INTERNATIONAL LAW AND THE OCCUPATION OF GERMANY 1944-1950

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PREFACE

This book deals with the six years from 18th September, 1944 when the initial occupation of German territory in the West took place, to 19th September, 1950, when in their "Communique on Germany" the Foreign Ministers of France, the United Kingdom and the United States announced the opening of a new phase in their relations with Germany. These five years fall into three distinct periods. The first, the period of conventional belligerent occupation, lasted until the unconditional surrender of Germany on 5th June, 1945. On that date the four Powers - France, the United Kingdom, the United States, and the U.S.S.R. - assumed supreme authority in respect of Germany. As a result the occupation ceased to have a conventional character, and a new period opened in the occupation of Germany. This, the second period, continued until 21st September, 1949, when the Federal Republic of Germany was established and the Western Occupying Powers limited the exercise of their supreme authority to certain defined fields. The first year of existence of the Federal Republic constitutes the third period. The distinctions between the three periods are explained in greater detail in the three corresponding Parts of this book.

The purpose of this book is to examine such of the measures and actions of the Powers in occupation of Germany as may be said to have significance for the international lawyer. Action taken by the Occupying Powers, or some of them, may be of significance for the international lawyer in a variety of ways. For example, the Occupying Powers concluded treaties which had a "law-making" character, and treaties, which, though they may not have made international law, contain special features reflecting the unprecedented situation arising from the unconditional surrender of Germany. Again the actions of the Occupying Powers on the international plane throw light on the status of Germany in international law, and the relationship between her and the

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Occupying Powers or of the Occupying Powers inter se.

To reduce what might otherwise have been too large a task to manageable proportions, it has been necessary to impose certain limitations on this work. First no attempt has been made to write a chronicle of the events of the period. Events are described only in so far as they appear to be material to the legal issues. The facts stated are, as it were, the facts-in-law only. Secondly, the work is written from a British point of view. The actions on the international plane described here are those to which the Government of the United Kingdom or its representative in Germany (the Military Governor and later the High Commissioner) were party. This rule in practice excludes little of the action taken by France or the United States (or their representatives in Germany), since in matters of international import these Powers acted for the most part jointly with the United Kingdom. How much the rule excludes of action taken by the U.S.S.R. on the international plane is a question which could be fully answered only by someone with access to Russian sources not available in the United Kingdom.

In presenting the material in Part II the choice lay between describing the various measures of the Occupying Powers in strict chronological order, or grouping them under certain broad headings. The latter method was chosen as making for greater clarity, although it has the disadvantage that the chronological relationship of matters dealt with in different chapters is not immediately apparent. To minimise this disadvantage cross-references have been given wherever they appear likely to assist, and a chronological table of international agreements and principal events has been appended.

The facts stated in this book are without exception facts, which in one form or another have been made public, and I bear sole responsibility for the opinions expressed.

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PART I: BELLIGERENT OCCUPATION

CHAPTER I

Belligerent Occupation

I

The initial occupation of German territory took place on 18th September, 1944. There was immediately issued Proclamation No. 1[1] in Article II of which General Eisenhower announced that:-

"Supreme legislative, judicial and administrative authority and powers within the occupied territory are vested in me as Supreme Commander of the Allied Forces and as Military Governor, and the Military Government is established to exercise these Powers under my direction."

At this stage the occupation of German territory was a belligerent occupation to which the Hague Regulations applied. The supreme authority assumed by General Eisenhower is thus to be understood as the "almost absolute power"[2] of an occupant as regards the security of his armed forces and the purpose of war.

Much of the Supreme Commander's legislation issued in the exercise of his "almost absolute power" was upon lines which may now be regarded as generally accepted under belligerent occupation. For example under Law No. 51[3] Allied Military Marks were made legal tender. Laws were promulgated for the control of foreign exchange (No. 53)[4], of posts, telephones, telegraphs and radio (No. 76)[5], and of frontiers (No. 161)[6].

/The Supreme

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(1) Military Government Gazette, Germany, Sixth Army Group Area of Control, No. 1; Military Government Gazette, Germany, 21 Army Group Area of Control, No. 2.

The classification of occupational enactments varied from time to time. The terms "proclamation," "law" and "ordinance" were never used except to designate instruments having the force of law. The distinctions made at various times between the three terms will, therefore, only be explained if the distinctions are material to the argument.

(2) Oppenheim: International Law, Volume II, Sixth Edition Revised, page 342.

(3) Mil. Gov. Gazette, Germany, Sixth Army Group Area of Control, No.1 Military Government Gazette, Germany, 21 Army Group Area of Control, No. 3.

(4) Ibid.
(5) Ibid.
(6) Ibid.

The Supreme Commander's specific measures for the security of his forces and the maintenance of public order - Ordinances Nos. 1 and 2[1] - were also on generally accepted lines. Ordinance No. 2 set up Military Government Courts, (composed of officers of the Allied Forces). The Courts were of three types - summary, intermediate and general - distinguished by their powers of sentence. They had jurisdiction ratione personae over all persons in the occupied territory except persons, other than civilians, subject to military, naval or air force law, and serving under the command of the Supreme Commander or any other Commander of any forces of the United Nations. They had jurisdiction ratione materiae over:-

(a) all offences against the laws and usages of war;

(b) all offences under any proclamation, law, ordinance, notice or order issued by Military Government or the Allied Forces, and

(c) all offences under the laws of the occupied territory or any part thereof.

The rights of the accused were laid down in Article V as follows:-

(a) to have in advance of trial a copy of the charges upon which he was to be tried;

(b) to be present at his trial, to give evidence and to examine or cross-examine any witness. (The court had, however, power to proceed in the absence of the accused if the accused had been granted permission to be absent or was believed to be a fugitive from justice.)

(c) to consult a lawyer before trial and to conduct his own defence or to be represented at the trial by a lawyer of his own choice, subject to the right of the court to debar any person from appearing;

(d) in any case in which a sentence of death might be imposed to be represented by an officer of the Allied Forces, if he was not otherwise represented;

/(e)

[1] Military Government Gazette, Germany, Sixth Army Group Area of Control No. 1, and Twenty-one Army Group Area of Control No. 2.

(e) to have material witnesses in his defence summoned by the court at his request, if practicable;

(f) to apply for an adjournment when necessary to prepare his defence;

(g) to have the proceedings translated;

(h) in the event of a conviction to file a petition, setting forth the grounds why the finding or sentence should be set aside or modified.

The rights of the accused were given more precise definition in the Rules of Military Government Courts.(1)

Article VI provided for the review by such officers as might be designated by Military Government of the record of every case in which a petition for review was filed and of such other cases as might be laid down in Rules of Court. The reviewing authority was given power to set aside any conviction, to suspend, reduce, commute or modify the sentence, to order a new trial or to make any other such order as might be appropriate. He might not, however, increase the sentence, unless a petition for review had been filed, and it was considered to be frivolous. Under Article VII sentences of death required confirmation in writing by the Supreme Commander or such officer as he might designate.

Ordinance No. 1 was promulgated "in order to provide for the security of the Allied Forces and to establish public order throughout the territory occupied by them" and created forty-three offences, some of them embracing many kinds of activities, e.g. "acts to the prejudice of good order or of the interests of the Allied Forces or any member thereof" (paragraph 43).

Article IV, entitled "Collective Fines" provided that the Bürgermeister or other principal representative of any community might be charged and tried as representing the residents thereof with any offence for which such residents or a substantial number of them were alleged to be collectively responsible, and that in the event of his

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(1) cf. extract in Military Government Gazette, Germany 21 Army Group Area of Control No. 2.

being convicted, and collective responsibility being established, a collective fine might be imposed.(1)

Article VI provided that it should be a good defence to any charge under the Ordinance that the offence charged was an act of legitimate warfare by a person entitled to the status of a combatant, but that it should not be a defence that the offence charged was committed under orders of any civil or military superior or of any person purporting to act as an official or member of the Nazi Party, or that the offence was committed under duress.

II

Part of the legislation which was promulgated by General Eisenhower as Supreme Commander of the Allied Expeditionary Force can, however, be understood only in the light of the declared war aims of the United Nations.

The United Nations Declaration(2) of 1st January, 1942, itself referred to "the struggle for victory over Hitlerism," a variation of the words "final destruction of the Nazi tyranny" which occur in the Atlantic Charter.(3) The Moscow Declaration on General Security(4) of 30th October, 1943, confirmed earlier declarations that hostilities would be continued until the Axis powers laid down their arms on the basis of unconditional surrender.

It is, therefore, apparent that Section II of the Report of the Crimea Conference(5) of February, 1945, merely gave precise expression to war aims which had been settled some considerable time before the initial occupation. The section reads (in part) as follows;

"It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world. We are determined.....to wipe out the Nazi Party, Nazi laws, organizations and institutions, remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people..... It is not our

/purpose

(1) cf. Article 50 of the Hague Regulations.

(2) Yearbook of the United Nations, 1946-47.

(3) H.M.S.O. Cmd. 6321.

(4) Yearbook of the United Nations, 1946-47.

(5) H.M.S.O. Cmd. 6598.

purpose to destroy the people of Germany, but only when Nazism and militarism have been extirpated will there be a hope for a decent life for Germans and a place for them in the comity of nations."

The demand for unconditional surrender, and the declaration of war aims, which, while disclaiming any intention of territorial aggrandisement, went beyond the total defeat of the enemy state, and was directed to the elimination of a form of government, and indeed of a way of life, within that State, were without precedent. Moreover, General Eisenhower's first enactment - Proclamation No. 1 - made it clear that the realisation of the war aims of the United Nations was not to await a peace settlement, but that on the contrary measures for the extirpation of militarism and Nazism were to be taken without delay.

In Article I of Proclamation No. 1, addressed to the people of Germany, General Eisenhower declared that the Allied Forces serving under his command came as conquerors but not as oppressors: "In the area of Germany occupied by the forces under my command we shall obliterate Nazism and German Militarism. We shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive and discriminatory laws and institutions which the Party created. We shall eradicate that German Militarism which has so often disrupted the peace of the world. Military and Party leaders, the Gestapo and others suspected of crimes and atrocities will be tried, and if guilty, punished as they deserve."

Article III provided that all German Courts and educational institutions within the occupied territory were suspended; that the Volksgerichtshof,(1) the

/Sondergerichte

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(1) The Volksgerichtshof (People's Court) was set up in 1934 for the trial of the most serious political crimes, e.g. treason. It was a criminal court of original and final jurisdiction, composed of five members, two of them professional judges, and three of them representatives of the National Socialist Party, or its affiliated and associated organizations.

Sondergerichte,(1), the S.S. Police Courts and other special courts(2) were deprived of authority throughout the occupied territory; and that the reopening of the criminal and civil courts and educational institutions would be authorised when conditions permitted.

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(1)Sondergerichte (Special Courts) had been set up by a decree of 21st March, 1933 (RGBl I.136). So far as their constitution went, the Special Courts bore the marks of respectability. There was a Special Court for the area of each Court of Appeal (Oberlandesgericht). Only professional judges could sit on its Bench; only regularly appointed prosecutors and duly admitted advocates could appear before it. The distinguishing feature of the Special Court was the speed of its procedure. The preliminary procedure, which preceded the trial in a normal criminal court was omitted; the procedure at the trial itself was simplified in some respects; and there was no appeal against any judgment of the Special Court. The jurisdiction of the Special Courts was originally a limited one. They could only try offences under such legislation as the Presidential Decree for the Prevention of Insidious Attacks on the National-Socialist Government of 21st March, 1933, (Verordnung des Reichspraesidenten für Abwehr heimtueckischer Angriffe gegen die Regierung der nationalen Erhebung) RGBl I 135). This Decree threatened with severe punishment anyone who was in unauthorised possession of a Party uniform or badge; who committed a criminal offence while wearing any Party uniform or badge to which he was not entitled; or who made or published statements, which being untrue or grossly exaggerated were calculated to prejudice the Reich, the Reich government, the Nazi party or its associations. This Decree was replaced and extended by a Law of 20th December, 1934 (RGBl I 1269). The latter introduced the additional offences of pretending, from motives of private gain, to be a member of the Party or its organisations; unauthorised manufacture, storage, sale or distribution of Party uniforms or emblems; and making statements in public, or if of an aggravated character even in private, which showed a base mentality and were calculated to undermine the confidence of the people in their political leaders. This somewhat limited, if vicious, jurisdiction was gradually extended by various laws and decrees, until finally by a Decree of 20th November, 1938, public prosecutors were empowered to bring any case, not being a case within the jurisdiction of the People's Court or the Court of Appeal, before the Special Court if they considered it necessary in view of the gravity of the offence, strong public feeling, or serious danger to public safety and order.

(2)The courts referred to were the Nazi Party Courts set up in 1933 which had jurisdiction over members of the party, its associated and affiliated organisations. The jurisdiction ratione materiae was originally limited to breaches of duty. (Any act or omission, however, constituted a breach of duty if it was prejudicial to the existence, organisation, activities or prestige of the National Socialist Party.) In October, 1939, the Party Courts were given exclusive criminal jurisdiction over full-time members of certain of the party organisations and of the S.S. units which were on military service.

The objects of Law No. 1[1] enacted by the Supreme Commander in conjunction with Proclamation No. 1 were stated in the Preamble to be to eliminate from German law and administration within the occupied territory the policies and doctrines of the National-Socialist Party and to restore to the German people the rule of justice and equality before the law. Article I accordingly provided that the following fundamental Nazi Laws, together with all supplementary or subsidiary carrying-out laws, decrees or regulations, were deprived of effect within the occupied territory:-

Law for Protection of National Symbols of 19th May, 1933.[2]

Law Against the Creation of Political Parties of 14th July, 1933[3]

Law for Securing the Unity of Party and State of 1st December, 1933.[4]

Law Concerning Insidious Attacks Against the State and the Party and for the Protection of Party Uniform of 20th December, 1934[5]

Reich Flag Law of 15th September, 1935[6]

Hitler Youth Law of 1st December, 1936[7]

/Law for

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(1) Military Government Gazette, Germany, Sixth Army Group Area of Control, No. 1; Military Government Gazette, Germany, Twenty-first Army Group Area of Control, No. 3.

(2) Prohibited the use of Nazi or nationalist symbols in any manner calculated to affront "the feeling for their dignity" (RGBl I 285).

(3) Proclaimed that the National Socialist was the only existing party in Germany, and threatened with severe penalties any attempt to form any other (RGBl I 479).

(4) Re-affirmed that the National-Socialist was the only permissible party and laid the foundation for all the privileges the Party and its organisations were to enjoy. It declared that the National-Socialist Party was the "bearer of the idea of the German State" and indissolubly bound to it (RGBl I 1016).

(5) RGBl I 1269 cf. Note on Sondergerichte, (above).

(6) Restored black, white and red as the Reich colours and made the National-Socialist swastika flag the Reich flag (RGBl I 1145).

(7) Declared that the entire German youth was mustered (zusammengefasst) into the Hitler Youth for physical, mental and moral training in the spirit of National-Socialism for service to the people (RGBl I 993).

Law for Protection of German Blood and Honour of 15th September, 1935. (1)

Decree of the Fuehrer Concerning the Legal Status of the N.S.D.A.P. of 12th December, 1942, and (2)

Reich Citizenship Law of 15th September, 1935. (3)

Article I also provided that additional Nazi laws would be deprived of effect by Military Government for the purposes stated in the Preamble, and this was done by Regulation No. 1 issued under the Law. (4)

Article II, which is described as a general suspending clause, provided that no German law, however or whenever enacted, should be applied judicially or administratively in any instance where such application would cause injustice or inequality either by favouring any person because of his connection with the Nationalist-Socialist Party, or by discriminating against any person by reason of his race,

/nationality

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(1) The Law for the Protection of German Blood and German Honour (Gesetz zum Schutz des Deutschen Blutes und der Deutschen Ehre) had three principal provisions. It prohibited and declared void any future marriage between a Jew and a German national of German or kindred blood. The penalty for contravention was penal servitude for life. It prohibited sexual intercourse between a Jew and a German national of German or kindred blood. The penalty (for the man) might be penal servitude for life. Thirdly, a Jew was not permitted to employ in his household any female German national of German or kindred blood of less than 45 years of age. (RGBl.1146).

(2) Exempted the National-Socialist Party from the general rules of law (RGbl I 733)

(3) The Reich Citizenship Law (Reichsbürgergesetz) provided that, while nationality (StaatsangehÖrigkeit) continued to be governed by the existing law, citizenship (Reichsbürgerrecht), a privileged status, was to be open only to German nationals of German or kindred blood, who proved by their conduct that they were willing and able loyally to serve the German people and the Reich. Citizens alone enjoyed full political rights, in accordance with law. A"Jew" - the term was elaborately defined - could not acquire citizenship, and thus could not exercise political rights or hold any public or official position. Any remaining Jewish civil servants were accordingly dismissed on 21st December, 1935, or in a few special cases pensioned. (RGBl I 1146).

(4) Military Government Gazette, Germany, Twenty-first Army Group Area of Control No. 3.

nationality, religious beliefs or opposition to the Nationalist-Socialist Party or its doctrines.

ArticleIII, containing the general interpretation clauses, prohibited the interpretation and application of German law in accordance with Nationalist-Socialist doctrines; provided that the decisions of German courts, of official agencies or of officials, and legal writings, supporting, expounding or applying National-Socialist doctrines should not be referred to or followe as authority for the interpretation or application of German law; and that German law which became effective after 30th January, 1933, and was permitted (i.e. by Military Government) to remain i force, should be interpreted and applied in accordance with the plain meaning of the text, and without regard to objectives or meanings ascribed in Preambles or other pronouncements.

Article IV headed "Limitations on Punishment," provided that no charge should be preferred and no sentence or punishment inflicted for an act unless such act was expressly made punishabl by law in force at the time of its commission, and prohibited the punishment of offences determined by analogy or in accordance wit "the sound instincts of the people,"(gesundes Volksempfinden.)(1)

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(1) This referred to a National-Socialist amendment of Article 2 of the German Criminal Code. In its original form this was to the effect that no punishment might be inflicted for any act, unless the act was declared by a law to be punishable before it was committed. In 1935 Article 2 was amended to read:-
" Every person shall be punished, who commits an act, which is declared by law to be punishable, or which is deserving o punishment according to the underlying purposes(Grundgedanke of a penal law and the sound instincts of the people(gesundes Volksempfinden). If no penal law can be directly applied to the act, the act shall be punished according to the law, the underlying purposes of which are most nearly applicable." This amendment meant that the principle nullum crimen et nulla poena sine lege, and the rule that in interpreting a penal statute a court should in general not go beyond the literal meaning of the words were swept away. Acts might be punished "by analogy," i.e. if though not within the provision of any statute, they seemed to be covered by the general purposes underlying some statute and seemed to be deserving of punishment "according to the sound instincts of the people" The commentaries on the Code leave little room for doubt that the instincts of the people were "sound" only when they commended themselves to the leaders of the Nazi Party. Wachinger, for example, observes that what matters is the vie taken by the "undegenerate leading classes of the people" (der nicht entarteten führenden Schichten des Volks). In endeavouring to meet the wishes of the Party leaders, the court was not unduly hampered by the requirement that the act must be covered by the underlying purposes of a law. It was not bound by preambles or a consideration of the circumstance in which the law was originally enacted. The test was what

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It prohibited cruel or excessive punishments and also abolished the death penalty, except for acts punishable by death under laws in force prior to 30th January, 1933, or promulgated by or with the consent of Military Government. The Law further provided that all punishments imposed prior to its effective date of a character prohibited by it and not yet carried out should be modified to conform to it or annulled.

Law No. 2[1] on the German Courts by Article II dissolved the Volksgerichtshof (People's Court), the Sondergerichte (Special Courts) and all courts and tribunals of the National Socialist Party, its associated or affiliated organizations, and by Article I all the ordinary and administrative German courts and tribunals were suspended and deprived of authority until authorised (i.e. by Military Government) to reopen. The Law also contained various provisions to be applied when the courts were re-opened. Thus Article V provided that no person should act as a judge, prosecutor, notary or lawyer without the consent of Military Government, and prescribed a special form of oath for such persons. Under Article VII Military Government was declared to have power to dismiss or suspend any German judge, prosecutor or other court official, and to disbar from practice any notary or lawyer; to supervise the proceedings of any court; to review administratively all decisions of German trial and appellate courts and to nullify, suspend, commute, or otherwise modify, any findings, sentence or judgment rendered by such court; and to transfer to the jurisdiction of the Military Government courts any case or classes of case.

In order that claims and rights of action might be preserved, Article VIII provided that the period of suspension of German courts was to be excluded in determining periods of limitation or prescription.

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(1) Military Government Gazette, Germany, Sixth Army Group Area of Control No. 1; Military Government Gazette, Germany, Twenty-first Army Group Area of Control, No. 3.

Contd. acts would it be desirable to bring within the mischief of the statute, if it were being enacted afresh to-day (cf. Strafgesetzbuch für des Deutsche Reich: Kom entar von Dr. Adolf Schönke (1942) page 19 *et seq.* for a review of the authorities on the interpretation of the Nazi version of Article 2.)

Law No. 191 [1] prohibited within the occupied territory the exercise of any of the functions, activity or authority of the Reich Ministry of Popular Enlightenment and Propaganda, required its property to be held at the disposal of Military Government, and established a system of Military Government licensing for publications of all kinds, broadcasting, news services, films, theatres and other places of entertainment.

The thoroughness with which the aim of extirpating National Socialism was pursued is illustrated by Law No. 7 [2]. This prohibited the use, for the authentication of any document or for any official purpose, of any seal bearing a swastika or other insignia, emblem or legend of the National-Socialist Party, S.S., or other National Socialist organization.

The Supreme Commander's legislation may, so far as it was directed against Nazism be summarised as follows :-

(1) A number of the laws upon which the National Socialist régime was based was deprived of effect. All other German laws of a discriminatory character were suspended. The interpretation or application of German law in accordance with National Socialist doctrines, and the punishment of offences in accordance with "the sound instincts of the people" or by analogy were prohibited.

(2) The National Socialist Party and most of its organizations were dissolved, and National Socialist property was taken under control.

(3) Distinctively National Socialist courts, i.e. the People's Court (Volksgerichtshof), the Special Courts (Sondergerichte), and the Party courts were dissolved.

(4) All other German courts were suspended, and far-reaching powers of control over them were assumed against their re-opening.

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(1) Military Government Gazette, Germany. Twenty-first Army Group Area of Control, No.3.

(2) Military Government Gazette, Germany. Twenty-first Army Group Area of Control,No. 3.

(5) All educational institutions were suspended.

(6) The Reich Ministry of Popular Enlightenment and Propaganda was forbidden to exercise any of its functions, and certain organizations connected with labour were suspended.

III.

The measures by which these results were achieved clearly go beyond previously accepted practice.(1) Their legality must, therefore, be tested by reference to the Hague Regulations, in particular Article 43, which, while laying upon an occupant the duty of taking all the measures in his power to restore and ensure, so far as possible, public order and safety, requires him also to respect, unless absolutely prevented (sauf empêchement absolu) the laws in force in the occupied territory. Oppenheim paraphrases Article 43 as follows :-

"The occupant ... has no right to make changes in the laws (i.e. of the occupied territory) or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realisation of the purpose of war.(2)

If "military necessity" in the above sense be the sole test by which an occupant's action is to be judged, the Supreme Commander would have been compelled to confine himself to prohibiting all such activities of the National Socialist Party or its organizations and of the courts and other

/institutions

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1) For a review of previous practice, with particular reference to the laws and the courts of the occupied territory, cf. Freeman : War Crimes by Enemy Nationals Administering Justice in Occupied Territory: (American Journal of International Law, Vol. 41, 1947, page 579).

2) Oppenheim : International Law, Volume II, Sixth Edition Revised page 342. Stödter, basing his argument on the wide powers with which a belligerent occupant is invested, claims that under the Hague Regulations an occupant is entitled to make changes in the law of the occupied territory, so far as may be necessary for the realisation of his war aims, including his political war aims (cf. Stödter : Deutschlands Rechtslage, Chapter VII). This claim cannot, however, be reconciled with the generally accepted view that the occupant's authority is of an essentially temporary character.

institutions as were inimical to the security of his forces or the purpose of war and to abrogating such laws as were objectionable on these grounds. It is, however, clear that much of the Supreme Commander's legislation went beyond what would have been justified by military necessity. As has already been stated, it was expressly laid down in the preamble to Proclamation No. 1 that "cruel, oppressive and discriminatory laws and institutions" would be abolished.

The question arises whether there was legal justification for such action. Jennings has suggested that an occupant is not required to respect the laws in force in the country to the extent of respecting laws, which are contrary to natural justice.(1) Fraenkel expounds the same proposition at greater length :-

> "The phrase in the Hague Convention concerning the occupant's duty to respect the existing laws of the occupied country, 'unless absolutely prevented' represents an obligation of international law. Nevertheless, international law, which originates in and is deeply imbued with the principles of natural law does not oblige any military government to respect existing laws that violate basic ideas of justice. An occupying power that conforms with the principles of international law is for that very reason obliged to disallow any municipal law that is contrary to the ordre public of the international community."(2)

The validity of this contention may be tested by reference to the Hague Regulations themselves. These presuppose that the legislation and institutions of all states which claim their protection will be based upon a certain respect for - to use the modern phrase - "human rights". For example,

/Article 46

(1) Jennings: "Government in Commission," British Year Book of International Law, 1946, page 45, note 1.

(2) Fraenkel: "Military Occupation and the Rule of Law", pages 188-9

Article 46, which requires the occupant to respect "family honour and rights, individual lives and private property, as well as religious convictions and liberty" is clearly based upon the assumption that these rights and liberties were respected in the territory before occupation. If this assumption was not justified (and it was not in the case of Germany), adherence to the letter of the Hague Regulations would lead to the nonsensical result that an occupant was required by Article 46 himself to respect rights and liberties, while required by Article 43 also to respect laws in force in the territory which violated them. The Hague Regulations could not, it is submitted, be so construed as to prevent the Supreme Commander from abrogating "cruel, oppressive and discriminatory laws". It might even be argued that he was under a duty to abrogate such laws in so far as they violated the postulates of the Hague Regulations.(1)

The Supreme Commander's measures against institutions call, however, for some further examination. The prohibition of the activities of the Reich Ministry of Popular Enlightenment and Propaganda was clearly justified. In these days of "psychological welfare" the military necessity is apparent.

That many National Socialist institutions, the National Socialist Party itself, the People's Court and the Special Courts offended against the ordre public of the international community and that action against them was justified by the test suggested by Jennings and Frankel is beyond question.

/Nevertheless

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(1) The possibility that the penal laws of the occupied territory might not be in accordance with the principles of the Hague Regulations appears to be envisaged in Article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12th, 1949. This provides that the penal laws of the occupied territory may be repealed or suspended by the occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the Convention. Subject to this latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory are to continue to function in respect of all offences covered by the penal laws of the occupied territory. The expression "application of the Convention" is clearly wide enough to cover Section I, Part III of the Convention, which is in part an amplification of Article 46 of the Hague Regulations.

Nevertheless, there remain two difficulties. The occupants' authority, almost absolute though it may be, is recognized as being of an essentially temporary character. It is, therefore, open to question whether an occupant is justified in going beyond a mere suspension of an institution and actually dissolving it, however obnoxious it might be. The National Socialist Party and its organizations had been very closely bound up with the German State. Their dissolution, therefore, meant a fundamental change in the character and political structure of the German state.

Secondly, the Supreme Commander suspended certain institutions, the ordinary, the administrative and the labour courts, and the educational institutions, which however imbued with National Socialist ideology certain of their practices might be, can scarcely, without abuse of language, be said to offend against the ordre public of the international community. Moreover, the suspension of all the normal courts and the educational institutions is comprehensible only as a step towards the reform of the administration of justice and the educational system which was to be undertaken after the unconditional surrender, that is to say, as measures to bring about further changes in the character of the German state.

In a word, the realisation of the declared war aim of the United Nations to extirpate Nazism and militarism was not to await the cessation of hostilities or the conclusion of a peace treaty; it was put in hand from the day of the initial occupation of German territory.(1) Understandable though the impatience of the United Nations to achieve their war aims may have been, the lawyer is hard put to it to find justification for the Supreme Commander's actions in dissolving political

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1) The legislation promulgated during the Allied occupation of Italy bears certain resemblances to that promulgated by the Supreme Commander in Germany. For example, General Alexander's Proclamation No.1, addressed to the people of Sicily and adjacent islands, recites that "it is the purpose of the Allied Powers to deliver the people from the Fascist régime, which led them into war, and to restore Italy as a free nation," and his Proclamation No. 7 dissolved the Fascist Party and confiscated its property (cf.H.A. Smith: "The Government of Occupied Territory": British Year Book of International Law, 1944, page 151)

organizations and suspending educational institutions and the normal courts of justice. Neither by the test of "military necessity" nor by that of "the ordre public of the international community" can these actions be entirely justified.

PART II: MILITARY GOVERNMENT 1945-1949

Chapter II

Unconditional Surrender

Introduction

Writers[1] on international law have tended to take the Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany by the Governments of the United Kingdom, U.S.A., U.S.S.R. and the Provisional Government of the French Republic, issued on 5th June, 1945,[2] as the starting point of their consideration of the position of Germany in international law. While there can be no doubt, that the Declaration did create a new situation, the question to what extent and why it was new, merits examination.

The assumption of supreme authority might not appear at first sight to be in itself a new element in the situation. In Western Germany, General Eisenhower had assumed supreme authority as early as 18th September, 1944. But his "supreme" authority had been that of a belligerent occupant ruling a territory adversely to its legitimate government and the extent to which it could properly be exercised was defined in the Hague Regulations. The supreme authority assumed by the four Powers was of a different character. It was assumed, after the disappearance of the last remnants of the German government, in a situation, which could not be classified as belligerent occupation, and was indeed without precedent in international law.

In November, 1944, Hitler had left his headquarters in East Prussia, and returned to Berlin to begin the extraordinary closing phase of his life in the bunker of the Reich Chancellery. The effective authority of the National-Socialist Government was dwindling rapidly both in a territorial sense (as a result of

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[1] cf. Jennings: "Government in Commission" (British Year Book of International Law, 1946); Mann: "The Present Legal Status of Germany"; Kelsen: "The Legal Status of Germany According to the Declaration of Berlin" (American Journal of International Law, Volume 39, 1945); Geiler: "Zur völkerrechtlichen Lage Deutschlands" (Schriftenreihe der Aktionsgruppe Heidelberg); Laun: "Der gegenwärtige Rechtszustand Deutschlands" (Jahrbuch für Internationales u. Ausländisches öffentliches Recht 1948/I), and others.

[2] H.M.S.O. Cmd. 6648.

Allied advances) and in other respects. Speer, Reich Minister of Armament and War Production, was making it his first business to sabotage Hitler's "scorched earth" policy. Goering, who in a speech of Hitler's of 1st September, 1939, and by a Decree of 29th June, 1941, had been designated as Hitler's successor, was by Hitler's orders arrested on the night of 22nd-23rd April 1945 on a charge of high treason. By the 28th April Hitler had been handed a British Reuter report on the discussions regarding surrender between Count Bernadotte and Himmler. This "treachery" of Himmler's was the signal for Hitler's end. On the night of 28th-29th April, Hitler executed his "political testament". So far as this remarkable document is material it recorded Hitler's intention to commit suicide; it expelled Goering from the Party and deprived him of all the rights conferred upon him by the Decree of 29th June, 1941, and the speech of 1st September, 1939, and appointed in his place Grand Admiral Doenitz as Reich President and Supreme Commander of the Armed Forces, and also as Minister for War and Commander-in-Chief of the Navy. Certain other appointments were also made, such as that of Goebbels as Reich Chancellor, Seyss-Inquart as Foreign Minister and Field Marshal Schoerner as Commander-in-Chief of the Army. On 30th April Hitler died in the bunker by his own hand. Doenitz was notified at Ploen (Schleswig-Holstein) of Hitler's death and of his own succession.(1)

The trend of German opinion appears to regard the appointment of Doenitz as Reich President, and to the other offices mentioned in Hitler's political testament, as formally valid in accordance with German law as it then existed, and to accept that the government which Doenitz shortly afterwards formed at Flensburg was constitutionally the government of Germany.(2) The point is, however, of small importance, since the

/"government's"

(1) This paragraph is based on Trevor-Roper's admirable reconstruction in "The Last Days of Hitler".

(2) cf. for example Laun, op. cit. at page 10 and Menzel: "Deutschland - Ein Kondominium oder Koimperium?" in Jahrbuch für Internationales u. Ausländisches Oeffectliches Recht, 1948/I at page 65.

"government's" effective authority was non-existent, and though they never formally withdrew recognition, the four Powers never at any time had dealings with the Doenitz régime as a government.

The Basic Documents

It was Doenitz' task to arrange the unconditional surrender of the German armed forces as a whole. On 6th May, 1945, Doenitz executed a full power to enable Colonel-General Jodl, Chief of Staff to the Supreme Command of the Armed Forces, to conclude an Armistice Agreement (sic) with the Headquarters of General Eisenhower. The full power is simply headed "Headquarters" and signed "Doenitz, Grand Admiral". The presumption is that in accordance with the classic doctrine[1] that capitulations are conventions between armed forces of belligerents, Doenitz gave the full power in his capacity as supreme commander, though he may also have been the Head of State from the standpoint of German constitutional law.

Two acts of military surrender in respect of all German forces were signed.[2] By the first, done at Rheims on 7th May, Jodl, acting by authority of the German High Command, surrendered unconditionally to the Supreme Commander, Allied Expeditionary Force, and simultaneously to the Soviet High Command all forces on land, at sea and in the air, which were at that date under German control.[3] The second was done at Berlin on 8th May, 1945, and was signed by Friedeburg, Keitel and Stumpf on behalf of the German High Command. Such textual variations as exist between the two instruments are now of no importance. Both were of an exclusively military character.

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1) cf. Oppenheim: International Law Volume II, 6th Edition (Revised) page 430 et. seq.

2) American Journal of International Law, Volume 39, 1945 - Supplement of Documents.

3) Ibid; Official Gazette of the Control Council for Germany, Supplement No. 1.

Each act of military surrender recited that it was without prejudice to, and would be superseded by, any general instrument of surrender imposed by, or on behalf of, the United Nations and applicable to Germany and the German armed forces as a whole.

The general instrument of surrender took the form of the Declaration of 5th June, 1945, regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany, by the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the Provisional Government of the French Republic.(1) No German signature was possible since Germany had since Hitler's death been without a government having any effective authority at all, and the last remnants of the German "government" had disappeared upon the arrest of Doenitz and his associates by the Allies on 23rd May.

The preamble to the Declaration after reciting that the German armed forces on land, at sea and in the air had been completely defeated, and had surrendered unconditionally and that Germany, which bore responsibility for the war, was no longer capable of resisting the will of the victorious powers, stated that "the unconditional surrender of Germany has thereby been effected, and Germany has become subject to such requirements as may now or hereafter be imposed upon her."

The preamble proceeded to state that there was no central Government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers; and that it was accordingly necessary, without prejudice to any subsequent decisions that might be made with respect to Germany, to make provision for the cessation of any further hostilities on the part of the German armed forces, for the maintenance of order in Germany, and for the administration of the country, and to announce the immediate requirements with which Germany must comply.

/Accordingly

(1) H.M.S.O. Cmd. 6648. cf. Gros: La Condition Juridique de l'Allemagne, (Revue Générale de Droit International Public, 50 (1946) pp.67-78) for the genesis of the Declaration.

