiana University Press, 2008), 243-315.

³³ See: Gehrig, *Legal Entanglements*, 68-141.

appealed to newly independent states to support East German independence in their own language of decolonization based on the right of self-determination of people.³⁴

The ensuing UN conflicts over divided countries galvanized ideological tensions over legal principles of sovereignty and self-determination. The Indian government had been the first prime advocate of PRC membership. After the Bandung Conference in 1955 during which non-aligned states had outlined principles for an alternative framework of global governance, the Indian UN delegation submitted annual requests to the General Assembly demanding that the question of Chinese representation should be officially debated. The General Assembly evaded the issue twice before the Indian request finally led to a first discussion on 19 September 1958. The US delegation immediately pushed for a rejection of the Indian proposal with the support of Australia, Ecuador, El Salvador, the UK, and the ROC. Ceylon, Czechoslovakia, Indonesia, Nepal, Panama, and the Soviet Union in turn supported the inclusion of the Chinese question into the list of issue officially debated by the General Assembly. While the US ultimately prevailed, the Western alliance had to fend off several amendments and additional resolution drafts. The Irish and Swedish delegations voiced veiled criticism of the US position of complete non-recognition and revealed the first cracks in the Western alliance. An official discussion of the Chinese issue would by no means represent a victory for communism, the Swedish argued, but rather stand for a vital principle of the democratic tradition: free debate.³⁵

Disagreement over the question of Chinese representation reflected on the Security Council debate on Korea and Vietnam in December of the same year. On 9 December 1958, the US together with France, the UK and Japan requested the consideration of the Republic of

³⁴ Sebastian Gehrig, "Reaching Out to the Third World. East Germany's Anti-Apartheid and socialist human rights campaign", *German History* 36,4 (2018): 574-97.

³⁵ Office of Public Information, *Yearbook of the United Nations 1958* (New York: Office of Public Information of the United Nations, 1958), 89-91.

Korea (ROK) and Vietnam for membership. ³⁶ In the politicking on the corridors of the UN headquarters, the Soviet delegation argued that only simultaneously admitting both parts of Korea would accelerate the process of unification. When it came to Vietnam, the Soviet representative pointed out that one-sided admission of South Vietnam was unacceptable. Such an elevation in status would only encourage the South Vietnamese government to ignore the Geneva agreement on the unification of the country. Against these Soviet claims, the US-led coalition claimed that the establishment of South Korea under UN auspices would already give the Seoul government a special claim to membership over the North. In retaliation, the Soviet vote prevented the admission of any new members.³⁷ The Cold War stalemate once more prevailed.

Decolonization began to threaten Western dominance over UN politics with the admission of a sizeable number of newly-independent countries in 1960. This led to institutional manoeuvring on the issue of national division. The US could no longer prevent the issue from being officially discussed on the floor of the assembly. On behalf of the US, New Zealand submitted a resolution to declare the China issue an “important question” in 1961. To raise the bar on allowing the issue to move forward, the US together with Australia, Colombia, Italy, and Japan managed to establish that a two-third majority was necessary to even begin discussion of such important questions “whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations.” Moreover, such debates should be conducted on a case-by-case basis. The delegation from Ghana voiced concerns that the US-led draft insinuated that after every change in government within a state a two-third majority was necessary to readmit a country. Such a position had directly reflected on the unstable situation in Africa in the midst of decolonization and threatened the

³⁶ Ibid.

³⁷ Ibid., 104-5.

international recognition of the independence from colonial rule. Other delegations made the point that the question of PRC representation had to be divorced from the issue what would happen to the ROC.³⁸ At a time when West German politicians still avoided calling on the UN even to protest the building of the Berlin Wall for fear of elevating the issue of East German sovereignty, Chinese representation moved to have a special status in the debate on the sovereignty of divided countries.

In May 1962, almost a year after German division had been cemented by the Berlin Wall, the West German ambassador stationed in Colombo cabled to Bonn. He reported that the contender for the next presidency of the General Assembly and official observer for Ceylon at the UN in New York Gunapala Malalasekera had attacked the West German legal interpretation of German division in statements to the press. Malalasekera had recently been elected chairman of the Sixteen-member Committee of the United Nations for Information from Non-self-governing Territories. In this capacity, the prolific UN diplomat suggested a de-facto official acknowledgement of divided nations. He included the divided Germany and Berlin into his list of divided countries alongside South Vietnam and Laos. Malalasekera endorsed the argument that only official UN recognition of all independent states and territories could lead to unification. The West German ambassador pointed to Malalasekera previous diplomatic posts in Moscow where he established relations between Ceylon and the PRC, Czechoslovakia, and Yugoslavia, as well as his diplomatic stations in Warsaw, Budapest, and Bucharest. These close ties to the socialist bloc, the report insinuated, marked him as a supporter of the GDR's attempt to reach international recognition as a sovereign state "through the backdoor" at the UN.³⁹

³⁸ Office of Public Information, *Yearbook of the United Nations 1961* (New York: Office of Public Information of the United Nations, 1961), 124-8.

³⁹ Political Archive, Foreign Office (hereafter: PA/AA), B 30/341, letter, 14 May 1962.

