THE "CONTRACTUAL AGREEMENTS" WITH THE FEDERAL REPUBLIC OF GERMANY

A STUDY IN THE ADAPTABILITY OF INTERNATIONAL LAW TO POLITICAL REALITIES

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At Paris, on October 23, 1954, the United States, the United Kingdom, the French Republic (the "Three Powers") and the Federal Republic of Germany, as part of the salvage operations following the collapse of the plan for a European Defense Community, signed a Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany. The first article of that Protocol provides that, upon ratification by the four signatories, the so-called Contractual Agreements with the Federal Republic of Germany, originally signed at Bonn on May 26, 1952, shall enter into force—with, however, certain amendments contained in five Schedules to the Protocol.¹ Two days later, Secretary Dulles explained to the President, the other members of the Cabinet, and several millions of anonymous television viewers:

... we approved the various agreements and documents which had to deal with this subject of restoring German sovereignty. Rather complicated because of the great many things that have been going on during this past 10-year period which have got to be wound up in an orderly way.²

The Secretary's statement, while incontestable as far as it goes, does less than full justice to a truly remarkable set of international agreements. Drafted in response to an unprecedented international situation, they create a situation which defies classification in terms of ordinary concepts of international law. The primary aim of this supplement to Mr. Dulles' homely remarks is less to analyze than to describe this situation, with particular attention to the status which the Federal Republic will enjoy under the Agreements. A secondary aim is comparison of the Agreements, as signed in 1952, with those which emerged after two years of steady growth in German power and prestige.

The Contractual Agreements include a Convention on Relations between the Three Powers and the Federal Republic of Germany; a Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany; a Finance Convention; and a Convention on the Settlement of Matters Arising Out of the War and the

¹ The full texts of the Contractual Agreements, as originally signed, are contained in Execs. Q and R, U. S. Senate, 82d Cong., 2d Sess., June 2, 1952. The texts of the 1954 Protocol and Amendments appear in Department of State Publication 5659, London and Paris Agreements (November, 1954), pp. 63-122. The Protocol, as of March 15, 1955, is not in force.

² Dept. of State Publication 5659, p. 5.

Occupation. Annexed to the Convention on Relations is the Charter of an Arbitration Tribunal for the hearing of disputes arising under the conventions, and possibly even the settlement of those disputes which involve no important interest of the signatories.

The Contractual Agreements can more easily be understood if they are viewed against the background of the occupation which they will replace. That occupation, which will have completed its tenth year in May, is nearly as unusual and interesting a study in international law and politics as are the Agreements themselves. In general, it may be said that the status of Western Germany immediately preceding the Agreements' entry into force represents about the maximum of adaptation to political exigencies possible within the limits of the traditional concept of occupation. Since 1949, when the Occupation Statute entered into effect,³ the Federal Republic has in practice exercised a very large degree of sovereignty over its domestic and even foreign affairs. But the Three Powers still have, in theory, all the powers which they assumed upon the collapse of the Third Reich.⁴ They can veto German legislation, if it runs counter to their policies, and they can themselves promulgate legislation in any one of the key fields which they reserved to themselves under the Occupation Statute. They maintain a system of courts, exercising jurisdiction not only over their own personnel but also over Germans for violations of occupation laws or offenses against the occupants. Their own personnel enjoy complete extraterritoriality. They can requisition what they need from the German economy. They can at any time revoke the Occupation Statute and restore military government, however unthinkable such a course might be in practice.

Even this occupation is sufficiently anomalous to have provoked a good deal of academic controversy, much of it centering around the applicability of the Hague Regulations. On the whole, the controversy radiated more heat than light. German lawyers, not unnaturally, inclined to the view that the Hague Convention was applicable in its entirety;⁵ American lawyers—especially those who had been connected with the occupation—leaned toward the proposition that Germany's unconditional surrender reduced the Regulations to the status of a code of ethics for occupants, so far as Germany is concerned, rather than binding rules of international law.⁶ Professor Rheinstein, however, came to the conclusion that some of the Hague Regulations were applicable to the occupation of

³ On Sept. 21, 1949, the Allied High Commission declared in force the Occupation Statute, as promulgated on May 12, 1949; Dept. of State Bulletin, Vol. 20 (1949), p. 500; this JOURNAL, Supp., Vol. 43 (1949), p. 172.