Accordingly the Representatives of the Supreme Commands of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics and the French Republic, acting by authority of their respective Governments and in the interests of the United Nations, made the following Declaration:-

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

The Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic, will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory."

Also on 5th June, 1945, a Statement (1) was issued by the four governments to the effect that Germany would for the purposes of occupation be divided into four zones, one allotted to each Power, and that the area of Greater Berlinwould be occupied by forces of each of the four Powers, and administered by an Inter-Allied Governing Authority or Komendatura.

On the same date the four Governments issued a Statement on Control Machinery in Germany, which so far as material was as follows:-

" In the period when Germany is carrying out the basic requirements of unconditional surrender, supreme authority in Germany will be exercised, on instructions from their Governments by the British, United States, Soviet and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole. The four Commanders-in-Chief will together constitute the Control Council. Each Commander-in-Chief will be assisted by a Political Adviser.

The Control Council, whose decisions shall be unanimous, will ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and will reach agreed decisions on the chief questions affecting Germany as a whole." (2).

Developments so far may then be summarised as, firstly the imposition of a general surrender on Germany as a whole /(and

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1) H.M.S.O. Cmd. 6648

2) For descriptions of the quadripartite control machinery, cf. Nobleman: uadripartite Military Government Organisation and Operations in Germany American Journal of International Law, 41 (1947) page 650 et seq.) and onier:Le Conseil de Contrôle de Berlin (Revue Générale de Droit Inter-ational Public 51 (1947) page 48 et seq.)

(and not merely on her armed forces)[1] ; secondly, that the surrender was imposed in the interests of the United Nations; thirdly, the assumption by the four Powers jointly of supreme authority over the whole of Germany; and, fourthly, the setting up of machinery for the exercise of that supreme authority.

Emphasis was given to the fact that the general surrender had been imposed on Germany in the interests of the United Nations by a further Statement[2] issued on 5th June, 1945. This was to the effect that in exercising the supreme authority assumed in respect of Germany, it was the intention of the Governments of the four Powers to consult with the Governments of other United Nations.[3]

Protocol of the Proceedings of the Berlin Conference.

The Berlin Conference in July and August 1945 was the last occasion upon which the Heads of Government of the U.S.A., the United Kingdom and the U.S.S.R., the three states which had played the largest part in waging the war, met together to take major decisions of international import. France, though she had assumed supreme authority in respect of Germany jointly with her three Allies and though she was already installed in her own zone and in Berlin as an occupying Power, was not represented at the conference.

/Part

German writers sometimes maintain that only the German armed forces surrendered, and that there was no surrender by Germany, or the German state or the German people. cf. for example Stödter: Deutschlands Rechtslage. Sauser-Hall also does not appear to appreciate that a general surrender was imposed upon Germany, and not merely upon her armed forces, cf. L'Occupation de l'Allemagne par les Puissances Alliées in Annuaire Suisse de Droit International, 1946.

H.M.S.O. Cmd. 6648

Nevertheless, when the United Nations Charter came to be signed on 26th June, 1945, it expressly provided in Article 107 that nothing in it was to invalidate or preclude action in relation to any State, which during the Second World War had been an enemy of any signatory, taken or authorised as a result of that war by the Governments having responsibility for such action.

Part I of the Protocol of the Proceedings of the Berlin Conference (1) provided for the establishment of the Council of Foreign Ministers, upon which the United Kingdom, the U.S.S.R., China, France and the U.S.A. should be represented. The council was, inter alia, to be utilised for the preparation of a peace settlement with Germany to be accepted by the Government of Germany, when a government adequate for the purpose was established. It was also agreed that work of a detailed character for the co-ordination of Allied policy for the control of Germany previously undertaken by the European Advisory Commission would in future fall within the competence of the Control Council.

Part II laid down the political and economic principles to govern the treatment of Germany in the initial control period.

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1) H.M.S.O. Cmd. 7087

Under the political principles were included the "purposes of the occupation":-

"(i) the complete disarmament and demilitarisation of Germany and the elimination or control of all German industry that could be used for military production;

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(ii) to convince the German people that they have suffered a total military defeat and that they cannot escape responsibility for what they have brought upon themselves, since their ruthless warfare and the fanatical Nazi resistance have destroyed German economy and made chaos and suffering inevitable;

(iii) to destroy the National-Socialist Party and its affiliated and supervised organizations, to dissolve all Nazi institutions, to ensure that they are not revived in any form and to prevent all Nazi and militarist activity or propaganda;

(iv) to prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful co-operation in international life by Germany."

For the most part, the political principles were of German internal interest but it may be noted that it was also laid down that for the time being no central German government should be established, though provision was made for certain essential central German administrative departments to be established and to act in the fields of finance, transport, communications, foreign trade and industry, under the direction of the Control Council.

The economic principles (which laid down that during the period of occupation Germany should be treated as a single economic unit) and the provisions relating to reparations will be discussed in later chapters.

In Part V the conference agreed in principle to the ultimate transfer to the Soviet Union of the City of Königsberg and the area adjacent to it. In Part VIII the three Heads of

/Government

Government agreed that pending the final determination of Poland's western frontier the former German territories east of a line running from the Baltic Sea immediately west of Swinemünde and thence along the Oder River to the confluence of the western Neisse River and along the western Neisse to the Czechoslovak frontier should be under the administration of the Polish State.

The decisions of the Berlin Conference were clearly taken in exercise of the supreme authority assumed in respect of Germany. How far the three Powers could properly exercise supreme authority in the absence of France (which had at that time only a provisional government) in fundamental matters affecting Germany as a whole is an interesting theoretical question. It is, however, unnecessary to discuss it here, since in practice it was plain that effect could not be given to the purported exercise of supreme authority by the three Powers, except in so far as France subsequently gave her consent, express or implied, to it.

The Government of France was informed of the Berlin decisions after the conclusion of the conference. It stated that it approved the statement on the purposes of the occupation in Part II of the Protocol. It had no objections to the decisions concerning the Eastern frontiers of Germany, but it considered the establishment of central German administrative departments premature, and could not consent to them, until decisions had been taken on German frontiers as a whole, and on the régime to which in future the industrial regions of the Ruhr and the Rhine were to be subject.(1) Accordingly the French Commander-in-Chief in Germany consistently vetoed all proposals for the establishment of central administrative departments.

The Establishment of the Control Council for Germany

On 30th August, 1945, the Commanders-in-Chief of the Armed

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cf. Virally: L'Administration Internationale de l'Allemagne du 8 mai, 1945, au 24 avril, 1947, page 38.

Forces in Germany of the U.S.A., U.S.S.R., the U.K., and French Republic (acting jointly as members of the Control Council) issued Proclamation No. 1.[1] It announced that the Control Council had been established in virtue of the supreme authority and powers assumed by the four Governments in their Declaration of 5th June, 1945, and that supreme authority in matters affecting Germany as a whole had been conferred upon the Control Council.

On 20th September, 1945, the Control Council in Proclamation No. 2[1] announced "certain additional requirements imposed on Germany." It was addressed to the people of Germany, and could clearly take effect only within Germany. The main provisions of international interest are summarised below.

Section II provided for the withdrawal from territories outside the frontiers of Germany as they existed on 31st December, 1937, of German authorities and officials and for the evacuation from such territories of the German civil population in accordance with such directions as the Allied Representatives (i.e. the Commanders-in-Chief) might give.

Section III announced that the Allied Representatives would regulate all matters affecting Germany's relations with other countries, and that no foreign obligations, undertakings or commitments of any kind would be assumed or entered into by or on behalf of German authorities or nationals without the sanction of the Allied Representatives. The Allied Representatives would also give directions concerning the abrogation, bringing into force, revival or application, of any treaty, convention or other international agreement to which Germany was or had been a party. It was declared that the diplomatic, consular, commercial and other relations of the German State with other States had ceased

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(1) Official Gazette of the Control Council for Germany No. 1.

to exist in virtue of the unconditional surrender. (The full text of the Section makes it clear, however, that "relations" meant only the activities of German missions and officials. The international relations of Germany were to be conducted by the Allies themselves).

Section V, paragraph 14, provided that the property, assets, rights, titles and interests (whether situated inside or outside Germany) of the German State, its political sub-divisions, the German Central Bank, State or semi-State, provincial, municipal or local authorities or Nazi organisations, and of such private companies, corporations, cartels, trusts, firms, partnerships and associations as the Allied Representatives might designate, and those situated outside Germany of any person resident or carrying on business in Germany would not be disposed of in any way whatever without the sanction of the Allied representatives. The German authorities were to furnish full information about the aforementioned property. Paragraph 16 announced that all property, assets, rights, titles and interests in Germany held for, or belonging to, any country against which any of the United Nations was carrying on hostilities or held for or belonging to the nationals of any such country or any persons resident or carrying on business therein would be taken under control and preserved, pending further instructions. A similar provision was made in regard to property in Germany of countries other than Germany (and of private individuals, private enterprises and companies of those countries) which had in any time since 1st September 1939, been at war with any of the United Nations.

Section VI provided that the German authorities would carry out, for the benefit of the United Nations, such measures of restitution, reinstatement, restoration, reparation, reconstruction relief and rehabilitation as the Allied representatives might

/prescribe

prescribe (including the surrender or transfer of property). The German authorities were also required to comply with all such directions as the Allied representatives might give relatin to property, assets, rights, titles and interests located in Germany belonging to any one of the United Nations or its nationals, or having so belonged at any time since the outbreak of war between Germany and that nation, or since the occupation of any part of its territories by Germany.

In Section VII it was provided that foreign merchant shipping in German service or under German control would be made available to the Allied representatives, and that merchant ships of the United Nations in German hands would be surrendered to the Allied representatives regardless of whether title had been transferred as a result of prize court proceedings or otherwise.

In Section VIII it was provided that all German rights in international transport bodies or organisations and in relation to the use of transport and the movement of traffic in other countries, and the use in Germany of the transport of other countries, would be exercised in accordance with the directions of the Allied representatives.

In Section X the German authorities were required to give such assistance as might be required in connexion with the trial of persons suspected of war crimes, or of any national of any of the United Nations alleged to have committed an offence against his national law.

Germany's Status in International Law

The assumption of supreme authority in respect of Germany by the four Powers gave rise to a number of questions which have proved controversial, and are not free from difficulty. The first of these is whether Germany continued to exist as a state in the sense of international law.

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The Arguments for the View that the German State was Extinguish

The principal exponent of the view that the unconditional surrender imposed upon Germany extinguished her as a state in the sense of international law, is Kelsen.(1) In 1944 Kelsen drew attention to the advantages to be derived from the establis ment of a condominium placing Germany under the joint sovereignt of the U.S.A., the U.K. and the Soviet Union.(2) In 1945 he expressed the view that what the four Powers had done in assuming supreme authority with respect to Germany was in fact to establish such a condominium, and thus to extinguish Germany as a state.(3)

Kelsen rests his view on two main grounds. He attacks the statement in Oppenheim's "International Law" Volume II (Sixth Edition Revised) at page 467, that "Subjugation takes place only when a belligerent, after having annihilated the forces and conquered the territory of his adversary, destroys his existence by annexing the conquered territory." In Kelsen's view the complete defeat of the German armed forces, and the fact that Germany was no longer capable of resisting the will of the victorious Powers, and the disappearance of the legitimate German government meant that there was subjugation. He appears to regard the disclaimer of annexation in the Declaration of 5th June, 1945, as being intended to convey that the assumption of sovereignty was for purposes more limited than annexation or for a limited period only.

Kelsen's alternative argument is that the existence of an independent government is an essential element of a state in the eyes of international law, and that by abolishing the last German Government (by arresting Doenitz and his staff) the four Powers destroyed the existence of Germany as a state. The view

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(1) The following adherents of the Kelsen thesis may be mentioned Abendroth (Jahrbuch für Internationales. und Oeffentliches Ausländisches Recht 1948/I page 249); Quincy Wright (cf. American Journal of International Law Volume 41, 1947, page 50 Freeman, (ibid, page 605). Schick (ibid, page 780); cf. also the views of Virally and Schwarzenberger discussed below.

(2) American Journal of International Law Volume 38, 1944, page 689

(3) Ibid, Volume 39, 1945, page 518.

is sometimes wrongly attributed to Kelsen that he regarded the lack of a government as fatal to the continued existence of Germany as a state.(1) Had he done so, he might justly have been accused of having completely failed to understand the arrangements made by the four Powers for carrying on the government of Germany or of having overlooked the fact that international law is not concerned with the form of government in a particular state.

Virally(2) takes as the starting point of his argument the classical view that the three indispensable elements in a state are a territory, a population, and a government. The disappearance of a government composed of Germans means, therefore, the disappearance of the state. He suggests that debellatio, the complete occupation of the territory of a state, means the extinction of that state, unless it has a government - (a government in exile would suffice), - exercising some kind of authority, or unless it has Allies continuing the war. Virally agrees with Kelsen that the four Powers exercise complete political sovereignty in Germany. Virally, however, rejects the term "condominium," as suggesting too great a degree of permanence. He prefers to describe Germany as being under an international administration. The meaning he attributes to the disclaimer of any intention to annex Germany is that though the four Powers exercise all the powers of a German government, Germany remains foreign territory in the eyes of the four Powers, and its inhabitants German nationals under the laws in force in that territory. Virally is compelled to recognise that Germany's international relations continue, but attempts to reconcile his theory of an assumption of political sovereignty with this fact by saying that Germany is recognised as a subject of international law, although she is deprived of the political organisation (organisation étatique) which would enable her herself to assert

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(1) e.g. by Menzel op. cit. page 65.

(2) Virally: l'Administration International de l'Allemagne du 8 Mai 1945 au 24 Avril 1947.

her international rights and perform her international obligations, and suggests that Germany represents a new kind of subject of international law.

Gros regards the German state as having disappeared on 5th June, 1945, as a result of the complete disintegration of all public services and the disappearance of a Government. He rejects, however, the idea that the four Powers had assumed sovereignty over Germany. He prefers to say that the Declaration regarding the Unconditional Surrender established a provisional international administration comparable to trusteeship.(1) The view of Virally and Gros that Germany ceased to exist as a state appears also to ~~be~~ have been the view of the French Government since the following passage occurs in the opening speech of M. François de Menthon, Chief Prosecutor of the French Republic before the International Military Tribunal at Nuremberg:-

"But in the present situation there is no German State. Since the Surrender Declaration of 5th May, 1945 (sic), and until the day when a government shall have been established by the agreement of the four occupying Powers, there will be no organ representing the German state. Under these conditions, it cannot be considered that a German state juridical order exists." [capable of bringing the accused to trial] (2)

Schwarzenberger finds support for the view that the four Powers assumed sovereignty and established a condominium over Germany in the use of the expression "exercise of sovereign legislative power" by the International Military Tribunal to describe the action of the four Powers in framing its Charter, and McNair appears also to attach importance to this use of the word "sovereign". Schwarzenberger takes the disclaimer of annexation in the Declaration of 5th June, 1945, to mean merely that the four Powers would administer Germany as a separate legal entity.(3)

Examination of the Argument that Germany was subjugated

The learned editor of the Seventh Edition of Oppenheim's "International Law" Volume I, takes occasion to deal with the status of Germany after the unconditional surrender, and the views expressed by Kelsen (pages 518-520). He maintains the doctrine that conquest alone does not ipso facto make the conquering state the sovereign of the conquered territory, and that conquest is only /a

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(1) Gros op. cit. But cf. Chapter X for criticism of the trusteeship theory.
(2) International Military Tribunal: Proceedings Volume V, page 389, Nuremberg 1947. cf. also "Ending State of War with Germany - French Proposals Submitted" - Times 22nd June, 1950.
(3) Schwarzenberger: International Law Volume I (Second Edition) pages 142 and 315, and Law Quarterly Review Volume 62, 1946, pages 96-98; McNair: Legal Effects of War (Third Edition) page 354.

a mode of acquisition if the conqueror, after having firmly established the conquest, formally annexes the territory (s 236).(1) He says of Germany that but for the express disclaimer by the four Powers of the intention of annexation, the assumption of full authority over Germany would have been indistinguishable from subjugation. (§237a)

The difference between Kelsen and Lauterpacht on analysis narrows down to a difference as to the point of time at which a conquered state passes under the sovereignty of the conquering state. Lauterpacht's view apparently is that the conquered state continues to exist as a state until such time as the conquering state by annexation or otherwise makes some final disposition in respect of it. Kelsen's view appears, on the contrary, to be that the conquered state immediately upon conquest passes under the sovereignty of the conquering state, notwithstanding that the conqueror does not make and does not, at that time, intend to make any final disposition in respect of the conquered state.

The correctness of these divergent views may be tested by reference to the situation which may arise when the conqueror has no territorial ambitions, and does not desire to make any, or any substantial, changes in the territory of the conquered state. On the Kelsen view the conquered state would be extinguished at the moment of conquest and would re-emerge as a new state at the moment when a new government was formed. There seems to be no escape from this conclusion. The fact that the whole process may occupy only a short period of time does not invalidate the conclusion, since Kelsen is in the case of Germany clearly ready to contemplate that the conquered can pass merely temporarily under the sovereignty of the conqueror. The objection to Kelsen's view is, therefore, that international law, which assumes a high degree of permanence in its subjects, does not accept sudden changes of the character, which if Kelsen's view were correct, it would be necessary to envisage.

But it may be that Lauterpacht understates the case, when he says that but for the express disclaimer of the intention of annexation the assumption of full authority over Germany would

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(1) This corresponds also to McNair's view, cf. Law Quarterly Review, January, 1941, page 34.

have been indistinguishable from subjugation. For even apart from the disclaimer of annexation, it is difficult to read the rest of the Declaration to mean that Germany was extinguished as a state. The Preamble to the Declaration states that "Germany has become subject to such requirements as may now or hereafter be imposed upon her," and later that the four Powers find it necessary "to announce the immediate requirements with which Germany must comply." This language cannot easily be reconciled with the view that "Germany" is merely a geographical expression.

Moreover, the Declaration itself stated that the four Governments would thereafter "determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being part of German territory." Though the four Powers thus reserved to themselves power to determine, whether at some future date Germany's existence as a state should be brought to an end, published evidence as to the attitude of two at least of the Powers parties to the Declaration shows that no such decision has been taken. In the case of the United Kingdom, there is the reported case of R. v. Bottrill ex parte Kuechenmeister(1) in which a certificate by the Secretary of State for Foreign Affairs was given which stated inter alia that Germany still existed as a state. A statement by General McNarney, the United States Military Governor, to the effect that Germany continued to exist as a state appeared in the American licensed press in Berlin on 18th March, 1947,(2) and the U.S. Deputy Military Governor in approving the constitutions of the Laender in the U.S. Zone, stipulated that they should be read "subject to the preservation of a German state."(3)

The attitude of the U.S. authorities is supported by the decision of the U.S. Supreme Court in Clark v Allen. It appears to have been argued in this case that Germany, as a result of its defeat and occupation by the Allies, had ceased to exist as an independent national or international community and that, therefore, the Treaty of Friendship, Commerce and Consular Rights of 1923 between the United States and Germany must be held to have failed to survive the war. The Supreme Court stated that the

/question

(1) All E.R.(1946)1, page 635; 1947 1 K.B.41; cf.also British Yearbook of International Law, 1947, page 381.

(2) Quoted by Menzel, op. cit. page 67.

(3) Quoted by Friedmann: The Allied Military Government of Germany, page 63.

question whether a state is in a position to perform its treaty obligations is essentially a political question, and held that the establishment of the Control Council was "a policy and course of conduct by the political departments, wholly consistent with the maintenance and enforcement, rather than the repudiation, of pre-existing treaties."(1)

Examination of the Argument that Germany lacked a Government.

This argument takes two forms, that there was no government composed of Germans (Virally) and that there was no independent government of Germany (Kelsen). To assess the correctness of either argument it is necessary to examine the arrangements, which the four Powers made for the governing of Germany.

In the statement on Control Machinery in Germany it had been laid down that supreme authority would be exercised in Germany by the Commanders-in-Chief (who were also the Military Governors), each in his own zone of occupation, and jointly in matters affecting Germany as a whole. The Military Governors were, in fact, in the words of the Secretary of State for Foreign Affairs "the agency through which the government of Germany is carried on"(2) Virally's argument amounts to saying that the last normally constituted German government having disappeared, this substitute for a German government was insufficient to save the German state from extinction. This argument is, it is submitted, unsound. It is elementary that constitutional changes, brought about by revolutionary or otherwise, do not affect the continued existence of the State. International law is not in any way concerned with the niceties of the internal constitutional law of states. Situations may arise in which a state finds itself with an imperfectly constituted government, but they cannot affect the identity or continued existence of the state. The fact that

/Germany

(1) 331 U.S. 503

(2) This expression is used in the Secretary of State's certificate in R. v. Bottrill, ex parte Kuechenmeister. The certificate actually speaks of the "Allied Control Commission an attempt apparently to find a short generic term to cover the quadripartite Control Council in Berlin (i.e. the Militar Governors jointly), and the control organisations set up in each zone (i.e. the Military Governors severally.)

Germany had a "government" which was not merely imperfectly constituted from the point of view of her constitutional law, but was completely abnormal, is not in itself sufficient to deprive her of statehood in international law.

The "agency through which the government of Germany is carried on" was certainly not independent of the Governments which set it up. As the Statement on Control Machinery in Germany shows, each Military Governor was subject to instruction by his Government. Moreover, it entrusted the Military Governors with the exercise of supreme authority in Germany only. The Governments themselves exercised supreme authority on the international plane (as will appear from later chapters); and in exercising supreme authority on the international plane the Governments bound their Military Governors in Germany. Kelsen's statement that Germany lacked an independent government is, therefore, incontestably correct. It is, however, questionable whether the disappearance of an independent government necessarily and immediately results in the disappearance of the state itself. Even after conquest a state continues, on the generally accepted view, to exist for so long as the conqueror chooses so to treat it. It may be that normally the conqueror would treat the conquered state as continuing for only a short period pending the transfer of sovereignty. There is, however, nothing in international law to prevent the conqueror from postponing the transfer of sovereignty for a prolonged period, and pending transfer of sovereignty the state would continue to exist. A fortiori the state continues to exist, when as in the case of Germany the conquerors show no disposition to transfer sovereignty either to themselves or others even though for a prolonged period there is no independent government.

The Examination of the Argument derived from the Judgment of the International Military Tribunal

With all respect to the International Military Tribunal and to the learned writers, who have adopted it, it is difficult to attach much weight to this argument. It rests on the choice by the Tribunal of a single word - "sovereign". Moreover the

/Charter

Charter annexed to the London Agreement of 8th August, 1945(1) was expressly made binding upon the Tribunal. It was therefore, unnecessary for the Tribunal to examine the circumstances in which its Charter was drawn up. Its reference to the legislative competence of the four Powers may therefore have been intended as a general description rather than as an exact legal definition.

Analysis of the Controversy concerning the Status of Germany in International Law.

When the protagonists on either side of a controversy include writers of the calibre of Kelsen and Lauterpacht, it would be presumptuous to attempt to decide on theoretical grounds the issues, which divide them. A more appropriate enquiry is, how far have subsequent events decided the issues, and what is the real difference between the writers on such issues, as are as yet undecided?

In the view of Kelsen, Virally, Schwarzenberger, and (semble) McNair, Germany passed on her unconditional surrender under the sovereignty of the four Powers. To attribute to Lauterpacht the view that German sovereignty was not assumed by the four Powers but put into suspense would be consistent with the following language used by him:-

"Pending the restitution of German sovereignty the exercise of the internal and external prerogatives and rights of the German State is vested, with full effect in International Law, either jointly with the four Powers or with any one of them in respect of the part of German territory placed under its administration"(2)

A solution, or at all events a contribution towards a solution of this part of the controversy may be yielded by an enquiry into the factual question, whether the supreme authority

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(1) H.M.S.O. Cmd. 6668

(2) Oppenheim: International Law Volume I, page 520. But cf. also page 411, where the supreme authority assumed by the four Powers in respect of Germany is equated with sovereignty.

exercised by the four Powers actually amounted to sovereignty or not.

In the sphere of German domestic law the four Powers introduced far-reaching changes which suggest an assumption of sovereignty. To give only one example among many, at the session of the Council of Foreign Ministers in Moscow in April and May, 1947, it was decided that land reform should be carried out in all four zones by the end of the year.(1) But on the other hand at the session of the Council of Foreign Ministers in London in December, 1947, it was agreed that the socialisation of industry should be made subject to endorsement by the German people.(2)

The supreme authority exercised by the four Powers on the international plane came very close to sovereignty. Since for example the power to cede territory is one of the marks of sovereignty, it is necessary to consider the definitive severance by the four Powers of Austria (3) and the Sudetenland from the territory of the German state. It is doubtful, however, whether these severances can be regarded as on a par with the cession of territory. The Anschluss with Austria had been effected by Germany in breach of the Treaties of Versailles and St. Germain and the Geneva Protocols of 1922 concerning the financial and economic reconstruction of Austria. By the subsequent establishment of a protectorate over the rest of Czechoslovakia, Germany had repudiated the international agreement in pursuance of which she had acquired the Sudetenland. The four Powers adopted a different procedure in connexion with territory which was part of the German state on 31st December, 1937 (i.e. before the

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(1) Cf. Hansard (Commons) Volume 437, No. 105, 15th May 1947, cols. 1735 and 1741.

(2) cf. Hansard (Commons) Volume 445, No. 43, 18 December, 1947, col. 1891, and Law No. 75 (Reorganisation of German Coal and Iron and Steel Industries), Military Government Gazette, Germany, British Zone of Control, No. 27.)

(3) cf. Moscow Declaration of 1943; and Agreements concerning Control Machinery and Zones of Occupation in Austria and the Administration of the City of Vienna, H.M.S.O. Cmd. 6958.

period of National Socialist expansion.) No such territory was ceded de jure by the four Powers; any transfers of such territory were stated to be provisional, and regarded as requiring ratification by the other United Nations at a peace conference.(1)

Thus the exercise of supreme authority by the four Powers whether on the municipal or the international plane did fall short of the exercise of sovereignty. This, it must be admitted, does not conclusively show that they had not assumed sovereignty. It might be the position, that they had assumed sovereignty but did not exercise it to the full, just as an undoubtedly sovereign government may refrain from certain action on grounds of policy, expediency or equity. Support for the view that the four Powers did not intend, and did not, assume sovereignty can however be found in the relevant international agreements. First, there is the complete absence from the relevant documents of the word "sovereignty". It is difficult to explain the consistent use of the expression "supreme authority", unless it was intended to mean something different from "sovereignty". Secondly it can be clearly established from the agreements that the four Powers intended to exercise supreme authority for a limited period only. The Statement on Control Machinery in Germany which defined the manner in which supreme authority would be exercised itself referred to "the period when Germany is carrying out the basic requirements of unconditional surrender". Part II of the Protocol of the Proceedings of the Berlin Conference is related throughout to "the initial control period". The answer to the question, how long the periods referred to were to last, may also be deduced from the agreements. The Berlin Protocol envisaged in Part I the preparation of a peace settlement to be accepted by the Government of Germany, when a government adequate for the purpose was established. In a peace settlement with Germany the Governments of other United Nations besides the four Powers would undoubtedly participate. The reference in the Declaration regarding the Unconditional Surrender to its having been imposed in the interests of the United Nations and the Statement of the same date regarding consultation with the Governments of the United Nations in exercising supreme authority, coupled with

(1) cf. Protocol of the Proceedings of the Berlin Conference, Parts V and VIII (supra); and Chapter VII.

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the reference in the Berlin Protocol to a peace settlement show that the four Powers assumed for a period, intended to be of limited duration, an authority, which though described as "supreme" was itself limited in the sense that all matters proper to a peace settlement were excluded from it. It is therefore submitted that the better, if not indeed the only tenable, view is that the four Powers did not assume sovereignty over Germany.

A re-examination of the ~~Schwargenberger~~ relevant agreements in the light of subsequent events thus, leads to the conclusion that Kelsen, Virally, and Schwarzenberger were mistaken in thinking that the four Powers had assumed sovereignty over Germany. If Kelsen was wrong in holding that sovereignty had been assumed, then clearly his view that the four Powers had established a condominium over Germany ~~who~~ is untenable. In the case of Virally and Schwarzenberger, however, it does not necessarily follow from their error as to the nature of the authority exercised by the four Powers that their descriptions or classifications of the territory known as "Germany" were also erroneous. Schwarzenberger regards Germany as a "separate legal entity" administered by the four Powers. It is not, however, clear, whether he means that Germany was merely a separate legal entity in the sense that it retained its own municipal law or whether he intends to convey that Germany was a separate legal entity for international purposes. The latter is certainly the view of Virally, who describes Germany as a new kind of subject of international law. That Germany continued to be a subject of international law, there is no room for doubt.(1) The choice therefore lies between saying, with Virally, that Germany could not be a state because she did not have all the attributes of a state, but since she continued to be a subject of international law, she must be a new (and presumably abnormal) subject of international law, or of saying, with the generality of German writers(2) that Germany continued to be a state, but since /she

(1) cf. Chapter X

(2) In addition to the works of Geiler, Laun, Menzel and Stödter, already cited, reference may be made to the following:-
Dölle-Zweigert:Gesetz Nr. 52, page 6.
Kraus:Kontrollrats-Gesetz Nr.10, page 63.
Stappert:Recht der Besatzungsmaechte, page 10 et seq.
K.E.v.Turegg:Deutschland und das Voelkerrecht, page 41.
Weber:Verwaltungsaufbau Deutschlands, page 5.
One of the few German writers, who holds that Germany was extinguished as a state is von Dassel, cf Frage nach dem deutschen Staat, page 19 et seq, but cf also Abendroth already cited.

she did not have all the attributes of a state, she must be an abnormal and exceptional state.

The election which each student of international law makes between these two classifications will be determined by the definition he gives to the expression "state" and whether he is prepared to admit that an international entity, not having all the attributes normally regarded as those of a state, can in abnormal circumstances nevertheless be deemed to be a state. For the British student the election presents no great difficulty: in view of the history of the countries of the Commonwealth and their gradual emergence as international persons in the full sense, the concept of the not fully sovereign state is familiar to him and he will classify Germany as a state, though an abnormal one.

The view taken by the neutral states, which, not being of the United Nations, had no close concern with the treatment of Germany is also of interest. Of the neutral states Switzerland has provided the clearest evidence of its attitude towards Germany. The Obergericht of the Canton of Zürich, following in part statements by the political departments of the Confederation, held on 1st December, 1945, that Germany had not lost the character of a state. The court stated that annexation can take place only if there is an intention to annex, an intention, which is usually expressed in a formal instrument, such as a declaration or peace treaty. The absence of any such intention meant that Germany had not ceased to exist as a state, and the Hague Convention on Civil Procedure of 1905 continued in force between Germany and Switzerland. The court also stated that the acts of the four Powers in respect of Germany were to be regarded as the acts of German governmental authorities (deutsche Staatsgewalt) (1)

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(1) cf. Annuaire Suisse de Droit International, 1946, page 204 et. seq. The Austrian courts also appear to have held that Germany continued to exist as a state cf. Seidl-Hohenveldern: Austrian Decisions on Private International Law 1945-1950 (International Law Quarterly, Vol. 3, No. 4, page 487)

The attitude of other neutral states is less clearly evidenced. It may be said, however, that Sweden entered into an Agreement for the Liquidation of German Assets,(1) which (like the comparable agreement entered into by Switzerland(1)) clearly implies that German nationality continues. While the continuance of German nationality is not conclusive, the agreement, read as a whole, is difficult to reconcile with the view that Germany was not a state. As a preliminary to entering into a similar agreement, the Spanish Government expressly recognized the Allied Control Council as the "Government of Germany." This recognition and the agreement subsequently concluded make it extremely difficult to attribute to the Spanish Government the view that Germany had ceased to exist as a state (2). The fact that the neutral countries, expressly or by implication, recognized the continuance of Germany as a state, is in itself a persuasive argument for holding that she retained that status.

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cf. Chapter III.

The Status of the Military Governors

Before passing from the question of Germany's status, it is appropriate to examine further the arrangements for carrying on her government. The only quadripartite agreement, which throws any light on the status of the Military Governors is the Statement on Control Machinery in Germany. Of this the material words are:-

... "supreme authority in Germany will be exercised, on instructions from their Governments, by the....Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole."

The four Powers had jointly imposed the unconditional surrender on Germany, and jointly assumed supreme authority in respect of Germany. In the above quoted Statement they jointly defined the manner in which supreme authority was to be exercised in Germany. The status of the Military Governors, when acting jointly, i.e. in the Control Council, is clear. The requirement that they should act on instructions from their Governments, coupled with the rule that they could reach decisions by unanimity only, meant that they either acted as the agents of the four Powers jointly, or did not act at all.

The status of the Military Governors severally, i.e. in their respective zones, is less clear, and indeed is a matter upon which it is possible to take more than one view. The fact that a Military Governor exercised supreme authority in his own zone on instructions from his own Government only, would at first sight seem to suggest that he was the agent of his own Government only. That view would, however, be tenable only on the assumption that the Power concerned occupied its zone in its own right and was endowed with supreme authority in its own right. The question, whether that assumption can properly be made is not free from difficulty. In view of the fact that the assumption of supreme authority was by the four Powers jointly, the Powers severally could exercise supreme authority in their own right, only if there had been a

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of authority from the Powers jointly to the Powers severally. It may be said at once that there is no treaty or other formal instrument which expressly effects such a transfer. It might, however, be argued that the Statement on Control Machinery by expressly stating that supreme authority would be exercised severally in the zones by implication transferred the supreme authority itself, as regards the zones, from the Powers jointly to the Powers severally. This argument, which is not altogether easy on the terms of the Statement, might be made more persuasive, at least in an international court, by an appeal to discard fictions and consider the substance, since a joint authority must in respect of the zones be something of a fiction (as indeed it proved in practice to be), if it can only be exercised there severally.

The question, whether each Power, as a matter of law, exercised in its zone several authority in its own right, or joint authority on behalf of itself and the other three Occupying Powers is not merely one of theoretical interest. If it were the true position that the Powers severally exercised authority in their zones in their own right, certain consequences would follow in the municipal law of the United Kingdom, and possibly in that of the other Occupying Powers. If that were the true position, it would follow, in the municipal law of the United Kingdom, that the British Zone of Germany is a place, where "His Majesty exercises jurisdiction" within the meaning of the ~~For~~ Foreign J. Jurisdiction Act 1890 (1) and of other statutes where the expression occurs. There is, however, no reported decision of the United Kingdom courts, where the question has been decided either on a certificate of the Secretary of State or otherwise.

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cf. Hall: Foreign Jurisdiction of the British Crown.

The weakness, then, of the contention that in his zone the Military Governor was the agent of his own Government only is that it cannot be clearly established that the Powers occupied their zone in their own right. The relevant documents are, in fact against such a view. The Declaration regarding the Unconditional Surrender shows beyond doubt that the assumption of supreme authority was by the Powers jointly. The Statement on Control Machinery in Germany deals only with the exercise of authority. If the distinction between supreme authority and the exercise of supreme authority is borne in mind, it seems clear that authority in the zones though exercised severally, was nonetheless in law joint authority exercised by each Power not in its own right but on behalf of the four Powers. The better view, it is submitted, is therefore that the Military Governor was even in his own zone, in law the agent of the four Powers jointly.

