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LEGAL PROBLEMS OF GERMAN OCCUPATION*

Charles Fahy †

I

IN early May, 1945, after conflict of almost unimaginable proportions, the ground forces of Germany which were still fighting had been pushed back into the boundaries of Germany; the resistance of its army, navy and air forces was collapsing. The armies of the United States, the United Kingdom, the Union of Soviet Socialist Republics and France were in actual occupation of practically all of Germany. The German government composed of Hitler and his cabinet had come to an end by the death, capture or flight of its members. Under Hitler's "political testament," however, Admiral Doenitz was recognized as Hitler's successor by German leaders still in the field. No one claiming to represent the people or government of Germany asserted a conflicting claim to authority. Admiral Doenitz gave Generals Jodl and Keitel powers of attorney to sign surrender instruments. Two such instruments were signed, one on May 7 at Rheims,¹ the other May 8 at Berlin.² Both instruments were signed on behalf of the German High Command and constituted formal documents of unconditional surrender terminating combat. Each instrument stated that it was without prejudice to and was to be superseded by a general instrument of surrender imposed by or on behalf of the United Nations and applicable to Germany and the German Armed Forces. On May 23, Doenitz and his associates were arrested and his "government" also came to an end. After that date no German government existed either de facto or de jure. On June 5, 1945 the Commanding Generals of the armies of the United States, the Union of Soviet Socialist Republics, the United Kingdom and of the Provisional Government of the French Republic, issued several documents, including the Berlin

* Adapted from Mr. Fahy's lecture at the University of Michigan Forum on International Law, July 22, 1948.—*Ed.*

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¹ EXECUTIVE AGREEMENT SER., No. 502.

² *Ibid.*

Declaration.³ This declaration announced the unconditional surrender of all German Armed Forces and declared that Germany had become subject to such requirements as might then or thereafter be imposed.

A state had been subjugated by force and was without government of its own. The legal vacuum, if it may be so termed, was filled by the formal assumption of authority by the United States, the United Kingdom, the U.S.S.R. and France. The three first named, through the President of the United States, the Prime Ministers of the United Kingdom and Marshall Stalin of the U.S.S.R., respectively, met at Potsdam, in the environs of devastated Berlin, in July. They agreed upon the general terms and policies of the occupation, including the means for the government of Germany. The terms of the Potsdam Protocol were made known on August 2, 1945.⁴ Whatever ancient or modern theories or precedents may be advanced to describe the situation, the simple fact is that sovereign power in Germany was assumed and exercised by right of conquest accompanied by unconditional surrender of the armed forces and collapse of civil authority. This assumption of supreme authority cannot successfully be challenged under the law. It was a development of a war initiated and prosecuted by Germany in violation of international law. The allies defeated the aggressor and validly imposed terms which placed supreme authority as above noted. The question may arise whether this constituted an assumption of sovereignty. It is clear that it was the exercise of full sovereign power. It may well be that in theory sovereignty in an ultimate sense resides in the people of Germany but was suspended in exercise by them pending accomplishment of the purposes of the war and the occupation, and until a final settlement.

On July 15, 1945, when I arrived in Germany, one of the problems then much discussed in legal circles concerned with activation of the machinery of the occupation was whether or not the rules of the Hague Convention of 1907 relating to the occupation of hostile territory⁵ were binding upon the United States in Germany. I refrained from formulating an opinion in the abstract, believing that the question need be resolved formally only if desirable in connection with some concrete problem of application. As experience with the character of the occupation matured my first view that these provisions of the Hague Convention were inapplicable grew into a conviction. Nevertheless, there seemed no reason to propound this view initially as a

³ TREATIES AND OTHER INTERNATIONAL ACTS SER., No. 1520.

⁴ 13 DEPT. OF STATE BUL. 153 (1945).