⁴ As part of the Final Act of the London Conference, on Oct. 3, the Three Powers stated that their High Commissioners in Germany, pending the entry into effect of the Contractual Agreements, "will not use the powers which are to be relinquished unless in agreement with the Federal Government, except in the fields of disarmament and demilitarisation. . ." Dept. of State Publication 5659, p. 10.

⁵ *E.g.*, Laun, "The Legal Status of Germany," this JOURNAL, Vol. 45 (1951), p. 267.

⁶ *E.g.*, Fahy, "Legal Problems of German Occupation," 47 Michigan Law Review (1948) 1.

Germany as it had evolved by 1948, and some were not, those relating to the rights and duties of the army of occupation and the status of occupation personnel falling into the former category.⁷

Much professorial sweat and lucubration have likewise been devoted to the essentially sterile problems of the nomenclature and classification of the occupation—whether *occupatio bellica*, *occupatio pacifica* or, as Professor Rheinstein suggested, *occupatio ambivalens*.⁸ For American lawyers, at least, answers to these questions for most practical purposes were furnished by the opinion of the Supreme Court in *Madsen v. Kinsella*,⁹ which was concerned with the jurisdiction of a court of the Allied High Commission for Germany after the effective date of the Occupation Statute. Starting from the classic proposition that “. . . The status of military government continues from the inception of the actual occupation till the invader is expelled by force of arms, or himself abandons his conquest, or till, under a treaty of peace, the country is restored to its original allegiance or becomes incorporated with the domain of the prevailing belligerent,”¹⁰ the Court had little difficulty in concluding that, while American government in Germany had passed from military to civilian hands and so had ceased, at least in name, to be “military government,”¹¹ it continued to be “a government prescribed by an occupying power and it depended upon the continuing military occupancy of the territory.”¹²

Since the proceedings at issue in the *Madsen* case had taken place in 1950, the Court did not consider the effect of the joint resolution of Congress, approved by the President October 1, 1951, terminating “the state of war between the United States and the Government of Germany, declared by the joint resolution of Congress approved December 11, 1941.”¹³ It is, however, very doubtful that this unilateral action could affect the status of Germany under international law, for its effect was plainly intended to be limited to the domestic law of the United States, such as the Trading with the Enemy Act. It did not purport to end the

⁷ Rheinstein, “The Legal Status of Occupied Germany,” *ibid.*, pp. 23, 27. The Supreme Court, in deciding a case which arose after the promulgation of the Occupation Statute and which involved the question of the jurisdiction of the courts of the occupation government, quoted Art. 43 of the Hague Regulations, which obligates the occupant to take all measures in his power to ensure public order and safety. *Madsen v. Kinsella* (1952), 343 U. S. 341, 348. The applicability of the Hague Regulations was not in issue, and the Court may simply have regarded Art. 43 as stating the consensus of opinion on customary international law.

⁸ Rheinstein, *loc. cit.*, at p. 33. The author, in his search for historical analogies, is reduced to such curiosities of the *ius gentium* as the Austro-Hungarian Empire's thirty-year “occupation” of Bosnia and Herzegovina and the medieval practice of pledging territory to a foreign sovereign to secure an obligation.

⁹ 343 U. S. 341 (1952); this JOURNAL, Vol. 46 (1952), p. 556.

¹⁰ Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 801.

¹¹ Exec. Order 10062, June 6, 1949, 14 Fed. Reg. 2965.

¹² 343 U. S. at p. 357.

¹³ Pub. Law 181, 82d Cong., 1st Sess.; Proclamation 2950, 16 Fed. Reg. 10915; this JOURNAL, Supp., Vol. 46 (1952), p. 13.

state of war, under international law, created by Germany's prior declaration of war, but only the situation under United States law created by the resolution of Congress. Moreover, the Proclamation explicitly declared that

the rights, privileges and status of the United States and the other occupation powers in Germany . . . derive from the conquest of Germany and the assumption of supreme authority by the Allies and are not affected by the termination of the state of war.

In summary, then, it may be concluded that, however sweeping the changes in the political situation, in strict legal theory the status of Germany prior to the entry into force of the Agreements is essentially what it was immediately after unconditional surrender and the evaporation of the so-called "Doenitz Government." Although the Government of the Federal Republic is (like the Communist German Democratic Republic in the Soviet Zone of Germany) undoubtedly a *de facto* government within its territorial and political area of jurisdiction, and while (unlike the German Democratic Republic) it is a most important factor in international politics, it derives its powers from Allied military government, which can, again in strict legal theory, at any time and for any reason by unilateral action resume those powers.¹⁴ There is nothing which would irrevocably deprive the occupants of any portion of their supreme authority.

