He is survived by his wife, Suse, whom he married in 1931, and his son, Professor Rolph Schwarzenberger.

L. C. GREEN*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

Judge Roberto Ago's article, *"Binding" Advisory Opinions of the International Court of Justice* (85 AJIL 439 (1991)), expressly invites a response. The issues he raises focus on a central question: should the United Nations now be given the capacity to appear before the Court as a contentious party? Judge Ago's argument is highly persuasive, and it suggests an affirmative answer to this question. It would require amendment of the Statute of the Court, but, in addition, it would require the United Nations to think through some of the implications of this new capacity. And at a time when the United Nations is contemplating what it might usefully do during the Decade of International Law, this particular exercise strikes one as an eminently suitable one. The following are all issues to which some thought would need to be given.

1. *Which organ would decide to initiate an application to the Court?* The most likely candidate would be the General Assembly, if only for the reasons that there would be budgetary implications (litigation costs money!), and that a decision on this course of action by the plenary organ would be less likely to raise subsequent controversy than a decision by an organ of limited composition.

2. *What categories of disputes would be subject to United Nations participation as a contentious party?* There is clearly an important policy decision to be made, namely, whether the new UN capacity would extend only to those subject matters in relation to which, at present, a "binding" advisory opinion can be sought; or whether the capacity ought to extend to any legal dispute, or defined categories of legal disputes. In either event, thought would have to be given as to how the consent of the other parties would be expressed. Would it be an ad hoc consent expressed in a special agreement, or would there be some form of consent in advance (e.g., by an amendment to the 1946 General Convention on Privileges and Immunities)?

3. *Who would control the policy of the litigation?* No doubt the routine or technical control of the conduct of any litigation—selection of counsel, preparation of pleadings, etc.—could be left to the Legal Counsel. But what of the many crucial policy decisions that arise during litigation? Should the United Nations seek interim measures of protection? Should the United Nations seek to intervene in a case between states? Should damages or some other form of remedy be sought? It is commonplace for quite critical decisions of policy to have to be taken during litigation, and, whereas these can be taken by the government of a state party, it is by no means so clear who would take them for the United Nations. The General Assembly would not be very appropriate, if only because these are matters not appropriate for open, general debate: confidentiality about such decisions is vital.

The answer might lie in a small committee of the General Assembly, appointed in each case, to advise the Secretary-General. But it would have to be understood that decisions reached and implemented could not thereafter be reopened and questioned by the entire General Assembly, for the conduct of litigation would be impossible on such a basis.

4. *A formal commitment to the binding character of any judgment.* It may seem unnecessary to require such a commitment, but Article 94 of the Charter imposes obli-

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gations on states, not on the United Nations as such, and, although Articles 59 and 60 of the Statute seem clear enough, it might be preferable if the General Assembly were to resolve formally that it would accept and implement any judgment to which the United Nations was a party. No one would wish to see a repetition of the difficulties of the 1950s, when some doubts were held as to whether the Organization was bound to implement judgments of its own Administrative Tribunal.

There are doubtless many other issues to be explored. But, if they are to be explored, it is really for the United Nations itself to do so, assuming that a decision is reached that, in principle, the Organization would wish to have this new capacity. Judge Ago has very properly drawn attention to the advantages of so doing. It would be a pity if his article met with no reaction.

D. W. BOWETT

On the Reunification of Germany

TO THE EDITOR IN CHIEF:

It is indeed appropriate for the *Journal* to have focused on the reunification of Germany in recent articles by Messrs. Frowein and Czaplinski (86 AJIL 152 and 163, respectively (1992)); however mesmerizing, the diplomatic and political aspects of this process were in many respects secondary to the impact of Germany's postwar legal structure on the eventual form of reunification. As a close observer of the "two-plus-four" process, I write to add some thoughts for your consideration.