The factual position, as distinct from the position in strict law, is described by Jennings in the following words:-

"This machinery of control, it will be noticed, does not create a simple hierarchy of authority with the Zone Commands subordinated to the Control Council, and the Control Council in turn subordinated to the Allied Governments. It creates two distinct areas of authority: first the authority exercised by each Zone Commander in his own zone, and, secondly, an overriding authority in the Control Council for matters, affecting Germany as a whole, on which the Control Council is able to reach an agreed decision. However, the strictly consensual basis of the Control Council's procedure makes it little more than a machinery for the auto-limitation of the Zone Commanders' authority for the unanimity rule, coupled with the fact that the Control Council is composed of the Zone Commanders' themselves, means in effect that the Control Council is powerless to legislate when the Commander-in-Chief of any particular zone refuses to agree. The

/Commanders

The Commanders-in-Chief whether acting as Zone Commanders or as members of the Control Council, act on instructions from their respective Governments. Consequently, the extent to which the Control Council is able to provide as effective central government for Germany as a whole depends directly on the extent to which the four Allied Governments can agree among themselves on a common policy, to be followed in the exercise of the supreme authority, which they have jointly assumed." (1)

It will be noticed that, though Jennings speaks of two "distinct areas of authority", he actually mentions three, the third being that of the Governments of the Occupying Powers. The authority of the Governments in respect of Germany was exercised in a variety of ways. The commonest exercise of authority was that of issuing instructions to their Military Governors, either to take specific action or to pursue a particular policy in their respective zones or to endeavour to reach agreement on certain lines in the Control Council. Again, the Foreign Ministers of the Occupying Powers met from time to time in the Council of Foreign Ministers and reached decisions both on matters domestic to Germany and on matters which affected the relations between Germany and other states. The Governments also exercised authority in respect of Germany by concluding international agreements inter se, or with other states.

Governmental powers in respect of Germany were, then, exercised in three echelons; by the Governments; by the Control Council; and by the Military Governors individually in their zones. The relationship between the Control Council and the zones resembled that between a federal government and the states of a federation, in that the enactments of the Control Council were directly binding upon thepopulation of the zones, without any intervention of the Military Governors of the zones. The Governments of the Occupying Powers, on the other hand, had no direct power over the inhabitants of Germany. Their decisions

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1) Jennings, op. cit. page 31.

required transformation into the law of Germany by the Control Council or the Military Governors. The relationship between the Governments of the Occupying Powers and the single state of Germany thus resembled that between a union and the confederated states of which it is composed. But neither the analogy with the federal state nor the analogy with the union of confederated states can safely be carried further.

It has been said that the Military Governors were in law the agents of the four Powers jointly. In fact and in practice the Military Governors were the agents of such of the Powers as could agree on a particular policy or course of action. This was most clearly shown in the economic sphere. In the early stages of the occupation quadripartite agreement was to some extent achieved on economic policies. (1) Early in 1946, however, it became apparent that owing to Russian intransigence quadripartite agreement could not be achieved on such important matters as the plans and programmes for Germany's foreign trade. Accordingly, the economic fusion of the British and United States zones was decided upon later that year, and on 1st January 1947, the British and United States Military Governors became jointly the agents of the British and United States Governments for the economic purposes which had been agreed between those governments.(2)

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(1) cf. Anne Whyte: "Quadripartite Rule in Berlin": International Affairs, 1947.

(2) cf. Chapter IV.

Termination of the State of War

Whether after the unconditional surrender of Germany the state of war could continue, is a further question, which has given rise to divergent views. Most of the writers who hold that Germany ceased to exist as a state, hold (as indeed seems on their hypothesis inescapable) (1) that the state of war was eo ipso terminated. For those who (like the present writer) hold that the German state was not extinguished, the answer must be sought by reference to the recognised methods by which a state of war may be terminated. There ~~is~~ was no subjugation. There was, equally, no peace treaty, or declaration by the United Nations generally terminating the state of war. There remains for consideration the third recognized, method by which a state of war may be terminated, i.e. that the belligerents abstain from further acts of war and "glide into peaceful relations." (2)

Whether since 8th May, 1945, the belligerents may be said to have "glided into peaceful relations" is a question of some difficulty. At first sight the fact that the United Nations generally

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But cf. Gros (op.cit) who implies that some formal act, presumably of the Occupying Powers, would still be necessary.

cf. Oppenheim: International Law, Volume II, Sixth Edition Revised, page 464.

generally have not made declarations terminating the state of war would seem to be evidence that there has been no cessation of the animus belligerandi and that the state of war continued for the purposes of international law. But the United Nations in most cases refrained from making declarations terminating the war for reasons connected with their municipal legislation and their action or inaction is conclusive for the purposes of their municipal law only.(1) It might well be the position that the various United Nations, while maintaining the state of war for the purposes of their municipal law, had resumed peaceful relations with Germany in such a manner and to such an extent that for the purposes of international law the state of war must be regarded as having come to an end.(2)

In normal circumstances it may be an easy matter to establish that belligerents have "glided into peaceful relations." The resumption of diplomatic relations, for example, would be clear proof. No such simple test was, however, available in the case of Germany, since under Control Council Proclamation No. 2 (supra) the four Powers had themselves taken over the conduct of Germany's foreign affairs.

The question is further complicated by the fact that the Declaration regarding the Defeat of Germany gave the four Powers such wide rights and powers that there was never thereafter any need for them to rely for the justification of their actions upon the continuance of the state of war. Nevertheless, it is suggested that the latest date at which the termination of the state of war can be put for the purposes of international law is the date at which the four Powers and the United Nations generally, ceased to exercise such rights and take such action in or in regard to Germany which apart from the Declaration regarding the Defeat of Germany could be justified only on the

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(1) The Control Council also refrained from taking any step, which would have had the effect of terminating the state of war for the purposes of German municipal law.

(2) cf. the judgment of Scott, L.J. in R. v. Bottrill ex parte Kuechenmeister (All E.R.; (1946) 2 page 435) where the distinction in this respect between municipal and international law is clearly indicated.

footing that the state of war continued, and that the United Nations were still allies in war.

The action of the United Nations in retaining prisoners of war for periods of years after the cessation of hostilities has been widely discussed. Whether the Unconditional Surrender and the disappearance of the German Government, freed the United Nations, or those of them who were signatories, from the obligation implicit in the Geneva Convention of 1929 to return prisoners of war as soon as possible is a controversial topic,(1) but not one relevant to the present issue. But given that the signatories did not consider themselves bound by the Geneva Convention in this respect, it might be said that when the Powers did decide to return prisoners of war they were taking such a long step towards the restoration of normal, peaceful relations that the date of the termination of the state of war might be determined by reference to that decision or its execution. Unfortunately little help can be derived from this investigation. The Council of Foreign Ministers meeting in Moscow in March and April, 1947, decided to call upon the Control Council to produce by 1st July, 1947, a plan for the return of all prisoners of war in territories of Allied Powers and other territories by 31st December, 1948.(2) Some Powers returned all their prisoners well within the time limit; others made no serious attempt to comply with it. All that can be said, therefore, is that the agreement of the four Powers to return prisoners by 31st December, 1948, is evidence that they intended their relations with Germany after that date to be peaceful, and to that extent it is evidence that the state of war did not continue after that date.

On the other hand it is equally possible to instance action taken by the Occupying Powers, which apart from the Declaration regarding the Defeat of Germany would normally have been possible

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(1) The retention of prisoners was part of the policy, agreed at the Crimea Conference, of exacting "labour reparations" from Germany. For a review of the legal aspects of this policy, in contrast to the deportations from countries occupied by Germany, cf. Fried "Transfer of Civilian Manpower from Occupied Territory" (American Journal of International Law Volume 40, 1946, page 303.)

(2) cf. Hansard (Commons) 15th May, 1947, column 1740.

only after the state of war had been brought to an end by a peace settlement. The most conspicuous example, perhaps, is the announcement in the Berlin Protocol of the sources from which the various United Nations were to receive reparations, and the removal of capital equipment as reparations. These measures were taken in virtue of the supreme authority assumed by the four Powers in respect of Germany, and suggest that an examination of the consequences of that assumption of supreme authority (including all the powers of the German Government) may provide a test by which the date of the termination of the state of war in international law may be determined.

The disappearance of the German government and the subsequen dissolution of the German armed forces do not conclusively show that hostilities were no longer possible. There might have been a levée en masse. The question when the state of war ended, may be tested by considering the character of such a levée en masse, if it had occurred. Would the four Powers have been compelled to regard a levée en masse as a resumption of hostilities between belligerents, with all the consequences which such a view would have entailed in international law, or would they have been entitled to treat it as an internal insurrection against the "agency through which the government of Germany was carried on"? It is submitted that it necessarily follows from the fact that the four Powers had assumed all the powers of the German Government that they would have been entitled to treat a levée en masse as an internal insurrection, and that the date of the assumption of those powers, the 5th June, 1945, is the date upon which the state of war terminated in international law. Th four Powers could not continue to be at war with a state the government of which they had assumed. This conclusion is in no way invalidated by the fact that the United Nations generally did not for the purposes of their respective municipal laws terminate the state of war for some considerable time after 5th June, 1945

/Inapplicability

Inapplicability of the Hague Regulations.

If it is correct to say that the assumption of the powers of the German government terminated the state of war and freed the four Powers from any obligation to treat a levée en masse in accordance with the laws and usages of war, it follows that that same assumption freed them from any obligation to subject their occupation of Germany to the Hague Regulations, since these Regulations form part of the laws and usages of war. It has however despite the unconditional surrender of Germany and the assumption of supreme authority been contended[1] that the four Powers continued to be bound by those provisions of the Hague Regulations which relate to occupation. It is therefore proposed to examine in some detail the occupation of Germany in relation to the Hague Regulations.

The "purposes of the occupation" as defined in the Berlin Protocol, and the requirements imposed on Germany in Control Council Proclamation No. 2 (supra) show conclusively that the four Powers no longer considered themselves bound by the restrictions, which the Hague Regulations impose upon an occupant, in particular as regards amendment of the laws in force in the occupied territory. It is therefore necessary to consider whether the four Powers were entitled to act in this way, or whether their measures constituted a breach of the Hague Regulations, which, as the judgment of the International Military Tribunal emphasized,[2] were by 1939 recognized by all civilised nations.

The Hague Regulations are concerned with occupation as an incident of warfare. The principles underlying them are that the occupant exercises for the time being military authority over the occupied territory, and that while he is entitled to administer the territory in the interest of his own military

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(1) cf for example Laun op.cit.

(2) Judgment of the International Military Tribunal, Section IV(F) "The Law Relating to War Crimes and Crimes Against Humanity."

advantage, he must also, so far as possible, respect certain of the basic rights and liberties of the inhabitants.(1) The Hague Regulations, therefore, govern an occupation up to the cessation of hostilities, and subject to any special stipulations in an armistice convention, in the normal course of events, also until the termination of the state of war. Thereafter the occupation becomes a pacific occupation, governed not by the Hague Regulations, but by the peace treaty or any special convention between the occupying and the occupied state. If the view advanced above, that the state of war ended for the purposes of international law on 5th June, 1945, when the four Powers assumed supreme authority in respect of Germany be correct, it is submitted that the Hague Regulations could no longer govern the occupation, since they are concerned with occupation as an incident of warfare, and that this result is not avoided by the fact that the Hague Regulations were not, as previous practice would have required, replaced by a convention between the occupying and occupied states to govern the continuing occupation. It is significant that German writers, who contend that the occupying Powers are bound by the Hague Regulations, maintain that the state of war has not been terminated.(2) The termination of the state of war as a result of the assumption of the government of Germany by the four Powers had the same effect on the Hague Regulations as on the other laws and usages of war.

Even, however, if the view that the state of war was terminated by the assumption of the government of Germany by the four Powers should be held to be incorrect, it is submitted that the situation obtaining in Germany in May and June 1945 was so radically different from any situation envisaged by the framers

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(1) cf. Oppenhim: International Law, Volume II, Sixth Edition Revised, pages 338 - 339.

(2) cf., for example, Laun, op. cit. and other writings and lectures. The inapplicability of the Hague Regulations is admitted by other German jurists. cf., for example, Opinion of the Kaiser-Wilhelm Institut für Ausländisches und Internationales Privatrecht in Tübingen on timber felling for the benefit of the Occupying Powers and other United Nations. (Jahrbuch für Internat. u. Ausl. Oefft Recht 1948 II/III page 3

of the Hague Regulations, that these Regulations cannot be held to apply. The novel element in the situation was the disappearance of any central German government, which had any vestige of effective authority. There was thus no mere displacement of the legitimate government of the occupied territory, as contemplated by the Hague Regulations. Whether the assumption of the government of Germany by the four Powers terminated the state of war or not, the disappearance of the German government which preceded it freed the four Powers from any obligation to conform to the Hague Regulations.

It is worthwhile also to recall some of the conditions obtaining in Germany at the unconditional surrender, and, so far at least as they affected the British Zone of Occupation, some of the consequences of the disappearance of the German central government. In pursuance of the four Power statement of 5th June, 1945, that Germany would be divided into four zones of occupation, the United Kingdom was allotted as its zone an area comprising some 38,000 square miles in North-West Germany, with a population estimated, in the absence of reliable census figures, at some 20 millions. The British Zone presented a cross-section of the German system of regional and local government. It contained three Prussian provinces and part of a fourth (Schleswig-Holstein, Hanover, Westfalen and Nordrhein), two typical Länder (Brunswick and Oldenburg), two Lilliputian Länder (Lippe and Schaumburg-Lippe) and one of the old city state (Hamburg). The huge administrative structure of the Nazi Party had collapsed, and the complex system of local and regional government, upon which it had been paralleled, had come to a standstill. The first task was to set the latter in motion again, an operation which was not rendered easier by the disappearance of the central government, and the consequent increase in the load which local and regional government had to carry.

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It was evident that these remnants of the German administration were incapable of dealing with the conditions which obtained in the British Zone on its establishment, the hordes of displaced persons, released prisoners of war, and refugees, the vastly diminished resources in food, fuel and housing, in communications and transport, and the lack of many of the amenities of normal European life. Nor should it be forgotten that the British Zone contained the vast industrial complex of the Ruhr, its coal, coke and steel industries intermeshed with the industries of the rest of Europe. In these circumstances direct action by the occupation authorities, whether by way of improvisation or permanent measures, was necessary in almost every sphere of German public life. As McNair has said: "In the light of the collapse of government in Germany, any attempt by the Allied Powers to confine themselves to the rights and obligations of a belligerent occupant strictu senso would have produced or continued a state of chaos."(1)

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(1) McNair: Legal Effects of War, Third Edition, page 354.

Chapter III

The Recovery of Reparations from Germany and the Restitution of Property to Territories Formerly Occupied by Germany

I. Reparations

The Crimea Conference(1)

The Heads of Government of the United Kingdom, U.S.A., and U.S.S.R., meeting at Yalta in February, 1945, had recognized it as just that Germany should be obliged to make reparation in kind for the damage she had caused to the Allied Nations in the war, and agreed to set up an Allied Reparation Commission to work out a detailed plan for the exaction of reparations from Germany, including "annual deliveries of goods from current production for a period to be fixed."(2) The Commission was to consider a claim put forward by the Russian representatives for 10,000 million dollars worth of reparations from Germany, a figure to which the Heads of Government of the United Kingdom and U.S.A. were unable to agree without further examination.

The Berlin Conference

Before the work of the Allied Reparation Commission could progress, the three Heads of Government again met at the Berlin Conference in July and August, 1945. The Protocol(3) of the Conference contained in Part III the general provisions relating to sources from which reparations should come. It provided that the reparations claims of the U.S.S.R. (which undertook to settle the reparations claims of Poland from its share) should be met by removals from the Soviet Zone, by certain deliveries, (partly in exchange for food and other commodities) from the Western Zones and from German foreign assets in Bulgaria, Finland, Hungary, Roumania and Eastern Austria. The reparations

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(1) cf. Report of the Crimea Conference, H.M.S.O. Cmd. 6598.
(2) Protocol of the Proceedings of the Crimea Conference, H.M.S.O. Cmd. 7088.
(3) Protocol of the Proceedings of the Berlin Conference, H.M.S.O. Cmd. 7087.

claims of the United Kingdom, U.S.A., and other countries entitled to reparations were to be met by removals from the Western Zones and from German external assets in countries other than those specified above. The Soviet Government also renounced any claim to gold captured by the Allied troops in Germany.

Part IV provided for the disposal of the German Navy and merchant marine. The total strength of the German surface navy, excluding ships sunk and those taken over from Allied Nations, but including ships under construction or repair, was to be divided equally between the United Kingdom, ~~U.S.S.R.~~, U.S.A., and U.S.S.R. The German merchant marine (excluding inland and coastal ships determined by the Control Council to be necessary for the basic German peace economy) was to be equally divided among the U.S.S.R. (which was to provide out of its share for Poland) and the U.K. and the U.S.A. (which were to provide out of their shares for other Allied States, whose merchant marines had suffered heavy losses in the common cause against Germany.)

The reparations provisions of the Protocol referred in terms only to the removal of capital equipment from the respective zones of occupation and to the seizure of German external assets. Moreover, among the economic principles in Part II of the Protocol it was laid down that payment of reparations should leave enough resources to enable the German people to subsist without external assistance. In working out the economic balance of Germany the necessary means were to be provided to pay for imports approved by the Control Council, and the proceeds of exports from current production and stocks were to be available in the first place for payment for such imports. It was thus clearly agreed that if goods from current production were to be taken as reparations (a proposal which had indeed been discussed at the Crimea Conference)

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they could only come out of any surplus of exports over imports.

The Control Council's Level of Industry Plan

The first requirement, therefore, was to determine the amount and character of the industrial capital equipment which could be regarded as available for reparations. This task was entrusted to the Control Council and it drew up a "Level of Industry Plan"(1) in March, 1946.

The Control Council planned on the assumptions that the population of post-war Germany would be 66.5 millions; that Germany would be treated as a single economic unit; and that exports from Germany would be acceptable in international markets.

The plan divided German industry into four categories:-

(1) Industries prohibited in order to eliminate Germany's war potential. The production of arms, ammunition and implements of war, all types of aircraft and sea-going ships was prohibited and would be prevented. All industrial capital equipment for the production of such items as heavy machine tools, heavy tractors, primary aluminium, magnesium, beryllium, vanadium, radio-active materials, war chemicals and gases, and radio-transmitting equipment was to be eliminated. Equipment for the production of synthetic gasoline and oils, synthetic ammonia, synthetic rubber, ball and taper roller bearings was to be retained to meet domestic requirements only until imports were available.

(2) Restricted industries, i.e. industries in which permitted production was for security reasons fixed at certain levels, and capital equipment unnecessary to maintain production at those levels was declared available for reparations. Of these the most important was steel. Production capacity to be left in Germany was fixed at 7.5 million ingot tons, but actual production was not to exceed 5.8 million ingot tons in any future year without the specific approval of the Control Council. Other

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(1) "The Plan for Reparations and the Level of Post-War German Economy," published by the Allied Control Authority, Berlin, April, 1946.

"restricted" industries were non-ferrous metals, chemicals, machine manufacturing and engineering.

(3) Industries, in which the levels of production necessary for the German economy in 1949 were determined, but from which it was not for the time being intended to exact reparations. These industries included coal, rolling stock, agricultural machinery and textiles.

(4) "Unrestricted" industries, those, which, subject to any internal licensing system, were left free to develop according to requirements and available resources. These included such industries as building, building materials and potash.

It was estimated that the general effect of the plan was to reduce the level of industry as a whole to about 50 or 55% of the level in 1938 (excluding the building and building materials industries). It was also agreed that the value of exports from Germany should be planned at Rm. 3 billion (at 1936 values) for 1949, and that sufficient industrial capacity should be retained to produce goods to this value, and cover the internal requirements of Germany, and that approved imports should not exceed Rm. 3 billion (at 1936 values.)

The Distribution of Reparations Among the United Nations

Part III of the Berlin Protocol had defined the sources from which, on the one hand the U.S.S.R. and Poland, and on the other, the U.K., U.S.A. and all other countries entitled were to receive reparations. There still remained the task of determining the sub-division of such reparations as might become available among the members of these two groups of countries. For the second group (consisting of France, the U.K., the U.S.A. and 15 other states) the task was discharged even before the Control Council's Level of Industry Plan had been settled. At a conference which met in Paris in November and December, 1945, and drew up the Agreement on Reparation from Germany, on the Establishment of an

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Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold.[1]

The Agreement laid down in Article 1 detailed provisions regarding the percentage shares which each signatory was to receive of the various forms of German reparation, including industrial and other capital equipment removed from Germany, merchant ships and inland water transport, and German assets in countries which remained neutral in the war against Germany. The reparation account of each signatory was also to be charged over a period of five years with the German enemy assets within its jurisdiction, which, by Article 6, the signatory was bound to hold or dispose of in such a manner as to preclude their return to German ownership or control.

It was the function of the Inter-Allied Reparation Agency,(set up in Brussels) to allocate German reparation among the signatory governments

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(1) Treaty Series No. 56 (1947), H.M.S.O. Cmd. 7173.

and to act as the medium through which the signatory governments might receive information concerning, and express their wishes in regard to, items available as reparation. That the Occupying Powers had special functions in the distribution of German reparation is shown by Article 13, the effect of which is that unlike other signatory governments, a government responsible for the control of a part of German territory, could not withdraw from the Agency. The Occupying Powers not only controlled the physical removals of capital equipment from the Western Zones; they also had, special functions in relation to German external assets and to monetary gold.

Part I, Article 6, paragraph C provided that German assets in those countries which remained neutral in the war against Germany should be removed from German ownership or control and liquidated or disposed of in accordance with the authority of France, the United Kingdom, and the United States, pursuant to arrangements to be negotiated with the neutrals ~~by those~~ countries. The net proceeds of liquidation were to be made available to the Inter-Allied Reparation Agency for distribution on reparation account.

Article 8 dealt with the allocation of a reparation share to non-repatriable victims of German action. Its object was to assist persons who had suffered heavily at the hands of the Nazis but were unable to claim the assistance of any government receiving reparation from Germany. The Governments of the United States of America, France, the United Kingdom, Czechoslovakia and Yugoslavia - in consultation with the Inter-Governmental Committee on Refugees - were as soon as possible to work out a plan which was to provide that a share of reparation assets consisting of all the non-monetary gold found by the Allied Armed Forces in Germany, and in addition a sum not exceeding twenty-five million dollars, should be allocated for the rehabilitation and resettlement of non-repatriable victims of German action. The sum of twenty-five million dollars was to be met from a portion of the proceeds of German assets in neutral countries.(1)

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(1) Details were worked out in the Agreement on a Plan for the allocation of a Reparation Share to non-repatriable victims of German action of 14th June 1947; Treaty Series No. 81 (1947); H.M.S.O. Cmd. 7255.

Part III, entitled "Restitution of Monetary Gold", provided that all the monetary gold found in Germany by the Allied Forces, and any monetary gold, which might be recovered from a third country to which it had been transferred from Germany, should be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany. The portion of monetary gold thus accruing to each country participating in the pool was to be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold without prejudice, however, to claims by way of reparations for unrestored gold. The various countries participating in the pool were to supply to the Governments of the United States of America, France and the United Kingdom, as the occupying Powers concerned, data regarding gold losses, and the three Governments were to take appropriate steps in their zones of occupation to implement distribution.

The conference adopted unanimously two resolutions on German assets in neutral countries. One resolved that the countries which remained neutral in the war against Germany should be prevailed upon by all suitable means to recognise the reasons of justice and of international security policy which motivated the Powers exercising supreme authority in Germany, and the other Powers participating in the conference in their efforts to extirpate the German holdings in the neutral countries. The other resolved that the neutral countries should be prevailed upon to make available for distribution all looted gold transferred into their territories from Germany.

The responsibilities assumed in connection with the distribution of reparations by the United Kingdom, United States of America, and France, by virtue of their supreme authority in respect of Germany may be summarised as follows:-

(a) They were severally responsible for the selection in their

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respective zones of the capital equipment to be made available to the I.A.R.A. for distribution as reparations. In this they acted at first within a quadripartite agreement, since the industries from which capital equipment was to be taken were determined by the "Leval of Industry" plan drawn up by the Control Council.(1)

(b) They accepted responsibility under the Agreement on Reparation from Germany for negotiating with countries which had remained neutral in the war with Germany, agreements by which German assets in those countries were to be liquidated and the proceeds (or part of them) made available to I.A.R.A. for distribution as reparations, and for the recovery of monetary gold looted by Germany and deposited in those countries. The three Powers entered into such agreements with the consent of the fourth occupying Power, since in the Berlin Protocol the U.S.S.R. had waived all claim to German assets in those countries.

(c) They agreed to pool all monetary gold found by their forces in Germany and to apportion it among countries, which had lost monetary gold by looting or wrongful removal to Germany. Here also the three Powers were acting with the consent of the fourth occupying Power, since in the Berlin Protocol the U.S.S.R. had waived all claim to the gold.

In their own right the U.K., U.S.A., and France were entitled to a share of reparations distributed by I.A.R.A., and they were also under an obligation to liquidate German assets in their respective jurisdictions and to account for the proceeds to I.A.R.A.

The Liquidation of German Property in Neutral Countries(2)

The Governments of the U.K., the U.S.A. and France, charged under Part I, Article 6, paragraph C of the Agreement on Reparation from Germany with the duty of securing the liquidation of German assets in those countries, which had remained neutral in the war with Germany, were able to negotiate agreements for that purpose with Switzerland, Sweden and Spain. These agreements, were unprecedented in international law. They also varied considerably in detail, and it is, therefore, necessary to examine them individually.

/Agreement

(1) For subsequent Anglo-American and tripartite "Level of Industry" plans cf. Chapter IV.
(2) cf. Mann: German External Assets, British Yearbook of International Law, 1947, page 239.

Agreement Concerning the Liquidation of German Property in Switzerland (1)

The Agreement between the Governments of the United Kingdom, United States of America and France (referred to as the "Allied Governments") on the one hand, and the Government of Switzerland (acting also on behalf of the Principality of Liechtenstein) on the other, took the form of an exchange of notes in Washington on 25th May, 1946, setting out the following accord. The Allied Governments, fully recognizing Swiss sovereignty, claimed title to German property in Switzerland by reason of the capitulation of Germany and the exercise of supreme authority within Germany, and sought the return from Switzerland of gold stated to have been wrongfully taken by Germany from the occupied countries during the war and transferred to Switzerland. The Swiss Government was unable to recognize the legal basis of these claims but desired to contribute its share to the pacification and reconstruction of Europe, including the sending of supplies to devastated areas.

Accordingly, the Swiss Compensation Office was to complete its investigations of property of every description in Switzerland owned or controlled by Germans in Germany, and of such other persons of German nationality as were to be repatriated to Germany, and to liquidate such property. The term "property" was to include all property of every kind and description and every right or interest of whatever nature in property acquired before 1st January, 1948. There were, however, special interim arrangements regarding German-owned patents, trade-marks and copyrights pending the conclusion of multilateral agreements, and property in Switzerland of the German state, including property of the Reichsbank and the German railroads, was excluded from the accord.

"Germans in Germany" was to mean all natural persons resident in Germany, and all juridical persons constituted

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(1) H.M.S.O. Cmd. 6884

or having a place of business or otherwise organised in Germany, other than those organisations of whatever nature the ownership or control of which was held by persons not of German nationality. Appropriate measures were to be taken to liquidate the interests in Switzerland, which German nationals resident in Germany had through such organisations and equally to safeguard substantial interests of non-German persons which would otherwise be liquidated. The Compensation Office was to settle in general or particular, in consultation with a Joint Commission composed of representatives of the four governments, the terms and conditions of sales of German property, taking into reasonable account, inter alia, the national interests of the signatory governments and those of the Swiss economy. Of the proceeds of the liquidation, 50% was to accrue to the Swiss Government and 50% placed at the disposal of the Allied Governments for the rehabilitation of countries devastated or depleted by the war, including the sending of supplies to famine stricken people. The Swiss Government undertook to permit the three Allied Governments to draw immediately up to 50 million Swiss francs against their share of the proceeds of liquidation. These advances were to be devoted to the rehabilitation and resettlement of non-repatriable victims of German action through the Inter-Governmental Committee on Refugees.

Germans affected by the liquidation of property under the terms of the Accord were to be indemnified in German money, and Switzerland would, out of funds available to it in Germany, furnish one half of the German money necessary for this purpose. The Governments of Switzerland undertook to place at the disposal of the three Allied Governments the amount of 250 million Swiss francs, payable on demand in gold in New York, and the Allied Governments declared that in accepting this amount they waived, in their name and in the name of their banks of issue, all claims against the Government of Switzerland and the Swiss National Bank in connection with gold acquired during the war from

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Germany by Switzerland. All questions relative to such gold would thus be regulated.

The Government of the United States would unblock Swiss assets in the U.S.A., and the Allies would discontinue without delay the "Black Lists" insofar as they concerned Switzerland.

Agreement Regarding the Liquidation of German Assets in Sweden(1)

The Agreement between the Governments of the United Kingdom, the United States of America and France (referred to as "the Allies") on the one hand, and the Government of Sweden, took the form of a series of notes exchanged in Washington on 18th July, 1946, setting out the following understanding.

The Swedish Government confirmed its intention to pursue a programme of economic security by the elimination of German interests in Sweden, and that for this purpose the Swedish Foreign Capital Control Office would continue to uncover, take into control, liquidate, sell or transfer German property. "German property" was to include all property owned or controlled, directly or indirectly, by any person or legal entity of German nationality inside ~~of~~ Germany, or subject to repatriation to Germany, other than persons whose case merited exceptional treatment. (There were, however, special interim arrangements regarding German-owned patents, trademarks and copyrights, pending the conclusion of multilateral agreements.) The Swedish Government also undertook to identify German assets held outside ~~of~~ Sweden by or through Swedish nationals or institutions, and to supply this information to the Allied Governments.

The Swedish Government undertook to give favourable consideration to the question of putting the rolling stock found in Sweden of the German State railways at the disposal of the appropriate Allied authorities, and the Allied Governments reserved their claims with respect to German official property in Sweden, such as the German legation building and its contents. The disposal of the proceeds of German assets in Sweden after clearing against certain Swedish claims would leave a balance which should be considered to be 150 million kronor. This sum of 150 million

/kronor

(1) H.M.S.O. Cmd. 7241

kronor was to be used for financing such purchases of essential commodities for the German economy as might be agreed between the Swedish Government and the Allies for the purpose of preventing disease and unrest in Germany. In pursuance of its policy of participation in the work of reconstruction and rehabilitation, the Swedish Government would make available 50 million kronor to the Inter-Governmental Committee on Refugees for the benefit of non-repatriable victims of German action, and a further 75 million kronor which it would allocate among the parties to the Paris Agreement on Reparation from Germany.

The German owners concerned should be indemnified in German money for property liquidated or disposed of in Sweden and the Allied authorities in Germany would take the necessary steps for the recording of the title of the German owners of property to receive the counter-value thereof.

In pursuance of its policy to restitute looted property the Swedish Government would effect restitution to the Allies of all gold acquired by Sweden and proved to have been taken by the Germans from occupied countries, including any such gold transferred by the Swedish Riksbank to third countries. The Allied Governments undertook to hold the Swedish Government harmless from any claims deriving from transfers from the Swedish Riksbank to third countries of gold to be restituted according to the above declaration.

The representatives of the three Allied Governments declared in the first and principal note that so far as concerned the provisions contained in it regarding the liquidation of German property, the spending of 150 million kronor on supplies for Germany, compensation for the German owners of liquidated property, and the restitution of looted gold, they were also acting on behalf of the other 15 signatories of the Paris Agreement on Reparation from Germany. In a later note the representatives of the three Allied Governments confirmed their understanding that in view of the evidence produced and checked, no further claim would be presented

/by

by the Governments signatory to the Paris Agreement with regard to any gold acquired by Sweden from Germany and transferred to third countries prior to 1st June, 1945.

The Allied Governments would in due time require Germany or the future German Government to confirm the provisions of the understanding in so far as they affected German property in Sweden.

The representatives of the Allied Governments announced that in recognition of the understanding reached, the three Governments had eliminated the "black lists", inter alia, so far as Sweden or known Swedish nationals were concerned, and it was also announced that the United States Government would, at the earliest possible date after the coming into effect of the understanding, unblock Swedish holdings in the U.S.A.

Accord for the Expropriation of German Enemy Property in Spain and the Liquidation of Balances and Payments between Spain and Germany

The Accord between the Governments of France, the United Kingdom and the U.S.A., on the one hand, and the Spanish Government on the other, for the expropriation of German Enemy Property in Spain and the Liquidation of Balances and Payments between Spain and Germany, signed in Madrid on 10th May, 1948,(1) was preceded by an Exchange of Notes dated 28th October, 1946, between the Government of the United Kingdom and the Spanish Government, for the recognition of the Assumption by the Allied Control Council of Powers of disposal in regard to German Enemy assets in Spain.(2)

The exchange of notes referred to the Act of Military Surrender dated 7th May, 1945,(3) and the Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority (called "the Declaration of Berlin") dated 5th June, 1945,(3) and to the assumption by the four Powers of all the powers of the German Government, as described in the Declaration of Berlin, and the agreement of the four Powers to exercise this authority through the Allied Control Council for Germany. The Spanish Government recognized the assumption of these powers by the Allied Control Council /for

(1) Treaty Series No. 71 (1948); H.M.S.O. Cmd.7558
(2) Treaty Series No. 70 (1948); H.M.S.O. Cmd.7535
(3) cf. Chapter II

for Germany and the immediate consequences of this recognition were deemed to be the recognition of the authority of the Allied Control Council with respect to the governmental assets, whether official or quasi-official, of Germany in Spain (including its Possessions and Protectorates) and that the Allied Control Council had no less authority than any previous German Government with respect to German subjects and their property in Spain. The Government of the United Kingdom, however, guaranteed to the Spanish Government that the first Government to succeed the Allied Control Council for Germany would recognize formally the validity of all actions taken by Spain at the request of the Allied Control Council. Claims b y the Spanish Government against Germany were to be given consideration in the course of general negotiations following recognition of the Allied Control Council by Spain as the Government of Germany, and the Control Council was, after such recognition, to assume the rights and obligations incident to its status as a government. The representatives in Spain of the Allied Control Council were to be considered as the Government of Germany with respect to the registration and disposal of property of the German Government, both official and quasi-official, situated in Spain. The Spanish Government also accepted that under the Declaration of Berlin and in accordance with the Protocol of the Proceedings of the Berlin Conference (supra) the Governments of the United Kingdom, the United States of America and the Provisional Government of the French Republic were jointly responsible for the German assets within geographical limitations in which Spain was located. Accordingly, these three Allied Governments would act as the representatives in Spain of the Allied Control Council for Germany.

The preamble to the Accord referred to Resolution VI of the United Nations Monetary and Financial Conference (Bretton Woods, July, 1944)[1] which recommended Governments represented at the Conference to call upon the Governments of neutral countries t take steps to facilitate the ultimate delivery to the post-armistice

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(1) H.M.S.O. Cmd. 6546.

authorities of German assets in those countries and of looted property transferred there by Germans. The preamble also recited the acknowledgment by the Spanish Government that the powers and authority of the Government of the German Reich had been assumed by a Representation of the Allied Governments, represented in Spain, for purposes of the Accord, by the Governments of the United States of America, of France and of the United Kingdom. The preamble also indicated that balances arising through trade and payments between the Governments of Spain and Germany and certain claims pending between both States were to be liquidated.