As above indicated, the possibilities of development within the classical concept of occupation had been exhausted, and since 1950 it had become increasingly obvious that the laws of political ecology required further evolution in the status of Western Germany.¹⁵ The salient political facts which led to this conclusion are obvious and may be briefly summarized:

1. Germany is presently divided between East and West; neither the reunification of Germany nor the conclusion of a comprehensive peace treaty is practicable until there is at least a partial settlement of differences between the Communist countries and the democracies.

2. German public opinion makes it practically impossible for any German or foreign politician to admit that war may be the only alternative to a more or less permanent division of Germany and the loss of her territories beyond the Oder.

3. Both Soviet Russia and the Western Powers desire to take advantage of the military potential of their respective parts of Germany; and Soviet Russia, by the establishment of the para-military *Volks-polizei*, has already taken a long step in that direction. From the standpoint of the Western democracies, indeed, some soldiers doubt that the defense of Western Europe is possible without German par-

¹⁴ Sec. 3 of the Occupation Statute reserves to the occupying Powers the right to rescind the Statute.

¹⁵ "In considering the contractual agreements as a whole, it should be borne in mind that they have had to take into account an unprecedented situation. . . . The problem has posed itself of according to the Federal Republic full authority over its internal and external affairs while preserving the means of negotiating German unity and of maintaining the rights of the Three Powers in Berlin." Sen. Exec. Rep. No. 16, 82d Cong., 2d Sess. (Report of the Senate Committee on Foreign Relations on Execs. Q and R), p. 37. This problem has in nowise been diminished by events between 1952 and the present.

ticipation. This includes the availability of bases and similar facilities in Western Germany, as well as actual contribution of German soldiers and arms.

4. Prudence and public opinion in the democracies alike require some type of guarantee against a resurgence in Germany of Naziism or aggressive militarism.

5. A country which is sought as an ally cannot continue to be treated as occupied enemy territory.

The Contractual Agreements represent an effort to reconcile these nearly irreconcilable desiderata. Because they were worked out in response to a set of novel requirements, they are calculated to be the despair of the pundits of international law. The status of Western Germany which would result from their entry into effect cannot adequately be described in terms of "sovereignty" or "occupation" (whether *bellica* or *pacifica*) or any other terms from the lexicon of that science, though there will no doubt be valiant efforts. They can, indeed, be comprehended only by consideration of what they actually provide, in the light of the five requirements above stated.

1. *Provisions necessitated by the division of Germany and present impossibility of a peace treaty*

"In view of the international situation, which has so far prevented the reunification of Germany and the conclusion of a peace settlement, the Three Powers retain the rights and the responsibilities, heretofore exercised or held by them, relating to Berlin and to Germany as a whole, including the reunification of Germany and a peace settlement." The *raison d'être* of this quotation from Article 2 of the amended Convention on Relations is clear enough. These are rights which, vis-à-vis Soviet Russia, could not be replaced by any agreement with a government which the Kremlin does not recognize. The conclusion of a formal peace treaty with the Federal Republic and total abandonment by the Western Powers of their occupation of Germany would afford to the Soviets an excellent legal pretext to claim that the Western Powers had not only violated the Potsdam and other World War II agreements, but had abandoned their right to have any further say in the fate of Germany and their right to remain in Berlin. The legal dialecticians of the Soviet Union are rarely at a loss for rationalizations of its *realpolitik*, but there is no reason unnecessarily to simplify matters for them.

A far more difficult problem is presented by a third set of basic rights stemming from conquest and occupation—the rights, in the words of the 1952 Convention on Relations, relating to "the stationing of armed forces in Germany and the protection of their security." Russia is in no position to dispute the right of the Three Powers to station their forces in Germany as occupants, but it could, and probably will, vociferously challenge their right to be there on no other basis than the consent of a government which it does not recognize.¹⁶

¹⁶ Soviet Russia's recent recognition of the "sovereignty" of the so-called German Democratic Republic was not, of course, accompanied by any withdrawal of Russian

The 1952 Convention dealt squarely with the problem; the right to station forces in Germany and to protect their security was specifically included among those retained by the Three Powers. The provisions of the 1954 Convention are a study in the use of ambiguity as a method of avoiding, or at any rate of postponing, the resolution of disagreement. Paragraph 1 of Article 4 now provides that:

Pending the entry into force of the arrangements for the German Defence Contribution, the Three Powers retain the rights, heretofore exercised or held by them, relating to the stationing of armed forces in the Federal Republic.