⁵ Section III, Arts. 42 et seq.

generalization without reference to actual questions as they arose. The subject receded in importance as one dealt with the problems of the occupying authorities. The interest of persons in responsible positions in the possible application of the Hague Convention was a manifestation of concern that the United States should proceed in accord with law notwithstanding the unlimited power residing in the victors. Undoubtedly these provisions of the convention were not legally applicable. The regulations contained in the convention were designed to govern the conduct of the military in its relations with the civilian population of an occupied territory during hostilities. They were designed to leave untouched so far as possible the sovereign authority of the enemy in the occupied territory.⁶ They are rules for the conduct of war in the area of impact of armed forces upon the territory and inhabitants of an enemy country still contesting. They do not govern or limit the right of the victor to impose terms and conditions when victory has been achieved, certainly where the victor in the eyes of the law has not forfeited its position by aggression in violation of international law. The imposition upon Germany of unconditional surrender, accompanied by such actual surrender and abandonment of governmental authority, created conditions making these provisions of the Hague Convention inapplicable. This is not to say that the regulations of the convention are of no effect. The acceptance of them by so large a part of the world caused them to be used as guides with persuasive but not obligatory effect in appropriate circumstances.

Another question which arose early and persisted, involved the status of the Geneva Convention of 1929⁷ establishing humane rules for the treatment of prisoners of war. Both Germany and the United States had formally adhered to this convention and considered it legally binding during the period of hostilities. With surrender and dissolution of the German government, did an international obligation remain on the United States to treat prisoners of war in the manner prescribed by these regulations? There is an important general distinction between the Hague Convention previously referred to and the Geneva Convention regarding prisoners of war. The dissolution of the German government did not relieve the United States of its obligations under the latter convention. Moreover, it would seem that the intent and spirit of the Geneva Convention required the repatri-

⁶ Section III, Art. 43: ". . . [The occupant] shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

⁷ U.S. TREATY SER., No. 846.

ation of the prisoners as soon as military reason for their continued detention no longer existed. The allies did not fully discharge their duties in this respect, but the United States as time passed made every effort to do so. There were some failures in compliance, I believe, such as arose out of the transfer to France of some of our own prisoners of war and their use by France for a longer period than the Geneva Convention justifies. Within our areas of control in Germany, however, progress as expeditious as the circumstances permitted was made in the repatriation of prisoners of war retained there by the United States.

A related problem grew out of the category of persons termed "disarmed enemy forces." These were not taken prisoners in normal course of combat but consisted of a huge number of enemy personnel who came into our hands shortly before and after the wholesale break-up of German resistance in the spring of 1945. In a strict sense these men were not deemed covered by the Geneva Convention. Nevertheless, the kinship of their status with that of prisoners of war made it incumbent upon us to apply to them so far as practical the humane provisions of the Geneva Convention and to give them freedom as soon as military necessity called no longer for their military supervision. I do not know the exact situation at this time regarding all former armed personnel of the enemy. I believe the United States no longer has any in its custody. This is not true as to some of our allies.

Assuming the inapplicability of the Hague Convention to the occupation as a matter of law, the question remains as to what law was or is applicable. This subject divides into several parts. One part is concerned with the law within Germany governing the rights and obligations of the people of Germany among themselves; another deals with the authority of the occupying powers in relation to the people of Germany, and a third deals with the relations of the occupying powers among themselves and to their own peoples and governments.

As to the law governing the rights and obligations of the German people inter se, it may be stated generally that the laws of Germany have continued in effect except as abrogated or modified by the occupying powers.⁸ This is not to say that these laws remained in practical operation. The collapse of Germany was accompanied, for example, by a closing of all courts and a cessation of all governmental functions except of a local and improvised character, so that until agencies of government, including the judiciary, were created or reconstituted,

⁸ See U.S.M.G. Proclamation 2, Sept. 19, 1945, Military Gazette, Issue A, p. 2 (1946).

the practical operation of the law was largely suspended.⁹ Basically, however, although largely suspended in operation by reason of practical circumstances and chaotic conditions, the domestic law of Germany remained in effect except as inconsistent with the purposes of the occupation or as repealed or modified by the occupying powers. This exception is of course of large importance. It can properly be said that from a legal standpoint the United States stood on the proposition that every law of Germany was subject to the authority of the occupying powers to further the purposes of the war and the occupation. This is not to say that no restraints existed. Our own occupation officials were subject to the authority of the government of the United States and to the terms of agreements entered into by our government with the governments of the United Kingdom, the U.S.S.R., France and other United Nations.