As Frowein notes, reunification occurred in the context of "a unique international framework." Allied rights and responsibilities in Germany were established through a series of quadripartite and tripartite agreements, as well as state practice, the latter designed to ensure that the specifically reserved rights were maintained until reunification occurred. These rights were significant, not only in and of themselves, but also because they formed the basis of a contractual relationship between the two Germanys and the four Allied powers. In fact, the nature of this contractual relationship dictated, to a large extent, the nature and outcome of the reunification process.

U.S. policy with respect to German reunification was designed to settle outstanding border issues, establish unfettered sovereignty for the Germans, and secure a unified state firmly embedded in the West and in the NATO strategic defensive alignment. The contractual nature of the existing legal order significantly contributed to the achievement of these policy goals by fostering the establishment of the two-plus-four process, and by compelling the participants to recognize that consensual agreement was necessary to alter the existing legal order.

When President Bush and Secretary Baker spoke of maintaining "European stability" by creating a unification process which is "peaceful, gradual, and . . . step-by-step,"[1] it is clear in retrospect that they were suggesting obliquely the outlines of what would become the two-plus-four process itself, agreed upon in Ottawa. U.S. policy makers wanted each of the parties with legitimate interests in the resolution of the German issue to participate fully in the process, as well as to negotiate whatever bilateral agreements necessary to provide for adequate regional security arrangements, so as to reduce potential discord: the process must be "peaceful." The policy makers did not want unification to proceed to completion without negotiating and signing a legally binding document—the Final Settle-

[1] *See* DEP'T OF STATE, CURRENT POL'Y NO. 1233, A NEW EUROPE, A NEW ATLANTICISM: ARCHITECTURE FOR A NEW ERA 5 (Address by Secretary Baker to Berlin Press Club, Dec. 12, 1989).

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ment—regardless of the pace of events within the two Germanys: the process must be "gradual." And finally, U.S. policy makers wanted to reserve to the two Germanys those issues relating to internal governance properly left to the two Germanys, after which the four powers would resolve the external matters (including confirmation of definitive borders) remaining from the postwar period: the process must be "step-by-step."

The two-plus-four process was a direct outgrowth of the contract created when the four Allied powers assumed rights and responsibilities over the remnants of vanquished Nazi Germany in 1945. This "contract" (as modified by subsequent international agreements and by actual four-power practice) served any number of purposes during the intervening years, including the establishment of limits on Allied and German activities, and the reservation of certain issues for eventual resolution by and among the parties. President Gorbachev's *glasnost* and abandonment of the Brezhnev Doctrine of support for bloc rulers combined with the rising intolerance of Central and East Europeans for the Soviet system to create the political environment necessary for such a resolution. The legal regime thereafter served to inform the process by limiting the participants to those with a direct interest in the outcome (the parties to the contract), and by requiring the unanimous agreement of those parties to modify the existing regime (unless otherwise specified, unilateral modification of a contract is impermissible).

Limited participants: limited agenda. The contractual nature of Allied rights was essential as a means of limiting the reunification process to "two plus four" and *not* "two plus fifteen." While it would have been impossible for the United States to contend that the broader European community of nations ought not to be included in a full discussion of regional security issues, it was not difficult to exclude those other than the four powers when the framework for discussion was limited to the resolution of those specifically enumerated legal rights relating to occupation. The parties to the contract were the only states with a legitimate (read "legal") interest in the resolution of those issues. Thus, with the exception of Poland (involved solely in the resolution of the German-Polish border issue), the surrounding nations of Central Europe and the other NATO countries were excluded from the discussions, to their chagrin in many instances.

A related problem was created by the Soviets' desire to consider all manner of issues relating to larger security concerns between Germany and the USSR. Although a separate bilateral agreement between the Soviets and the Germans was reached during Chancellor Kohl's visit with Gorbachev in Stavropol, the United States was able to argue, convincingly, that only certain unresolved legal issues could appropriately be addressed directly in two-plus-four reunification talks—borders, reparations, the stationing of troops and the abandonment of existing four-power rights. Absent this limitation on participants and issues, it is almost inconceivable that the United States and West Germany would have achieved their overriding goal of establishing unfettered sovereignty for a unified Germany. In fact, purely as a practical negotiating matter, increasing the range of viewpoints and the breadth of the agenda might well have made it impossible to reach any agreement at all.