Malalasekera's statement pointed to a grave danger to West German legal and political frameworks of national division. Decolonization put the recognition of the right of national self-determination and sovereignty of former colonies at the core of UN debates. It was no coincidence that a UN observer from the global South with close ties to socialist states included the divided Germany and Berlin under Allied control into his list of "non-represented territories." The GDR government had started to engage in anti-Apartheid activism at home and through political declarations to the international community since 1960. Apartheid became the vehicle for the GDR leadership to latch the East German claim to independent GDR sovereignty to Third World legal semantics of a right of self-determination, territorial integrity, and international recognition. This new type of legalist language should break West German dominance in describing German sovereignty in international law politics.

It was in this context that Malalasekera intervened into German Cold War debates. The East German leadership fashioned the GDR in Third World logics of "non-represented territories" and equated the East German situation with the position of decolonized, yet still internationally non-recognised countries.⁴⁰ This shift in legal language, however, went deeper than a mere shift in semantics. The GDR leadership tasked its legal and foreign policy experts to design a comprehensive counter model to traditional German ideas of sovereignty rooted in the idea of the German nation and *Volk*. Ethnicity—or in the UN's terminology "nationality"—had provided the legitimacy for claims to unifying Germans in a nation-state since the early nineteenth century. Against this tradition of legal thought, the East Berlin government now put an "East German people" at the heart of its bid for international recognition.⁴¹ While the GDR

⁴⁰ Gehrig, "Reaching Out to the Third World", 576-84.

⁴¹ This was matched by an attempt to establish cultural patterns of identification for East Germans as a separate people. See: Jan Palmowski, *Inventing a Socialist Nation. Heimat and the Politics of Everyday Life in the GDR 1945-1990* (Cambridge: Cambridge University Press, 2009).

government still had to adhere to the notion of representing a people in international affairs, the East Berlin government shifted away from concepts of citizenship based in ethnicity and replaced them with a socialist citizenship of “GDR citizens” at home.⁴² The legitimacy of the East German state and its claim to sovereignty was now grounded in the anti-fascist and anti-racist nature of socialist society and its citizenry rather than ethnicity.⁴³

Shifting geopolitical interests of key-allies aggravated the threat to West German sovereignty doctrine. On 27 January 1964, Ellinor von Puttkamer alerted her Foreign Office superiors to recent events in the General Assembly in a confidential memorandum compiled for the Section United Nations. In charge of monitoring UN politics and international organizations, von Puttkamer had closely followed a recent major turnaround in French Cold War politics. The French government had opened official diplomatic relations with the CCP government under chairman Mao Zedong in Beijing. Von Puttkamer sensed a mounting danger that key allies of the Bonn government, among them the French, US, and potentially also the British government, were moving to view Cold War politics in new ways that could transform “German division” into “German partition.” Nowhere was this danger more acute than in UN politics. Puttkamer outlined the potential for a seismic shift in international politics putting the West German government on the defensive. While “there exist no formal legal parallels between the relationship of the Federal Republic and the SBZ [Soviet Occupation Zone] on the one hand and Formosa and Mainland China on the other,” von Puttkamer argued in the West German Cold War rhetoric of the era, “this doesn’t change the fact that surprisingly many governments make precisely this comparison and measure the problem of the divided Germany

⁴² Sebastian Gehrig, “Cold War Identities. Constitutional Reform and Citizenship between East and West Germany, 1967-75,” *Journal of Contemporary History* 49,4 (2014): 794-814.

⁴³ Gehrig, *Legal Entanglements*, 105-41

with the same parameters as the China Question.”⁴⁴ The French now had made it official that they could live with two officially acknowledged Chinese states. If both Chinese states would ever ascend to UN membership, it would be almost untenable to speak of German division instead of two independent states. It was pivotal, Puttkamer argued, that the Bonn government pushed for the representation of only one Chinese state within the UN. Otherwise, West German claims to representing German sovereignty in its entirety would evaporate.

The incoming head of the West German observer delegation at the UN Sigismund von Braun immediately requested a meeting with the UN Legal Department. The UN’s Legal Counsel Konstantinos Stavropoulos confirmed that the UN bureaucracy saw the French move to recognize the PRC as a breakdown of a united Western position.⁴⁵ Yet, the UN’s legal team had not identified any movement of “Franco-Africans” to adjust the position of newly-independent former French colonies in the China question. Stavropoulos nonetheless saw the writing on the wall. He confided in von Braun that he thought the US strategy of simply increasing the voting barrier to discuss the issue of Chinese representation in the General Assembly was misguided. The “two-China” paradigm gained ground in delegation offices around the UN headquarters. Stavropoulos saw the US strategy as wasting precious time in securing continued membership for the ROC as long as the US delegation still held a dominant position within the UN. As long as the Soviet Union only reluctantly peddled the PRC’s position, but had no real interest to share the “vanguard position among the suppressed peoples” within the UN after the Sino-Soviet split, the Western coalition should come to an agreement with Moscow that allowed membership for both Chinese states to solve the issue.

⁴⁴ PA/AA, B 30/341, Aufzeichnung , 27 January 1964.