The Potsdam Protocol states:

“In accordance with the agreement on control machinery in Germany, supreme authority in Germany is exercised on instructions from their respective governments, by the Commanders-in-Chief of the armed forces of the United States of America, the United Kingdom, the Union of Soviet Socialist Republics, and the French Republic, each in his own zone of occupation, and also jointly, in matters affecting Germany, as a whole, in their capacity as members of the Control Council.”¹⁰

The Potsdam Protocol, as already indicated, grew out of the conference held in the environs of Berlin between the President of the United States, the Prime Ministers of Great Britain,¹¹ and Marshall Stalin. The protocol constitutes the basic charter for the control of Germany. This international arrangement, though never submitted to the Senate for its consent, was within the constitutional power of the President. Under this agreement the supreme authority of the occupation powers in Germany became the Control Council, the top echelon of the Allied Control Authority. The Control Council itself was composed of the Commanding Generals of the four occupying powers. The Allied Control Authority, comprising the full governmental structure of the occupying powers for Germany as a whole, not including the zonal machinery of each power, was composed, in addition to the Control Council, of a number of four-power agencies to deal with all pos-

⁹ Section III, U.S.M.G. Proclamation 1, July 14, 1945, Military Gazette, Issue A, p. 1 (1946).

¹⁰ Part III, A, 13 DEPT. OF STATE BUL. 153 at 154 (1945).

¹¹ Mr. Churchill was succeeded during the conference by Mr. Attlee.

sible aspects of German life and occupation problems. The initial agencies, mentioned in the four-power agreements arrived at prior to the Potsdam Protocol, were as follows: Military; Naval; Air; Transport; Political; Economic; Finance; Reparations, Deliveries and Restitution; Internal Affairs and Communications; Legal; Prisoners of War and Displaced Persons; Manpower.¹² With the aid of these instrumentalities of government the Control Council has functioned on a quadripartite basis as the supreme authority for Germany, until the suspension of its activities in recent months. The executive authority resides primarily in each of the four zones, where it is administered by the respective commanding officers or military governors. In the City of Berlin itself, the Kommandatura, under the Control Council, performs similar functions for the City of Berlin as a whole, Berlin being divided into four sectors of occupation as Germany is divided into four zones.¹³

II

An understanding of details of legal problems is aided by describing the work of the Legal Division of the Office of Military Government of the United States (OMGUS) and of the Legal Directorate of the Allied Control Authority. The Legal Division is the national, and the Legal Directorate is the international agency, and the latter is composed of representatives of the former.¹⁴

The Legal Division of OMGUS has been a kind of Department of Justice for the United States in Germany. Originally divided into four branches it has gone through some reorganization dictated by experience. The four branches were Legal Advice, Administration of Justice, Prisons, and War Crimes. As implied by its name the Legal Advice Branch assists the director of the division in a great volume of opinions for all of Military Government. The Administration of Jus-

¹² Statement by 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 on Control Machinery in Germany, of June 5, 1945, *Official Gazette of the Control Council for Germany*, Supp. I, p. 10 (1946).

¹³ *Id.*, p. 11.

¹⁴ In addition there is of course a separate legal staff of the Theatre Judge Advocate with jurisdiction over United States military personnel, with which we are not concerned in this paper, although it should be pointed out that the Theatre Judge Advocate has also played a large part in the trial of war criminals for violations of the laws and customs of war. These numerous trials, covering some of the notorious concentration camp cases, are not to be confused with the Nuremberg trials, conducted initially by a separate organization under Mr. Justice Jackson. There has also been functioning a purely German legal system concerned principally with the German law which has remained in effect or which has been enacted since the occupation.

tice Branch has the responsibility for the reconstitution and administration of the judicial system of Germany. The Prisons Branch supervises the administration of German prisons. In the War Crimes Branch is found the place for policy coordination of the several programs for the trial of war criminals and related activities, but not the actual trial of cases. For example, this branch played a very substantial part in the organizational plans adopted for continuation of the zonal trials at Nuremberg which have gone forward since the original international trial there.