Thereafter, the matter is to be dealt with by a separate convention, effective upon the accession of Germany to the North Atlantic Treaty, whereby the Federal Republic agrees that "forces of the same nationality and effective strength as at that time may be stationed in the Federal Republic."¹⁷ This, however, is followed by an effort (Article 4(2)) to refute the inference that the Three Powers will have then abandoned their right to station forces in Western Germany:

The rights of the Three Powers, heretofore exercised or held by them, which relate to the stationing of armed forces in Germany and which are retained, are not affected by the provisions of this Article insofar as they are required for the exercise of the rights [relating to Berlin, Germany as a whole, reunification and a peace treaty].

Is the phrase "and which are retained" a bashful affirmation of the proposition that these rights *are* retained—rather than acquired by agreement—even after the entry into force of the arrangements for the German defense contribution? Who can say how far the retention of the right to station armed forces in the Federal territory is essential to the exercise of Allied rights respecting reunification and a peace treaty or the Allied right to remain in Berlin (which is not part of the Federal Republic's territory)? How does this square with the antecedent unequivocal declaration of paragraph 2 of Article 1 that "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs"? We search farther for enlightenment and find this (Article 4, paragraph 2):

. . . In view of the status of the Federal Republic as defined in Article 1, paragraph 2 . . . and in view of the fact that the Three Powers do not desire to exercise their rights regarding the stationing of armed forces in the Federal Republic, insofar as it is concerned, except in full accord with the Federal Republic, a separate Convention deals with this matter.¹⁸

occupation forces in East Germany, nor has Russia purported to sign a peace treaty with her East German satellite.

¹⁷ The text of the separate Convention on the Presence of Foreign Forces in the Federal Republic of Germany appears at pp. 94-96 of Dept. of State Publication 5659.

¹⁸ The Final Act of the London Conference obligates the United Kingdom, and morally commits the United States, to maintain armed forces in Germany, but says nothing about their *right* to maintain such forces. *Op. cit.*, p. 14.

On balance, this highly ambivalent language *seems* to mean that the Three Powers still retain their right, based on conquest and occupation, to station armed forces in Western Germany, although it is a right which will not be used without the consent of those who are subject to it—like the prerogatives of the British Crown; or it may mean that, to the extent that they have abdicated their rights, the abdication runs only in favor of the Federal Republic; *i.e.*, the Three Powers are, for purposes of international law, still occupants, but West Germany is not occupied. The lawyer's mind may boggle at such concepts; but the validity and meaning of these provisions may never be tested seriously. Article 9(3) excludes disputes involving these rights of the Three Powers, "or action taken thereunder," from the jurisdiction of the Arbitration Tribunal or of any other tribunal or court. Thus, unless and until there arises a real crisis in relations between the Three Powers and the Federal Republic, each party may construe the clause to its own satisfaction, the Germans taking the position that Allied forces are present in their territory only by grace of German consent and the Allies taking the position—especially in discussions with the Russians—that they are there on the same legal basis as before.

In tacit recognition that the Federal Republic cannot be universally accepted as a new sovereign entity, despite the declaration that it will "have the full authority of a sovereign state" (which may not be the same thing as actually *being* a sovereign state), the Three Powers, under Article 3, agree to represent its interests with international organizations and other states, but only at the request of the Federal Republic and when it is not in a position to do so itself. Although not explicitly so stated, the Federal Republic is at liberty to establish and carry on normal diplomatic relations with any countries which will recognize it¹⁹ and to join any international organization to which it can gain admission. Indeed, under the same article, the Federal Republic affirms its intention to join "international organizations contributing to the common aims of the free world," and the Three Powers pledge themselves to support its candidacy "at appropriate times."²⁰

2. Provisions in deference to German desire for reunification

The various documents relating to the Agreements, and the Agreements themselves, are liberally sprinkled with protestations and provisions in-

¹⁹ The Three Powers themselves, under the 1952 Convention, would have conducted their relations with the Federal Republic through ambassadors, who were, however, to "act jointly in matters the Three Powers consider of common concern" under the Contractual Agreements. This provision has vanished from the convention itself—presumably for the same reasons which induced throughout the agreements the replacement of the phrase "The Three Powers and the Federal Republic" by the phrase, "The Signatory States." There seems to be nothing to inhibit joint action in practice, and in fact the quoted provision now appears in a tripartite agreement. Dept. of State Publication 5659, p. 121.