⁴⁵ De Gaulle’s retreat from NATO and the attempt to build an independent French Cold War policy prompted the French diplomatic recognition of the PRC. See: Garret Joseph Martin, *General de Gaulle's Cold War. Challenging American Hegemony, 1963-68* (New York: Berghahn Books, 2013).

Stavropoulos made clear that the law could only follow politics here as “a solid legal solution seemed unlikely, so the Gordian knot needs to be severed with the political sword.”⁴⁶

Von Braun dreaded the UN legal counsel’s ideas for constructing legal arguments that allowed for membership of both the ROC and PRC. A switch from the ROC to the PRC in Chinese representation seemed the most straightforward legal solution, but the least appealing result in political terms. Yet, if as Stavropoulos suggested, the US and other Western states worked towards membership of both Chinas, a multitude of legal trappings would open up. Stavropoulos insisted that the case of Syrian membership could not serve as legal precedent after the United Arab Republic (UAR) had collapsed in 1961. In his view, the Syrians simply again took up their formerly already existing membership. Stavropoulos as one of the leading UN legal experts saw a legal construction of both Chinese states as “successor states” of the UN’s foundational member “China” as the most promising option. The Security Council seat had to go to the PRC accounting for the country’s military strength and territorial size, but both Chinese states could be seated in the General Assembly. As there existed no precedent in UN legal procedures for divided countries and legal theory on sovereignty of divided countries within international law was also non-existent, Stavropoulos thought that such a solution could still garner the support of the overwhelming majority of current UN members. This would give enough political cover for his legal interpretation.⁴⁷

Von Braun immediately realized the danger for West German foreign policy and legal theory. He alerted the Foreign Office and requested a new line of legal argumentation. “The theory of Chinese successor states is perilous for us as one can draw parallels from it to the Soviet argument that two German states have developed on the soil of the German Reich.”⁴⁸

⁴⁶ PA/AA, B130/3134A, Fernschreiben, 3 February 1964.

⁴⁷ Ibid.

⁴⁸ Ibid.

Since 1945, West German international law experts had ardently fought any suggestion of a discontinuation of German sovereignty to deny Soviet arguments of the succession of two German states after the demise of the German Reich in 1945.⁴⁹ State succession seemed an obvious legal construction for Stavropoulos in a time of decolonization and the emergence of new states, but it was the least desirable precedent for West German diplomats and legal experts. The hegemony of West German legal thought on international sovereignty in the German-German Cold War confrontation was in serious peril.

West German diplomats swarmed out on fact-finding missions to gauge the impact of the issue of Chinese sovereignty and international representation on German division. The West German ambassador to France Klaiber met with his US counterpart Lyon in Paris to discuss the fallout of French diplomatic recognition of the PRC. Lyon reassured Klaiber after a meeting with Premier Pompidou that the French saw the question of divided countries purely politically. As long as Soviet troops were needed to prop up the GDR government, there could be no “reality” of the GDR as a sovereign state in the French view. Klaiber reported to Bonn that Lyon debunked distressing contrary rumours that the French might accept the “reality” of “Pankow”—the East German government and state—as they did in case of the PRC.⁵⁰

The West Germans were not the only ones upset with the French government’s shift in Cold War politics. The South Vietnamese government in Saigon sharply criticized the French recognition of the PRC fearing for its own position against the communist North. When a French delegation visited for regular consultations, the West German representative at NATO in Paris Alexander Böker pressed the issue with his French counterpart Mana’ch. Given France’s colonial history in Vietnam, Mana’ch claimed, the French government had no plans to acknowledge North Vietnam or North Korea. Based on the Geneva Treaties of 1954, France

⁴⁹ See: Gehrig, “Recht im Kalten Krieg,” 64-97.

⁵⁰ PA/AA, B130/3134A, Fernschreiben, 27 January 1964.

only planned to maintain economic and cultural links with North Vietnam. French suggestions that Vietnam could be united as a neutral country raised the ghost of Stalin's offer to unite Germany under neutrality from 1952, which the West German government still viewed as a Soviet ruse to take over the whole of Germany. The West Germans impressed on their French guests that they should at least avoid any similar rhetoric in discussing divided countries and asked if they would support efforts to ensure that "neutral non-aligned countries would not establish relations to North Vietnam and North Korea. The similarity with the divided Germany could otherwise be obvious."⁵¹ To make the French position clear that the GDR was no sovereign state under international law, West German diplomats asked them to speak of "China and Formosa" instead of "two Chinas" to avoid parallels to the "wrong term of 'two Germanys'."⁵²

Politics and historical developments now openly became guiding arguments to make a claim for differences in the legal nature of divided countries' sovereignty. In March 1964, the West German UN observer delegation received new marching orders. In case the theory of two Chinese successor states should be brought into continued contact with the Soviet assertion of two German successor states, the Foreign Office instructed the UN observer delegation, the diplomats should highlight historical differences between the two cases. The division of Germany occurred due to outside influence and the "Pankow regime" remained a concealed Soviet occupation system. In contrast, Chinese division had developed out of internal transformations as an outcome of civil war. Foreign office diplomats concluded that a "division into a Chinese and Formosan state would be by far not as unnatural as a tearing apart of Germany, which is historically, culturally, and following the will of its population a much more

⁵¹ PA/AA, B130/3134A, Deutsch-französische Konsultationen, 11 March 1964.