Articles 1, 2 and 3 provided that property of every description situated in Spain (including its Protectorates or Possessions) on 5th May, 1945, and sums falling due between that date and 30th April, 1948, belonging to persons, natural or juridical, of German nationality not resident or domiciled in Spain on 5th May, 1945, should be expropriated.

Under Article 5 the (Allied) Representatives in their capacity as representatives of the Government of Germany were to assume the protection of the interests of the owners of expropriable property. Under Article 8 the Government of Germany was to adopt the necessary measures for payment to the respective owners in Germany of the sums corresponding to the fair appraisal values of the expropriated property. Article 9 provided that sums in pesetas realised from the expropriation should be credited in an account to be opened in the Spanish Foreign Exchange Institute in the name of the (Allied) Representatives. Under Article 11 it was provided that as settlement of the balances between Spain and Germany, deductions should be made from the account opened in the Spanish Foreign Exchange Institute in the name of the (Allied) Representatives, on a sliding scale commencing with 20% of the first 100 million pesetas, and rising to 30% of any amount exceeding 400 million pesetas. The Spanish Government was to have the free disposition of the amounts so deducted and the remainder was to be distributed among the beneficiary Powers in the

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proportions determined by common agreement between the Powers signatory to the Accord. Amounts so distributed were, however, not to be transferred abroad or used for investment in Spain without the special agreement of the Spanish Government.

Under Article 12 the Allied Powers signatory to the Accord in the name of the Government of Germany, ceded to the Spanish Government all rights, titles and interests possessed or exercisable by or in the name of the German Government or its agencies over properties in Spain belonging to the National Socialist schools in eleven Spanish cities. The Spanish Government declared that the sums arising from the liquidation of this property were destined to cover its expenses in the execution of the Accord.

Under Article 13 both Parties accepted the fulfilment of the Accord as the total liquidation of all classes of claims and trade or payments balances between Spain and Germany respectively. In Article 15 the Allied Powers signatory to the Accord confirmed, in the name of the Government of Germany, the waiver of the claims referred to in Article 13 and guaranteed the Government of Spain against any eventual or subsequent claim by former owners in Germany of expropriated property. They also undertook that Germany, or whatever German Government succeeded the Allied Control Council for Germany in the government of Germany, should confirm the provisions of the Accord.

A Financial Protocol laid down the proportions in which the balances in the account opened in the Spanish Foreign Exchange Institute, after deduction of the sums payable to the Spanish Government, were to be distributed among the "beneficiary powers" i.e. the signatories of the Agreement on Reparation from Germany. The Spanish Government declared that transfers, cessions or investments of these monies would be authorised within the limits and possibilities of the Spanish economy, and the Allied Representatives accepted that principle.

In a subsequent exchange of notes the Spanish Government undertook to restitute 101.6 kgs. of gold taken by Germany from the Netherlands, and any additional identifiable monetary gold taken by Germany, should it be found that any such gold might have been acquired by Spain, and provided that claims were presented by 30th April, 1949.

/Restitution

Legal Justification for the Liquidation of German Property by the Neutral States

The liquidation of German property in the neutral states calls for consideration both from the point of view of private and of public international law. To consider first the position in private international law, the Control Council in Berlin has on 30th October, 1945, passed Law No. 5[1] entitled "Vesting and Marshalling of German External Assets." Under the terms of the law all rights, titles and interests in respect of property of any description outside Germany owned or controlled by any person of German nationality, whether inside or outside Germany, or by a juristic person organized under the laws of Germany or having its principal place of business in Germany, were vested in a German External Property Commission, composed of representatives of the four Occupying Powers. The enactment of a law in such term constituted an assumption of jurisdiction by the Control Council far exceeding the previous practice of governments. Moreover, the law was clearly confiscatory in character, and contained no effective provisions for the payment of compensation to the person divested of their property rights. The vesting of these rights in the German External Property Commission would, according to generally accepted rules of private international law, not have been recognized in the courts of the countries where the property was, physically or notionally, situated. The effective divesting of persons of German nationality of their property rights could be achieved only by legislation in the countries where the property was situated. In the agreements discussed above the Governments of Switzerland, Sweden and Spain undertook to take the necessary measures to bring about that result.

The question arises what justification these governments had for entering into such undertakings. They could claim neither that they were entitled as belligerents to vest enemy property, nor that they were entitled to reparations from Germany, since they had all remained formally neutral in the war. Each of the three governments concerned based its action on different grounds.

/in negotiation

(1) Military Government Gazette, Germany, British Zone of Control No. 5.

In negotiation with Switzerland(2) the Allied Governments (i.e. the Governments of France, the United Kingdom and the United States) claimed title to German property in Switzerland by reason of the capitulation of Germany and the assumption of supreme authority within Germany. It is difficult to see what justification there could be for this claim. If 'title' is to be understood as title in municipal law, the three Governments must have been aware that title was vested, for the purposes of German municipal law, not in them, but in the German External Property Commission, and in the eyes of Swiss law presumably still in the German owner. If 'title' is to be interpreted from the point of view of international law, the claim is still of very doubtful validity. Part III of the Protocol of the Berlin Conference, (supra) read in conjunction with Part I, Article 6, paragraph C of the Agreement on Reparation from Germany (supra) entitle the three Governments, not to claim German assets in Switzerland for themselves, but to negotiate with the Swiss Government for the liquidation of German assets and the handing over of the proceeds of liquidation to the Inter-Allied Reparation Agency for distribution among the signatories of the Agreement on Reparation from Germany (including the three Governments). The Government of Switzerland was, not surprisingly, unable to recognize the legal basis of the Allied claims, and found justification for its liquidation measures simply in a desire "to contribute its share to the pacification and reconstruction of Europe, including the sending of supplies to devastated areas." Accordingly it was agreed that of the proceeds of liquidation 50% were to accrue to the Swiss Government and 50% were to be placed at the disposal of the Allied Governments for the rehabilitation of countries devastated or depleted by the war, including the sending of supplies to famine-stricken people. The Agreement also contained provisions for the eventual payment of compensation to the German nationals affected by the liquidation of property.

/In

(2) cf. Mann: "German Property in Switzerland" (British Year Book of International Law, 1946, page 354).

In negotiation with the Government of Sweden the three Allied Governments contended that, as they were exercising sovereignty (sic) in Germany, and as it was a rule of international practice to give effect to foreign decrees regulating the property of nationals, if such decrees were consistent with the public policy of the foreign state, Sweden was bound to give effect to Allied decrees concerning the seizure of German property in Sweden (1) (sc. Control Council Law No.5). The Government of Sweden did not accept this argument. It preferred to rest its case for liquidating German property partly on its "intention to pursue a programme of economic security by the elimination of German interests in Sweden" and partly, like the Swiss Government, on humanitarian grounds. To assist in preventing disease and unrest 150 million kronor of proceeds of the German assets in Sweden were to be used for financing the purchase of essential commodities for the German economy. In addition, the Swedish Government, "in pursuing its policy to participate in the work of reconstruction and rehabilitation" would make available 50 million kronor to the Inter-Governmental Committee on Refugees for the benefit of non-repatriable victims of German action, and would allocate 75 million kronor among the countries party to the Agreement on Reparation from Germany.

The Spanish Government apparently considered that the liquidation of German property would not constitute an international wrong, if it were done by agreement with the government of Germany. (This proposition seems to be clearly right, whether the government of Germany is regarded as waiving the wrong committed against it in the persons of its nationals, or whether by operation on the international plane of the principle volenti non fit injuria the agreement of the government of Germany prevents the wrong from arising.) Accordingly as a preliminary to concluding an agreement for the liquidation of German property, the Spanish Government recognised that "the Allied Control Council had no less authority than any previous German Government with respect to German subjects and their property in Spain." The agreement subsequently concluded described the Governments of France, the United Kingdom and the U.S.A. as representing the Allied Control Council in Spain.

In Part III of the Protocol of the Proceedings of the Berlin Conference, however, the U.S.S.R. had by clear implication waived any claim to German property in Spain. The Governments of France, the United Kingdom and the U.S.A. could thus exercise the supreme authority assumed in respect of Germany, and as the 'government' of Germany enter into an agreement with the Government of Spain for the liquidation of German property. The insistence in the agreement with Spain on the point that the three Allied Governments were acting, not as, but for, the government of Germany, appears to be based on a failure to appreciate that governmental powers in respect of Germany could be exercised by the governments of the Occupying Powers as well as by the Allied Control Council. This would not, however, appear to invalidate any claim the Spanish Government may make to have carried out the liquidation of German property by agreement with the government of Germany.

The Governments of France, the United Kingdom and the U.S.A. were equally entitled, under the terms of Part III of the Berlin Protocol, to negotiate as the government of Germany for the liquidation of German property in Switzerland and Sweden. The real justification for the measures of liquidation in Switzerland and Sweden, as in Spain, is that they were taken in agreement with the 'government' of Germany. The fact that in the case of Switzerland and Sweden the agreements were not expressed to be concluded with the 'government' of Germany obscures but does not destroy the basis upon which they were in fact concluded. This basis is also not destroyed by the fact that the three governments, besides acting as or for the 'government' of Germany, also acted for the signatories of the Agreement on Reparation from Germany, including themselves.

(1) cf. Oppenheim: International Law, Vol.I, Seventh Edition page 297 (note)

Restitution of Monetary Gold

In order to discharge their responsibility for the restitution of monetary gold France, the U.K., and U.S.A. set up a Tripartite Commission for the Restitution of Monetary Gold(1) in Brussels. It was the function of the Commission to receive and scrutinise claims by countries formerly occupied by Germany to have lost definite quantities of monetary gold by looting or wrongful removal to Germany, and to make allocations of gold to these countries from the "pool" of gold captured by the Allied forces in Germany.

This pool was augmented by the gold which Sweden, Switzerland and Spain were to surrender to the three Powers in accordance with the agreements on the liquidation of German assets in those countries already described.

A further step to augment the pool was taken when the Agreement between the Governments of the U.K., the U.S.A. and France, on the one hand, and the Bank for International Settlements, on the other, for the Return to those Governments of Gold looted by Germany, was concluded in Washington on 13th May, 1948.(2) The Bank was to deliver in London to the three Governments, upon demand, 3,740 kgs. of fine gold, and the three Governments, acting in their own behalf and in behalf of all other governments signatory to the Agreement on Reparation from Germany and of the banks of issue of the signatory governments, agreed that, in accepting delivery they waived all claims against the Bank with regard to looted gold transferred to it by Germany. It was expressly stated that 374.33436 kgs. of gold looted by Germany, and subsequently transferred by the Reichsbank to the Bank for International

/Settlements

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(1) cf. London Gazette, 27th September, 1946.

(2) Treaty Series No. 38 (1948); H.M.S.O. Cmd. 7456.

Settlements, and thereafter transferred to the account of the National Bank of Hungary, were included in the calculations which led to the agreement.

On the other hand, the United Kingdom, United States of America and France also entered into agreements with three states not signatories of the Agreement on Reparation from Germany, by which these states were allowed to make claims on the pool. Protocols for the Restitution of Monetary Gold Looted by Germany were signed with Austria on 4th November, 1947,(1) with Italy on 16th December, 1947(2), and with Poland on 6th July, 1949.(3) Each of these states was to receive a proportional share of the gold distributed pursuant to the Agreement on Reparation from Germany on the same basis as countries signatory to that Agreement to the extent to which it could establish that a definite amount of monetary gold belonging to it had been looted by Germany or wrongfully removed into German territory, and it was to accept the portion of monetary gold accruing to it in full satisfaction of all claims against Germany for the restitution of monetary gold. The Italian Government also agreed to set aside out of its proportional share, and to leave on deposit with the Governments of the U.K., U.S.A. and France an amount of gold approximately equal to the claims which it was then known would be made against Italy under Article 75, paragraph 8, of the Peace Treaty with Italy (4), (by which Italy undertook to restore to the Government of the United Nations concerned all monetary gold looted by, or wrongfully removed to, Italy, or to transfer to that Government an amount of gold equal in weight

/and

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(1) Treaty Series No. 85 (1947); H.M.S.O. Cmd. 7265.
(2) Treaty Series No. 3 (1948); H.M.S.O. Cmd. 7298.
(3) Treaty Series No. 44 (1949); H.M.S.O. Cmd. 7749.
(4) Cmd. 7022.

and fineness to that looted or wrongfully removed.)

Conflicting Claims to German External Assets

At an early stage in the work of the Inter-Allied Reparation Agency it became apparent that the obligation upon signatories to liquidate German assets in their own jurisdiction would give rise to many cases of conflicting claims to German enemy assets in the various countries entitled to reparations from Germany. The problems involved were studied by committees of the I.A.R.A. in the course of 1946 and 1947, and conventions for the settlement of such "inter-custodial" conflicts were drawn up.

The Agreement for the Settlement of Inter-custodial Conflicts relating to German Enemy Assets(1), to which, with France, the U.K. became a party on 15th July, 1948, contained the following provisions.

Securities or currency issued in the territory of one party, but located in the territory of another, were to be released to the former party. Negotiable instruments were to be released to the country of residence of the principal obligor. Bills of lading, warehouse receipts and similar instruments were to be released to the country where the property to which they related was situated.

Property within the jurisdiction of a party, forming part of the estate of a non-enemy who had died domiciled in the territory of another party, in which estate a German enemy had an interest, was to be released from control by the former party to facilitate the normal administration of the estate in the territory of the latter party. Similarly property within the

/jurisdiction

(1) Treaty Series No. 74 (1948); H.M.S.O. Cmd. 7551.

jurisdiction of one party held under a trust being administered under the laws of another party, in which trust a German enemy had an interest, was to be released from control by the former party. Each of these provisions was subject to the proviso that the releasing party might retain any interest vested in or devolving upon a German enemy in immovable property located in its territory.

The Agreement made no attempt to provide exact solutions of the conflicts which arose, when assets in the territory of one party belonged to a corporation organized under the laws of another party, in which there were direct or indirect German enemy interests. The principle was, however, laid down that assets might be claimed as German enemy assets, if German enemies controlled directly or indirectly the policy, management, voting power or operations of the corporation, or if they held directly or indirectly at least 50% of the voting rights, outstanding capital stock or other proprietorship rights. The dangers to the economy of the country in which the corporation was situated and to non-enemy interests in the corporation were, however, recognized, and there were elaborate provisions for consultation between the governments concerned with a view to special agreements.

The "Interpretation and Application" Part of the Agreement included provisions that a party was not obliged to recognize any transfer of a German enemy interest occurring after it had instituted war-time emergency measures, or any forced transfers of non-enemy property in Germany to German enemies without adequate consideration. No account was to be taken of any transfer of property to a German enemy which represented looting or forced transfer within the meaning of the Inter-Allied Declaration against Acts of Dispossession of 5th January, 1943 (infra). It was also expressly provided that nothing in the Agreement might be construed as conferring any right on a person to prosecute a claim in any court or administrative tribunal against his government or against any other party.

/Finally

Finally, the Governments of France and the United Kingdom made a declaration, accepting that the burden of reparation should fall on Germany and not on Allied nationals, agreeing in principle that external capital assets of companies of German incorporation, in which there was a substantial non-German interest, should, so far as practicable, be excluded from the part of German property considered available as reparation, and expressing their willingness to negotiate with any other Government an Agreement giving effect to the foregoing principles.

The Agreement was to come into force as soon as it had been signed by any two governments members of the I.A.R.A., as between them, and was thereafter to remain open for six months for signature by any other government, member of I.A.R.A. Any government not a member of I.A.R.A. might within nine months signify its desire to become a party by notifying the Government of Belgium, and the parties to the Agreement would consult with each other and with the government making the notification concerning its participation in the Agreement. Thus subject to the consent of the parties, it would have been possible for governments of neutral states to participate in the Agreement. But in fact no other government became a party to the agreement, and it thus remains as a bilateral agreement between France and the United Kingdom. A further Agreement, the substantive terms of which were similar, was, however, signed between the Netherlands and the United Kingdom on 20th September, 1949.(1)

Patents

Industrial property rights also clearly required special treatment both in connection with the obligation of countries signatory to the Agreement on Reparation from Germany to liquidate German assets in their own jurisdiction and in connection with the liquidation of German assets in neutral countries. In the Military Government period, however, agreement was reached only on the treatment of patents.

The Accord(2) regarding the Treatment of German-owned Patents was drawn up at a conference convened in London by the Governments of the French Republic, the United Kingdom and the United States of America, and was signed on 27th July, 1946. A protocol amending

/the Accord

(1) H.M.S.O. Cmd. 7803
(2) Treaty Series No. 15 (1948); H.M.S.O. Cmd.7359.

the Accord was signed in London on 17th July, 1947.(1) Under Article 1 each Government party to the Accord undertook that all former wholly-German owned patents issued by it and in its possession or control under the general law and regulations relating to German-owned property, which had not ceased or been dedicated to the public, should be dedicated to the public, or placed in the public domain or continuously offered for licensing without royalty to the nationals of all governments parties to the Accord.

Under Article 2, if a government made available, by the grant of licences or otherwise, to its own nationals rights under patents in which there was formerly a German interest, such rights should be made available to the nationals of all governments parties to the Accord on the same terms as to the nationals of that government.

Under Articles 3 and 4 all licences should include the right to practise and exercise the inventions claimed in the patents and to make, use and sell the products of the inventions, provided that such products were manufactured in a country or territory to which the Accord applied, and subject to the right of each government to protect and preserve proprietary licence, or other rights and interests in such patents as had before 1st August, 1946, been lawfully granted to, or acquired by, any non-German. An exclusive licence granted to any person before 1st August, 1946, might be protected by declining to grant any new licence during the period of such exclusive licence and a non-exclusive licence might be protected by imposing on new licencees the same terms as those imposed on the existing licencee.

Article 9 provided for acceptance of the Accord before 31st July, 1947, by members of the United Nations and by countries, which remained neutral in the second World War.

/Restitution

(1) Treaty Series No. 15 (1948); H.M.S.O. Cmd. 7359.

II Restitution of Property to Territories Formerly Occupied by Germany

The Inter-Allied Declaration against Acts of Dispossession committed in territories under Enemy Occupation or Control was issued in London on 5th January, 1943, by the Governments of the United Kingdom, the U.S.A., and U.S.S.R., the French National Committee, and fourteen other governments of the United Nations, which had suffered invasion of their national territory.(1) The Declaration was a formal warning to all concerned, and in particular to persons in neutral countries that the United Nations concerned intended to do their utmost to defeat the methods of dispossession practised by the governments with which they were at war. Accordingly the governments making the Declaration and the French National Committee reserved all their rights to declare invalid any transfers of, or dealings with, property, rights and interests in territories under enemy occupation or control or belonging to persons resident in those territories.

The implementation of this Declaration after the unconditional surrender of Germany took two forms. Monetary gold found in Germany or recovered from neutral states, was, as has already been described, placed in a pool, and distributed to formerly occupied states in proportion to their losses, under arrangements made by the Governments of France, the United Kingdom and U.S.A., in accordance with Part III of the Paris Agreement on Reparation from Germany.

The restitution of all other types of property was carried out in accordance with certain broad directives laid down by the Control Council, and implemented as they thought fit by the individual Military Governors. While practice varied from Zone to Zone, certain basic principles were followed. Only identifiable property could be claimed. (Losses of property, which could not be identified, were deemed to be covered by the reparations claim against Germany of the country concerned.) The original transfer must have been wrongful, a condition which might be satisfied in a variety of ways, e.g. by proving duress or pressure

(1) H.M.S.O. Cmd. 6418

pressure upon the transferor, or by showing that the transferor, if a company or organization, had been exploited by Germans placed in control of it. Claims were entertained only from official restitution missions from the formerly occupied countries and the property was restored to the claimant state, not to the former owner. All claims were received and adjudicated upon by administrative staffs of the individual Military Governors.

Chapter IV

The Economic Recovery of the Western Zones of Occupation

The Basic Economic Aims of the Occupation

In Part II of the Berlin Protocol the following "economic principles" had been laid down. During the period of occupation Germany should be treated as a single economic unit. To this end Allied controls were to be imposed upon the German economy, inter alia, to carry out programmes of industrial disarmament and demilitarisation, of reparations, and of approved exports and imports; to assure the production and maintenance of goods and services required to meet the needs of the occupying forces and displaced persons in Germany and essential to maintain in Germany average living standards not exceeding the average of the standards of living of European countries (excluding the U.K. and the U.S.S.R.); and to ensure the equitable distribution, to be determined by the Control Council, of essential commodities between the several zones so as to produce a balanced economy throughout Germany, and reduce the need for imports. It was also laid down that payment of reparations should leave enough resources to enable the German people to subsist without external assistance. In working out the economic balance of Germany the necessary means were to be provided to pay for imports approved by the Control Council, and the proceeds of exports from current production and stocks were to be available in the first place for payment for such imports.

The Failure to Achieve the Economic Unity of Germany

The first signs that the economic unity of Germany was not going to be easy to achieve were seen when attempts were made to associate Germany with three international economic organizations set up to deal with the problems of the period immediately before and after the cessation of hostilities.

The refusal of the U.S.S.R. to join in the formation of the Emergency Economic Committee for Europe, meant that the

/activities

activities of that body in advising on imports and exports to and from Germany, and such related questions as payments could extend only to the Western Zones of Occupation.(1)

All four occupying Powers were parties to the Agreement concerning the Establishment of a European Central Inland Transport Organization(2) of 27th September, 1945. It was the function of the Organization to advise governments on the restoratio of the transport systems in Continental Europe and to co-ordinate the movement of traffic of common interest to those systems. In January, 1946, however, the quadripartite Transport Directorate failed to reach agreement on a proposal that the Organization should, as envisaged by Article VI, paragraph 2 of the Agreement, be requested to advise and assist the Commanders-in-Chief in the Control Council on matters within its competence. Accordingly, the zones of Germany had to be represented separately on the various committees and at the meetings of the Organization.

The European Coal Organization was established by an Agreement of 4th January, 1946,(3) its purpose being to promote the supply and equitable distribution of coal and scarce items of coal-mining supplies and equipment. The U.S.S.R., however, was not a member of the Organization and refused to pool any coal except coal which the Russian authorities themselves determined to be surplus to their own requirements and to those of their Zone of Occupation.

Meantime no progress had been made by the quadripartite control authorities in establishing the plans (envisaged in the Berlin Protocol) for the pooling of the resources of the several zones and common export and import programmes designed to reduce Germany's need for external assistance. These plans and programmes were in fact never worked out. Soviet refusals to supply information regarding the removal from the Eastern Zone, by way of reparations, of capital equipment and goods from current production (the latter, itself, a breach of the principles of the Berlin Protocol) were followed on 5th April, /1946

f. Emergency Economic Committee for Europe: Report by the Secretary-General; ondon: H.M.S.O. 1946.
reaty Series No. 34 (1946) H.M.S.O. Cmd. 6919
f. Treaty Series No. 1 (1946), H.M.S.O. Cmd. 6732, and Treaty Series No. 6

1946, by a categorical statement by the Soviet member of the quadripartite Economic Directorate that in the Soviet view each zone should be responsible for its own foreign trade.

The Economic Fusion of the British and United States Zones of Occupation

The Berlin Protocol, in these economic and in other matters, was a statement of principles and an "agreement to agree" on plans and programmes. In view of the Soviet refusal "to agree," the Western Powers were clearly entitled to proceed with such measures consistent with the agreed principles, as they thought fit. In fact the U.S. Government, which took the initiative in the situation created by the Soviet attitude, proceeded in such a way as to avoid closing the door upon the quadripartitely agreed plans and programmes envisaged in the Berlin Protocol.

At the Council of Foreign Ministers in Paris in June and July, 1946, the U.S. Secretary of State made a declaration to the effect that in the absence of economic unity for Germany as a whole the U.S. Government was willing to bring about the economic fusion of the U.S. Zone with any other zone. This offer was accepted by the Government of the U.K. as a step towards the economic unity of Germany and the Agreement concerning the British and American Zones of Occupation in Germany (referred to as the "Fusion Agreement") was signed in New York on 2nd December, 1946,(1) and came into force on 1st January, 1947.

Article 2 provided that the two zones should be treated as a /single

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(3) (Contd.) (1947) H.M.S.O. Cmd. 7041.

(1) H.M.S.O. Cmd. 6984.

single area for all economic purposes, (referred to as the "bizonal area"). Under Article 4 responsibility for foreign trade was to rest initially with the Anglo-American Joint Export/Import Agency, but this responsibility was to be transferred to a German administrative agency under joint Anglo-American supervision to the maximum extent permitted by the restrictions existing in foreign countries at any given period. Under Article 6 the Governments of the U.S.A. and the United Kingdom were to become responsible on an equal basis for costs of approved imports brought into account after 31st December, 1946. For this purpose the imports of the area were to be divided into two categories, those required to prevent disease and unrest (Category "A") and those further imports which would be required to create a self-sustaining economy for the area by the end of 1949 (Category "B"). The proceeds of exports from the area were to be collected by the Joint Export/Import Agency and to be used primarily for the provision of Category "B" imports until there was a surplus of export proceeds over the cost of these imports. Any portion of the cost of Category "A" imports which could not be defrayed from the proceeds of export were to be defrayed by the two Governments in equal shares from appropriated funds. The United States and United Kingdom shares of the sum to be provided by the Government of Sweden under the Agreement of 18th July, 1946,(1) for the purchase of essential commodities were to be brought into account. The sums advanced by the two governments were to be recovered from future German exports.

Under Article 7 barriers to trade with Germany should be removed as rapidly as possible. An exchange value for the Mark should be established and financial reform effected in Germany at an early date. Under Article 8 the determination of import requirements was to be the responsibility of the Joint Export/Import Agency. The procurement of imports financed from the appropriated funds of either government should be the responsibility of that government, and the procurement of imports not financed by appropriated funds should be the responsibility

/of the

(1) cf. Chapter III

of the Joint Export/Import Agency, with such assistance from the two Governments as might be desired. Under Article 10 the two Governments accepted a ration standard of 1,800 calories for the normal consumer as the minimum which would support a reasonable economic recovery in Germany, and under Article 11 they agreed that the maintenance of displaced persons from the German economy should not exceed the maintenance of German citizens. Article 12 provided for an annual review of the Agreement, and for its amendment by mutual agreement.

Exports of Coal from the Western Zones of Occupation

Following upon the failure to reach agreement on the question of the economic unity of Germany at the session of the Council of Foreign Ministers in Moscow in March and April, 1947, it was jointly announced by the British, French and U.S. Governments on 21st April, 1947, that an agreement had been made to fix the proportion of exports of coal from their zones of occupation in Germany to the countries belonging to the European Coal Organization, and to Austria, and of bunker coal, for the six months period beginning 1st July, 1947. Exports were to be to a sliding scale according to the daily output of clean, hard coal in the Western Zones, and the scale was to take account on the one hand of the needs of coal for the reconstruction of the liberated countries of Europe which had always been dependent on imports of German coal, and on the other of the essential industrial and other requirements of the German economy.(1)

Anglo-American Level of Industry Plan

The Control Council's Level of Industry Plan of March, 1946,(2) had been drawn up on the assumption, expressed in the Plan itself, that Germany would be treated as an economic unit. That assumption having been falsified, the Council of Foreign Ministers at its session in Moscow in March and April, 1947, agreed that the plan should be revised. The ensuing quadripartite discussions in Berlin, however, resulted in deadlock. Once more there was an "agreement to agree", followed by a failure of the four Powers to agree. Accordingly, in August, 1947, talks were held in

/London

(1) Treaty Series No. 53 (1947); H.M.S.O. Cmd. 7165.

(2) cf chapter III

London between the Governments of the U.K. and U.S.A., and a revised plan for the level of industry in the bizonal area was announced in Germany by the British and U.S. Military Governors(1) on 29th August.

The plan for the bizonal area was designed to permit of its assimilation into a plan for Germany as a whole, particularly in the event of the other occupying Powers availing themselves of the invitation to join the bizonal area. Accordingly the division of German industries into the four categories laid down in the Control Council's Level of Industry Plan was retained. It was stated that the overriding consideration in preparing the revised plan had been to provide the level of industry necessary to make the bizonal area self-supporting.

The main difference between the Control Council and the Anglo-American plans was that the latter made considerable increases in the permitted levels of production in the "restricted" industries, metals, chemicals and machinery, the industries from which the bulk of reparations were derived. Thus in steel the permitted level of production was to be raised, for the bizonal area, to 10.7 million ingot tons a year, and sufficient capacity to produce that tonnage was to be retained. While no change was made in the list of prohibited industries, no plants in the aluminium, beryllium, vanadium and magnesium industries were to be made available for reparations pending further review.

Revised Fusion Agreement

A review of the Fusion Agreement was undertaken in the latter part of 1947 on representations from the U.K. Government that it was unable to continue to make payments in dollars in respect of imports for the combined area, and a revised fusion agreement was signed in Washington on 17th December, 1947.(2) Article 1 provided that the liability of the U.K. Government to supply goods and services from dollar areas should be terminated on certain conditions and that it should thereafter have no further liability to provide dollars for goods and services imported into the Bizonal area. (Under Article 4, however, the U.K. Government accepted a continuing liability to convert into dollars sterling held or /acquired

1). "Revised Plan for Level of Industry in the U.K./U.S. zones of /Germany

acquired by the Joint Foreign Exchange Agency, a body subordinate to the Joint Export/Import Agency.)

Under Article 3 it was provided that the Joint Export/Import Agency should enter into immediate negotiations with representatives of the Government of the United Kingdom, with a view to drawing up a plan to maximize trade in both directions between the Bizonal area and the sterling area, and that the U.S. and British Military Governors should co-operate with the Government of the United Kingdom for the purpose of meeting the needs of the United Kingdom for heavy steel, scrap and timber. All trade between the Bizonal area and the sterling area was to be conducted in sterling in both directions, and the manner in which payments in respect of such trade should be made was laid down.

Under Article 5 the Government of the United Kingdom recognized that so long as the Government of the U.S.A. was called upon to make the major contribution towards the cost of the essential imports of the Bizonal area, that Government should be entitled to a larger measure of authority with respect to the operations of the Joint Export/Import Agency and the Joint Foreign Exchange Agency. The Joint Export/Import Agency and the Joint Foreign Exchange Agency were to be governed by a Board of Directors to which the respective Military Governors should each appoint an equal number of members. Each group was, however, to have a voting strength in relation to the other group equal to the proportion which the appropriated funds made available by their respective governments, and funds contributed to the capital of the Joint Export/Import Agency, bore to the total funds made available by the two governments for these purposes. Decisions reached by a Board of Directors in this manner were final unless a Bipartite Board, consisting of the two Military Governors, agreed to disapprove or modify them.

The Agreement was, under Article 11, to remain in force until agreement had been reached for the treatment of Germany as

/as

Germany, Berlin, August, 1947.

(2)Agreement amending certain terms of the Bizonal Fusion Agreement signed at New York on 2nd December, 1946; H.M.S.O. Cmd.7287.

as an economic unit or until 31st December, 1948, whichever was the sooner. The two Governments were to consult together before 1st December, 1948, to consider the terms and conditions of a new agreement for a further period.(1)

The Economic Commission for Europe

The resolution(2) adopted by the United Nations Economic and Social Council on 3rd April, 1947, setting out the terms of reference of the Economic Commission for Europe, empowered the Commission to consult with representatives of the Allied Control Authorities of the occupied territories, and to be consulted by them for the purpose of mutual information and advice on matters concerning the economies of those territories in relation to the rest of the European economy.

Endeavours by the Executive Secretary of the Commission to establish liaison with the Allied Control Authority in Berlin and with the Military Governor of the Soviet Zone of Occupation ended in failure. The reasons for this failure may be deduced from the opposition of the Soviet delegate at the second session of the Commission in July, 1947, to the resolution (carried only by a majority) instructing the Executive Secretary to continue consultations regarding the establishment of liaison in Berlin.(3)

The Military Governors of the French, British and U.S. Zones of Occupation, however, in June, 1947, expressed willingness to co-operate with the Commission.(4) In August, 1947, the

/Governments

(1) The Revised Fusion Agreement was kept in force in 1949 by a series of three-monthly extensions until the coming into force of the Occupation Statute (cf. Treaty Series No. 12 (1949) H.M.S.O. Cmd. 7623; Treaty Series No. 41 (1949); H.M.S.O. Cmd. 7742 and Treaty Series No. 46 (1949) H.M.S.O. Cmd. 7757.) Those of its provisions, which related to trade between the bizonal area and the sterling area terminated on 5th August, 1949, upon signature of the Agreement between the Government of the United Kingdom and the United States, United Kingdom and French Military Governors for the Regulation of Payments (Treaty Series No. 71 (1949); H.M.S.O. Cmd. 7824.)

(2) United Nations Document E/CN 10/1 of 3rd April, 1947.

(3) United Nations Document E/451 of 18th July, 1947.

(4) cf. U.N. Document E/ECE/60 of 26th February, 1948.

Governments of the U.K. and U.S.A. agreed to the establishment of an Economic Commission for Europe Liaison Office at the headquarters of the Bizonal Area. These arrangements were a continuation of the arrangements made by the Emergency Economic Committee for Europe,[1] and were stated to be of a provisional character in the sense that they would be subject to review if relations developed between the Commission and the Allied Control Council in Berlin.

Both the British and United States Military Governors had expressed a desire to be represented in the Economic Commission for Europe. Accordingly, arrangements were made for experts from the bizonal area to attend E.C.E. meetings, when matters affecting the Bizone were under discussion. The normal practice of the Military Governors was to send British and American experts who attached themselves as advisers to their respective national delegations. On occasion there would attend from the Bizone a single expert, who placed himself equally at the disposal of the British and U.S. delegations. In all cases experts from the Bizone spoke, not for the British and U.S. Zones respectively, but for the bizonal area as a whole, in accordance with policies from time to time agreed between the British and U.S. Military Governors.

Convention for European Economic Co-operation and the European Recovery Programme

The session of the Council of Foreign Ministers in London during November and December will call for discussion in a later chapter for its significance as a turning point in the political development of occupied Germany. It was, however, also a session marked by acrimonious and sterile discussions of economic issues. The Russian Foreign Minister once again put forward his

/country's

(1) The activities of the Emergency Economic Committee for Europe, as well as those of the European Coal Organization and the European Central Inland Transport Organization were transferred to the Commission.

country's claims for 10,000 million dollars-worth of reparations and for reparations from current production. Once again it was pointed out by the representatives of the Western Powers that no such claims had been agreed either at the Crimea or the Berlin Conferences. The U.S. Secretary of State stated that the U.S. and U.K. Governments had been pouring food and other supplies into Western Germany at the rate of 700 million dollars a year, while on the available information the U.S.S.R. was extracting reparations from the Eastern Zone at a rate of over 500 million dollars a year. The Russian representative refused to supply the figures for the actual removals from the Russian Zone, and upon that refusal the session was brought to an end. This was the third successive session of the Council of Foreign Ministers, at which it had proved impossible to arrive at agreement with the U.S.S.R. for the economic rehabilitation of Germany.

Informal discussions on their future policy in Germany were opened in London on 23rd February, 1948, between representatives of the French, U.K., and U.S. Governments. Agreement was reached to invite the Benelux countries to participate with the three Western Occupying Powers in a Six-Power Conference in London[1] to consider the association of West German economic reconstruction with that of Western Europe as a whole, and the establishment of a sound basis for the participation of a democratic Germany in the community of free peoples. During the first session of the ensuing Six-Power Conference agreement was reached that Western Germany must be allowed to make its contribution to European recovery.