²⁰ In Sec. V of the Final Act of the London Conference the Three Powers declare that "They 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 affairs." *Ibid.*, p. 17.

tended to refute any inference that either the Three Powers or the Federal Republic are resigned to a quasi-permanent division of Germany into two new and more or less hostile states. The Three Powers declared in the Final Act of the London Conference that "The achievement through peaceful means of a fully free and unified Germany remains a fundamental goal of their policy."²¹

Both Article 2 and Article 7 contain references to "Germany as a whole," i.e., recognition that Germany, at least as she existed before Hitler's conquests and annexations, is still an international concept, if not an actuality; in abeyance, but not extinguished.²² Article 7, indeed, is almost wholly devoted to dispelling the idea that the new relationship of the Western Powers to Western Germany marks the abandonment of plans for reunification.²³ The Three Powers and the Federal Republic will co-operate to achieve by peaceful means a unified Germany; and the Three Powers will "consult with" the Federal Republic on the exercise of their (retained) rights regarding Germany as a whole.

But suppose Germany actually *is* unified; what then becomes of the elaborate system of rights and duties embodied in the Contractual Agreements? The Convention on Relations does not, and probably could not, supply an unambiguous answer. Article 7(3) of the 1952 version provided in effect that this new Germany would be "extended" the rights of the Federal Republic under the Contractual Agreements (and the EDC Treaty) upon its assumption of the Federal Republic's obligations thereunder. Taken by itself, this would have been open to the construction that the government of the new Germany was to have a choice of ratifying or rejecting the Federal Republic's accession to the Contractual Agreements (and the E. D. C.); and it may be remarked in passing that it is not very easy to conceive circumstances in which Soviet Russia would consent to the reunification of Germany on terms which would leave the new government any such choice. This has vanished, and the problem is dealt with only by Article 10, which provides that the four signatories will "review" the terms of the Contractual Agreements upon "the reunification of Germany, or an international understanding being reached

²¹ *Ibid.*

²² *Of.* Laun, "The Legal Status of Germany," this JOURNAL, Vol. 45 (1951), pp. 267, 268-272. The author, a German lawyer, devotes much time, learning and ingenuity to the elaboration of the argument that Germany, not having been formally annexed by any of the conquerors, still exists, despite the creation of the Federal Republic and the German Democratic Republic, and that this continued existence is recognized by many acts of both the Western democracies and the Communist Powers, such as the continued existence of the Quadripartite Control Authority (also in abeyance), the many references in the legislation of the occupying Powers to "Germany as a whole" and the reference, contained in the Basic Law (*Grundgesetz*) of the Federal Republic to a future Constitution (*Verfassung*) to be agreed upon by the whole German nation.

²³ The 1954 amendments substitute the words "reunified" and "reunification" for "unified" and "unification" in a number of instances, e.g., Convention on Relations, Arts. 7(2), 10. The psychology of this refinement is unclear; perhaps it is intended to connote the restoration of Germany as she existed before Hitler, including East Prussia and Silesia.

with the participation or consent of the States parties to the present Convention on steps towards bringing about the reunification of Germany, or the creation of a European federation; or in any situation which all of the Signatory States recognize has resulted from a change of a fundamental character" from present conditions. Thereafter they will modify the conventions "to the extent made necessary or advisable by the fundamental change," but only by mutual agreement.

This implies more than it says, although the implications are far from clear. It seems, indeed, to be founded on the premise that the Government of the Federal Republic will be the government of a reunified Germany, and that the Federal Republic will be bound by its present commitments, except to the extent that the Three Powers consent to their modification.²⁴ The United States appears to put this construction on Article 10, for the Secretary of State's letter transmitting to the President the amendments to the conventions states that, in the event of review consequent upon reunification or an international understanding on steps toward that goal, "There must, of course, be agreement by all the signatory governments to any changes made in the conventions."²⁵ It is apparently not the view of the Government of the Federal Republic, whose legal experts are reported to have taken the position that the conventions would be "invalid and inapplicable" after German reunification.²⁶

These provisions appear to be essentially:

(a) Earnest declarations that the reunification of Germany remains a basic goal;

(b) Provisions treating such reunification as a real possibility; and

(c) Provisions (the same ones) which give to the Three Powers in the event of unification rights which they could not insist upon without jeopardizing the prospect of removal of Soviet obstruction to reunification.