⁵² PA/AA, B130/3134A, Niederschrift der deutsch-französischen Konsultationen.

tightly formed entity.”⁵³ Moreover, geography and the separation of Taiwan and the PRC by the Taiwanese Strait made division more credible.

The ever-closer comparison of national divisions in Europe and Asia soon also concerned the NATO Council. In Beijing, the CCP leadership decided to accredit an official North Vietnamese ambassador. The West German NATO delegate Sahm immediately demanded curbing the standing of this “doyen” (*Doyenat*).⁵⁴ It had dawned on the West German government that “third party countries will watch our position towards North Vietnam and North Korea closely and draw comparisons between those territories and the SBZ.”⁵⁵ The Foreign Office now stepped up efforts to refute comparisons between North Vietnamese diplomats and East German attempts to establish more official diplomatic posts outside the socialist bloc at the time.⁵⁶ But the NATO Council agreed that the alliance should avoid the public appearance of a NATO position on the issue of PRC UN membership. This would just open up NATO for propaganda attacks from Beijing and Moscow. The NATO legal counsel tried to calm West German concerns by arguing that diplomatic recognition of the PRC did not preclude support for UN membership. In the recent UN vote, the Netherlands, Israel, and Nigeria abstained while Rwanda voted against although they all recognized the PRC’s statehood.⁵⁷ Yet, the growing importance of the PRC in international politics and changed priorities of key-allies were hard to overlook.

The contradictions between legal concepts of sovereignty and international politics started to affect internal assessments within Western governments by the mid-1960s. While

⁵³ PA/AA, B130/3134A, Theorie der chinesischen Nachfolgestaaten, 9 March 1964.

⁵⁴ PA/AA, B130/3134A, Abteilung II, DgII i.V., 12 November 1964.

⁵⁵ PA/AA, B130/3134A, Aufzeichnung, 14 January 1965.

⁵⁶ PA/AA, B130/3134A, Aufzeichnung, 16 November 1964.

⁵⁷ PA/AA, B130/3134A, BRD Vertretung /NATO., 26 June 1964.

legal experts across Europe and the US tried to alert diplomats to the dangers of shifting positions on the representation of divided countries' sovereignty, but still believed in the powers of institutional rules within the UN to block changes, South-East Asia specialists confronted with "continuously expanding Red-Chinese influence" saw the matter differently.⁵⁸ What still saved Western majorities to contain the PRC's influence was Beijing and Taipei's strict mutual non-recognition positions, which cancelled each other out as long as the Western alliance could reign in enough African and Asian countries using economic and political pressure. Yet, the West German government came under ever-increasing pressure within the UN since Malalasekera's intervention in 1962. When West German-PRC talks on trade relations broke down in 1964, the PRC turned its back again on Bonn's position of "one Germany" and offered renewed support to the GDR government. While West German diplomats hoped that "the setbacks China has suffered in Africa" could diminish support for the PRC within the UN, the East German government clearly thought otherwise.⁵⁹

In 1966, Walter Ulbricht submitted the GDR's official application for UN membership. The GDR application played on the trope of universality to legitimize UN membership. Since its foundation, the promise of universal representation of all independent states within the organization had remained unfulfilled as the GDR examples showed. The East German government highlighted the sovereignty and self-determination of the GDR and its willingness to fulfil all obligations necessary to be a UN member.⁶⁰ In contrast to the PRC, the GDR

⁵⁸ Within the US administration, the UN unit and the South-East Asia desk at the State Department clashed over vastly differing assessments on the China question. See: PA/AA, B130/3134A, report, 9 January 1965.

⁵⁹ PA/AA, B130/3134A, BRD-Vertretung/NATO,, 7 April 1965, 10.

⁶⁰ See: Gehrig, "Reaching Out to the Third World", 583-4.

leadership argued that membership of both German states would aid eventual unification.⁶¹ The Soviet Union used the ensuing debate over the application to make the point that the FRG could not represent the populations of both East and West Germany. In their response, the US, UK, and France held the West German line and maintained that only the Bonn government could speak for the German people in international affairs. In contrast to their position on China, the three Allied powers maintained that the recognition of the GDR's sovereignty could only hinder eventual unification as agreed at the Geneva Conference on 23 July 1955 with the Soviet Union.⁶² When it came to Germany, the attempts to establish the GDR as a separate state "could only frustrate the implementation of the principle of self-determination in Germany and thus make a peaceful settlement in Europe more difficult."⁶³

Von Braun now sounded the alarm bells in the hope that the Foreign Office in Bonn was waking up to the pressure building at the UN.⁶⁴ When the human rights covenants were opened for signature in 1966, the issue of universal representation of all states also moved forward.⁶⁵ Albania, Algeria, Cambodia, Congo, Cuba, Guinea, Mali, Romania, and Syria tabled a renewed request to debate Chinese representation. For the first time, the principle of universality was put front and center in explaining why the PRC had to be recognized as a UN member. The PRC's position as a nuclear power also meant that major international issues could not be solved easily anymore without Maoist China. The US assembled a group of countries in the attempt to reaffirm the notion that Chinese representation represented an

⁶¹ Office of Public Information, *Yearbook of the United Nations 1966* (New York: Office of Public Information of the United Nations, 1966), 205.