Requirement of consensual agreement. Because the four-power occupation rights were jointly held, and because of the intrinsic nature of such rights, the United States could more easily exert leverage on the other parties in an all-or-nothing negotiating process, and thereby more effectively control the outcome of the two-plus-four process. Put differently, the U.S. position had more significance than it might otherwise have had because the parties were operating in an environment in which, in the end, they were obliged to act in concert. For example, the Germans might have been willing to grant the Soviets certain privileges, or to accept certain limits on their sovereignty, that extended far beyond the eventual agreement to offer substantial funding for Soviet troop relocation and economic development, as well as the agreement to cap Bundeswehr troop levels.

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Germany's participation: Germany's limitations. The existing legal structure provided no more support for "zero plus four" than it did for "two plus fifteen." After 1955, the FRG and (as a legal matter) the GDR had sovereignty over most internal matters. One is hard pressed to develop a convincing argument for the proposition that, having progressed long ago to accepting responsibility for their respective internal governance, the two Germanys were not competent to resolve those internal issues arising in the context of reunification. Thus, the postwar legal order virtually assured the presence of the "two" in the "two plus four," and contributed to the satisfaction of the related U.S. objectives of full participation by the German people and avoidance of the dreaded "singularization" of an imposed settlement.

On the other hand, the existing legal structure was also significant to the extent that it was effective in holding off the Germans in their rush toward reunification. If there had been only political obstacles to resolve, the rush of émigrés from the GDR might well have overcome those obstacles quickly and propelled German reunification on an even faster track than that produced by the accelerated two-plus-four process. However, this would have worked against our security interests in several ways. First, such a rapid unification process could well have been destabilizing, both to the two Germanys and to their neighbors, particularly if any of the four powers believed that their respective interests had not been addressed adequately. The existence of legal rights made it far more likely that these concerns would be considered, because legal rights are relinquished in a formal, deliberate manner and this relinquishment will not be forthcoming absent satisfaction of the holder of the rights. Moreover, absent legal rights, the German haste to unify might have produced a compromise with the Soviet Union that was not to the liking of the three Western Allies.

The evaporation of limits on German sovereignty. Throughout the forty-odd years of occupation, document after document, declaration after declaration presupposed eventual reunification for the state of Germany, and a concomitant return to normalcy. The entire structure of the occupation regime, in fact, was such that triggering any change in the legal status quo could well have operated to eliminate all residual rights. With the evident willingness of the Soviet Union to permit reunification, the task at hand was to complete the legal process of returning Germany to normal postwar status. To the extent that the Allied claims were based on more nebulous political imperatives or sheer military power, it would not follow so conclusively that such interests had been extinguished and the temptation to retain residual limitations on German sovereignty would have been more difficult to resist.

In the flurry of attention to political and security considerations, the underlying significance of the law in the two-plus-four process has been neglected. The postscript on this episode should give due credit to the reigning legal order of Germany, which played a major role in establishing the participants, agenda, nature and outcome of the negotiating process, and in so doing aided U.S. policy makers in their quest to secure a reunited, democratic Germany. In the wake of two plus four, Germany remains committed to NATO and to full participation in the European Community and other Western institutions; German-Soviet relations have shifted from military confrontation toward economic cooperation; and German-American relations are as close as they have ever been since Bismarck's establishment of the German state in the mid–nineteenth century. The application of international legal principles in the two-plus-four process clearly played an unprecedented role in the course of a landmark diplomatic and political achievement.

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* The views expressed above are solely those of the writer, and should not be attributed to the Department of State or to the United States Government.

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