Although this essay is devoted to the genuine politico-legal problems arising from the new relationship of Western Germany to the Western democracies, rather than to the highly artificial relationship between the Soviet Svengali and its East German Trilby, it should be pointed out that the Soviet Union, while constantly emitting propaganda in favor of German reunification, has caused the German Democratic Republic to assume commitments much more prejudicial to the chances of peaceful reunification, notably its formal acceptance of the Oder boundary and the concomitant territorial cessions to Poland and Russia. Article 7(1) of the Convention on Relations, on the other hand, commits the democracies to the proposition that "the final termination of the boundaries of Germany" must await a peace settlement.

²⁴ Disputes under Art. 10 are not among those which Art. 9 exempts from the jurisdiction of the Arbitration Tribunal. Conceivably it could be argued that Art. 10 is an agreement to agree, or at least to bargain in good faith, and that the Federal Republic could bring before the Tribunal an arbitrary refusal by the Three Powers, or any one of them, to consent to modifications which are reasonably necessary, or even "advisable," in the light of some fundamental change.

²⁵ New York Times, Nov. 16, 1954, p. 12; Dept. of State Bulletin, Vol. 31 (1954), pp. 851-852.

²⁶ New York Times, Dec. 21, 1954, p. 6.

At the same time, there is a concession to the not very realistic fear in the back of the French (and perhaps the Russian) mind that a rearmed Germany might be tempted to launch an armed crusade for the recovery of her lost territory, dragging her new partners with her: as part of the Final Act of the London Conference, the Federal Republic undertook "never to have recourse to force to achieve the reunification of Germany or the modification of the present boundaries of the German Federal Republic."²⁷ Moreover, in the same instrument, the Three Powers stated that they will regard as a threat to their own safety any recourse to force which threatens the defensive character of the Atlantic Alliance, and would consider a government which so offended as having forfeited its right to military assistance under NATO.²⁸ There is also a much more substantial concession to the much more substantial fear that the Federal Republic might play off the West against the Soviets, bargaining the abrogation of her commitments to the former in exchange for reunification and the recovery of her territories from the latter, for the inability of the Federal Republic to modify its obligations under the Agreements without the consent of the Three Powers means that they cannot be excluded from any negotiations with the Soviet Union.

3. *Provisions relating to Western defense*

The positive satisfaction of this political exigency, *i.e.*, arrangement for the contribution of German manpower and matériel to the common defense, is handled through the mechanism of the Brussels and North Atlantic treaties and is beyond the scope of this article. But it was no less essential to provide for the continued stationing in Germany of the forces of the other Western Powers and to regulate the rights and duties of such forces. This problem (which, of course, did not exist under the occupation) had to be dealt with by the Contractual Agreements.

As noted above, the Three Powers seem to retain, under Article 4, the right to station armed forces in Germany, although their mission is changed from occupation to "the defense of the free world, of which Berlin and the Federal Republic form part." But, without the consent of the Federal Republic, there can be no increase in the effective strength of these forces.²⁹ Moreover, the NATO Council, implementing the decisions of the London Conference, has agreed that the location of NATO forces, *i.e.*, those forces of NATO countries stationed on the Continent and under the command of SACEUR (the NATO supreme commander), is to be determined by SACEUR "after consultation and agreement with

²⁷ Dept. of State Publication 5659, p. 16. ²⁸ *Ibid.*, p. 17.

²⁹ Art. 4(2); separate Convention on the Presence of Foreign Forces, Art. 1(2). Curiously enough, Art. 5(1)(b) of the Convention on Relations provides that, "in the event of external attack or imminent threat" thereof, the Three Powers may bring in, as part of their forces, contingents of the armed forces of any nation not now providing such contingents, without the Federal Republic's consent. No such provision is made for additional contingents of the Three Powers' own forces.

the national authorities concerned."³⁰ Presumably these "national authorities" include not only those of the country whose forces are concerned, but also those of the prospective host country; but it is not clear to what extent NATO will "recognize as suitable to remain under national command" and hence not under the authority of SACEUR,³¹ American, French or British forces now stationed in Germany.