⁶² *Ibid.*, 206-7.

⁶³ *Ibid.*, 206.

⁶⁴ See: Gehrig, *Legal Entanglements*, 105-41.

⁶⁵ United Nations General Assembly, Official Records, Annexes Twenty-First Session, Agenda Item 90: "Restoration of the lawful rights of the People's Republic of China in the United Nations", New York, 1966.

“important question” but hoped to avoid any further debate of the issue. Yet, the initial exchanges showed that the Western coalition and the ROC were no longer in a position to curb debates on the issue. The coalition around the US and the ROC now built a new line of defence around a benchmark of a two-third majority within the General Assembly on all decisions taken in regard of the China question. A coalition consisting of Albania, Ceylon, France, Ghana, Nigeria, and the Soviet Union banished this move as a procedural manoeuvre with the sole goal to postpone the inevitable.⁶⁶ The non-representation of a quarter of the world’s population, the opponents of the US resolution contended, dealt a serious blow to the UN’s promise of universal representation. This would reduce the UN’s authority and effectiveness. Within the Credentials Committee, a new battlefield was opened every year when the General Assembly was constituted. The Soviet delegation immediately moved to request that the committee removed the ROC representatives’ credentials as they would not lawfully represent China.⁶⁷ Despite the tensions between the Soviet Union and the PRC since the Sino-Soviet split, the Soviet delegation continued to support the PRC’s opposition of the “two China” paradigm even when open military hostilities broke out at the Sino-Soviet border in 1969.⁶⁸

Western legal experts such as Arthur Larson now hinted at the danger of an expulsion of the ROC if no “package deal” could be agreed in advance of seating the PRC. Larson had served at the US Information Agency and as president Dwight D. Eisenhower’s executive speech writer before taking up a professorship at Duke University. If the ROC were to lose its seat, the government in Taipei had to apply as a new member for renewed membership. Such

⁶⁶ Office of Public Information, *Yearbook of the United Nations 1966* (New York: Office of Public Information of the United Nations, 1966), 133-4.

⁶⁷ *Ibid.*, 136f.

⁶⁸ Office of Public Information, *Yearbook of the United Nations 1967* (New York: Office of Public Information of the United Nations, 1967), 136.

a re-application would be subject to the Soviet Union and PRC's veto against ROC membership. Once expelled, Larson saw a "net result [...] with no prospect of re-admission" of the ROC.⁶⁹ It thus was clear already in 1966 that the US and other Western governments had to find a way to make a deal with the Soviet Union and PRC to allow continued membership of the ROC. They had not heeded Stavropoulos' warning that time was running out to secure ROC membership. The socialist bloc and several African and Asian countries now pushed for the ROC's complete expulsion.⁷⁰

Yet, in Larson's eyes, there seemed to be precedent for a deal. When Syria had left the UAR in 1961, the Syrian government resumed a separate UN membership without applying as a new member. Larson argued against Stavropoulos's Syria position and claimed that a UN member state had split into two separate sovereign states and both governments were allowed continued membership. However, the PRC had made clear that it would under no circumstances accept the notion of two Chinese states. This route to accommodate both Chinese governments thus seemed blocked. The PRC's foreign minister Chen Yi had even demanded a fundamental reform of the UN as a precondition of PRC membership in which "the UN Charter should be reviewed and revised jointly by all countries, big and small; all independent states should be included in the United Nations; and all imperialist puppets should be expelled."⁷¹ The resolutions condemning the PRC and North Korea as aggressors should also be revoked in favour of denouncing the US as the aggressor in the Korean War. Despite

⁶⁹ Arthur Larson, *Questions and Answers on the United Nations* (Durham, NC: Duke University Law School, 1966), 53.

⁷⁰ UN Document No. A/L.469 (1965).

⁷¹ Quoted in *Department of State Bulletin*, vol. 53, no 1381 (13 December 1965): 941.

those radical demands, even Larson argued that PRC membership within the UN could at least create a permanent diplomatic framework to engage with the Beijing government.⁷²

When universal membership and access to the UN moved to the center of UN disputes over China, the Korean question also returned.⁷³ Socialist bloc countries demanded that the UN Commission for the Unification and Rehabilitation of Korea (UNCURK) was dissolved and all US troops withdrawn. Kim Il Sung hoped to capitalize on the increasing number of African and Asian UN members and demanded that all “unlawful resolutions [...] adopted under US pressure” had to be revoked.⁷⁴ When the International Law Commission re-examined the draft articles for the Law of Treaties in 1966, socialist bloc and African states again pushed for the application of the “all states” formula. Against standing UN practice of the so-called Vienna Formula, which only allowed member states and official observers an official say in UN debates, all sovereign states should be able to partake in the codification of the Law of Treaties in accordance with the universality promise of international law. This proposal was eventually voted down with the argument that it would place undue political responsibility on the Secretary-General to decide which entities were states that ought to be invited.⁷⁵ States such as the GDR now saw the Secretary-General as their primary target for lobbying for their states’ recognition. That indeed pushed for the transformation of the UN from an institution still

⁷² Larson, *Questions and Answers on the United Nations*, 56.