Meantime the Committee of European Economic Co-operation, meeting in Paris on 15th and 16th March, 1948, had already decided to recommend that since the full co-operation of Germany was essential in the continuing organization, necessary for the realisation of the objectives of the European recovery programme, the Combined (United Kingdom - United States) Zone and the French Zone should, in default of the economic unity of Germany, each be regarded as an independent participating area, and should be

(1) cf. also Chapter IV

signatories of the proposed multilateral agreement and participate fully in the activities of the new organization.(1) On 16th April, 1948, the Final Act of the Conference,(2) and the Convention for European Economic Co-operation were signed by the British Military Governor on behalf of the Combined Zone and the French Military Governor on behalf of the French Zone. Article 10 of the Convention provided that the members of the Organization for European Economic Co-operation should be the parties to the Convention, a provision which clearly covered the Combined Zone and the French Zone.

The signature of the Final Act and of the Convention by the Military Governors was a departure from the practice previously followed in the conduct of Germany's foreign relations. Hitherto the practice had been for the Governments of the Occupying Powers to enter into major, and most other, international agreements either in respect of Germany or in respect of their several zones (3) and to represent their respective zones in international organizations such as the Narcotics Commission of the United Nations Economic and Social Council and the Economic Commission for Europe. In the Convention for European Economic Co-operation the Military Governors were signing a multilateral convention to which two of the Governments of the Western Occupying Powers, France and the United Kingdom, were also parties and the zones were accorded representation separate from that of the Occupying Powers in the Organization for European Economic Co-operation

It was a natural corollary of the separate signatures /of the

(1) cf. H.M.S.O. Cmd. 7388.
(2) Treaty Series No. 59 (1949); H.M.S.O. Cmd.7796.
(3) The (quadripartite) Allied Control Authority had, however, entered into "service" agreements concerning posts and telecommunications with a large number of countries. The British and United States Military Governors had jointly concluded international agreements on certain economic matters, e.g. on the restitution of inland water craft from and to the Netherlands (20th January, 1947); the exchange of power with Austria (7th July, 1947); the debts of the Austrian and German railways (10th September, 1947). Individual Military Governors had also entered into international agreements, mostly of a minor character, e.g. Agreement for the recruitment of displaced persons (U.S. Military Govenor and U.K. Government - May, 1947); agreement concerning displaced persons and non-German refugees in Germany (British Military Governor and the International Refugee Organization - 28th June, 1947.)

of the Convention for European Economic Co-operation in respect of the zones of occupation that the inclusion of Western Germany in the European Recovery Programme should be effected by agreements between the United States Government and the Military Governors. There was first an exchange of letters in May, 1948, between the U.S. Political Adviser in Germany (acting on behalf of the United States Government) and the British and United State Military Governors, acting jointly for the Combined Zone,(1) followed in July by formal agreements between the Government of the United States and the French Military Governor in respect of the French Zone,(2) and between the Government of the United States and the British and United States Military Governors in respect of the Combined Zone.(3)

It also followed from the separate signature on behalf of the zones that subsequent agreements made within the framework of the Convention for European Economic Co-operation, such as the Agreement for Intra-European Payments and Compensations of 16th October, 1948,(4) were signed by the Military Governors in respect of the Zones. It also became the normal practice for the Military Governors to enter into trade and payments agreements, commencing with that of 6th August, 1948, between the British and United States Military Governors and the Belgo-Luxemburg Economic Union.

Most-Favoured-Nation Treatment for the Merchandise Trade of Western Germany

In the course of 1948 and 1949 agreements were concluded which to an increasing extent secured most-favoured-nation treatment for the merchandise trade of Western Germany. The first was an exchange of notes, dated 6th July, 1948,(5) between the Governments of the United Kingdom and U.S.A., by which each government undertook, subject to reciprocity, to accord most-favoured-nation treatment (as provided in the General Agreement on Tariffs and Trade of 30th October, 1947(6)) to the merchandise trade of any area in Western Germany in the occupation or control of which the other government participated. This agreement on Most-Favoured-Nation Treatment for Western Germany was /concluded

(1) U.S. State Department, Germany, 1947-1949-The Story in Documents, page 522.
(2) U.S. State Department, Treaties and other International Acts Series 1784.
(3) Ibid. 1785. /(4) Contd.

concluded in conjunction with the Economic Co-operation Agreement between the two governments.

During the second session of the Contracting Parties to the General Agreement on Tariffs and Trade, the United Kingdom, United States and France entered with eleven other states in September, 1948, into the Agreement on Most-Favoured-Nation Treatment for Areas of Western Germany under Military Occupation,(1) and during the third session the majority of the signatories concluded a Memorandum of Understanding(2) extending the Agreement to the Western sectors of Berlin.

These undertakings were entered into in the absence of effective or significant tariff barriers to imports into the areas referred to. In the event of such barriers being imposed, the undertakings were to be without prejudice to application by any signatory of the principles relating to the reduction of tariffs on a mutually advantageous basis, as set out in the Havana Charter for an International Trade Organization.(3) It was recognized that the absence of a uniform rate of exchange for the currency of the areas in Western Germany might have the effect of indirectly subsidizing exports from such areas and that it would not be inconsistent with the Agreements for any signatory (normally after consultation with the appropriate authority) to levy a countervailing duty on imports equivalent to the estimated amount of such subsidization if the signatory determined that the subsidization was such as to threaten domestic industry. The earliest date upon which the undertakings could be withdrawn was 1st January, 1951.

/Ferrous Scrap

(1) Treaty Series No. 17 (1949); H.M.S.O. Cmd. 7643.
(2) Treaty Series No. 7 (1950); H.M.S.O. Cmd. 7876.
(3) H.M.S.O. Cmd. 7375.

(Contd.)
(4) H.M.S.O. Cmd. 7546.
(5) Treaty Series No. 42 (1948); H.M.S.O. Cmd. 7470. The Agreement applied also to the Free Territory of Trieste.
(6) H.M.S.O. Cmd. 7258.

Ferrous Scrap Exports

While previous international agreements had been concerned with the removal from Germany of surplus capital equipment by way of reparations or the provision of external assistance for the German economy, the Combined Zone could, in one respect, the export offerrous scrap, make a contribution, in association with the Organization for European Economic Co-operation, to the recovery of Western Europe as a whole.

An Agreement between the Government of the United Kingdom and the Government of the U.S.A., relating to Ferrous Scrap Exports, was concluded in Washington on 30th September, 1948.(1) It proposed the formation of an ad hoc committee in Paris consisting of representatives of O.E.E.C. members, and the U.S.A. as a full member, to make recommendations to the Governments of the countries participating in the O.E.E.C., including the Bizonal area of Germany and the French Zone, on the distribution of scrap exports from those countries. It was also agreed to send identical instructions to the U.S., and U.K. Military Governors in Germany to the effect that the total collection and export of scrap from the Bizonal area, after providing for the legitimate requirements of the German steel industry, should be maximized. The Agreement provided for the setting up of the U.S./U.K. Scrap Control Authority in Germany, and laid down for the interim period, while recommendations from the ad hoc committee were awaited, the allocations of ferrous scrap to the U.K., U.S.A., and other countries, gave the Military Governors a choice of methods by which allocations were to be implemented, empowered them to fix prices, and if necessary to resort to "special" measures for the recovery of scrap.

Association of the French Zone with the Combined Zones in Economic Matters

On 18th October, 1948, the three Western Military Governors announced

(1) Treaty Series No. 72 (1948); H.M.S.O. Cmd. 7538.

announced the fusion of the two bodies controlling the foreign trade of the Combined Zone and the French Zone respectively. In foreign trade matters the directives and methods of the Combined Zone were to be gradually introduced in the French Zone, the process to be completed in December, 1948. In other economic matters a method of joint consultation was to be worked out by the three Military Governors with a view to adjusting the practices of the three zones to each other.(1)

Reparations and Recovery

The economic history of the occupation of Western Germany is that of the steps (described in the previous chapter) taken by the Occupying Powers to ensure that Germany fulfilled her international obligation to pay reparations in kind, and of the measures taken by the Occupying Powers (particularly the U.S.A.) to establish a viable economy in Western Germany. In each of these directions the Occupying Powers were exposed to considerable pressure. The Council of Foreign Ministers both at its session in October, 1946, and at its session in November, 1947, had received protests from the member states of the Inter-Allied Reparation Agency concerning the delays in dismantling and transporting plants scheduled for reparations. On the other hand voices were raised in Germany, to some extent in the United Kingdom, but above all in the U.S.A., alleging that the removal of capital equipment was a major obstacle in the way of industrial recovery. The solution was found by adjusting the reparations programme in such a way as to ensure that plants were either removed from Germany or retained there as would best serve the European Recovery Programme.

The U.S. Economic Co-operation Act of 1948(2) provided in Section 115 (f) as follows:-

" The [Economic Co-operation] Administrator will request /the

1) cf. "Times" 19 October, 1948: Communique issued by the three Military Governors.
2) Public Law 472, 80th Congress.

the Secretary of State to obtain the agreement of those countries concerned that such capital equipment as is scheduled for removal as reparations from the three western zones of Germany be retained in Germany if such retention will most effectively serve the purposes of the European recovery program.

A preliminary examination of the list of plants scheduled for removal as reparations led the United States Government to select 381 for further study. This study was carried out by the Industrial Advisory Committee appointed by the Economic Co-operation Administrator. The Committee, after consulting experts of the British and French Governments and Control Authorities in Germany, made a report (published on 13th April, 1949) recommending the retention in Germany of certain equipment in 167 of the 381 plants which it had been requested to study.

The report was approved by the Economic Co-operation Administrator, who requested the Secretary of State to seek the agreement of the British and French Governments to the retention of the plants in Germany. Discussion between governments resulted in agreement to retain in Germany certain equipment in 159 of the 167 plants on the Committee's list.

The Prohibited and Limited Industries Agreement - a Tripartite "Level of Industry Plan"

The report of the Industrial Advisory Committee of the Economic Co-operation Administration was discussed by the three Governments in conjunction with recommendations from their Military Governors for a revised list of prohibitions and limitations to be imposed on German industry on security grounds.

The resulting Agreement(1) (published as an agreement reache by the U.S., U.K., and French Military Governors pursuant to instructions received from their respective Governments) followed previous agreements in so far as it prohibited certain industrie and placed limitations on others. The prohibitions were to

/remain

(1) H.M.S.O. Cmd. 7677

remain in force until the peace settlement, the limitations until 1st January, 1953, or until the peace settlement, whichever was the earlier, and thereafter as might be agreed. The limitations were also subject to review, if no peace settlement had been concluded by 30th June, 1952.

The principal omission from the previous list of prohibitions was that of ocean-going ships. Under the new agreement Germany was to be permitted to construct ships provided they did not exceed certain limitations of size and speed, and provided that no ocean-going ships were constructed until a German coastal fleet, adequate for the requirements of European and German recovery, had been reconstituted. Germany was also during the period of the Agreement to be permitted to acquire abroad a certain number of tankers exceeding the limitations and also certain dry cargo ships. The construction of vessels exceeding the limitations of size and speed might also be authorised by the Military Governors for special purposes, e.g. to enable the ships to be economically operated in the trades or on the routes for which they were intended.

In those industries, in which under the Control Council Plan[2] equipment was to be retained to meet domestic requirements until imports were available, the removal or destruction of certain equipment was authorised, as appeared appropriate for the period of the Agreement.

Primary aluminium was removed from the list of prohibited, to that of restricted, industries, and the permitted level of steel production was set at 11.1 million ingot tons a year for the three Western Zones.[1]

(1) cf. Anglo-American Level of Industry Plan, which placed a limit on steel production of 10.7 million ingot tons for the Combined Zone.

(2) cf. Chapter III

Chapter V

The Association of Germany with Western Europe.

The Failure to achieve the Political Unity of Germany.

An examination of the relevant agreements makes it clear that it had been the common intention of the four Powers in assuming supreme authority that Germany should be treated not only as a single economic, but also as a single political, unit. The Statement on Control Machinery in Germany of 5th June, 1945, reproducing without material alteration the Agreement on Control Machinery reached in the European Advisory Commission, stated that supreme authority would be exercised by the four Commanders-in-Chief jointly in matters affecting Germany as a whole, and that the Control Council would ensure appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation and would reach agreed decisions on the chief questions affecting Germany as a whole.(1) The Berlin Protocol of 2nd August, 1945, provided (among the provisions accepted by France) that the Council of Foreign Ministers should be utilised for the preparation of a peace settlement for Germany to be accepted by the Government of Germany when a Government adequate for the purpose was established. It had further laid down that for the time being no central German Government should be established, but that the administration of Germany should be directed towards the decentralisation of the political structure and the development of local responsibility, and that to this end local self-government should be restored throughout Germany on democratic principles. Clearly, then, the intention was that the suppression of a central

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(1) cf. Chapter II.

central German government should continue only until such time as local self-government had taken root. The Protocol also laid down as one of the "Political Principles" that so far as practicable there should be uniformity of treatment of the German population throughout Germany.

By the time the Council of Foreign Ministers met in Moscow in March and April, 1947, governments had been established in the Laender (states)[1] and the U.S. Secretary of State drew attention to the desirability of establishing at the earliest possible date a German provisional central government. It became evident, however, that agreement could not be reached on the powers which such a government should have. The U.S.S.R. favoured a strong central government. The United Kingdom and the U.S.A. were substantially in agreement in favouring a central government, with carefully limited powers (all other powers being reserved to the Laender). France desired a central government with extremely limited powers. The only point upon which the Foreign Ministers reached agreement was that any commitment they entered into on the future political structure of Germany presupposed the re-establishment of the economic unity of Germany.

At the London session of the Council of Foreign Ministers in November and December, 1947, the U.S.S.R. proposed that the four Powers should agree on the immediate establishment of a German central government. The Western Powers unanimously took the view that the establishment

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(1) cf.Ordinance No.57 (Powers of Laender in the British Zone), Military Government Gazette, Germany, British Zone of Control, No.15.

establishment of a German central government could not be undertaken until the political and economic unity of Germany had been restored. The U.S.A. proposed that in order to restore German unity, the four Powers should agree upon five fundamental measures:-

(1) the elimination of artificial zonal barriers to permit the free movement of persons, ideas and goods throughout German territory;

(2) the relinquishment by the occupying Powers of ownership of properties in Germany seized under the guise of reparations without Four Power agreement. (A proposal aimed at the U.S.S.R.);

(3) currency reform for all Germany;

(4) a definite determination of the economic burdens, which Germany would be called upon to bear in future, including occupation costs, the repayment of sums advanced by the occupying powers, and reparations;

(5) an export and import plan for all Germany.

The subsequent discussion was dominated by the reparations issue. The Russian Foreign Minister again put forward a claim for a total reparations payment to the U.S.S.R. of 10,000 million dollars over a period of 20 years. This was a claim, which had, originally been advanced at the Crimea Conference but which had never been accepted by the Western Powers, and was in their view inconsistent with the provisions of the Berlin Protocol to the effect that current production should be available for reparations only if there were a surplus of exports over imports.(1) The

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cf. Chapter III.

The Russian Foreign Minister also refused to give any figures whatsoever for the reparations already taken from the Russian Zone, unless the Western Powers agreed to the Russian claim. Upon this refusal the session was adjourned.

The deadlock, in which the discussions ended, meant that two and a half years after the unconditional surrender the three Western Powers were faced with a situation in which there was no prospect of securing on a four Power basis that economic reunification of Germany, which all were agreed was the prerequisite to the establishment of a German central Government, or the political unity, which the three Western Powers considered essential.

Informal discussions on the future policy to be followed in Western Germany were accordingly opened in London on 23rd February, 1948, between representatives of the British, American and French Governments. It was agreed that in view of the closeness of the links between the economies of the Benelux countries and that of Germany, representatives of the former countries should be invited to talks in London to discuss the relationship of Western Germany under the Occupying Powers to the European Recovery Programme[1], the rôle of the German economy in the European economy, control of the Ruhr industries, security against Germany, reparations, the evolution of the political and economic organization of Germany and provisional territorial arrangements.

The London

(1)cf. Chapter IV - Convention for European Economic Co-operation and the Economic Recovery Programme.

The London Six-Power Conference

The ensuing Conference between representatives of the Governments of the U.K., U.S.A., France, Belgium, Luxembourg and the Netherlands, ended on 2nd June, 1948, with the issue of a communique making known the recommendations, which the Conference had decided to make to governments. These included:-

(a) the convening of an inter-governmental group to make recommendations to governments concerning the protection of foreign interests in Germany;

(b) that a joint military security board should be set up by the Military Governors of the three Western Zones to ensure the maintenance of disarmament and demilitarisation;

(c) that certain minor provisional territorial adjustments in connection with the western frontiers of Germany should be made;

(d) the establishment of an international authority for the control of the industries of the Ruhr;

(e) that the German people in the different states should be free to establish the political organization and institutions which would enable them to assume those governmental responsibilities, which were compatible with the minimum requirements of occupation and control and which ultimately would enable them to assume full governmental responsibility;

It was stated that the recommendations, which in no way precluded and on the contrary facilitated eventual four Power agreement on the German problem, were designed to solve the urgent political and economic problems arising out of the situation in Germany. The recommendations were described as a step forward in the policy, which, because of the previous failure to reach comprehensive four Power decisions on Germany, the Powers represented at the conference were determined to follow with respect to the economic reconstruction of Western Europe,

/including

including Germany,[1] and with respect to the establishment of a basis for the participation of a democratic Germany in the community of free peoples.

On 9th June, 1948, the Secretary of State for Foreign Affairs announced that the recommendations had been approved by the United Kingdom Government. They were also approved by all other governments represented at the conference.

The Russian reaction to the holding of the London Six-Power Conference had been sharp. Before the recommendations of the Conference were even published the Russian Government delivered in London, Washington and Paris notes of protest alleging violations of the Berlin Protocol and the Agreement on Control Machinery. The rejection of the protest was followed on 20th March, 1948, by the Russian Military Governor's withdrawal from the Control Council, which resulted in the cessation of the quadripartite government of Germany.

On the Russian side there was thus a claim that there had been infringement by the Western Powers of the basic agreements concerning Germany, and (semble) that that infringement entitled the U.S.S.R. to withdraw her Military Governor from the Control Council. The Western Powers' claim on the other hand was that in the situation created by Russian refusal to agree to the fulfilment of the Berlin Protocol (in particular as regards the economic unity of Germany), they were taking certain measures which did not preclude the resumption of effective quadripartite control, and that these measures were unavoidable in view of the urgent economic and political problems arising in Germany. To assess the validity of the Western Powers' claim that their measures did not preclude a resumption of quadripartite control it is necessary to examine in some detail the implementation of the recommendations of the London Six-Power Conference.

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(1) cf. Chapter IV - Convention for European Economic Co-operation and the European Recovery Programme.

Inter-Governmental Group on the Protection of Foreign Interests in Germany

The Inter-Governmental Group, consisting of representatives of France, the U.K., U.S.A., Belgium, the Netherlands and Luxembourg, met in Paris on 25th October, 1948. Its discussions were concerned with the protection of foreign interests in Germany only in the interim period pending a peace settlement, and its report(1) emphasised that its recommendations were without prejudice to final decisions, which could only be made in connexion with such a settlement. The recommendations were in their majority concerned with private rights and questions of private law. The Group did, however, touch upon the field of public international law, for example, in recommending that the problems resulting from the long delay of an ultimate settlement by Peace Treaty with regard to established property rights of United Nations nationals under pre-war treaties be studied (Recommendation No. 23) and in recommending that in the terms of any Occupation Statute, powers should be reserved to the Military Governors necessary to secure the safeguarding of United Nations interests in Germany, and the maintenance of the principle of non-discrimination (Recommendation No. 29).

The recommendations did not have the force of law, and therefore could not in any way preclude a resumption of quadripartite control. Any action taken by the Occupation Authorities in pursuance of the recommendations was provisional pending a peace settlement in which the U.S.S.R. would presumably participate with other United Nations.

Military Security Board

The terms of reference, functions and constitution of the Military Security Board were announced by the Military Governors of the three Western Zones of Germany in Berlin on 17th January, 1949. The terms of reference cover the whole field of disarmament and demilitarisation in the interests of security, including the control of scientific research, and the prohibited and limited industries. The Board's functions are to

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(1) Report and Recommendations of the Inter-Governmental Group on the Safeguarding of Foreign Interests in Germany, H.M.S.O. Cmd. 7850.

collect and study information and statistics and to make recommendations to the Military Governors.

The Board consists of three divisions, Military, Industrial and Scientific Research, controlled by a commission consisting of three officers of General or equivalent rank, appointed by and representing the respective Military Governors. The divisions organise and despatch inspectors or tripartite inspection groups to verify in the three zones the execution of the measures ordered by the Military Governors. The Occupation authorities at Land level in the various zones receive their instructions on disarmament and demilitarisation and report to their higher authorities (originally the Military Governors, now the Allied High Commission) through the Board. The Board was set up in pursuance of an agreement among the three Powers to discharge jointly their responsibilities in the field of disarmament and demilitarisation. There is nothing in the agreement which would necessarily prevent the three Western Powers jointly from participating in any form of quadripartite control in this field, or from amending the agreement to allow them severally to participate in such control.

Minor Provisional Territorial Adjustments

The manner in which the minor rectifications of Germany's Western frontiers were carried out is described in Chapter VII. For the purposes of the present discussion it is sufficient to say that the rectifications could not in any way preclude the resumption of quadripartite control. They were subject to any decisions to be taken by the United Nations (including the U.S.S.R. at a peace settlement.

Agreement for the Establishment of an International Authority for the Ruhr

The Agreement between the Governments of the United Kingdom, Belgium, France, Luxembourg, the Netherlands and the United States of America (called the "Signatory Governments") for the Establishment of an International Authority for the Ruhr was signed in London on 28th April, 1949.(1)

(1)Treaty Series No. 28(1949); H.M.S.O. Cmd.7685 & 7677, Annex VIII

The Preamble states that international security and general economic recovery require that the resources of the Ruhr should not in the future be used for the purpose of aggression but should be used in the interest of peace and that access to the coal, coke and steel of the Ruhr, which was previously subject to the exclusive control of Germany, be in the future assured on an equitable basis to the countries co-operating in the common economic good; that it is desirable for the political and economic well-being of the countries of Europe co-operating in the common economic good, including a democratic Germany, that there be close association of their economic life and that it is important that trade between these countries should be facilitated by lower trade barriers and by other means.

The International Authority of the Ruhr is accordingly established by Article 1. Under Article 2 the members of the authority are the Signatory Governments and Germany. Under Article 3 the authority consists of a Council composed of representatives of the Signatory Governments and of Germany. At the time when the Agreement was signed there was no central German government in existence. Articles 4 and 9 accordingly contain transitional provisions allowing the "Occupation Authorities concerned" to appoint a representative to cast the votes allocated to Germany until such time as the German government assumed the obligations placed upon it by the Agreement. The Government of the Federal Republic of Germany (infra) assumed these obligations on 16th December 1949 and the representative of that Government then took the place of the representative of the Occupation Authorities concerned on the Council.(1)

The expression "Occupation Authorities concerned requires explanation. The terms "Occupying Powers concerned" and "Occupation Authorities concerned" are defined by Article 29 to

(1) cf. Chapter XII

/mean

mean those Occupying Powers or Occupation Authorities which share the responsibility for the economic administration of that part of Germany which includes the Ruhr. In the Military Government period the terms accordingly meant the United Kingdom and the United States of America, and their Military Governors. Upon the establishment of the Allied High Commission (infra) France and the French Occupation Authorities came within the definition.

The functions of the authority are defined in Part III of the Agreement. Under Article 14 the Authority is to make a division of coal and steel from the Ruhr as between German consumption and export according to certain principles, including consistency with the objectives of the Convention for European Economic Co-operation or with any decision of the Organisation set up thereunder.

Under Article 15 the Authority is given the right to determine whether transport, price and trade practices, quotas, tariffs and other governmental measures or commercial arrangements instituted or permitted by the German authorities which affect the coal, coke or steel of the Ruhr are artificial or discriminatory and of such a nature as to prejudice the accomplishment of the pruposes of the Agreement, and whether they should be modified or terminated.

Under Article 16, during the control period, or until such earlier time as may be agreed upon by the Occupying Powers, the authority is to bring to the attention of the Occupation Authorities concerned measures which will ensure, and after such period or time the authority is itself to ensure, in conformity with any international agreements relating to the protection of foreign interests in Germany to which the Signatory Governments are party, the safeguard and protection of foreign interests in coal, coke and steel enterprises in the Ruhr and the protection of such enterprises involving foreign interests from the application of discriminatory measures.

/Under

Under Article 17 the Occupation Authorities concerned are to maintain such power as may be necessary to enforce the disarmament of Germany, including power to control the supply of Ruhr coal, coke and steel to any industry prohibited or limited in the interests of security.

Under Article 21 during the control period or until such earlier time as may be agreed upon by the Occupying Powers, the Authority is to transmit its decisions regarding the division of the Ruhr products between German consumption and export, and artificial or discriminatory practices, and its recommendations concerning the safeguarding of foreign interests to the Occupation Authorities concerned. Thereafter the Authority is to transmit its decisions or directions concerning the safeguarding of foreign interests to the German Government.

Under Article 22 of the Occupation Authorities concerned are, during the control period, or until such earlier time as may be agre- by the Occupying Powers, responsible for ensuring that the decisions of the Authority are carried out (unless in their judgment any decision regarding the division of Ruhr products requires modification in view of any agreement between two or more Occupying Powers relating to financial assistance to Germany or any agreement among the Occupying Powers regarding the allocation of coal, coke or steel), and are to inform the Authority of action taken on its recommendations. Thereafter the German Government is to carry out the decisions and directions of the Authority.

Under Article 24 the representatives of the signatory governments on the Authority have power, should the German government fail to take any action required of it by the Authority, or be found to be taking or permitting action which may frustrate the proper exercise of the functions of the Authority, to declare it in default and to make recommendations as to the necessary measures to be applied.

The special relation of the Occupying Powers towards Germany is recognised in Article 33, which provides that so long as that relation continues the agreement may be terminated by those Powers subject to prior consultation with the other Signatory Governments. Thereafter it may be terminated by the

/agreement

agreement of all the Signatory Governments. Unless terminated under Article 33, the Agreement is to continue in force until a peace settlement with Germany and thereafter as provided in the peace settlement.

How far then can it be said that the Agreement for the Establishment of an International Authority for the Ruhr infringes the Berlin Protocol and the Agreement on Control Machinery? Although the U.S.S.R. had at as early a stage as the Berlin Conference advanced a claim to participate in the control of the Ruhr,(1) the Ruhr Agreement contains no provision which would enable the U.S.S.R. to accede to it. It might be argued, however, that the three Western Occupying Powers had retained sufficient control over the Ruhr Authority to enable them, if the U.S.S.R. were willing, to establish "common (quadripartite) policies in regard to mining and industrial production and its allocation, "which paragraph 14 of Part II of the Berlin Protocol envisaged as a step towards the treatment of Germany as a single economic unit. For under Article 14 of the Ruhr Agreement the Authority is required to make its division of coal, coke and steel from the Ruhr as between German consumption and export "in accordance with the terms of any agreement among the (Western) Occupying Powers with respect to the allocation of coal, coke, or steel, which is in force at the time the division is made." Whether it would ever be practicable to dovetail the Ruhr Agreemer into a common quadripartite agreement for the allocation of coal, coke and steel is not a question which a lawyer can answer. From the legal point of view the conclusive answer to the charge of infringing agreements for the quadripartite control of industry is to be found in Article 33. This enables the (Western) Occupying Powers, so long as their special relation towards Germany

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(1) cf. Germany: An Account of the Events leading up to a Reference of the Berlin Question to the United Nations, H.M.S.O. Cmd. 7534, page 12.

continues, to terminate the Agreement at any time after consultation with the other signatory governments. Thus the Western Occupying Powers have not by entering into the Ruhr Agreement disabled themselves from concluding with the U.S.S.R. an agreement extending to all German coal, coke and steel production and superseding the Ruhr Agreement, as soon as the U.S.S.R. may be willing to implement the Berlin Protocol.

The Establishment of the Federal Republic of Germany

To fulfil the recommendation of the London Six-Power Conference that the German people should be free to establish political institutions which would enable them to assume governmental responsibilities, a Parliamentary Council charged with the duty of preparing a "Basic Law" (i.e. provisional constitution) for Western Germany, was convened in August, 1948. It consisted of delegates elected by the Land Parliaments of the three Western Zones on the basis of the proportional strength of the parties.

The Parliamentary Council completed its work in May, 1949. The Basic Law (Grundgesetz für die Bundesrepublik Deutschland) (1) was shortly afterwards approved (with certain reservations) by the three Military Governors and subsequently ratified by all the Landtage (Parliaments) of the Laender in the British, United States and French Zones of Occupation. Article 23 provides that it should apply for the time being in these Laender, (2) and should be put into force for other parts of Germany on their accession. The way is thus left open for the Laender in the Russian Zone to join the Federal Republic, if they so desired, and the U.S.S.R.

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(1) For a translation of the text, cf. U.S. State Department; Germany 1947-1949. - The Story in Documents, page 283.

(2) The Basic Law also provides in Articles 23 and 144(2) for its application to Berlin as a Land of the Federal Republic. The Military Governors directed, however, that these provisions should be interpreted to mean only that Berlin might designat a small number of representatives (without voting rights) to attend meetings of the two houses of the Federal Parliament (Bundestag and Bundesrat).

permitted.(1)

The decision to allow the German people to establish a free and democratic form of government in Western Germany necessitated a definition of the powers and responsibilities which should be retained by the Occupying Powers. This definition was laid down in the draft agreed in Washington by the Foreign Ministers of the United Kingdom, United States and France in April, 1949, of an Occupation Statute (2) to be proclaimed in Germany by the three Military Governors jointly.

The preamble stated that the Occupation Statute was proclaimed "in the exercise of the supreme authority which is retained by the Governments of France, the United States and the United Kingdom." Paragraph 1 stated that it was the desire of the three Governments that the German people should enjoy self-government to the maximum possible degree consistent with the occupation and that the Federal State and the participating

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(1) The Basic Law contains a number of provisions of international interest. Article 24 provides that the Federal Government may transfer sovereign rights (Hoheitsrechte) to international institutions and that in order to preserve peace it may join a system of mutual collective security and consent to such limitations of its sovereign rights as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world, (cf. the preamble to the French Constitution of February 1946, which declares that France, on the basis of reciprocity, will consent to limitations of sovereignty necessary for the organization and defence of peace.) It is also provided that the Federal Government will adhere to international agreements for general, comprehensive and obligatory arbitration. Article 25, following the precedent of the Weimar Constitution, provides that the general rules of international law form part of federal law. In case of conflict they are to be followed in preference to statutes and they are to create rights and duties directly for the inhabitants of the federal territory. Article 32 makes foreign relations a subject reserved to the Federal Government, but requires the Federal Government, before concluding a treaty of particular concern to a Land, to consult that Land. The Laender may also, with the approval of the Federal Government, conclude treaties concerning the subjects upon which they are competent to legislate. Article 9 provides, inter alia, that associations of which the objects or activities are directed against international understanding are prohibited. Under Article 26 activities calculated and intended to disturb peaceful relations between nations, and especially preparations for an aggressive war, are unconstitutional and are to be made punishable. Weapons designed for warfare may be manufactured, transported or traded only under licence from the Federal Government.

(2) H.M.S.O. Cmd. 7677.

...ner should, subject only to the Statute, have full legislative, executive and judicial powers in accordance with the Basic Law and their respective constitutions.

Paragraph 2 laid down the fields in which powers were specifically reserved to the Occupying Powers. These were:-

(a) disarmament and demilitarisation, prohibitions and restrictions on industry and civil aviation;

(b) controls in regard to the Ruhr, restitution and reparations; decartelisation and deconcentration; non-discrimination in trade matters, foreign interests in Germany and claims against Germany;

(c) foreign affairs (including international agreements made by or on behalf of Germany);

(d) displaced persons and the admission of refugees;

(e) the protection, prestige and security of the Allied Forces, their dependants, employees and representatives, their immunities and the satisfaction of occupation costs and their other requirements;

(f) respect for the Basic Law and the Land constitutions;

(g) control over foreign trade and exchange;

(h) control over internal action to the minimum extent necessary to ensure the use of funds, food and other supplies, in such manner as to reduce to a minimum the need for external assistance to Germany;

(i) control of the care and treatment in German prisons of persons charged before or sentenced by courts or tribunals of the Occupying Powers or occupation authorities.

In paragraph 3 the Occupation Authorities reserved the right, acting under instructions of their governments to resume, in whole or in part, the exercise of full authority if they considered that to do so was essential to security, or to preserve democratic government in Germany or in pursuance of the international obligations of their governments.

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Under paragraph 4, however, the German Federal Government and the Governments of the Laender had power, after due notification to the Occupation Authorities, to legislate and act in the fields reserved to those authorities unless the occupation authorities specifically directed otherwise or unless such legislation or action would be inconsistent with decisions or actions taken by the Occupation Authorities themselves.

Under paragraph 5 any amendment of the Basic Law required the express approval of the Occupation Authorities before becoming effective. But all other legislation, and agreements between the Federal State and foreign Governments, could become effective twenty-one days after receipt by the Occupation Authorities, unless previously disapproved. The Occupation Authorities would not, however, disapprove legislation, unless it was in their opinion inconsistent with the Basic Law or Land constitutions or their own legislation or directives, or unless it constituted a grave threat to the basic purposes of the occupation. In paragraph 6 the occupation authorities guaranteed, subject only to the requirements of their security, to respect the civil rights of every person to be protected against arbitrary arrest, search or seizure and to have a fair and prompt trial.

Paragraph 7 provided for the repeal of such legislation of the Occupation Authorities as was inconsistent with the Occupation Statute and, if requested by the German authorities, such legislation as was not covered by the reserved powers.

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The Agreement as to Tripartite Controls [1] (approved by the Foreign Ministers at the same time as the draft Occupation Statute) laid down the basis upon which the tripartite control machinery for the Western Zones of Germany was to be established. It provided for the establishment of an Allied High Commission consisting of one High Commissioner of each Occupying Power. It was provided that in exercising the power to approve amendments to the Basic Law, the decisions of the Allied High Commission required unanimous agreement, and that in cases where the exercise or failure to exercise the power reserved in the Occupation Statute to control foreign trade and exchange would increase the need for assistance from the appropriated funds of th United States Government, there should be a rule of "weighted" voting. Under this rule the representatives of the Occupation Authorities would have a voting strength proportionate to the funds made available to Germany by their respective governments. On all other matters action should be by majority vote, subject in certain cases to the right of any High Commissioner, who found himself outvoted by his two colleagues, to appeal to his governmen This right of appeal was given in any case in which a majority decision altered or modified any inter-governmental agreement relating to any subject listed in paragraphs 2(a) and (b) of the Occupation Statute (supra). In such a case the appeal served to suspend the decision until agreement was reached between the three governments. There was also a right of appeal in any case in which a dissenting High Commissioner considered that a

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(1)
H.M.S.O. Cmd. 7677

majority decision conflicted with any inter-governmental agreement relating to any subject listed in paragraphs 2(a) and (b) of the Occupation Statute, or with the fundamental principles for the conduct of Germany's external relations, or with matters essential to the security, prestige, and requirements of the occupying forces. In such a case the appeal served in the first instance to suspend action for 30 days. Thereafter action proceeded if two Governments indicated that they did not consider that there were grounds for further suspension.