The above summary descriptions of the main branches of the Legal Division are necessarily imperfect. Numerous activities are fitted into the division, including American participation in the four-power Legal Directorate activities, the Clemency Board for rectifying inequalities and injustices in the large number of cases handled by Military Government Courts, supervision of the Patent Office, denazification laws and administration, the work of the Military Government Courts, legal assistance to and supervision of German governmental agencies, and, more recently, bizonal and trizonal legal work.

To the lawyers was assigned the responsibility for carrying into effect certain specific provisions of the Potsdam Protocol, particularly those calling for the abolition of Nazi laws which provided the basis of the Hitler regime or established discrimination on the ground of race, creed or political opinion; the freeing of the administration of law from all such discrimination; provisions for punishment of those guilty of atrocities or war crimes; certain aspects of the denazification program; the reorganization of the judicial system in accordance with the principles of democracy, of justice under law and of equal rights for all citizens without discrimination on the basis of race, nationality or religion; and the provisions for the vesting of German external assets. These responsibilities were carried forward under a series of laws and orders adopted by the Control Council.¹⁵ In addition there was undertaken a rather comprehensive program for the reform of German law, involving the complete rewriting of some basic German laws and the modi-

¹⁵ Repeal of Nazi Laws, Law No. 1 (Sept. 20, 1945), Official Gazette of the Control Council for Germany, No. 1, p. 6; Termination of Nazi Organizations, Law No. 2 (Oct. 10, 1945), *id.*, p. 19; removal of Nazis from office, Directive No. 24 (Jan. 12, 1946), *id.*, No. 5, p. 98; punishment of persons guilty of war crimes, Law No. 10 (Dec. 20, 1945), *id.*, No. 3, p. 50; arrest and punishment of war criminals, Directive 38 (Oct. 12, 1946), *id.*, No. 11, p. 184; reorganization of the judicial system, Law No. 4 (Oct. 30, 1945), *id.*, No. 2, p. 26; establishment of administrative courts, Law No. 36 (Oct. 10, 1946), *id.*, No. 11, p. 183; vesting German external assets, Law No. 5 (Oct. 30, 1945), *id.*, No. 2, p. 27 and Regulation No. 1 (May 10, 1946), *id.*, No. 8, p. 160.

fication of others. In the former category may be mentioned the Hereditary Farm Law¹⁶ and the Marriage Law.¹⁷ As time has passed and events have retarded four-power operations, our legal officers have participated actively in bizonal and trizonal developments and in assistance to German officials in the carrying out of the responsibilities which have been transferred from time to time to German agencies in our zone. The United States led the way in the development of agencies of German government, first within the three German States comprising the United States Zone, followed by important machinery for the coordination of governmental activities within the zone as a whole. These developments entailed the installation of German officials within the states able to assume responsibility, selected in the first instance by Military Government, followed by a comprehensive program of elections, constituent assemblies and constitutional developments which have not yet ended.

Denazification and related problems were among the most controversial and difficult. Related to denazification were the broad provisions of the Potsdam Protocol that all Nazi leaders and officials, and persons deemed dangerous to the occupation or its objectives, were to be arrested and interned, with no provision as to what should be done with them if not tried for crime. Under pre-Potsdam directives designed to carry out this same policy, a very large number of persons were arrested and interned. Arrests continued at a great rate. A system for review and disposition of cases was urgently needed. The first step was the establishment of review boards in our zone, roughly comparable to the system of boards created in this country during the war for the review of the cases of interned enemy aliens. Releases were authorized under appropriate standards administered by the boards rather than by the arresting personnel. But this first step dealt with only one phase of the subject. On March 5, 1946, however, after thorough study and analysis of the whole problem by our own officials, there was enacted by the German authorities with the approval of Military Government, a very comprehensive denazification program to replace the various directives previously in effect which called for arrests and removals from positions but which made no provision for final disposition of cases on an individual basis.¹⁸ For those guilty of

¹⁶ Law No. 45 (Feb. 20, 1947), *id.*, No. 14, p. 256.