⁷³ United Nations General Assembly, Official Records, Annexes Twenty-First Session, Agenda Items 31 and Item 93, New York, 1966.

⁷⁴ The leadership of the DPRK had unrealistic hopes that the economic crisis and political unrest within the ROK in late 1960s would facilitate unification under communist control. This strategy eventually collapsed in 1973. See: Sergey Radchenko and Bernd Schaefer, “‘Red on White’: Kim Il Sung, Park Chung Hee, and the Failure of Korea’s Reunification, 1971-1973”, *Cold War History* 17,3 (2017): 259-77.

⁷⁵ Office of Public Information, *Yearbook of the United Nations 1966* (New York: Office of Public Information of the United Nations, 1966), 897.

shaped by the legal inequalities originating from the colonial era into a universal organization open to all states based on the principle of sovereign equality.⁷⁶

Conflicts over Chinese sovereignty and representation now reached boiling point at the UN.. The power struggles over the sovereignty of divided countries crystallized in battles over internal UN regulations. The supporters of the PRC's position argued that the China question presented a procedural issue within the Security Council. In the General Assembly, however, there existed no distinction between "procedural matters" and "all other matters" in dealing with questions of national representation. Even if the China issue represented a "procedural matter" as the US claimed, it would not be rendered unimportant automatically. Political agendas now dictated the classification of the legal intricacies of the "China question." The French delegation made the point against the US position that the matter of Chinese representation should not be treated as an "important question" and issue of admitting a new state or recognize a government. Rather, the French maintained the UN had "to make sure that properly accredited representatives, in law and in fact, represented a State which was a Member of the United Nations—the People's Republic of China."⁷⁷ The PRC's representation within the UN thus did not represent an "important question" in the remits of Article 18 or the UN Charter following the French view—and thus did not require a two-third majority as the US hoped to maintain—but should be decided by simple majority. By 1968, supporters of the PRC radicalized their legal language further and accused the coalition around the US and ROC of an illegal quarantine of Beijing.⁷⁸ Supporters of the PRC now argued that there existed confusion over the distinction between "state" and "government." While the Guomintang

⁷⁶ For Thant's role in lobbying for the GDR see: Gehrig, *Legal Entanglements*, 105-41.

⁷⁷ *Ibid.*, 137.

⁷⁸ Office of Public Information, *Yearbook of the United Nations 1968* (New York: Office of Public Information of the United Nations, 1968), 160.

“government” had taken part in the foundation of the UN, the PRC actually represented the Chinese “nation and state.” Thus, the PRC had a natural right to represent China internationally.⁷⁹

The West German UN observer delegation watched with increasing fear how the US government was forced to realize that its total non-recognition policy of the China issue had outlived its time. The US had to surrender its resistance to the formation of a UN study group on the issue, which was supposed to restart the debate. By 1970, African support for the PRC’s position had hardened. More and more African states supported the discussion of an admission of the PRC. The initially small coalition spearheaded by Albania and reluctantly supported by the socialist bloc had growing appeal among the Afro-Asian bloc in the UN.⁸⁰ Countries supporting the PRC now became bolder in their approach. Tunisia proposed a resolution that demanded that the Secretary-General should be entrusted with the task of exploring solutions to the China issue. In other words, the UN as an institution should actively involve itself into the dispute. Although voted down, the attacks on the US and ROC became more overt with every year. Now, critics argued that “any ‘two China concept’ was politically and juridically unsound.”⁸¹ While this reassured the West German government, the US administration realized that the US had to come to a new arrangement with Beijing. A year later, Henry Kissinger’s secret visit to the PRC prepared the famous rapprochement announced by Richard Nixon and Mao in 1972. The Soviet Union meanwhile put more pressure on the Western coalition to recognize the sovereignty of the GDR, PRC, North Vietnam, and North Korea following the

⁷⁹ Ibid., 164.

⁸⁰ Office of Public Information, *Yearbook of the United Nations 1970* (New York: Office of Public Information of the United Nations, 1970), 194.

⁸¹ Ibid., 196.

unanimous adoption of the declaration celebrating the UN's twenty-fifth anniversary that had once again reaffirmed the goal of universal representation of all states within the institution.⁸²

“One China” and a divided Germany

In 1971, the dam broke. The US was no longer able to use procedural rules to block the PRC's accession to UN membership.⁸³ Against the routine of previous years, the US proposal on the China issue was no longer discussed under one heading together with the draft championed by Albania and other countries. The coalition of countries that supported PRC membership successfully decoupled the vote from the Security Council and moved it on the floor of the General Assembly. In response, the US delegation tried to shift tactics and advocate the UN's acknowledgement of the existence of two Chinese states in a memorandum from 17 August 1971. A coalition of twenty-two states forced the official distribution of a PRC Ministry of Foreign Affairs' statement, in which the PRC rejected the existence of a second Chinese state. The PRC called for the immediate expulsion of the ROC from all UN affairs. Prompted by the US, the delegations of Saudi Arabia and Tunisia submitted amendments highlighting the right of self-determination of the Taiwanese. An independent Taiwanese state should not be rejected out of hand. The Albanian delegation now pressed the point that the question before the UN was the representation of a state that was already a member of the UN (not—as the US contended—“the representation of China in the UN” and a two-state question). With secret negotiations between the US and PRC government underway, George Bush as US representative at the UN declared that the US had decided that 1971 should be the year to

⁸² Ibid., 197.