The Foreign Ministers of France, the United Kingdom and the United States, meeting in Paris, approved on 20th June, 1949, the Charter of the Allied High Commission for Germany, (1). This provided for the establishment of an Allied High Commission, headed by three High Commissioners, one designated by each of the three Powers, for the exercise of supreme Allied authority in the Federal Republic of Germany. On the entry into force of the Occupation Statute all authority with respect to the control of Germany or over any German governmental authority vested in or exercised by the respective Commanders-in-Chief of the three Powers was to be transferred to the three High Commissioners respectively, to be exercised in accordance with the Occupation Statute, the Charter and the Agreement as to Tripartite Controls. The Charter provided that all the powers of the High Commission would be uniformly exercised in the constituent Laender of the Federal Republic in accordance with tripartite policies and directions. Nevertheless, the individual High Commissioners were severally responsible to their respective governments for certain matters. These included:-

(a) maintenance of law and order, if the responsible German authorities were unable to maintain law and order;

(b) ensuring the protection, prestige, security and immunities of the Allied forces and authorities, their

/dependants

(1) H.M.S.O. Cmd. 7727

dependents, employees and official representatives;

(c) the delivery of reparations and restitutable property;

(d) displaced persons;

(e) the disposition of war criminals;

(f) administration of justice in cases falling within the jurisdiction of Allied courts;

(g) control of the treatment in German prisons of persons charged before or sentenced by courts or tribunals of the occupation authorities.

The Government of the Federal Republic of Germany was established on 21st September, 1949. Thereupon the Occupation Statute[1] (which had been proclaimed by the Military Governors on 12th May), the Charter of the Allied High Commission, and the Agreement as to Tripartite Controls, came into force, and Military Government was terminated in the three Western Zones of Occupation.

How far can it be said that the enactment of the Occupation Statute and the Basic Law, and the conclusion of the international agreements concerning tripartite controls and the establishment of the Allied High Commission infringed the Berlin Protocol and the Agreement on Control Machinery?

At first sight the indictment is a formidable one to answer. A German government[2] had, without the concurrence of the U.S.S.R., been established in pursuance of a Basic Law, enacted, according to its preamble, by the German people in the Laender of the three Western Zones of Occupation "also on behalf of those Germans to whom participation was denied." The machinery set up to control the German government, (the Allied High Commission,) differed in important and significant respects from the Control Council, set up in pursuance of the Agreement on Control Machinery. The Allied High Commission consisted of civilian High Commissioners, whereas the Control Council was composed of the Commanders-in-Chief of the respective forces of occupation. Moreover the rule which obtained

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(1) cf. "Declaration concerning the Entry into Force of the Occupation Statute," Control Commission Gazette - Germany (British Zone) Issue No.39 Official Gazette of the Allied High Commission for Germany, No. 1.

(2) The establishment of a German government was the gravamen of the Russian charges. cf. Generalissimo Stalin's statement on 2nd August, 1948

in the Control Council that decisions could only be taken by unanimous vote was retained in the Allied High Commission only in respect of amendments to the Basic Law in all other matters decisions were taken by majority vote, (subject in certain cases to appeal to governments) or by a "weighted" vote in proportion to the funds provided for Germany by the Power concerned. While the Agreement on the Machinery of Control had somewhat loosely provided that the Control Council would "reach agreed decisions on the chief questions affecting Germany as a whole", the Charter of the Allied High Commission bound the High Commissioners to take joint tripartite decisions in all matters except those specifically made the responsibility of the individual High Commissioner, and even in respect of these matters the individual High Commissioner was bound, so far as possible, to "co-ordinate the general policies. . . with those of the other High Commissioners" and to act in accordance with such tripartite legislation or policies as the Allied High Commission might adopt. But all these measures were in the situation created by repeated Russian refusals to agree to measures to re-establish first the economic and then the political unity of Germany, a quite literal implementation of the principle laid down in Part II, paragraph 2 of the Berlin Protocol that "so far as is practicable, there shall be uniformity of treatment of the German population throughout Germany."

Further there was no insuperable legal obstacle in the way if the U.S.S.R. had desired to associate her Zone of Occupation and herself with the measures taken by the Western Powers in their Zones of Occupation. In paragraph 2 of the Occupation Statute, powers

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to representatives of the three Western Powers in the course of discussions on the question of Berlin. "The only real issue he had in mind in this context (i.e. of the decisions taken as a result of the London Six-Power Conference) was the formation in the Western Zones of a German Government. He did not object to the unification of the three Zones and even considered this to be progress": Germany: An Account of the Events Leading up to a Reference of the Berlin Question to the United Nations, H.M.S.O. Cmd. 7534, page 22.

were specifically reserved to the occupation authorities in wide fields "in order to ensure the accomplishment of the basic purposes of the occupation." Over these wide fields, therefore, the Western Powers would encounter no legal difficulty in acting, or in ensuring that the German Government acted, in accordance with any quadripartite agreements, into which the U.S.S.R. might be willing to enter. The Allied High Commission and the German Federal Government were thus together a piece of governmental machinery which could be fitted into any quadripartite control machine, which might be devised with powers limited to the reserved fields.

Further the powers of the occupation authorities could, by agreement between governments, be extended beyond the reserved fields. Under paragraph 3 of the Occupation Statute the Occupation Authorities reserved "the right, acting under instructions of their Governments, to resume in whole or in part, the exercise of full authority if they consider that to do so is essential . . . in pursuance of the international obligations of their Governments." Under the terms of the Occupation Statute, the Western Powers were thus in a position to fulfil their obligations under the Berlin Protocol (whether the U.S.S.R. did so or not), and to carry out the Agreement on Control Machinery, as soon as the U.S.S.R. was willing to do so, or to enter into any new agreement, which the U.S.S.R. might be willing to conclude for the quadripartite control of Germany.

It would thus have been legally possible, while maintaining the Occupation Statute and the Basic Law intact, to resume quadripartite control of Germany in a variety of ways. The U.S.S.R. might have decided to allow the Laender in her Zone of Occupation to accede to the Federal Republic of Germany under Article 23 of the Basic Law and have claimed a place for herself in the Allied High Commission. In such an event the U.S.S.R. could, by agreement with the Western Powers, have secured under paragraph 3 of the Occupation Statute, any extension of the fields in which the Allied High Commission exercised authority, which she considered necessary. Equally, if the U.S.S.R. had desired, without allowing the Laender in her Zone of Occupation to accede to the Federal Republic of Germany and claiming for

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herself a place in the Allied High Commission, to bring about a resumption of quadripartite control, the Western Powers had not by enacting the Occupation Statute and approving the Basic Law in any way disabled themselves from implementing the Agreement on Control Machinery or any new control agreement which might be negotiated between the four Powers. The Agreement as to Tripartite Controls and the Charter of the Allied High Commission can also not be regarded as legal obstacles to a resumption of quadripartite controls, since they were merely agreements of the three Powers, inter se, and were thus open to amendment at any time by agreement of the three Powers.

While the Western Powers had not by enacting the Occupation Statute and setting up the Federal Republic of Germany disabled themselves from resuming quadripartite control they were, however, not in fact willing to do so on the previous basis. After the Occupation Statute was proclaimed on 12th May, 1949, but before it came into force on 21st September, the United Kingdom Secretary of State proposed on 28th May at the sixth session of the Council of Foreign Ministers in Paris the resumption of quadripartite control in Germany on the basis that the Laender of the Russian Zone would accede to the Federal Republic of Germany in accordance with the Basic Law, and a quadripartite Occupation Statute would be enacted. The published text of the proposal and the account of the Secretary of State's explanations of it do not make it clear beyond doubt, whether the negotiation of a new Occupation Statute was envisaged, or whether the U.S.S.R. was being asked to accept the Occupation Statute which had already been proclaimed. The Russian Foreign Minister appears to have interpreted the proposal in the latter sense. The debate ended, when the Russian Foreign Minister made it clear that the only condition upon which he was prepared to discuss German unity was the re-establishment of "the activity of the Control Council . . . on its former basis" (i.e. that decisions could only be taken by unanimous vote)(1) The Western Powers were not willing to resume quadripartite control, unless the Agreement on Control Machinery were amended, at

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(1) cf. Report on the Proceedings of the Sixth Session of the Council of Foreign Ministers, Paris, 23rd May-20th June 1949; H.M.S.O Cmd. 7729.

least to the extent of removing the right of any one Power to veto any decision. They must therefore be taken to have accepted the Russian repudiation of that Agreement, which the Russian withdrawal from the Control Council constituted.

This chapter would be incomplete without some explanation in the light of the texts of its title; "The Association of Germany with Western Europe." The texts reveal that the attitude of the Western Powers towards Germany had in the course of the years of occupation undergone a significant change. Originally, as is shown by the Berlin Protocol and other early agreements, it would not have been untrue to define the principal purpose of the occupation as the security of the Occupying Powers and other United Nations against Germany. The creation of a democratic Germany was thought of as an element in security. Security remained the dominant note at least until the signing in March, 1947, of the Treaty of Dunkirk,(1) a defensive alliance between France and the United Kingdom against a renewal of German aggression.

A year later the emphasis had changed. The Brussels Treaty,(2) signed on 17th March, 1948 by France, the United Kingdom and the Benelux countries, though it still refers in its preamble to "the event of a renewal by Germany of a policy of aggression," is in fact a defensive alliance against aggression from whichever quarter it may come, and is, moreover, an alliance for the defence of human rights and fundamental freedoms and the rule of law(3). The London Six-Power Conference, for which invitations were issued about the same time as the signing of the Brussels Treaty, laid in its communiqué greater emphasis on the "participation of a democratic Germany in the community of free peoples" than on security.

Before the termination of Military Government, there was also signed, on 5th May, 1949, the Statute of the Council of Europe(4) This makes willingness to accept the principles of the rule of law and of human rights and fundamental freedoms a condition of associate membership under Article 5, a provision which, there is no reason to doubt, was designed to enable the Federal Republic of

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(1) Treaty Series No. 73 (1947); H.M.S.O. Cmd. 7217
(2) Treaty Series No. 1 (1949) H.M.S.O. Cmd. 7599
(3) cf. Beckett: The North Atlantic Treaty, The Brussels Treaty and

Germany to join the organization, as she subsequently did.

It is, therefore, not sufficient to say that the measures taken in pursuance of the recommendations of the London Six-Power Conference do not present any legal obstacle to a resumption of quadripartite control. France and the United Kingdom as parties to the Brussels Treaty and the Statute of the Council of Europe, and the United States through its European Recovery Programme, are pledged to uphold a definite way of life. The connexion between the pledges entered into by the Western Occupying Powers and the measures taken in pursuance of the recommendations of the London Six Power Conference is clearly shown by express words in the Agreement for the Establishment of an International Authority for the Ruhr. Under Article 14 the Authority is to discharge its most important function, the division of coal and steel between German consumption and export, according to principles consistent with "the objectives of the Convention for European Economic Co-operation or with any decision of the Organization set up thereunder", and the intention of the repeated reference in the preamble to "countries of Europe co-operating in the common economic good" is unmistakable. The Western Occupying Powers are thus bound to reject proposals for a resumption of the quadripartite control of Germany unless it be on some basis not inconsistent with the maintenance of the way of life which they are pledged to uphold. Thus however strictly the lawyer may confine himself to his texts, he cannot be blind to the war of ideas and principles which has divided the four Occupying Powers and it is difficult to resist the conclusion that a termination of this war must be a postulate for the resumption of quadripartite control in Germany.

(Contd.) (4) Treaty Series No. 51 (1949), H.M.S.O. Cmd. 7778.

The fact that the Foreign Ministers of the three Western Occupying Powers, meeting in Washington in April, 1949, to approve the draft Occupation Statute, ~~also~~ used the occasion to sign the North Atlantic Treaty(1) also has its own significance. In the preamble to the Treaty the parties declare their determination "to safeguard the freedom, common heritage and civilisation of their peoples founded on the principles of democracy, individual liberty and the rule of law." Under Article 2 "the Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions." The North Atlantic Treaty, therefore, like the Brussels Treaty is an alliance based on the defence of a particular way of life. The special significance of the North Atlantic Treaty for Germany lies, however, in Articles 5 and 6. Under Article 5 an armed attack against one or more of the parties in Europe or North America is to be considered an attack against them all, and under Article 6 an armed attack on one or more of the parties is deemed to include an armed attack on the occupation forces of any party in Europe. The Federal Republic of Germany was thus brought under the protection of the North Atlantic Treaty powers, since any armed attack upon her territory would almost certainly involve an armed attack on the occupation forces stationed there. The occupation which had originally been intended to serve the security of the Occupying Powers against Germany thus became a means of furthering the security of the greater part of the German state against armed attack from whatever quarter it might come.(2)

(1) Treaty Series No. 56 (1949); H.M.S.O. Cmd. 7789.
(2) cf. also Chapter IX - Participation of Allied Forces in the Occupation of the British Zone.

CHAPTER VI

BERLIN[1]

The right of France, the U.K. and U.S.A. (as of the U.S.S.R.) to occupy any part of Germany, including Berlin, derived from the defeat o the German armed forces, the unconditional surrender of Germany, and th assumption by the four Powers jointly of supreme authority in respect o Germany. The areas actually to be occupied by each Power were defined in agreements of the four Powers inter se. These agreements, reached i the European Advisory Commission, the earliest in September, 1944 were reproduced without material alteration in the Statement on Zones of Occupation and the Statement on Control Machinery in Germany both of 5t June, 1945.[2] These statements make it clear that the area of Greater Berlin was not to form part of any zone of occupation, but was to be divided into sectors each allotted to one of the Occupying Powers.

Paragraph 2 of the Statement on Zones of Occupation read as follows:-

> "The area of "Greater Berlin" will be occupied by forces of each of the four Powers. An Inter-Allied Governing Authority (in Russian Kommandatura) consisting of four Commandants, appointed by their respective Commanders-in-Chief, will be established to direct jointly its administration."

Paragraph 7 of the Statement on Control Machinery in Germany read:

> "The administration of the "Greater Berlin" area will be directed by an Inter-Allied Governing Authority, which will operate under the general direction of the Control Council, and will consist of four Commandants, each of whom will serve in rotation as Chief Commandant. They will be assisted by a technical staff which will supervise and control the activities of the local German organs."

There were thus to be three tiers of Allied authority in Berlin. First there was the Control Council, which had power to legislate on matters affecting Germany as a whole (including Greater Berlin). The Allied Kommandatura was responsible under the Control Council for the administration of the city as a whole, and for the control of the local

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(1) cf. Germany: An account of the events leading up to a Reference of the Berlin Question to the United Nations, H.M.S.O. Cmd 7534

(2) cf. Chapter II.

German organs, i.e. the municipal administration or Magistrat, the City Assembly and the borough councils. Thirdly there were the sector commandants, who in addition to commanding the respective forces of occupation, were members of the Kommandatura. Individually they also promulgated legislation as might be necessary for their particular sectors.

The areas occupied by the respective Allied armies at the cessation of hostilities, did not correspond to the zones of occupation laid down in the four Power agreements. The Russian army was in sole and complete occupation of Berlin. British and American forces had penetrated far into the area, which was to constitute the Russian zone of occupation. The redeployment of the Allied forces took place after correspondence in June, 1945 between Premier Stalin and Mr. Churchill, and President Truman, in which it was agreed that the British and American forces would be withdrawn to the zonal boundaries, provided that satisfactory arrangements could be entered into between the military commanders, which would give access by rail, road and air to British and United States forces in Berlin, Premier Stalin gave assurances that all necessary measures would be taken, and redeployment of forces then commenced. The arrangements entered into by military commanders were, however, of an informal character.

The Russian authorities had taken advantage of the initial period when the Russian army was in exclusive occupation of Berlin, to establish a Communist-dominated, though nominally all-party, city administration. Probably as a result of this, the Allied Kommandatura set up on 11th July, 1945, at first functioned reasonably smoothly.

As a result, however, of elections for the City Assembly and certain of the borough assemblies in October, 1946, the Communist-dominated Socialist Unity Party lost its leading position, and the key posts in the city administration were no longer filled by communists subservient to the Russians. Thereupon the Soviet authorities commenced a campaign, by means of unilateral action violating quadripartite agreements, to weaken or undermine quadripartite control of the city. The situation worsened after the breakdown of the discussions at the Council of Foreign Ministers in December, 1947, and

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it became virtually impossible, owing to Russian intransigence, to keep the Allied Kommandatura functioning since it could take decisions only by a unanimous vote. Outside the Kommandatura the Russian campaign from January 1948 onwards took the form of imposing restrictions on the communications of the Western Allies with their zones. The last passenger rail link for Allied officials between Berlin and the British Zone was cut on 22nd April, and road traffic between Berlin and the West ceased on 15th June. On 16th June the Russian Commandant withdrew from the Kommandatura.

Meantime it had become apparent that the reform of the German currency could no longer be delayed. The Russian withdrawal from the Control Council on 20th March made it impossible to obtain the quadripartite agreement which had long been sought. The three Western Occupying Powers accordingly on 18th June issued the first of their three currency reform laws[1] for their own zones. They emphasized that the reform did not extend to Berlin, since the city was under quadripartite administration, but the immediate Russian denunciation of the reform openly claimed for the Soviet Military Administration the right to legislate for the whole of Berlin and asserted that Berlin was economically part of the Russian Zone. Consultations between the four Commandants on currency reform for Berlin failed because the Russian representatives insisted that they alone should be responsible for any new Berlin currency, and refused to recognise the Kommandatura as the legislative authority in matters affecting all Berlin.

Almost immediately the Russian authorities announced a separate currency reform for their zone and Berlin. Thereupon on 24th June the three Western Powers announced that the new West-German currency, (the Deutschemark), would be introduced in their sectors on 25th June. The Russian authorities immediately stopped all remaining railway traffic (i.e. freight and German passenger traffic) on the route connecting Berlin with the Western zones and the British and United States authorities replied by increasing the air services between their zones and Berlin, services which as they grew acquired the name "air lift"

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(1) cf. Military Government Gazette, Germany, British Area of Control No.28.

The dispute concerning Berlin was taken up on the governmental level on 6th July, when the Governments of the three Western Powers delivered notes of protest to the Russian Government. The Russian reply dated 16th July claimed that the Western Powers had forfeited their right to be in Berlin because they had allegedly broken four Power agreements relating to Germany by carrying out a separate currency reform in the Western zones, by introducing a special currency for the Western sectors of Berlin, and by adopting a policy of dismembering Germany. (A reference to the recommendations of the London Six-Power Conference).[1] Discussions were then opened between representatives of the four-Powers in Moscow. They lasted for five weeks and ended with the despatch of an agreed directive for discussion by the four Military Governors in Berlin. These discussions began on 31st August but broke down a week later (7th September) because of the attitude of the Russian Military Governor. It had been the clear understanding, arrived at in Moscow, that the blockade would be lifted and the Russian Zone mark introduced as the sole currency in Berlin under quadripartite control, but the Russian Military Governor made it plain that he was not prepared to abide by the terms of this agreement, and in this he was upheld by his Government.

On 26th September the three Western Powers having failed in their endeavours to settle the Berlin dispute by negotiation as required by Article 33 of the Charter of the United Nations announced that they intended to bring the dispute before the Security Council. This was done on 29th September by identical letters addressed to the Secretary General of the United Nations. These asked the Security Council to consider under Chapter VII of the Charter and as quickly as possible the blockade of Berlin, which constituted a threat to peace.

The Security Council met on 4th October to consider the complaint of the three Western Powers against the U.S.S.R. Mr. Vyshinsky argued that under Article 107 of the Charter the Security Council was not competent to deal with the Berlin problem. The representatives of the United States and United Kingdom in reply maintained that the cutting of

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(1) cf. Chapter V.

communications between Berlin and the Western Zones constituted an act of force that threatened peace. They pointed out that Article 107 concerned action taken in relation to an enemy state and that the Russian action had not been taken in relation to Germany but had been directed essentially against the Western Powers with a view to compelling them to withdraw from a city in which they had the right to be.

On 5th October the Security Council decided by 9 votes to 2 (U.S.S.R. and Ukraine) to put the dispute on its agenda. On 6th October the Council heard the detailed indictment by the Western Powers of Russian action in the Berlin dispute and thereafter adjourned.

On 15th October the Security Council resumed its consideration of the Berlin question. Dr. Bramuglia, Acting President, asked the representatives of the four Powers to supply further information concerning (a) the initial imposition of restrictions on communications between Berlin and the Western Zones and between the Western Zones and the Russian Zone (the latter imposed by the Western Powers in retaliation in the course of the summer of 1948), and (b) the agreement involved in the instructions given to the four Military Governors in Berlin and the reasons why the instructions were not implemented. The Council adjourned until 19th October to enable the delegates to obtain the information required. The information was supplied by the Western Powers alone when the Council reassembled on 19th October, and the debate was then adjourned until 22nd October.

When the Security Council met on October 22nd, Dr. Bramuglia presented a motion calling upon the four Powers, inter alia (i) to remove immediately all restrictions on transport and commerce imposed since 1st October, (ii) to call a meeting of the four Military Governors in Berlin to settle the currency questions on the basis of the joint Moscow directive of 30th August, and (iii) to call another meeting of the Council of Foreign Ministers to discuss all outstanding questions on Germany. When the Council met on 25th October to vote on the motion, it was vetoed by Mr. Vyshinsky and thus lost.

/Efforts

Efforts were made in November and December, 1948, by Dr. Evatt, the President of the General Assembly, Mr. Trygve Lie, the Secretary General of the United Nations, and Dr. Bramuglia, the Acting President of the Security Council, to mediate in the Berlin dispute.

On 30th November the formation of a committee of finance experts, working under the neutral members of the Security Council was announced. It was to be their task to suggest a settlement of the currency aspect of the Berlin dispute. It was reported to the Security Council on 16th March that the committee of neutral finance experts had failed to suggest a solution acceptable to the four Powers.

The committee of neutral finance experts had in fact been given an impossible task since on the very day of its appointment, 30th November, the Russian authorities had announced the setting up of a puppet municipal administration (Magistrat) in their sector of Berlin, and had claimed that this was the legitimate ~~assembly~~ administration for the whole city. This was the culminating point in the Russian policy, pursued throughout the second half of 1948, of splitting the administration of the city.

Meantime the original Magistrat, formed in accordance with the Berlin constitution continued to function, though its effective authority was necessarily limited to the three Western sectors of the city. The provisional Constitution of the City of Berlin, approved by all four Occupying Powers in 1946 provided that legislation and certain other acts of the Magistrat and of the City Assembly should require the approval of the Kommandatura. The suspension of the sittings of the Kommandatura since 1st July owing to the refusal of the Russian Commandant to attend was therefore having a most serious effect on the city administration. Accordingly on 21st December the three Western Kommandants made the following announcement from the Kommandatura building:-

"The

"The Allied Kommandatura will .....resume its work forthwith. If the Soviet Authorities either now or at a future date decide to abide by the agreements to which the Four Powers are committed, the quadripartite administration of Berlin could be resumed. During their abstention the three Western Allies will exercise the powers of the Allied Kommandatura although it is realised that owing to Soviet obstruction it will only be possible for them to carry out their decisions in the Western Sectors for the present."

The Russian Commandant did not attend on 22nd December, and the three Western Commandants accordingly commenced to "exercise the powers of the Allied Kommandatura."

Under the de jure Magistrat and the Allied Kommandatura (meeting without the Russian commandant), it was possible to make progress with many aspects of city administration in the Western sectors. In May, 1949 the Western Powers were able to announce through their Military Governors in Berlin that the relationship between the Allied Kommandatura and the Municipal Administration of Berlin would, (as their Foreign Ministers had agreed in Washington in April),(1) so far as possible, be similar to that between the Allied High Commission and the German Federal Government. This decision was embodied in "a Statement of Principles" which was clearly modelled on the Occupation Statute. The only material difference between the Statement of Principles and the Occupation Statute was that under the former there were certain additional fields in which action was specifically reserved to the Allied Kommandatura in view of the special conditions in Berlin. These included the supervision of the Berlin police; safeguarding freedom of speech, the press, assembly or association, until such time as these four basic rights were implemented by the Berlin constitution;

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(1) c.f. Memorandum on the measures agreed by the United Kingdom, United States and French Foreign Ministers on the programme for Germany, H.M.S.O. CMD 7677, page 4.

such controls as might be necessary to ensure that counter-blockade measures and the restriction of exports should remain effective during the continuance of the blockade; the control of banking and credit policy until such time as the Berlin Central Bank became a member bank of a central bank of issue, and the supervision of the German courts pending the inclusion in the constitution of basic provisions for the supervision and control of the administration of justice.

The internal procedure of the Kommandatura was revised to bring it as nearly as possible into line with the Agreement as to Tripartite Controls, which governed the internal procedure of the Allied High Commission. Thus unanimous decisions were required only to approve amendments to the constitution of the city of Berlin. There was a rule of "weighted" voting under which the Commandants had a voting strength proportionate to the funds made available to Germany by their governments, in cases where the exercise or failure to exercise certain powers of control would increase the need for assistance from the appropriated funds of the United States Government. In all other matters decisions were taken by majority vote, subject in certain cases to the right of the dissenting Commandant to appeal to the Allied High Commission. The possible grounds for appeal were that the majority decision conflicted:-

(a) with an inter-governmental agreement, or

(b) with a decision of the Allied High Commission, or

(c) with fundamental principles for the conduct of Germany's external relations, or

(d) with matters essential to the security, prestige or requirements of the Occupying forces, or

(e) with basic tripartite policies regarding Germany.

In case (e) the effect of the appeal was to suspend action for a period not exceeding 21 days, unless the Allied High Commission decided otherwise. In all other cases the period of

/suspension

suspension was in the first instance 30 days. Thereafter action proceeded unless two of the High Commissioners indicated that they did not consider that there were grounds for further suspension.

How far the Western Powers were entitled to proceed to reconstitute the Kommandatura amongst themselves, and to redefine its relations with the Magistrat is a question, which can be answered only after an examination of the powers and functions of the Kommandatura as originally constituted.

The Statements of 5th June, 1945, on the Zones of Occupation and on Control Machinery in Germany (1) were vague in the extreme as regards the functions of the Kommandatura. In effect they merely said that the Kommandatura would direct the administration of Greater Berlin under the general direction of the Control Council. The details had to be worked out in the Coordinating Committee of the Control Council.

The Coordinating Committee laid down that the Kommandatura was to have no autonomous legislative power. The Kommandatura was charged with the general administration of the city, and in particular it was to ensure the carrying out in the city of decisions taken by the Control Council in matters affecting Germany as a whole. For these purposes it might issue directives and instructions to the German municipal authorities, or it might itself issue "orders" having the force of law, and addressed to the people of Berlin. The prior approval of the Coordinating Committee had, however, to be obtained, if an order of the Kommandatura involved an amendment of German law, or conflicted with a decision of the Control Council. In practice this meant reference to the Coordinating Committee of all matters of any importance. Moreover, if the Commandants failed to reach a unanimous decision, the matter, whether an amendment of German law or conflict with a Control Council decision was in question or not, had to be referred to the Coordinating Committee and if agreement

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(1) H.M.S.O. Cmd 6648.

could not be reached there, to the Control Council. Finally, the Kommandatura was required to render monthly reports on its principal activities to the Control Council. These arrangements meant that the Kommandatura was little more than a subordinate body of the Control Council. The suspension of the Control Council, upon the Russian Military Governor's withdrawal on 20th March, 1948, was followed by a period during which endeavours were made to keep the Kommandatura functioning, a period which was brought to an end by the withdrawal of the Russian Commandant on 16th June.

Since the Kommandatura was part and parcel of the machinery for the control of Germany as a whole, the general arguments which justified the Western Powers in regarding that machinery as having broken down, and proceeding to set up the Federal Republic of Germany apply also to the arrangements they made for the administration of the Western sectors of Berlin. As in their zones, so in Berlin, the Western Powers proceeded to carry out the agreements for the occupation and control of Germany, so far as they were able, having regard to the fact that those agreements could not be regarded as setting up a permanent state of affairs, but had to be implemented in accordance with changing circumstances and the political development of the German people.

On 5th May, 1949, it was (1) announced in London, Washington, Paris and Moscow that quadripartite agreement on the raising of trade and traffic restrictions in Germany and the holding of a meeting of the Council of Foreign Ministers had been reached in New York the previous day. All restrictions on communications, transportation and trade between Berlin and the Western Zones and between the Western and Eastern Zones, imposed since 1st March, 1948, would be removed on 12th May, 1949, and eleven days thereafter, on 23rd May, 1949, a meeting of the Council of Foreign Ministers would be convened in Paris to consider questions relating to Germany and problems arising out of the situation in Berlin, including the currency of Berlin.

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(1) c.f. Report on the Proceedings of the Sixth Session of the Council of Foreign Ministers, Paris, 23rd May - 20th June, 1949. H.M.S.O. Cmd.7729.

The communication[1] issued by the Council of Foreign Ministers on 20th June recorded their inability to reach agreement on the restoration of the economic and political unity of Germany. It was, however, agreed that the occupation authorities should consult together in Berlin on a quadripartite basis with a view to mitigating the effects of the administrative division of Berlin, with particular reference to inter-zonal trade and the normalisation, so far as possible, of the life of the city. The four Governments agreed that the New York Agreement of 4th May, 1949, should be maintained. It was also stated that the occupation authorities, each in its own zone, would have an obligation to take measures necessary to ensure the normal functioning and utilisation of rail, water and road transport, for the movement of persons and goods between the zones and between the zones and Berlin and communications by post, telephone and telegraph.

The Berlin dispute thus ended in an agreement to call off the struggle, and to accept the fact that the original arrangements for the quadripartite administration of Greater Berlin had broken down, and that for the time being at least separate Allied and German administrations had been set up in the two parts of the city.

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(1) c.f. Report on the Proceedings of the Sixth Session of the Council of Foreign Ministers, Paris, 23rd May - 20th June, 1949. H.M.S.O. Cmd.7729.

Chapter VII

The Western Frontiers of Germany

The monotonously repeated failures of the Council of Foreign Ministers to reach agreement on certain basic questions relating to Germany, notably the volume of reparations, meant that the Council was never able to approach the task laid upon it by the Berlin Protocol of preparing a peace settlement. In these circumstances the Western Powers found it necessary to search for solutions of territorial questions affecting their respective zones. The solutions they found, which are described below, were all provisional, and subject to decisions to be taken at a peace settlement.

The Saar Territory

The territory of the Saar was originally part of the zone of occupation allotted to France. The French, however, from the first made it clear that they looked upon the Saar as a special area within their zone. For example, during the first two years of the occupation the French made important alterations in the boundaries of the Saar, which resulted in an increase in the area laid down in the Treaty of Versailles by about 35% and an increase in the population by 72,000 to 850,000.

At the session of the Council of Foreign Ministers in Moscow in March and April, 1947, the United Kingdom(1) and U.S.A. indicated their willingness to support a French proposal for the incorporation of the Saar into the economic and administrative system of France and its political detachment from Germany, these arrangements to be subject to confirmation at a peace settlement. A joint announcement by the British, French and U.S. Governments on 21st April, 1947, stated that when the economic incorporation of the Saar with France had been

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(1) cf. Hansard (Commons) Volume 437, No.105, 15th May, 1947. Col.1738 and Vol. 437, No. 106, 16th May, 1947. Col.1964.

decided upon, a joint notification would be made to the European Coal Organisation, making it clear that in future France would present to the European Coal Organisation both the resources and the needs of France and the Saar as a whole, and inviting the European Coal Organisation to take account of the new situation.(1)

On 28th May, 1947, a Saar Constituent Committee was set up to draft a constitution which was to be submitted to an elected assembly of Saarlanders for approval or rejection. Elections to the Assembly were held on 5th October, 1947, and on 8th November, 1947, the constitution was approved. The constitution provided for the political separation of the Saar from Germany, and for its economic integration with France; the defence of the Saar and its representation abroad was to be undertaken by France; a representative of France in the Saar was to have power to legislate in the economic field and general supervisory powers.

After the approval of the Constitution, the introduction began of a series of measures to integrate the Saar economically with France. Thus, for example, on 20th November, 1947, the French franc was introduced into the Saar. In January, 1948, a Franco-Saar Judicial Convention was signed to ensure legal uniformity between the Saar and France in economic and financial matters.

On 3rd January, 1948, the French Governor of the Saar was invested with the title of High Commissioner, an indication that the transitional phase was over, and that the Saar had attained the special status which it had been agreed it should have. Tripartite conversations were held between U.S., French and British representatives in Berlin in January and February, 1948,

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(1) Treaty Series No. 53 (1947); H.M.S.O. Cmd. 7165.

to work out the adjustments necessary as a result of the economic integration of the Saar into the French economy. It was agreed that coal produced in the Saar territory should be considered as a common resource with the coal produced in France and a joint notification to this effect was sent by the United States, French and British Governments to the Economic Commission for Europe (which had taken over the functions of the European Coal Organization.)

It was also agreed that the total sum to be deducted from the reparations of capital equipment due to France on account of the separation of the Saar economy from the German economy should be 7 million Reichsmarks. An agreed letter to this effect was to be addressed to the Inter-Allied Reparations Agency by the three governments.

Trade between the Bizone and the Saar was to be put on a foreign trade basis from 1st April, 1948, and payments were to be made through the mechanism established between the franc area and the Bizonal area. On 1st April, 1948, customs barriers between France and the Saar were accordingly abolished and the trade of the Saar with Western Germany became thereafter part of her foreign trade.

On 15th June, 1948, a Saar Nationality Bill was passed. It conferred a separate Saar nationality on persons resident in the Saar, and provided for the acquisition of Saar nationality by certain other classes of persons.

On 15th December, 1948, a Franco-Saar Patent Agreement was signed, providing for uniformity in patent law between France and the Saar, and on 5th March, 1949, a Franco-Saar Postal Agreement was concluded incorporating the Saarland into the internal French postal service and empowering France to represent the Saar in all

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its relations with the International Bureau of the Universal Postal Union.(1)

Minor Rectifications of Germany's Western Frontiers

France, Belgium, the Netherlands and Luxemburg had long desired certain minor adjustments of their frontiers with Germany, where they caused administrative anomalies or difficulties in transport by road or rail. A Committee on Western German Frontiers, consisting of representatives of the occupying Powers and other countries concerned accordingly met in Paris in March, 1949. A communique issued on 26th March announced that agreement had been reached on the frontier adjustments which should be made. Demarcation was carried out by joint commissions consisting of representatives of the country adjoining Germany, and of the Allied control authorities concerned. The several areas affected were, pending a peace settlement, placed provisionally under the administration of the countries adjacent to Germany.

Kehl

Most of the original population - some 13,000 persons - of Kehl, the Rhine River port facing Strasbourg, had been evacuated in the Autumn of 1944, when the Allies had reached the Rhine, and had not been allowed to return. The French authorities had found it necessary to house some 9,000 French people, mostly from Strasbourg,

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(1) The status which the Saar territory is to have at least until a peace settlement was made clear after the termination of Military Government. On 3rd March 1950 a number of conventions and protocols, of which the General Convention is the most important, was signed between the Government of France and the Government of the Saar. The General Convention provides that the Saar is autonomous in legislative, administrative and juridical matters. The French representative in the Saar has power to ensure the application in the Saar of French monetary and customs legislation. He may veto Saar legislation if in his view it compromises the monetary and customs union with France, or is in conflict with any international obligation to which the Saar is a party, or is calculated to impair the political independence of the Saar from Germany, or to threaten the external security of the Saar.

in Kehl. Despite French assurances to the contrary, it was believed in German circles that the French intended to occupy Kehl permanently in order to kill competition with the port of Strasbourg.(1)

The Foreign Ministers of France, the United Kingdom and the United States meeting at Washington on 6/8th April, 1949, reached an agreement regarding Kehl.(2) The French Control Authorities, with the assistance of the Strasbourg French authorities, were to maintain jurisdiction over the port zone in Kehl until the establishment of the German Federal Government and the conclusion of negotiations between the French and German authorities with respect to a joint port administration for Kehl. The French Government agreed that the city of Kehl should gradually be returned to German administration, and that the French inhabitants should be withdrawn from Kehl over a four-year period required for the preparation of additional housing in Strasbourg. A final decision with respect to the Kehl port zone was to be made in a peace settlement. If the joint port authority developed harmoniously the U.S.A. and U.K. would be willing at the time of a peace settlement to bring an attitude of goodwill towards the establishment of a permanent joint authority.