¹⁷ Law No. 16 (Feb. 20, 1946), Official Gazette of the Control Council for Germany, No. 4, p. 77, as amended Law No. 52 (April 21, 1947), *id.*, No. 15, p. 273.

¹⁸ See NEWS OF GERMANY (Information Control Division, O.M.G., U.S. Zone) (March 7, 1946) Vol. 1, No. 99, p. 1.

particular crimes, as distinct from those subject only to denazification processes, Control Council Law No. 10¹⁹ of December, 1945 furnished the basis for the handling of their cases. Law No. 10 is the one under which the current trials of Nuremberg have been proceeding since completion of the major trial before the International Military Tribunal held under the London Agreement and Charter negotiated on the part of the United States by Mr. Justice Jackson. The coordination of administration of Law No. 10 with the administration of the Denazification Law of March 5, 1946, also provided a means for disposing of the bulk of cases involving members of organizations declared criminal by the International Military Tribunal.

Provision has not yet been made for a Supreme Court of Germany; but the system of ordinary courts has been re-established by the Control Council with some modification of previous jurisdiction. The judicial system has of course been cleansed of the Nazi Peoples Courts. The re-establishment of the ordinary courts on an independent basis followed agreement in the Control Council upon principles for the administration of justice in Germany, set forth in Control Council Proclamation No. 3, adopted October 20, 1945.²⁰ A series of laws was also early enacted by the Control Council abolishing specifically a large number of Nazi organizations of a military, para-military or political character;²¹ and several laws were placed in effect for the confiscation or control of property of the organizations and institutions within Germany associated with the Nazi party or otherwise deemed necessary to be brought under control in aid of reparations, denazification, the destruction of war potential, and the fixing of an industrial level.²²

III

Some additional mention should be made of the opinions rendered to the Military Governor and his several Divisions of the Office of Military Government. The services of the Legal Division in this respect are evidence of the desire of our officials in Germany to develop rules of law and to evolve proper interpretations of basic instruments, such as the Potsdam Protocol, and other international obligations or, where light was not obtainable from these sources, for guidance from general principles of the law and legal tradition of the United States. The Legal Division was thus a factor in the promotion

¹⁹ Official Gazette of the Control Council for Germany, No. 3, p. 50 (1946).

²⁰ Proclamation No. 3 (Oct. 20, 1945), *id.*, No. 1, p. 22.

²¹ Law No. 2 (Oct. 10, 1945), *id.*, p. 19.

²² Law No. 9 (Nov. 30, 1945), *id.*, No. 2, p. 34.

of a rule of law and its development, with increasing influence as time passed. A few illustrations indicate the range of subjects dealt with in particular opinions. Questions arose as to the ownership of property, including coal mines, title to which was held by the Reich at the time of surrender; the status of joint chiefs of staff directives, (particularly JCS 1067,²³ the basic United States directive for the occupation) in relation to the Potsdam Protocol; the authority of the Control Council to legislate under the instruments agreed to by the occupying powers; complicated questions regarding the availability for reparations of industrial capital equipment, in relation, for example, to the agreed requirements for a German peace-time economy as set forth in the Potsdam Protocol; the nationality status of persons born in Germany of United Nations parentage; the status of the copyright situation in Germany during the occupation; the status of allied military missions; what principle should govern unilateral action in relation to the principle of unity of action in Berlin and its four sectors; the right of a German prisoner-of-war to be married by proxy to a German girl in Germany; the authority for the issuance of new currency to replace mutilated currency and to replenish the supply of coins; questions arising under the Trading with the Enemy Act; the effect of the transfer of prisoners-of-war to France on the right of such prisoners to repatriation under the Geneva Convention; interpretation of the Potsdam Agreement with respect to certain items requested by the French on reparations account; whether works of art were retainable by armed forces as war booty; the interpretation of legislation enacted by the Control Council and the effect of such interpretation on zonal laws on the same subject; various applications of the status of stateless persons; the identity of the Party and State in Nazi Germany; nationality of Jews who left Germany for residence abroad; the use of the proceeds of exports to pay for imports; the extent to which the Potsdam Protocol and "The Plan of the Allied Control Council for Reparations and the Level of Postwar German Economy"²⁴ constitute a binding mandate on the zone commanders; right of German employees to strike; claims against the United States arising out of requisition of property. It is interesting in view of the present state of conditions in Berlin to note that the control of the United States sector in Berlin was the subject of an opinion in a relatively early period of the occupation. It was decided that the control of the United States was com-