⁸³ United Nations General Assembly, Official Records, Annexes Twenty-Sixth Session, Agenda Item 93, New York, 1971. US counter-resolution printed in: United Nations General Assembly, Official Records, Annexes Twenty-Sixth Session, Agenda Item 96, New York, 1971.

change course on the China question. Bush claimed that he had consulted with nearly the whole UN membership and proposed to seat the PRC in the Security Council and both Chinese states in the General Assembly.

Yet, such a move posed fundamental dangers to newly independent African states. Bush tried to secure his desired outcome by proposing that the expulsion of the ROC required a two-third majority. The Mali delegate pointed to the peril for decolonized states by arguing that a “vote for the two resolutions would create a precedent which far from finding a solution to the problem of divided countries could foster parcelization of the States of the third world, many of which were looking for final boundaries conforming to their national identity.”⁸⁴ While the US still managed to get its draft resolution to a vote, the General Assembly rejected this proposal. The following US motion for a separation of the votes of admitting the PRC and expelling the ROC was subsequently also defeated. The General Assembly then adopted resolution 2758(XXVI), which restored all rights of UN representation of the PRC and expelled the ROC from all UN organisations on 25 October 1971. The Security Council was for the first time outmanoeuvred in such a crucial and far-reaching decision. On 23 November 1971, the PRC delegation first attended a Security Council meeting and completed the reversal of Chinese representation.

The Western world reacted with shock. In the historical moment of the PRC’s UN admission, decolonization had turned the General Assembly into the decision-making body of the UN; a demand advanced by many anti-colonial leaders in the 1960s.⁸⁵ Especially the American public was ill-prepared to accept such diminished US influence in world affairs. Since the mid-1960s, legal experts such as Larson had tried to refute claims that an Afro-Asian

⁸⁴ Office of Public Information, *Yearbook of the United Nations 1971* (New York: Office of Public Information of the United Nations, 1971), 131.

⁸⁵ Getachew, *Worldmaking after Empire*, 169.

bloc was taking over the UN. Since the Soviet Union had tried to depose Secretary-General Dag Hammarskjöld during the Congo Crisis, Western publics suspected the formation of a Third World front within the UN around the most “emotion-charged” issue of Chinese representation. In 1966, Larson had still contended that the Security Council and the General Assembly would decide independently of each other which state represented China in their ranks. He thus proposed that it was possible that two different states could represent China within the UN. The events of 1971, however, clearly showed that a veto of the Security Council against seating the PRC in case of an affirmative vote in the General Assembly was no option.

In this international climate, Menzel wrote his article in which he hoped to return the legal issue of German politics to the safe grounds of German *Staatsrecht* and the framework that the four Allies had set up after 1945. International politics of sovereignty, as the shift in Chinese UN representation showed, had critically endangered West German “one Germany” concepts and legal frameworks of sovereignty. The politics of sovereignty had moved on from the early Cold War West German frameworks of sovereignty that Menzel tried to defend. Anti-colonial rights campaigns had established the right of self-determination as the central concept for claims to political legitimacy in representing sovereignty. Western non-recognition policies of socialist states that formed part of “divided countries” moulded in legal languages at the UN and in other international organizations after 1949 had lost their credibility in the 1960s in the face of demands for a truly universal international system based on sovereign equality of states. The PRC’s rise as a regional power gave such demands the necessary political cloud within UN politics.

If we see Ostpolitik’s formula of “two states in one nation” promoted by the West German government in context of international politics of sovereignty at the UN, the impact of rights languages framing decolonization and new international coalitions in UN politics around

the representation of sovereignty on German Cold War politics comes into view.⁸⁶ The demand for equality and universal representation of all sovereign states within UN politics undermined West German legal frameworks. The universal recognition of all independent states was a question of actual power relations, international public opinion, and political support rather than the strict legal issue Menzel and Geiger both tried to portray to a West German scholarly audience in 1971 despite their disagreement over the interpretation of Germany's current legal status and the impact of Ostpolitik. Facing Western powers turning to politics of détente and the signature of Ostpolitik treaties, conservative voices within the Federal Constitutional Court and among legal scholars radicalized their language once more and postulated the Federal Republic and German Reich's sovereignty were identical. Earlier legal frameworks had stressed the legitimate succession in sovereignty as part of West German concepts of "double sovereignty."⁸⁷ In 1973, the constitutional court adopted the "identity theory" in a controversial verdict.⁸⁸ This judicial stopgap against fully recognizing the GDR's legal sovereign independence would remain part of West German conceptual debates until unification in 1990.⁸⁹

The politics of sovereignty that had been at play at the UN showed that the projection of sovereignty in international affairs heavily relied on political coalitions and was subject to

⁸⁶ For the decoupling of the Chinese and German question in UN politics see: Gehrig, *Legal Entanglements*, 105-41.