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(1) cf. Manchester Guardian, 1st October, 1948.

(2) H.M.S.O. Cmd. 7677.

Chapter VIII

Germany's Pre-War Treaty Relations

In Section III of Control Council Proclamation No. 2, it had been announced that the Allied Representatives (i.e. the Commanders-in-Chief) would give directions concerning the abrogation, bringing into force, revival, or application of any treaty, convention or other international agreement, to which Germany was or had been a party.

The years between the unconditional surrender of Germany and the termination of Military Government were marked, as has been demonstrated in other chapters, by the large number of new international agreements entered into, in respect of Germany, by the Occupying Powers inter se or with other states. No action was taken in this period formally to revive any treaty concluded by Germany, which had been abrogated or suspended by war. But the conventions relating to the international régime of the Rhine, to the control of narcotic drugs and to posts were re-applied in respect of Germany, (so far as was possible in the circumstances obtaining,) without any determination of the questions, whether they required revival, and if so whether they should be revived. New conventions relating to posts and telecommunications were also entered into by the Occupying Powers in respect of Germany. These were intended to supersede earlier conventions to which Germany was a party.

Central Rhine Commission(1)

The Central Rhine Commission was set up by the Convention of Mannheim(2) signed in 1868 by France, the Netherlands, Baden, Bavaria, Hesse and Prussia. Articles 354 to 362 of the

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(1) cf. Mance: International River and Canal Transport.
(2) State Papers Vol. 59, page 470.

Treaty of Versailles also relate to the régime on the Rhine. They provide that the Mannheim Convention should continue to govern navigation on the Rhine and that the Central Rhine Commission should meet and draw up a revised Convention which would be binding upon Germany. In addition, Article 355 of the Treaty provided that the Commission was to consist of nineteen members, two representatives each from the Belgium, Italy, the Netherlands, Switzerland and the United Kingdom, and four representatives of the German riparian states, (Baden, Bavaria, Hesse and Prussia) and four of France, under a president appointed by France. From 1920 to 1936 negotiations went on in the Commission for the revision of the Mannheim Convention, but there was considerable opposition mainly from Germany(3) and the Netherlands, the Germans objecting in particular to the powers vested in the Commission, and to the chairman appointed by France.

In 1936 a revised Convention of a comprehensive character was drawn up. Membership of the Commission was to be the same as that laid down by the Treaty of Versailles except that the German Reich replaced the German riparian states. This Convention was never accepted in its entirety, but a "modus vivendi" was signed on 4th May, 1936, by all the members of the Commission except the Netherlands. The "modus vivendi" was to bring the greater part of the revised Convention into force on 1st January, 1937. On 14th November, 1936, however, Germany denounced the "modus vivendi," as she was entitled to do under its terms, and indicated that her /denunciation

(3) Nominally the German riparian states, and not the Reich, were members of the Commission. But in the inter-war period German participation was centrally directed by the Reich. By a Law of 30th January, 1934 (Gesetz über den Neuaufbau des Reiches) all the governmental powers (Hoheitsrechte) of the States were transferred to the Reich (cf. Reichsgesetzblatt 1934 I page 75.)

denunciation included the provisions of the Treaty of Versailles relating to the Rhine and the Mannheim Convention. The "modus vivendi" was later also denounced by France and Belgium. Italy also withdrew from the Commission at the end of 1936.

The German repudiation of the Mannheim Convention and the relevant provisions of the Treaty of Versailles was never acquiesced in by the other parties. The other parties were, therefore, as a matter of law entitled up to the outbreak of war to regard the German riparian states as still bound by these treaties. It could be said also that the only effect of war on these treaties was to suspend their provisions for the duration of the war as between belligerents and not to abrogate them. The Mannheim Convention and the relevant provisions of the Treaty of Versailles are treaties of the type which McNair classifies as "multipartite treaties constituting an international régime, status or system."(1) Of such treaties McNair says that they probably possess a quality of permanence which enables them to survive a war whether all the contracting parties, or only some of them, become parties to that war.

It was not, however, sufficient for the Occupying Powers to consider only the effect of war. Account had also to be taken of the changes which they had made or intended to make in the German riparian states. Prussia was to be dismembered; Baden cut in two; the territory of Hesse enlarged to about three times that of the Hesse of 1868. Bavaria was to cease to be a riparian state and new riparian states were to come into being under the names "Rhineland Palatinate" and "North Rhine/Westphalia."

In these circumstances the three Western Occupying Powers decided, after the U.S.S.R. had indicated that she was not interested in the Rhine, to propose the reconstitution of the Central Rhine Commission on a provisional basis. As a result of correspondence(2) in October and November, 1945, between the Governments of the United Kingdom, U.S.A., France, Belgium and the Netherlands, it was agreed to establish a Central Rhine Commission "on a purely provisional basis without /prejudice

(1) McNair; Law of Treaties, page 547
(2) U.S. State Department; Treaties and other International Acts Series 1571.

prejudice to the conclusion of negotiations by the interested Governments for the establishment of a permanent régime, and that the Commission should "exercise the powers and functions accorded to the pre-war Rhine Commission by the Conventions of 1868 and 1919 and co-ordinate its activities with the European Central Inland Transport Organization." Membership of the Commission comprised the above-mentioned five countries, and Switzerland, each with one vote. The Allied military authorities controlling German riparian territory were represented at the meetings of the Commission by liaison officers.

The provisional character of the new Commission thus set up could scarcely have received greater emphasis in the exchange of notes. It was, however, the revival of a Commission for a river which flows through German territory for about 240 of its navigable course of about 550 miles, and forms a boundary between Switzerland and Germany, and Germany and France. It is clear that the agreement could have been brought about only on the basis that supreme authority in respect to Germany had been assumed by the four Powers, and that the United Kingdom, U.S.A., and France, jointly, were in a position to exercise the powers of a German government, in this field. Moreover, the powers and functions of the Commission were derived from international treaties, which Germany had purported to denounce. Though the three Powers acted jointly in the exercise of supreme authority over Germany, the action of the three Powers considered severally takes on a different character. The United Kingdom and France having been members of the pre-war Commission may severally be regarded as having acted in their own interests and by their own right. President Truman's proposal at the Berlin Conference of 1945 for the establishment of international authorities, with U.S. participation, to regulate navigation on European inland waterways bordering upon two or more states(1) suggests that U.S. membership /of the

(1) cf. Wehle: International Administration of European Inland Waterways (American Journal of International Law, Volume 40, 1946, page 100)

of the Central Rhine Commission is not intended to be limited to the period of the Allied occupation of Germany, and to that extent the U.S.A. was also acting in its own interests and by its own right.

Narcotic Drugs

The Reich was a party(1) to the International Opium Convention, 1912,(2) the International Convention relating to Dangerous Drugs, 1925,(3) and the International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 1931.(4) These are conventions of the type, which McNair classifies as multipartite law-making treaties, and of which he says that they probably survive a war, whether all the contracting parties or only some of them are belligerents.(5)

In view of their subject matter it is understandable that the question of the application of these Conventions should arise soon after the cessation of hostilities. The initiative came, however, not from the Occupying Powers, but from the United Nations.

At its session in December, 1946, the Economic and Social Council of the United Nations, on the recommendation of its Narcotics Commission, requested the Secretary-General on its behalf:-

"to inform the Governments of France, the U.S.S.R., the United Kingdom, and the United States of the special importance, which the Council attaches to the establishment of an effective control of narcotic drugs in Germany, and

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(1) cf. Dehlinger: Systematische Uebersicht über das Reichsgesetzblatt 1867 - 1943 or the Vertragsverzeichnis published by the Auswärtige Amt.

(2) Treaty Series No. 17 (1921); H.M.S.O. Cmd. 1520.

(3) Treaty Series No. 27 (1928); H.M.S.O. Cmd. 3244.

(4) Treaty Series No. 31 (1933); H.M.S.O. Cmd. 4413.

(5) McNair: Law of Treaties, page 547 - 8.

to invite them, on behalf of the Council, to recommend to the Allied Control Authority to take the necessary measures at the earliest possible moment for the establishment of an effective control of narcotic drugs in Germany, and to invite them, on behalf of the Council, to recommend to the Allied Control Authority to take the necessary measures at the earliest possible moment for the establishment of an effective control of narcotic drugs throughout Germany."(1)

Throughout the period of Military Government the occupying Powers accordingly made themselves responsible to the Narcotics Commission for the control of narcotics in their respective zones of occupation, in accordance with the international conventions to which the Reich was a party.

Universal Postal Union

The German delegates had not signed the Universal Postal Convention prepared at the Congress at Buenos Aires in 1939, but Germany had subsequently made a declaration of her intention to carry out the provisions of the Convention and its subsidiary agreements.

The disappearance in 1945 of the German central postal administration, and the suspension of all international postal services to or from Germany, raised considerable doubts as to the manner in which Germany's relations with the International Bureau of the Universal Postal Union in Berne should be conducted. Early in 1946 it was decided in Berlin that the Postal Sub-Committee, an allied quadripartite body, should communicate with the International Bureau regarding the resumption of international services, and their subsequent extension, and on matters of principle affecting Germany as a whole, while German bodies in each zone of occupation should be responsible for the operation of international postal services, and should communicate with the /International

(1) Year Book of the United Nations, 1946-47, page 535.

International Bureau (and with foreign post offices) on operational matters affecting their respective zones.

In May, 1947, a Congress met in Paris to revise the Universal Postal Convention of 1939, and the French Government as host government, invited the Allied Control Authority in Berlin to be represented. The Control Council in response to this invitation, decided to send to Paris a quadripartite delegation, but as observers only.

The Universal Postal Convention, as revised and signed in Paris on 5th July, 1947,(1) included Germany in the list of states between which it was concluded, but the space for signatures on behalf of Germany remained blank. A Final Protocol(2) was, however, signed at the same time as the Convention, which provided in Article XVII, paragraph 2, that Germany, temporarily precluded from acceding to the Convention and the Agreements, might accede to these Acts by simple notification to the Government of the French Republic when the time was considered opportune by the responsible authority. The Convention came into force on 1st July, 1948, but Germany has not acceded to it.

International Telecommunication Union

Germany was a party to the International Radio-telegraph Convention, Washington, 1927, the International Telecommunication Convention, Madrid, 1932, and the Radio Regulations and Additional Radio Regulations, Cairo, 1938.(3)

The revision of these and other international agreements was the task of the International Telecommunication Conference and the International Radio Conference which met at Atlantic City between May and October, 1947. The quadripartite authorities in Berlin, however, failed to reach agreement on the representation

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(1) H.M.S.O. Cmd. 7435

(2) H.M.S.O. Cmd. 7435.

(3) cf. Dehlinger: Systematische Uebersicht über das Reichsgesetzblatt 1867-1943 or the Vertragsverzeichnis published by the Auswärtige Amt.

of Germany at the Atlantic City conference, and accordingly Germany could not be represented.

The International Telecommunications Convention signed at Atlantic City on 2nd October, 1947(1), unlike the revised Universal Postal Convention, did not purport to be concluded with Germany but, as in the case of the Universal Postal Convention, there was a special provision concerning Germany. Protocol II provided that Germany might accede to the Convention, at such time as the responsible authorities considered accession appropriate, by simple deposit of an instrument of accession with the Secretary General of the International Telecommunication Union. There has, however, been no accession on behalf of Germany.

The European Regional Broadcasting Conference met at Copenhagen in the summer of 1948 to reallocate European broadcasting wavelengths which at that time still conformed, broadly speaking, to a plan drawn up at Lucerne in 1934. The British, French and Soviet Zones of occupation and sectors of Berlin were, in effect, represented by the national delegations of the Powers concerned, to which members of the occupation staffs were attached as advisers and observers. The U.S.A. was not entitled to be present at a European conference, but surmounted the difficulty of presenting the requirements of the U.S. Zone of Occupation in Germany by sending a "delegation of observers." The plan which the conference drew up allotted to each of the four zones (in which the sectors of Berlin were included for this purpose) two wavelengths only. The total power of all transmitters in each zone was to be limited to 140 kilowatts. The American observers stated, however, that their Government could not be bound by these decisions as the American occupation authorities had built up in their zone a separate broadcasting authority for each Land, and it was impossible for these Land organizations to remain in operation if they and the American Forces Network were forced to share two wavelengths.(2)

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(1) cf. U.S. State Department: Treaties and other International Acts Series 1901.

(2) The plan came into effect in the French and British Zones on 15th March, 1950, and at the same time the American authorities arranged for frequency changes to be made by transmitters in their zone in order that interference with stations in Germany and neighbouring countries adopting the frequencies planned by the conference might be avoided.

Chapter IX

Agreements Illustrating the Exercise of Supreme Authority

In this chapter there are gathered together certain agreemen which are of interest as illustrations of the manner and extent o the exercise of supreme authority by one or more of the four Powe but which do not fall within the scope of any of the other chapte in this book.

Prosecution of War Criminals[1]

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis

On 8th August, 1945, the Governments of the four Powers entered at London into the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.[2] It provided in Article 1 for the establishment, after consultatio with the Control Council for Germany, of an International Military Tribunal for the trial of war criminals whose offences had no particular geographical location, whether accused individually or in their capacity as members of organizations. Article 2 provided that the constitution, jurisdiction and functions of the tribunal should be those set out in the Charter annexed to the Agreement. Article 3 provided that each of the signatories would make available the major war criminals detained by them. Article 5 provided that any Government of the United Nations might adhere to the Agreement. Article 6 provided that nothing in the Agreement should prejudice the jurisdiction or the powers of any national or occupation court in any Allied territory or in Germany for the trial of war criminals.

The two capacities in which the four Powers entered into this agreement are contrasted in the Agreement itself and in the Charter annexed thereto. The preamble to the Agreement recites that it was concluded in the interests of "all the United Nations," /an

(1) cf. "History of the United Nations War Crimes Commission & the Development of the Laws of War," published for the U.N.W.C.C. by H.M.S.O.
(2) H.M.S.O. Cmd. 6668.

an expression which clearly covers the four Powers, jointly or severally, in their own right. Article 1, which provides for consultation with the Control Council, rather than the issuance of orders to it, also suggests that the four Powers were not acting solely as Powers exercising supreme authority in Germany. The Charter, however, includes provisions which could only have been inserted in virtue of the supreme authority assumed in respect of Germany and exercised either by the four Powers themselves or by their agents, the Military Governors, who, when acting jointly, formed the Control Council. Thus Article 22 provides for the location of the tribunal in Germany; Article 28 for the delivery of any stolen property of which a convicted person was deprived to the Control Council; Article 29 that sentences should be carried out in accordance with the orders of the Control Council, which was also empowered to reduce or otherwise alter sentences, but not to increase their severity; Article 30 for the charging of the expenses of the Tribunal against funds allotted for the maintenance of the Control Council. The Tribunal had jurisdiction over the major war criminals of the European Axis. Had any War criminals of non-German nationality been tried, the Control Council would also have had these functions to perform in relation to them.

In order that the Tribunal might have a clear basis in German municipal law, the London Agreement was made an integral part of Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, promulgated by the Control Council on 20th December, 1945.(1) The Tribunal thus acquired the character of a German municipal court. It was, however, originally constituted by an international treaty, concluded in exercise of the supreme authority of the four Powers on the international plane. The

/Tribunal

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(1) Military Government Gazette, Germany - British Zone of Control - No. 5.

Tribunal thus also had an international character, which was enhanced by the adherence of nineteen of the United Nations to the treaty.

Lesser War Criminals

Control Council Law No. 10 defined crimes against peace, crimes against the laws and usages of war, and crimes against humanity, and empowered each Zone Commander to designate the court or tribunal in his zone, before which persons accused of such crimes might be tried. Article IV also empowered the Zone Commander to entertain, and if he thought fit, to grant, requests by governments for the delivery of any person accused of having committed such crimes in their countries. Effect was thus given to the Moscow Declaration of 30th October, 1943, issued by the U.K., U.S.A., and the Soviet Union in the interests of thirty-two United Nations, that German war criminals would be sent back to the countries in which their abominable deeds were done, in order that they might be judged and punished according to the laws of those countries.

The Treaty of Peace with Italy (1)

The Treaty of Peace was concluded between the four Powers and 16 other states (referred to collectively as "the Allied and associated Powers") on the one hand, and Italy on the other. Article 77 related specifically to Germany. It provided:-

in paragraph 1 that from the coming into force of the Treaty property in Germany of Italy and of Italian nationals should no longer be treated as enemy property;

in paragraphs 2 and 3 for the restoration and restitution, in accordance with measures to be determined by the Powers in occupation of Germany, of identifiable property of Italy and Italian nationals removed by force or duress from Italian territory to Germany by German forces or authorities after 3rd September, 1943;

in paragraph 4 that, without prejudice to these and any other dispositions in favour of Italy and Italian nationals by

(1) H.M.S.O. Cmd. 7022

by the Powers occupying Germany, Italy waived on its own behalf and on behalf of Italian nationals all claims against Germany and German nationals outstanding on 8th May, 1945, except those arising out of contracts and other obligations entered into, and rights acquired before, 1st September, 1939, this waiver to be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war, and all claims for loss or damage arising during the war; and

in paragraph 5 that Italy should take all necessary measures to facilitate such transfers of German assets in Italy as might be determined by those of the Powers occupying Germany, which were empowered to dispose of the said assets.

It is clear that these rights and obligations could have been granted to or imposed upon Italy only in exercise of the supreme authority assumed by the four Powers in respect of Germany.

Memorandum of Understanding Regarding German Assets in Italy

The Memorandum of Understanding regarding German assets in Italy(1) was entered into at Washington on 14th August, 1947, by the Governments of France, the U.K., and U.S.A., on the one hand, and the Government of Italy on the other. In the Berlin Protocol the U.S.S.R. had waived all claim to German assets in Italy, and the signing of the Memorandum may, therefore, be regarded as the exercise of supreme authority by the three Powers with the consent of the fourth. Thus far the Memorandum resembles the Agreements for the Liquidation of German assets with Switzerland, Sweden and Spain.(2) But whereas the agreements with Switzerland, Sweden and Spain had been concluded in accordance with Part I, Article 6 of the Agreement on Reparation from Germany,(2) and the three Powers were thus under a clear obligation to make the proceeds of liquidation available for

/distribution

(1) Treaty Series No. 75 (1947); H.M.S.O. Cmd. 7223.
(2) cf. Chapter III

distribution by the Inter-Allied Reparation Agency, they were under no such obligation in the case of German assets in Italy. As to these assets the Agreement on Reparation from Germany is silent. T Memorandum of Understanding was accordingly not based upon the Agreement on Reparation from Germany, but upon Article 77, paragrapl 5 of the Treaty of Peace with Italy (supra). That France, the U.K. and the U.S.A. were "the Powers occupying Germany which were empowered to dispose of the said assets," is clear from the waiver by the U.S.S.R. in the Berlin Protocol.

Under the Memorandum of Understanding the Government of Italy undertook to effect the prompt sale or liquidation of all assets in Italy belonging directly or indirectly to:-

(a) German individuals in Germany or corporations or other organizations organized under the laws of Germany;

(b) the German State and German municipalities and state, federal, municipal, or other governmental authorities;

(c) German Nazi organizations, and

(d) German individuals already repatriated or to be repatriated to Germany.

Exceptions to these categories were to be made in the case of:-

(a) assets of individuals deprived of life or substantially deprived of liberty pursuant to any law, decree or regulation discrminating against political, racial or religious groups;

(b) assets belonging to religious bodies or private charitable institutions, and used exclusively for religious or charitable purposes;

(c) assets of a corporation organized under the laws of Germany to the extent that they were not beneficially German-owned;

(d) assets released under an inter-custodial agreement with another government;

(e) assets coming within the jurisdiction of Italy as a result of resumption of trade with Germany.

/Germany

"Germany" was defined as the Germany within the boundaries of that country on 31st December, 1937. Action with respect to German-owned trade-marks and patents was to be held in abeyance pending separate representations.

The Government of Italy was to dispose of German assets only to non-German nationals and to credit the proceeds of liquidation to a special account to be held for such disposition as might subsequently be determined in accordance with Article 77, paragraph 5, of the Treaty of Peace with Italy.

Provision was also made for the establishment of a committee, composed of one representative of each of the four Governments parties to the Memorandum of Understanding. The duties of the Committee were to include the following:-

"To review in advance of consummation all sales of German assets to insure that the proposed sales are in accord with the national interests of the four Governments, taking into account the objectives of precluding the return of German external assets to German ownership or control and of favouring freedom of trade."

(1)
The Treaties of Peace with Roumania, Bulgaria, Hungary and Finland

The Treaties of Peace with Roumania, Bulgaria, Hungary and Finland were entered into, of the one party, by "the States which are at war with [the enemy state concerned] and actively waged war against the European enemy states with substantial military forces." Accordingly of the four Powers only the U.S.S.R. and the U.K. were parties to all four treaties; the U.S.A. was not a party to the Finnish treaty, though she was a party to the other three; France was not a party to any of the four treaties. It is apparent, therefore, that so far as the conclusion of these treaties required the exercise of the supreme authority assumed in respect to Germany, that exercise was entrusted to three, and in the case of Finland, to two of the four Powers.(2) /In Articles

(1) H.M.S.O. Cmd. 7022.

(2) It was, however, the task of the Council of Foreign Ministers to draw up the peace treaties for submission to the United Nations, and the final texts were approved by the Council at its third session in New York in November and December, 1946.

The Peace Treaties contained two types of provisions based on the exercise of supreme authority by the Powers in occupation of Germany, those relating to the liquidation of German property in the state with which the Treaty was concluded, and those relati to the property in Germany of that state or its nationals.

In Articles 26, 24, 28 and 26 of the respective Treaties, Roumania, Bulgaria, Hungary and Finland recognized that the Soviet Union was entitled to all German assets in their respective states "transferred to the Soviet Union by the Control Council for Germany" and undertook to take all necessary measures to facilitate such transfers. But for the assumption of supreme authority such recognition would have been wrongful. The wording quoted is, however, curious. The U.S.S.R. derived her right to hav the assets transferred to her from the Protocol of the Berlin Conference. The actual transfer did not require an act of the Control Council, but depended on the provisions of the lex situs. Mann(1) appears to regard the wording as meaning that the Control Council should supply the definition of "German assets," which was lacking in the Peace Treaty, and to judge by a note of protest which it had occasion to address on 29th July, 1947,(2) to the U.S.S.R., that seems also to have been the view of the United States Government. In practice the U.S.S.R. appears to have settled all questions pertaining to the German assets to which she was entitled (including that of defining them) by agreements with the countries in which they were located. A similar procedure was followed by the Western Powers in respect of the German external assets to which they were entitled.(3)

The provisions relating to property in Germany, i.e. paragraph 1 - 3 of Article 77, of the Italian Treaty, (supra) are reproduced in Articles 28, 26, 30 and 28 of the treaties with Roumania, Bulgaria, Hungary and Finland respectively. Paragraph 5 of Article 77 of the Italian Treaty - waiver of claims against Germany and German nationals - is reproduced in the corresponding Articles of the treaties with Roumania, Bulgaria and Hungary, but is omitted from the Finnish treaty.

(1) Mann: German External Assets: British Yearbook of International Law, 1947, page 239.
(2) Department of State Bulletin No. 437, 17 (1947) p.298.
(3) cf. Chapter III.

Participation of Allied Forces in the Occupation of the British Zone

The Government of the United Kingdom entered into agreements with the Governments of Belgium, Denmark and Norway for the provision by these states of contingents of troops to undertake occupational duties in the British Zone of Germany. The agreements(1) conform to a pattern. The Allied contingents remained for discipline and administration under their own officers. For operational purposes they came under a British commander. There were also provisions concerning training facilities, requisitioning, communications and the like. When the agreements were renewed(2) the Government of the United Kingdom undertook that it would, if at any time the costs of occupation were recovered from the German state, assist the Governments of Belgium, Denmark and Norway to recover their shares pari passu with other occupying powers.(3)

The stationing of Allied troops in the British Zone of Germany acquired a new significance when the North Atlantic Treaty(4) was signed in Washington on 4th April, 1949. Article 5 provides that an armed attack against one or more of the parties in Europe, or North America shall be considered an attack aginst all parties, and provides in that eventuality for mutual assistance to restore and maintain the security of the North Atlantic area. Under Article 6 an "armed attack on one or more of the Parties" is defined to include an armed attack on the occupation forces of any party in Europe. Of the states parties to the Treaty, the United Kingdom, Belgium, Denmark, France, Norway and the United States all have occupation forces in the Western Zones of Germany.

/Agreement

(1) cf. Treaty Series No. 72(1947); H.M.S.O. Cmd.7226;
Treaty Series No. 52(1947); H.M.S.O. Cmd.7164.

(2) cf. Treaty Series No. 8 (1949); H.M.S.O. Cmd.7614
Treaty Series No.89 (1948); and Treaty Series No. 55(1949);
H.M.S.O. Cmd. 7785.

(3) Belgium, Denmark and Norway were occupying powers only in the sense that they maintained forces in Germany. They took no part in the

/Military

Agreement Concerning Yugoslav Displaced Persons

An Agreement between the Government of the United Kingdom and the Government of Yugoslavia concerning Yugoslav displaced persons was signed at Bled on the 8th September, 1947.(1) It is of interest as an agreement entered into by the United Kingdom both in respect of Germany and Austria. It was thus simultaneously an exercise of the authority assumed in respect of Germany, and of the powers, as regards displaced persons, retained by the Occupying Powers in Austria.(2)

Under Article 1 it was provided that the respective authorities of the Government of the United Kingdom and the Government of the Federative Peoples Republic of Yugoslavia should make a joint and intensified effort to reach final settlement of the whole question of Yugoslav displaced persons and collaborators on territory under British control. The joint effort was to include the provision of propaganda material by the Yugoslav Government, free return under Yugoslav amnesty laws of persons of certain categories not guilty of specific war crimes, the supply by the Yugoslav Government of all information in their possession about any Yugoslav Organizations hostile to United Nations interests and to repatriation existing in the British Zone of Germany or Austria, and an undertaking by the British Authorities to take all practical steps to dissolve any such organizations which they were satisfied were engaged in such activities.

The highest priority was to be given to the "screening" of Yugoslavs in the British Zone of Austria. On completion of "screening," all Yugoslavs found, whose surrender had been requested by the Yugoslav Government, and not formally refused by the Government of the United Kingdom, were to be arrested. Those whose arrest or surrender was refused were to be sent to the British Zone of Germany.

In addition the Government of the United Kingdom /undertook

Military Government of Germany. Where the expression "Occupying Powers" occurs anywhere else in this book, the reference is to the four Powers, who had assumed supreme authority and were thus responsible for the Military Government of Germany.

(4) Treaty Series No. 56(1949); H.M.S.O. Cmd. 7789.

(1) Treaty Series No. 77 (1947); H.M.S.O. Cmd. 7232.

(2) cf. Agreement on the Machinery of Control for Austria of 28th June, 1946; Treaty Series No. 49 (1946); H.M.S.O. Cmd. 6958.

undertook to remove as soon as possible from the British Zone of Austria to the British Zone of Germany all Yugoslav nationals in camps who:-

(a) were suspected of actively assisting the enemy during the war;

(b) could be shown to be members of an organization having as its purpose the overthrow by armed force of the government of their country of origin; or

(c) were actively discouraging their fellow nationals from returning to their country of origin.

Under Article 12 the Government of the United Kingdom agreed to take all possible steps to apprehend the Yugoslav nationals whose surrender as collaborators with the Axis forces had been requested by the Government of Yugoslavia, apart from those whose surrender had been finally refused.

Under Article 13 the Government of the United Kingdom was to surrender all Yugoslav nationals in their power against whom the Yugoslav Government had established a prima facie case of active and wilful collaboration with the Axis Powers.

Under Article 14 the Government of Yugoslavia agreed that they did not desire the forcible surrender of any Yugoslav nationals other than those whose surrender had been specifically requested by name, and further agreed to make no further requests for surrender after a period of two months following the signature of the Agreement.

CHAPTER X

The Status of Germany under Military Government

The view has been advanced in Chapter II that Germany did not cease at the unconditional surrender to be a state, but that after that event the occupation ceased to be a belligerent occupation to which the Hague Regulations applied. It is proposed in this Chapter to examine whether there is any legal description or classification which can be applied to the occupation of Germany after the unconditional surrender, and also the effects which the unconditional surrender and subsequent events had upon the character of the German state.

Sauser-Hall(1) after a careful examination of the hitherto ~~un~~recognized types and forms of occupation, comes to the conclusion that the occupation of Germany cannot be classified with any of them, and is thus sui generis. Though in his view the state of war continues, Sauser-Hall finds it impossible to classify the occupation of Germany as a belligerent occupation. He regards Germany as having been placed under a committee of trustees, and thus under a new type of occupation, the "fiduciary occupation". The idea that Germany was placed under international trusteeship appears also in the judgment of the Obergericht of the Canton of Zürich(2), and is adopted by a number of German legal writers(3). This superficially attractive theory tends, however, to obscure the original purposes of the occupation. Trusteeship, whether considered on the international or the municipal plane, must necessarily mean that the trustee acts always in the interests of the beneficiary and not at all in his own interests. It is true that the Occupying Powers set themselves the task of -

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(1) Sauser-Hall L'Occupation de l'Allemagne par les Puissances Alliées in Annuaire Suisse de Droit International, 1946.

(2) Annuaire Suisse de Droit International, 1946, page 204 et seq.

(3) cf. Menzel Jahrbuch für Internationales und Ausländisches Oeffentliches Recht, 1948/I, pages 76-86; the opinion of the Kaiser-Wilhelm Institut, already cited; also critised by v. d. Decken: Die Grenzen der Geltung der Haager Landkriegsordnung. (Jahrbuch für Internationales u. Ausländisches Oeffentliches Recht 1948/I, page 24.)

to quote part of Article 76(b) of the United Nations Charter - "promoting the political, social and educational advancement" of the German people. But the advancement of the German people was not so much the aim of the occupation as one of the means by which the basic aim, the security of the Occupying Powers and the other United Nations, might be attained. Moreover, great though the volume of funds and supplies was, which Germany received from the Occupying Powers, particularly the U.S.A., the occupation was not intended to serve the economic - (the word omitted from the quotation of Article 76(b) above) - interests of the German people. The obtaining of reparations from Germany was a very definite part of the economic plan laid down in the Protocol of the Berlin Conference and continued throughout the period covered by this book. Paragraph 15 of Part II of that Protocol also shows an intention not to allow average living standards in Germany to exceed the average of the standards of living of European countries (excluding the United Kingdom and U.S.S.R.) Kaufmann, sensible of this difficulty, argues that the object of the trust assumed by the four Powers was to make the German people again a full member of the comity of nations, and that to this end the trustees had power to do in relation to Germany everything which they could properly claim that Germany herself was bound to do in consequence of her defeat in Hitler's war.(1) This argument is ingenious rather than convincing. That the trustee should have power to obtain benefit for himself from the trust, however excellent the reasons may be for which the power is given to the trustee, is so utterly foreign to the concept of a trust, that the trusteeship theory must be rejected in any legal consideration of the occupation of Germany and Allied statesmen,(2) who have spoken of "trusteeship", must be

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(1) Erich Kaufmann: Deutschlands Rechtslage unter der Besatzung, pages 20-21.

(2) cf. Lord Pakenham quoted in Neues Europa, Heft. 21/1947 page 4 as having said ". . . our rôle in Germany is that of trustees . . . and it is our special duty to translate this conception of trusteeship into effective forms of administration."

taken to have used the word in a general or political sense.

One theory advanced by certain German writers(1) is that the acts of the Occupying Powers in respect of Germany must be regarded as an intervention for the attainment of the political ends laid down in the Protocol of the Berlin Conference, and that these political (and it might be added, economic,) ends limit the extent to which supreme authority could properly be exercised. "Intervention", however, though its meaning may vary, usually connotes interference in the affairs, internal or external, of another state. If the occupation has the character of an intervention, it would appear to follow that the acts of the Occupying Powers are attributable in law, not to Germany, but to the Occupying Powers themselves, and that the international personality of Germany is suspended, as Lauterpacht has indeed said it is.(2)

Section III of Control Council Proclamation No. 2(3) precluded any German authority from taking any part in the conduct of Germany's foreign affairs. Throughout the period of Military Government the foreign relations of Germany were conducted either by the Governments of the Occupying Powers or by their Military Governors. The exceptions to this rule are of small consequence. They are confined to such instances as the maintenance of relations on subjects determined by the occupation authorities, between certain of the German postal authorities and the International Bureau of the Universal Postal Union.(4) The assumption by the Occupying Powers of all but exclusive responsibility for the conduct of Germany's foreign relations, and their avoidance of the question of reviving treaties to which Germany was or had been a party(5) have no doubt encouraged the view that the international

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(1) cf. Geiler: Zur völkerrechtlichen Lage Deutschlands, page 21; Grewe: Ein Besatzungsstatut für Deutschland.
(2) Oppenheim: International Law, Volume I, Seventh Edition, page 520.
(3) cf. Chapter II.
(4) cf. Chapter VIII.
(5) cf. Chapter VIII.

personality of Germany is suspended and that the acts of the Occupying Powers are "interventionist".

The correctness of this view may be tested by asking and attempting to answer the following question. When a fully independent German Government emerges will it be entitled to treat all the international agreements entered into by the Occupying Powers in respect of Germany as res inter alios acta, or will it be required to assume the obligations and entitled to claim the rights under those agreements? The answer to this question depends on the answers to the further questions, whether France, the United Kingdom, the U.S.A., and the U.S.S.R. entered into agreements in respect of Germany as victorious belligerents or as occupying powers; whether they entered into such agreements in their own right or in virtue of the supreme authority assumed over Germany; whether they were in fact extending their own foreign relations to cover Germany or in truth conducting Germany's foreign relstions.

Constitutional development is so far advanced in many of the territories for the international relations of which the Government of the United Kingdom is responsible that it can in practice no longer compel the legislatures in those territories to enact any particular piece of legislation. Since many modern conventions dealing with economic, social and educational matters require to be implemented by legislation, it follows that the Government of the United Kingdom cannot enter into such conventions on behalf of its dependent territories without first consulting and securing the agreement of the governments in those territories. It is usually impossible to carry out these consultations quickly enough to enable the Government of the United Kingdom at the time of signature, ratification or acceptance of a convention, to become a party to it on behalf of all its dependent territories. For these reasons the Government of the United Kingdom

/insists

insists upon the inclusion in treaties, to which it intends to become a party, of special provisions relating to application to dependent territories. These "dependent territories clauses" take the form either of permitting a party to declare at the time of signature, ratification or acceptance, that the treaty shall not extend to all or certain of its dependent territories, or that the treaty does not extend to dependent territories until such time as the party responsible for their international relations makes a declaration or gives a notification that it shall so extend. Clauses of one or other of these types are frequent in modern conventions.