²³ 13 DEPT. OF STATE BUL. 596 (1945).

²⁴ 14 DEPT. OF STATE BUL. 636 (1946).

plete, notwithstanding that great Berlin was surrounded by the Russian Zone, except as four-party control was exercised in matters within the jurisdiction of the Kommandatura of Berlin or of the Control Council. The wealth of legal opinions of the legal staff of the occupation, now in bound form, is representative only, because it does not reflect the total work of the legal officers in their day to day contact with the various branches of military government.

IV

The legal situation, apart from the disruption caused by well-known recent circumstances, is as follows:

(a) The four occupying powers hold and exercise supreme authority over Germany as a whole. Subject to action taken on a four-power basis, each occupying power has and exercises authority in its zone and in its sector of Berlin. Except as altered by, and subject to, occupation authority, basic German law remains in effect; but there is no German government for Germany as a whole; in each zone, however, and in Berlin, German agencies of government, administrative and judicial, have been established, with transfer of authority to them by the occupation powers. In the United States Zone, and also more recently on a bizonal (United States and United Kingdom) and tri-zonal (United States, United Kingdom and France) basis, German instrumentalities of government have been charged with progressively greater governmental responsibility, but this is subject to occupation authority. (b) Our own legal machinery is roughly divided into three parts: zonal, quadripartite, and purely military. The latter is confined largely to the army itself, while the former deal with the control of Germany, itself of a dual zonal and quadripartite character. (c) The laws laid down by the occupying authorities are supreme where they cover a subject. These laws are within the framework of the broad international policies found primarily in the Potsdam Protocol. Except as such international obligations otherwise require, or as action of the Control Council for all of Germany is taken, each occupying power may legislate for its zone, subject to its own government's policies and directives.

The above summary must now be qualified to the extent that bizonal and tri-zonal agencies of both military and German governments have in recent months been created to fill the vacuum caused by the suspension of quadripartite machinery and the failure of the Control Council to create central German agencies to the extent contemplated at Potsdam.

It is interesting to read now, three years after, the following statement of the Potsdam Protocol:

"The Allied armies are in occupation of the whole of Germany and the German people have begun to atone for the terrible crimes committed under the leadership of those whom in the hour of their success, they openly approved and blindly obeyed.

"Agreement has been reached at this Conference on the political and economic principles of a coordinated Allied policy toward defeated Germany during the period of Allied control.

"The purpose of this agreement is to carry out the Crimea declaration on Germany. German militarism and Nazism will be extirpated and the Allies will take in agreement together, now and in the future, the other measures necessary to assure that Germany never again will threaten her neighbors or the peace of the world.

"It is not the intention of the Allies to destroy or enslave the German people. It is the intention of the Allies that the German people be given the opportunity to prepare for the eventual reconstruction of their life on a democratic and peaceful basis. If their own efforts are steadily directed to this end, it will be possible for them in due course to take their place among the free and peaceful peoples of the world."²⁵

The meaning of "democratic and peaceful basis" has become the subject of quite different interpretation and conduct by the western Allies on the one hand, and the eastern Ally on the other. The twain have met in Berlin; and the maintenance of our own conception of what can properly be included in the term "democratic" is the key to peace and freedom.

²⁵ Part III, 13 DEPT. OF STATE BUL. 153 at 154 (1945).