⁸⁷ See: Gehrig, "Recht im Kalten Krieg".

⁸⁸ Grigoleit, *Bundesverfassungsgericht und deutsche Frage*, 271-85.

⁸⁹ By the 1980s, the court would search for ways out of legal frameworks built on state continuity. See: Sebastian Gehrig, "Deutsche Staatsangehörigkeit und 'Deutschenfähigkeit': Das Teso-Urteil und die Debatten um Migration und bundesdeutsche Selbstbilder in den achtziger Jahren", in *Gegenwärtige Vergangenheit: Rechtsgeschichten in den achtziger Jahren*, ed. Martin Löhnig (Göttingen: Vandenhoeck&Rupprecht, 2021), 25-61.

shifts in international Cold War power relations. After the short moment in which the General Assembly became the decision-making body of the UN and altered Chinese representation, the brittle coalition between socialist-bloc countries and African and Asian states soon broke down. The defence of sovereignty rather than an endorsement of universal membership based on self-determination quickly occupied African and Asian leaders much more once they faced opposition to their rule after independence. The shift towards economic power relations and Third World demands for a New International Economic Order (NIEO) as well as the separation of the UN's legal interpretation of Chinese and German division in the early 1970s finally made the accession of two German states to the UN possible in 1973. While many observers had seen Chinese and German division as part of the same political and legal issue in the 1960s, the different historical trajectories that had led to the divisions of China and Germany determined different UN legal standards after 1971. In this, West German arguments prevailed. The UN legal division determined that the civil war in China that led to the division of the country in 1949 and the break-up of Germany under Allied occupation ought to result in a different legal treatment of the issue of Chinese and German sovereignty. While the "one-China" paradigm continued to structure debate on the PRC and ROC, Ostpolitik treaties created the basis for UN representation of both German states.⁹⁰ The moment of convergence in treating national divisions in Europe and Asia as a challenge to concepts of international sovereignty gave way to a special treatment of German sovereignty in UN legal politics until 1989.

⁹⁰ For the shift away from universality of UN see: Getachew, *Worldmaking after Empire*, 71-106 and 142-75.

For the separation of the Chinese and German case in UN politics see: Gehrig, *Legal Entanglements*, 68-105.

Conclusion

The convergence of the German and Chinese question at the UN in a climate of détente are one example of the constant clashes between the political realities of the Cold War and demands of universal recognition and representation of all independent states. Besides the already vastly different political and legal traditions in constructing legitimate claims to sovereignty in domestic affairs between countries such as Germany and China, the new universal international standard of nation-state sovereignty that the “Westphalian myth” suggested to be a reality after 1945 was inevitably contested ideologically. Anti-colonial movements and their focus on the right of self-determination accelerated these conflicts at the height of decolonization. The downfall of European colonial empires and the accession of newly independent countries across Asia and Africa to international affairs added further influential voices to the controversies over the political and legal construction of sovereignty in international law and UN politics.⁹¹ A recent history of the Bandung Conference has even argued that it was only in 1955 that international law became universal when African and Asian countries added their voices to debates on global equality and justice. It thus would be more appropriate to describe the international legal system that came of age in the postwar period “as *Bandungian* rather than *Westphalian*”.⁹² Yet, it might rather be the case that the end of the Second World War gave rise to renewed ideological competition over visions of sovereign equality rather than a replacement of one vision with another.

Cold War sovereignty doctrines developed under the pressures of the ideological conflict between Western legal tradition and socialist legality as well as demands for a new

⁹¹ Getachew, *Worldmaking after Empire*, 71-106.

⁹² Luis Eslava, Michael Fakhri, and Vasuki Nesiah, “The Spirit of Bandung”, in *Bandung, Global History, and International Law. Critical Pasts and Pending Futures*, ed. Luis Eslava, Michael Fakhri, and Vasuki Nesiah (Cambridge: Cambridge University Press, 2017), 1-32, here 16f.

international system articulated by decolonised states. For divided Germany, this meant that German intellectual traditions of thinking about self-determination and sovereignty were reshaped by new languages of human rights emanating from the global South.⁹³ At the same time, geopolitical interests and politics of detente impacted in crucial ways on the German-German politics of legal sovereignty. Without the reorientation of key-allies towards a new relationship with the Eastern bloc and the PRC, West German claims might have been defensible for longer in international law frameworks. Yet, German sovereignty doctrines no longer developed in isolation or Western frameworks alone from the 1960s onwards. UN politics around divided nations highlight that decolonization had a significant impact on German legal thought, East and West of the border.

⁹³ For a history of self-determination since the 18th century see: Eric Weitz, “Self-determination. How a German Enlightenment Idea became the Slogan of National Liberation and a Human Right”, *American Historical Review* 120, no. 2 (2015): 462-96. See also: Gehrig, *Legal Entanglements*.