Germany was in the same kind of relationship to the government of any one Occupying Power as a dependent territory to the Government of the United Kingdom, in as much as no one government was in a position to ensure the enactment in Germany of all the legislation it might desire. Quadripartite legislation could be enacted only by agreement of all four Powers. Even within a zone a Military Governor was not free to enact legislation, which would conflict with quadripartite legislation, decisions or policies to which he had agreed in his capacity as a member of the Control Council.

Had it then been the intention of the Occupying Powers to extend their own foreign relations to Germany, the most convenient method of doing so would have been under the "dependent territories clauses" in treaties as and when the necessary legislation could be enacted in Germany or in the Zone of Occupation of the Power concerned. But there is no known instance where the treaty relations of the Occupying Powers have been extended to Germany in that way. The British Zone of Germany has not been regarded as covered by any general declaration by the United Kingdom that a treaty to which she is a party extended to all the territories for the international relations of which she is responsible; nor has there been

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any specific application of a treaty to the British Zone of Germany as a territory for the international relations of which the United Kingdom was responsible.

There are, moreover, treaties, usually multilateral treaties, to which the Occupying Powers, or some of them, have become parties which either expressly provide that they do not extend to Germany or other occupied territories, or contain special provisions for application to such territories. Examples are the Final Act and Agreement of the Inter-Governmental Conference on the Adoption of a Travel Document for Refugees of 15th October, 1946,(1) the Universal Postal Convention of 5th July, 1947,(2) the International Telecommunications Convention of 2nd October, 1947,(3) and the General Agreement on Tariffs and Trade.(4) Such provisions go to show that the Occupying Powers did not regard their Zones of Germany as territories to which their own foreign relations could be extended by means of the usual "dependent territories" clauses or otherwise.

So far then as the United Kingdom is concerned, there was no extension of the Occupying Power's own international relations to Germany, and this is believed to be true also of the other Occupying Powers. As was expressly recognized in the Exchange of Notes(5), which preceded the Accord for the Expropriation of German Enemy Property in Spain, and the Liquidation of Balances and Payments between Spain and Germany(6) the Occupying Powers entered into agreements in exercise of the powers of the German government, which they had assumed.

This, however, is not to say that every agreement mentioned in this book was concluded by virtue of the supreme authority of the Occupying Powers as the "government" of Germany. In conducting their own foreign relations the Occupying Powers had

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(1) Treaty Series No. 3 1947; H.M.S.O. Cmd. 7033
(2) cf. Chapter VIII
(3) cf. Chapter VIII
(4) H.M.S.O. Cmd. 8048
(5) cf. Chapter III
(6) cf. Chapter III

to take account of the fact that they were in occupation of Germany. This is illustrated by certain provisions of the International Wheat Agreement(1). The area comprised in the Western Zones had never produced sufficient wheat for its own needs. When the wheat producing areas East of the Oder-Neisse line were placed under Polish administration, in pursuance of the Berlin Protocol, it became necessary for the Western Zones to obtain supplies of wheat from abroad, largely from the U.S.A. Account was taken of this fact, when the International Wheat Agreement was signed in Washington on 23rd March, 1949. The Agreement laid down the quantities of wheat, which the importing countries guaranteed to purchase, and the exporting countries guaranteed to sell, in a series of crop years commencing with 1949-1950 and ending with 1952-1953. The minimum requirements of wheat for any occupied area for which the U.S.A. had supply responsibility were excluded from the calculation of the quantities of wheat, which the U.S.A. guaranteed to sell in any crop year, and it was provided in Annex B to Article III of the Agreement that the necessity of meeting these requirements would be taken into account, if owing to an insufficient crop, the U.S.A. were compelled to ask, by the procedure laid down in Article X, to be relieved of part of its guaranteed sales.

The International Wheat Agreement, then, was an agreement concluded by the United States in the course of conducting its own foreign relations, which, however, took account of the fact that the United States were in occupation of part of Germany and had undertaken responsibility for the supply of wheat to Germany. In the same category may be included the Agreement for the Settlement of Inter-custodial Conflicts relating to German Enemy Assets(2) and the Accord regarding the Treatment of German-owned Patents.(3) These were agreements concerned

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(1) Treaty Series No. 65 (1947); H.M.S.O. Cmd. 7819
(2) cf. Chapter III
(3) cf. Chapter III

with the liquidation of German assets in the signatories' own jurisdiction. Though they are in a sense based upon the assumption of supreme authority in respect of Germany (since but for the assumption of supreme authority such measures would have required regulation in a peace treaty), the conclusion of these agreements, in itself, was part of the Occupying Powers' own foreign relations.

It is necessary, therefore always to distinguish agreements entered into by the Occupying Powers in virtue of their supreme authority, and agreements affecting Germany entered into by the Occupying Powers in their own right. The situation is further complicated by the fact that the governments of the Occupying Powers entered into agreements, particularly in the early stages of the occupation, partly in their own right, and partly by virtue of their supreme authority. The Agreement on Reparation from Germany, (1) the Agreement for the Prosecution and Punishment of the Major War Criminals(2) of the European Axis, and the correspondence concerning the reconstitution of the Central Rhine Commission(3) have been analysed from this point of view. Similarly in the proceedings of such international organisations as the Narcotics Commission(4) and the Economic Commission for Europe (5) it is necessary to distinguish between statements of the delegations of occupying Powers, which relate to the territories of the Occupying Power and those which relate to Germany.

The Agreements for Most-Favoured-Nation Treatment for Western Germany(6) are in a hybrid class. They are agreements conditional upon some of the parties being in occupation or control of Western Germany, but a study of their terms shows that they could have been entered into even if none of the

/parties

(1) cf. Chapter III.
(2) cf. Chapter IX
(3) cf. Chapter VIII
(4) cf. Chapter VIII
(5) cf. Chapter IV
(6) cf. Chapter IV

parties had exercised supreme authority in Germany. Since they were intended to lapse on the termination of Allied occupation or control, it would appear that they were agreements entered into by the Occupying Powers solely in the course of conducting their own foreign relations. But the agreements were intended to benefit Germany so long as certain conditions on the whole beneficial to the signatories obtained in Germany. It is therefore possible to argue that the Occupying Powers in entering into these agreements were not only conducting their own foreign relations but at the same time conducting those of Germany.

The situation clarifies itself, however, and the true legal position (it is submitted) is seen when the foreign relations of Germany are conducted not by the governments of the Occupying Powers but by their Military Governors. When the governments of the occupying Powers negotiate and conclude agreements with the Military Governors (as, for example, the Convention for European Economic Co-operation(1) or the Agreement between the Government of the United Kingdom and the United States, United Kingdom and French Military Governors for the Regulation of Payments)(2) and when the Military Governors send delegations separate from those of the occupying Powers to international organizations (as, for example, the Organization for European Economic Co-operation)(3) it is no longer possible to maintain that the international personality of Germany is suspended, or that the international relations of the occupying Powers are, by some form of "intervention", extended to cover Germany; or that for a future German government the commitments entered into will be res inter alios acta.

The agreements entered into by the Military Governors in

/exercise

(1) cf. Chapter IV.
(2) cf. Chapter IV.
(3) cf. Chapter IV. cf. also Chapter XII for the transfer of responsibility for representation in O.E.E.C. from the High Commissioners (successors of the Military Governors) to the Government of the Federal Republic of Germany.

exercise of supreme authority (including the powers of a German government) are clearly agreements entered into on behalf of Germany and form part of Germany's foreign relations. This is also true of the agreements entered into by the governments of the Occupying Powers in exercise of supreme authority. Inter-governmental agreements however have to be examined to establish whether they were entered into in virtue of supreme authority or in virtue of the government's own rights and powers.

The analogy in municipal law is not that of a natural person who has died or a juristic person which has been dissolved, (as the notion that the international personality of Germany has been suspended would suggest), but, in as much as German authorities participated in their own international relations to a very limited extent, a person under disability. But in municipal law the guardian is usually required to act in the ward's interests, and this analogy is thus open to the same objection as the trusteeship theory discussed above.

Another concept of municipal law with which the functions and actions of the four Powers and of their Military Governors in Germany can be brought into relation is that of agency. The Military Governors jointly and severally were, as has been shown, the agents of the four Powers jointly, and the four Powers, having assumed supreme authority, expressly in the interests of the United Nations, may jointly be regarded as agents for the United Nations as a whole. The four Powers and Military Governors jointly and severally were, however, also the agents of the German people in the same sense as any other government can be said to be an agent for its people. An examination of the actions of the four Powers and their Military Governors confirms the dual character of their agency. They took action, which otherwise only a normally constituted German Government could have taken. They introduced far-reaching

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changes in the political and economic structure of the state. They also took action, which international law would have precluded a normally constituted German Government from taking, but which an agent of the United Nations might properly take. For example, power was taken to treat as enemy the property of governments, nationals and residents, of nations which were or had been at war with the United Nations (or any of them) but not with Germany(1)

(1) cf. Law No. 52 Article I, paragraph 1 (b); Military Government Gazette, Germany, Sixth Army Group Area of Control No. 1 Military Government Gazette, Germany, Twenty-first Army Group Area of Control No. 3 and Proclamation No. 2, paragraph 16, Official Gazette of the Control Council for Germany No. 1.

PART III: THE ALLIED HIGH COMMISSION 1949-1950

CHAPTER XI

The Status of the Federal Republic of Germany.

As a preliminary to an assessment of the status in international law of the Federal Republic of Germany it is necessary first to examine the nature, and some of the consequences, of the transition from Military Government to the system established under the Allied High Commission.

Part II of the Protocol of the Proceedings of the Berlin Conference had laid down certain political and economic principles, foremost among which was the unity of Germany, to be observed by the Occupying Powers in the "initial control period". The duration of that period was not defined, unless it were by reference to the establishment of a German Government mentioned in the Protocol. But in any event the period could not be said to be at an end in April, 1946, when the quadripartite occupation of Germany had not lasted a year, and many of the basic requirements, as laid down in Control Council Proclamation Nr.2, had still to be fulfilled by Germany. But by that date the Russian representatives in Germany had made it clear that they had no intention of bringing about the economic unity of Germany, which the Berlin Protocol had envisaged.

In face of this flagrant violation of Part II of the Berlin Protocol the Western Powers might have been expected to take one of two courses. They might have accepted the Russian repudiation, declared that the Protocol was, as to Part II, at an end, and proceeded to govern their respective zones without reference to it. Alternatively they might have refused to accept the Russian repudiation, regarded the Protocol as a whole as still in force, and confined themselves to action within their zones which was as far as possible in conformity with it. In fact the Western Powers never publicly or formally made the election. Part II of the Protocol was a statement of

principles and an "agreement to agree" on their implementation. Faced with the Russian refusal "to agree" the Western Powers took action, going beyond the confines of their respective zones, to further, so far as possible without Russian co-operation, the economic unity of Germany. Thus they proceeded to bring about the "economic fusion" of their zones and later to set up a German Government in the West, while in no way disabling themselves from resuming the quadripartite control of Germany, should it ever appear to be in prospect.

The setting up of a German Government in the Western Zones had, however, been preceded by the Russian Military Governor's withdrawal from the Control Council. This action, which made the quadripartite exercise of supreme authority impossible in Germany, can only be construed as a repudiation of the Statement on Control Machinery in Germany.

In this Russian repudiation of the machinery by which the joint supreme authority of the four Powers was exercised the Western Occupying Powers undoubtedly acquiesced, since they made it clear that they would not contemplate any resumption of quadripartite control on the previous basis that decisions could be reached only by unanimous vote.

The question, whether the termination of the arrangements by which joint supreme authority was exercised brought the joint supreme authority itself (and with it the joint occupation of Germany) to an end, is a more difficult question and upon which more than one view might be held. Invoking the argument that international law must take account of facts and is much less able that any municipal system of law to tolerate artificialities and fictions, it might be said that the termination of the arrangements for the exercise of supreme authority must mean the termination of the joint authority itself. This contention is strengthened by the fact that the prospects of the four Powers being able to agree on alternative

machinery must, so long as they are divided by ideological conflicts, appear remote. If, however, the joint authority of the four Powers has been terminated, it would be difficult to resist the conclusion that Germany had been divided into two states, since international law could not for long tolerate as a single state a territory which was clearly divided, each part of which was under separate governments, each exercising supreme authority in its own area unrestricted by the other and each pursuing policies hostile to the other.

On the other hand a termination of joint authority would seem to require a repudiation of joint authority by the U.S.S.R. and an acquiescence in that repudiation by the Western Powers. There is no evidence of any such Russian repudiation. A study of the terms and timing of the Russian protest against the holding of the London Six-Power Conference suggests that the Government of the U.S.S.R. was principally concerned to prevent the Western Occupying Powers from acting otherwise than in concert with themselves, an attitude which would scarcely be consistent with an intention to bring the joint supreme authority of the four Powers to an end. But whatever the intentions of the U.S.S.R. may have been, the attitude of the Western Powers has been made clear beyond all doubt. Their constant endeavour has been to leave the door open for a resumption of quadripartite control whenever agreement could be reached on a new form of machinery for its exercise. Their attitude has been wholly inconsistent with any agreement to regard joint supreme authority as having been brought to an end.

The better view appears to be that the joint authority of the four Powers was not terminated by the repudiation of the machinery for its exercise or by the action of the Western Powers in their own zones which might at first sight appear inconsistent with its continuance.

Since, however, the joint supreme authority was not brought to an end, the powers assumed by France, the United Kingdom, the United States and the U.S.S.R. over Germany were in no way diminished, and the question for the Western Powers was how supreme authority was to be exercised in their zones. For this purpose they established the Allied High Commission. For the "agency through which the government of (all) Germany was carried on" there was substituted, in respect of the Western zones, a "government", consisting of the Allied High Commission (the High Commissioners jointly), the High Commissioners severally (for certain defined purposes) and the German Federal Government, the functions of these three elements being laid down in the Occupation Statute, the Charter of the Allied High Commission and the Basic Law.

In the East Russian repudiation of the original machinery of quadripartite control and refusal to agree upon any new form of machinery amounted to a wrongful withdrawal of the Russian zone from the joint supreme authority of the four Powers. The U.S.S.R. clearly remains under a duty to administer her zone so long as she remains in occupation of it, and it is open to her, as she has indeed done, to set up German authorities, through whom that duty may in part be discharged.

It has been stated above that if the joint supreme authority of the four Powers had been terminated, it would be difficult to resist the conclusion that Germany had been divided into two states. The question has now to be considered whether the somewhat fictional and artificial preservation of joint supreme authority is sufficient to preserve the single international personality of Germany. Though supreme authority may still as a matter of law be a joint supreme authority, the fact is not to be concealed that it is exercised through two quite independent systems of government. But though the concept of a state in international law is that of a

people occupying a defined territory under a single constitution whether unitary or federal, it is unnecessary to canvass here th well known fact that international law does tolerate, at least for limited periods, the existence within a single state of two rival governments, the classical example being that of a state disrupted by civil war. The de facto division has not, to put the argument at its lowest, yet continued for a sufficiently long period to require the conclusion to be drawn in internation al law that Germany has been split into two states.

The existing situation in Germany may be described by an analogy. A federal state (Germany) consisting of four provinces (the zones) has suffered a breakdown of central government (the quadripartite control machinery). Three of the provinces form a federation with a new type of central government (the Allied High Commission, the High Commissioners and the German Federal Government) and declare their willingness to welcome the fourth province as soon as it chooses to accede to the federation. The fourth province has also acquired a type of governmental machinery different from that which it had in the original federal state. From the point of view of constitutional law, it must be conceded that the federation is imperfectly constituted since its own constitutional documents reveal an intention that it should include the fourth province. But from the international point of view there seems to be no room for doubt that it is the government of the federation rather than the government of the dissident province which can claim to speak for the whole state.

The analogy set out above appears to fit the present situation in Germany. Whether or how that situation will develop, it is impossible to say. International law will, however, without any doubt have to take account both of any changes in that situation, and of any prolongation in time of

the situation. Thus if the situation proved to be permanent, it would become impossible to continue to hold that in international law, neither the joint authority of the four Powers nor their joint occupation of Germany had terminated, and if all possibility of the "dissident province" acceding to the "federation" were in fact to cease to exist, the consequence would have to be drawn in international law that the Russian Zone had been detached from Germany, and constituted a new state.

Chapter XII

The Entry of the Federal Republic of Germany into International Affairs

The view expressed in the previous chapter that it is the Government of the Federal Republic which is entitled to speak for the German state is the view of the Western Occupying Powers and of the German Federal Government itself. The first indication of this was given in the "Protocol of Agreements reached between the Allied High Commissioners and the Chancellor of the German Federal Republic at the Petersberg on 22nd November, 1949", which resulted from discussions which the three Foreigh Ministers meeting in Paris on 9th and 10th November, 1949, instructed the High Commissioners to hold with the Federal Chancellor. The Protocol contains the following passages:-

"The High Commission and the Federal Government are agreed to promote the participation of Germany(1) in all those international organisations through which German experience and support can contribute to the general welfare."

Earlier in the Protocol both parties declared that "their primary objective is the incorporation of the Federal Republic(1) as a peaceful member of the European community, and to this end German(1) association with the countries of Western Europe in all fields should be diligently pursued by means of her entry into the appropriate international bodies."

The use of "Germany" and "Federal Republic" as interchangeable terms would seem to imply that for international purposes the Federal Republic is Germany, the German state. If, however, this implication represented the true view, it would be necessary to draw the conclusion that the Russian zone of occupation had been detached from the German state, and possibly the further conclusion that it constituted a separate state. Subsequent declarations and statements

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(1) Author's underlining.

of the Occupying Powers will however show that they have never ceased to affirm that it is their ultimate aim to bring all Germany under one government. The language used in this connection by the Occupying Powers could scarcely be reconciled with the imputation to them of the view that the Russian zone of occupation had already been detached from the German state. Since the wording of the Petersberg Protocol cannot be dismissed as accidental or ill-considered, it must be taken in a political or general sense, and as implying in legal terms no more than the following. There is still only one German state, and for international purposes the Government of the Federal Republic represents this state, notwithstanding that a part of the German state, the Russian zone of occupation, is not under the effective authority of that Government, and subject to the limitations upon that Government's ability to assume international rights and discharge international obligations, which the territorial limitation on its authority necessarily brings with it.

The Occupation Statute included in paragraph 2 "foreign affairs" as a field in which powers were specifically reserved to the Occupation Authorities.(1) Under paragraph 4, however, the German Federal Government had power to act in the reserved fields (including foreign affairs) except as the Occupation Authorities specifically directed otherwise. It was not however the intention of the Occupation Authorities to give directions preventing the German Federal Government from participating in international affairs. They intended on the contrary to encourage the Federal Government to do so to the maximum extent possible in the circumstances obtaining, subject to their power under paragraph 5 of the Occupation Statute to disapprove international agreements entered into by the Federal Government, and to other safeguards to be mentioned below.(2) Thus,

While /

(1) cf. Chapter V

(2) cf. Directives on the negotiation of international agreements by the Federal Government.

while the "Government" of the Federal Republic, consisting of the Allied High Commission and the German Federal Government, was to be regarded as representing the German state for international purposes, the conduct of international affairs was gradually to pass into the hands of the one element, the German Federal Government, subject to supervision of the other, the Allied High Commission.

This process had begun even before the Petersberg Protocol was signed. In October 1949 the German Federal Government assumed responsibility for representing the Federal Republic in the Organisation for European Economic Cooperation. This assumption was treated as an internal constitutional change in the Federal Republic. The only action thought necessary was a notification to the Organisation of a transfer of responsibility for the matters with which it was concerned, from the Allied High Commission (the successors of the Military Governors who had originally signed the Convention for European Economic Co-operation[1]) to the Federal Government. On the view that there had only been an internal constitutional change in Germany the German Federal Government could have assumed rights and obligations under the Economic Co-operation Agreements[2] entered into with the United States Government by the Military Governors in respect of the Zones of Occupation. These Agreements were however replaced on 31st January, 1950, by an Economic Co-operation Agreement between the Government of the United States of America and the German Federal Government in respect of the territory of the Federal Republic.

The next step in the process of entrusting responsibility for international affairs to the German Federal Government was taken on 11th November, 1949, when the Allied High Commission approved a Directive relating to foreign trade and the negotiation of trade and payments agreements. The Directive, which came into force on 28th November, 1949, laid down that as a matter of principle the Federal Government would, unless otherwise directed by the High Commission, conduct the negotiation of trade and payments agreements with /

(1) cf. Chapter IV

(2) cf. Chapter IV

with other countries, subject to such controls as the High Commission might from time to time establish. The Federal Government was to keep the High Commission fully informed of the initiation and progress of negotiations, and High Commission observers might be appointed to attend the negotiations. German delegations might initial texts as agreed texts to be referred to governments, but could not formally sign them until they had been submitted to the High Commission. A number of rules were laid down which the Federal Government was to observe in the conduct of foreign trade. For example, it was to refrain from action which would prejudice the purposes of the Havana Charter for an International Trade Organisation[1] or of the International Monetary Fund.

Even at this early stage in the life of the Allied High Commission, the question of Germany's pre-war treaty relations had to be considered. In the period of Military Government the procedure had been established that certain of the multilateral treaties to which Germany was or had been a party were "re-applied" in respect of Germany without any determination of the questions, whether such treaties required revival, and if so, whether they should be revived.[2] This is in essence the procedure, which has also been followed by the Allied High Commission. Thus on 21st December, 1949, the Allied High Commission agreed to transmit to the Swiss Government a memorandum from the Federal Government declaring that following the establishment of a German Patent Office in Munich it had again become possible to give full effect within the territory of the Federal Republic to the following agreements:-

The Paris Convention of 1883 for the Protection of Industrial Property (revised Brussels, 1900; Washington, 1911; The Hague, 1925; and London, 1934).

The Madrid Convention of 1891 concerning the suppression of False statements of origin on goods (revised Washington, 1911; The Hague, 1925; and London, 1934).

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(1) H.M.S.O. CMD. 7375

(2) cf. Chapter VIII

The Madrid Convention of 1891 concerning the International Registration of Factory or Trade Marks (revised Brussels, 1900; Washington, 1911; The Hague, 1925; and London, 1934) and the Implementing Regulation thereto.

The Hague Convention of 1925 regarding the International Depositing of Trade Patterns or Designs (revised London, 1934) and the Implementing Regulations thereto.

Similarly in February, 1950, the Allied High Commission transmitted to the Governments of Argentine and Uruguay a declaration that the provisions of the Montevideo Convention of 1889 on the Protection of Works of Literature and Art would thenceforth be applied in the territory of the Federal Republic and a declaration in the same terms was made to the Swiss Government in April, 1950, in respect of the Berne Convention of 1886 on the Protection of Works or Literature and Art.

The procedure of "re-application" in respect of the Federal territory became the accepted method of dealing with conventions to which the Reich was or had been a party. The question of reviving such conventions is evidently one which the Occupying Powers and the Allied High Commission are reluctant to face. If, however, in their eyes, as the Petersberg Protocol suggests and later pronouncements make clear, the Government of Federal Republic represents the German state (although the Russian Zone is not under its effective authority), it is not easy to explain why the revival of the pre-war treaties of the German state, in so far as they require revival, should cause difficulty.

In the Petersberg Protocol, the Federal Government "appreciating the desirability of the closest possible co-operation by Germany in the rehabilitation of Western European economy" declared its intention to apply for membership of the International Authority for the Ruhr(1), and the Occupation Authorities declared that they would not impose any special conditions upon German accession, as they would have been entitled to do under Article 31 of the Agreement by

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(1) cf. Chapter V

which the Authority was established. The Federal Government duly assumed the obligations of membership on 16th December, 1949, and a further step was thus taken in the related processes of endowing the Federal Government with greater authority in international affairs and of introducing that Government as the representative of the German state in international organisations.

In the Military Government period Germany had not been separately represented on the (provisional) Central Rhine Commission, except through the liaison officers of the Allied military authorities controlling German riparian territory, who had only the right to attend meetings.(1) The Occupying Powers represented on the Commission were in effect guardians of Germany's interests, as of their own. In April, 1950, however, the Federal Government accepted the invitation of the six Powers till then represented on the Commission - France, the United Kingdom, United States of America, Belgium, the Netherlands and Switzerland - to participate in its work.

The International Wheat Agreement had taken cognisance of the responsibility of the United States of America for the supply of wheat to Germany, but had not made any special provision for the representation of Germany on the International Wheat Council.(2) The accession of the Federal Republic was, however, in March, 1950, approved by the Council by the two-thirds majority of exporting and importing countries necessary under Article XXI of the Agfeement, and the Federal Republic acceded in May, 1950.

The conference of the Foreign Ministers of the three Western Occupying Powers in May, 1950, affords an opportunity to examine anew the status of the Federal Republic in the light of the developments described above. At the close of their deliberations the Foreign Ministers issued on 13th May a number of Declarations and Statements, of which the Declaration on Germany, the Statement on German Unity, and the Declaration on Berlin are material to the present discussion. The Declaration on Germany contains the

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(1) cf. Chapter VIII

(2) cf. Chapter X

statement that the peaceful reunification of Germany remains the ultimate object of the policy of the three Western Occupying Powers. The Statement on German Unity states that the first step towards that end is the holding throughout Germany of free elections to a Constituent Assembly. The principles upon which unity might thereafter be achieved are also laid down. These include a free-elected all-German government, certain minimum human rights and fundamental liberties, and a system of quadripartite supervision, which would permit the German Government to function effectively. This last mentioned principle may be construed as a reiteration of the Western Powers' refusal to contemplate the resumption of quadripartite control on the previous basis that all decisions required unanimity. This, coupled with the emphasis on free elections and other human rights and liberties, matters upon which the Western Powers are poles apart from the U.S.S.R., makes it doubtful whether the restoration of German unity in the immediate future can be foreseen.

The occupation regime, it was also stated by the Foreign Ministers, is imposed on the Germans and on the Allies by the consequences of the division of Germany and the international position; until this situation is modified, the occupation regime must be retained in accordance with the common interests of Germany and Europe. The Allies are resolved to pursue their aim that Germany shall re-enter progressively the community of free peoples. When that situation has been fully reached, she would be "accorded her sovereignty" to the maximum extent compatible with the basis of the occupation regime (sc. the retention of supreme authority by the Occupying Powers). It will not be possible to proceed to the conclusion of a treaty of peace with Germany so long as the U.S.S.R. persists in its policy of refusing to permit the inhabitants of its zone of occupation to rejoin their fellow countrymen in a democratic and united Germany. The Ministers accordingly set up a Study Group in London to undertake the preparatory work for a review of the Occupation Statute, and to make recommendations for eliminating the major practical inconveniences arising in the countries concerned from the state of war, on the

understanding /

understanding that in the present situation of Europe supreme authority must remain in the hands of the Allied Powers.

From the legal point of view there was, then, to be no basic change. There could be no peace treaty and thus no final settlement with Germany. Supreme authority was to be retained by the Occupying Powers, since it constituted the basis of the occupation. At the same time the indications were that the Federal Government was to be given greater powers and greater liberty of action. In the widening fields in which the German authorities were given responsibility supreme authority could thus be retained only in the sense that in the ultimate resort the Occupying Powers could revoke the powers accorded to the Federal Government and undo what that Government had done. The view was apparently accepted that the state of war had already been terminated in international law,(1) since it was implied that all that remained to be done was to eliminate the inconveniences arising from its continuance in the domestic law of the countries concerned.

Also in May, 1950, the Allied High Commission issued a Directive No. 3 relating to the negotiations by the Federal Government or the Laender Governments of international agreements other than trade and payments agreements.(2) This Directive retained the requirements of the earlier directive on trade and payments agreements that the Allied High Commission must be kept fully informed; that Allied observers might accompany German delegations, and that agreements must be submitted to the Allied High Commission. While the earlier directive had laid down that the negotiation of trade and payments agreements was in principle a matter for the Federal Government, Directive No. 3 provided that the Federal Government must obtain the prior permission of the Allied High Commission before it extended an invitation to negotiate other types of agreement to another government or to an international organisation, in which it did not participate.

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(1) cf. Chapter II for a discussion of this topic.

(2) Official Gazette of the Allied High Commission No. 24.

The Allied High Commission also reserved the power to decide upon any such invitation extended to the Federal Government. Directive No. 3, in contrast to the directive on trade and payments agreements, permitted German delegations to sign international agreements. Signature ~~moreover~~ however could take place only on the understanding that the agreements would not come into force until the expiry of the 21 days within which under the Occupation Statute the Allied High Commission might disapprove them or of such shorter period as it might authorise. The procedure laid down was to apply, so far as appropriate, to negotiations undertaken by a Land government with the approval of the Federal Government.

In June the Federal Government was authorised to send a German delegation to the negotiations concerning the "Schuman Plan" in Paris, and in July the Federal Republic acceded to the Council of Europe as an associate member.

While in the summer of 1950 Germans were already taking a considerable part in European conferences and organisations, the time had not yet come for them to do so in world-wide organisations. To the fifth session of the General Conference of the United Nations Educational, Scientific and Cultural Organisation in Florence, the third Assembly of the World Health Organisation, and the 33rd General Session of the International Labour Conference in Geneva, the Federal Republic only sent observers, some of whom were Allied nationals and some German nationals.

The Communique on Germany issued on 19th September, 1950, by the Foreign Ministers of the three Western Occupying Powers was largely a reiteration and clarification of matters which had already been mentioned in earlier three Power pronouncements. Thus the desire for "the unification of Germany on a basis which respects the fundamental liberties" was once more expressed. "Pending the unification of Germany", it was said, "the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and, therefore, entitled to speak for Germany as the representative of the German people in

international /

international affairs".

Again the language is that of the politician rather than the lawyer. To equate "the Government of the Federal Republic" with "the German Government" is from a legal point of view confusing. Governmental powers were and are still to be divided between the Allied High Commission and the German Federal Government. It is therefore only the aggregate of these two authorities, which can properly be described as the "Government of the Federal Republic". It may be that the key to understanding the intention is provided by the words "as the representative of the German people in international affairs". So far as any part of Germany's international affairs could be allowed to pass into German hands, the competent authority was the German Federal Government and not any other "German Government" which might have been set up elsewhere.

The desire to integrate the Federal Republic into the community of free nations was re-affirmed and the somewhat obscure reference to the state of war in the Declaration on Germany of 13th May, 1950, was clarified by the statement that the three Governments would "take the necessary steps in their domestic legislation to terminate the state of war with Germany".

The Allied Governments, it was also stated, consider that their forces in Germany have in addition to their occupation duties also the important role of acting as security forces for the protection and defence of the free world, including the German Federal Republic and the Western sectors of Berlin. They will treat any attack against the Federal Republic or Berlin from any quarter as an attack upon themselves. This part of the Communique appears to have been intended as a reminder that an attack upon the Federal Republic or Western Berlin would involve an armed attack upon the forces of occupation and thus bring the North Atlantic Treaty into operation.(1)

The Communique did, however, strike a new note, when it referred to the "sentiments recently expressed in Germany and elsewhere in

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(1) cf. Chapter V

favour of German participation in an integrated force for the defence of European freedom". The questions raised were stated to be the subject of study and exchange of views.

The new phase, it was said, in the relations between the Allies and the Federal Republic would be marked by major extensions of the authority of the Federal Government. To make this possible the Occupying Powers were prepared to amend the Occupation Statute, while maintaining the legal basis of the occupation (sc. the supreme authority of the Occupying Powers.) In certain cases Allied powers would cease as soon as the Federal Government had given undertakings (sc. to take certain action or to pursue a particular policy in the future). In the field of foreign affairs, the Federal Government would be authorised to establish a Ministry of Foreign Affairs and to enter into diplomatic relations with foreign countries "in suitable cases" (semble not the U.S.S.R. or countries under her influence). This also represented an advance upon the Petersberg Protocol, which had authorised the exchange of consular and commercial representatives only.

It may therefore be said that the Government of the Federal Republic of Germany has entered to a considerable extent, and is about to enter further into international affairs. The more the Government of the Federal Republic emerges as the representative of the German state, the more the question poses itself for the student of international law whether and for how long it can be maintained that the Russian zone of occupation should not be regarded as a separate state. The statement by the Western Occupying Powers that it is the ultimate object of their policy to bring about the re-unification of Germany is relevant to the consideration of this question. The existing situation in Germany resembles in some respects that which arises when part of a state asserts its independence from the rest. On that analogy the time has not come yet to draw the conclusion in international law that Germany had been divided into two states, since in general secessions are not to be hastily recognised.(1) The analogy is however defective in at least

(1) cf. Examples mentioned in Lauterpacht: Recognition in International Law, Chapter II.

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one important respect. In a secession the revolting province usually does not claim to represent the state from which it is seeking to free itself, or the right to exercise any kind of authority in the rest of the state. In the situation existing in Germany, however, each part of the state claims to represent the whole state, and seeks to ensure that the re-unification, which it professes as its aim, should be achieved on some basis which would guarantee the projection over the whole of Germany of the form of government under which it at present finds itself. The situation in Germany is thus unprecedented. If the de facto division of Germany continues, it is likely to become a matter of great difficulty to determine as a matter of law whether a division into two states has taken place and if so, at what point in time. So long as the world ideological conflict continues and so long as the Western Occupying Powers hold to their professions that it is their aim to re-unite Germany, it is improbable that they will cease to support the claim of the part of Germany under their control to represent the German state or be ready to recognise the other part as a separate state. What is true of the Western Occupying Powers is no less true of the U.S.S.R. The lead of the Western Occupying Powers will no doubt be followed by the other states parties to the Brussels Treaty and the North Atlantic Treaty, and the lead given by the U.S.S.R. by the states associated with her. Even if the division of the geographical area, Germany, should prove to be permanent, general recognition of that fact is likely to be delayed. No doubt each group of states will in time be compelled to take cognisance of the existence of the governmental authorities in the part of the area, whose claim to represent the German state it does not support, and will have to recognise them as de facto authorities, while endeavouring to avoid recognising them as a Government entitled to speak for all Germany, or as the Government of a state separate from Germany.

Appendix I

Table of International Agreements and Principal Events

		Chapter
1941		
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1943		
5th January	Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control	III
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1945 (Contd.)		Chapter
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4th January	Agreement for the Establishment of a European Coal Organization	IV
14th January	Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency, and on the Restitution of Monetary Gold	III
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Bibliographical Note

This work is to a large extent based on official publications, the Gazettes issued by the occupation authorities

in Germany, and the Treaty Series, Command Papers, and statements by H.M. Ministers recorded in Hansard. References to these official publications are given throughout the text. For general information reference may be made to a further official publication, the Monthly Report of the Control Commission for Germany (British Element), which was distributed through H.M. Stationery Office.

A large number of articles on the international legal problems, arising from and since the war, have appeared in American periodicals, particularly the American Journal of International Law. Those most relevant to Germany have been referred to in the text.

German writings on the subjects dealt with in this book, particularly on the themes discussed in Chapters II and IX, have been by far the most voluminous. This is not in itself surprising, since German lawyers were after all those most closely concerned. The strong emotional reaction evoked in many Germans by Kelsen's contention that Germany had ceased to exist as a state has, however, not been fully appreciated outside Germany. The year 1947 was marked in Germany by a spate of pamphlets and articles (not only in the legal periodicals but also in the general press) devoted to refuting the Kelsen thesis. There is much reiteration in such writings and it has not been thought necessary to burden the text with references to more than a representative selection of them. Of those omitted the more learned will be found in the files of such periodicals as the Deutsche Rechts-Zeitschrift, the Monatsschrift fuer Deutsches Recht, and the Sueddeutsche Juristen-Zeitung.

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