If the Three Powers are to commit very substantial forces in Germany, and if these forces no longer have the status of occupants, a serious problem arises as to their security in the event of external attack, internal subversion, or other situations in which martial law might be appropriate. The 1952 Conventions dealt unambiguously with this thorny problem. Article 5 of the Convention on Relations, 1952 version, in substance provided for a restoration of the occupation regime whenever the Three Powers believed that the security of their forces was endangered—whether that danger stemmed from external aggression or from such an extreme development in German internal politics as an electoral triumph by neo-Nazis or Communists.³² In such case, the Three Powers would have had the power to "proclaim a state of emergency in the whole or any part of the Federal Republic." This was a polite way of saying "reinstate the occupation," for upon such a proclamation the Three Powers were empowered to "take such measures as are necessary to maintain or restore order and to insure the security of the Forces"—a phrase which fairly measures the powers of a military occupant under conventional concepts of international law.³³ Moreover, Article 5(7) of the 1952 Convention on Relations would have expressly provided that, even without the proclamation of a "state of emergency," any military commander whose forces were "immediately menaced" could take whatever action, including the use of armed force, was necessary to protect them.

Under the 1954 draft, these rights are considerably less clear-cut. Article 5(2) now provides that:

The rights of the Three Powers, heretofore held or exercised by them, which relate to the protection of the security of armed forces stationed in the Federal Republic and which are temporarily retained, shall lapse when the appropriate German authorities have obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces, including the

³⁰ Dept. of State Publication 5659, pp. 32-33.

³¹ *Ibid.*

³² Art. 5(2) of the 1952 Convention on Relations defined as follows the circumstances which would justify the Three Powers in resuming control:

". . . an attack on the Federal Republic or Berlin, subversion of the liberal democratic basic order, a serious disturbance of public order or a grave threat of any of these events, and which in the opinion of the Three Powers endangers the security of their forces . . ."

³³ "Thus the occupant's rights are double-based, resting on the necessity for providing some established government in a country which is shut off from its ordinary fountain of justice and spring of administration, and secondly, on the military interests of the occupying belligerent himself." Spaight, *War Rights on Land* (1911), p. 322. See also Garner, *International Law and the World War* (1920), Vol. II, p. 77 *et seq.*

ability to deal with a serious disturbance of public security and order. To the extent that such rights continue to be exercisable they shall be exercised only after consultation, insofar as the military situation does not preclude such consultation, with the Federal Government and with its agreement that the circumstances require such exercise. In all other respects the protection of the security of those forces shall be governed by the Forces Convention or by the provisions of the Agreement which replaces it, and, except as otherwise provided in any applicable agreement, by German law.

Taken literally, this provision seems to mean that the Three Powers will "temporarily" retain the right to proclaim a "state of emergency" and, in effect, restore military government, if they believe such actions requisite to the security of their forces, for they certainly hold such rights as occupants. What is not so clear is the point at which "the appropriate German authorities" can be said to have "obtained similar powers under German legislation enabling them to take effective action to protect the security of those forces." The vesting in the German Federal Government of emergency powers, similar to the powers under international law of a conqueror's military government, raises exceedingly difficult questions of politics and constitutional law. For example, does the "ability to deal with a serious disturbance of public security and order" include constitutional authority to set aside an election won by neo-Nazis or Communists? Two propositions may, however, be put forward with reasonable assurance:

(1) The military authorities of the Three Powers will continue for the foreseeable future to regard themselves as possessed of comprehensive powers to deal with any emergency which they believe endangers the security of their forces.

(2) If the questions of the extent of these powers and the point at which they lapse should ever become more than academic, they will not be resolved by lawyers. As is the case with the right to station forces in Germany, disputes involving the right to protect their security, "or action taken thereunder," are excluded by Article 9(3) from the jurisdiction of the Arbitration Tribunal or any other tribunal or court.

These conclusions are pointed up by the reasons assigned for the deletion of paragraph 7 of Article 5 which, as above noted, would have explicitly authorized any military commander to take any action necessary to protect his forces against an immediate threat. A "related letter" from the German Chancellor to the United States Secretary of State³⁴ says that "The Federal Government is of the opinion that this is the inherent right of any military commander according to international law and therefore German law."

Similarly, the Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany, even as revised, goes farther to insure the extraterritoriality of the "foreign forces" than would be the case under the NATO Status of Forces Agree-

³⁴ Dept. of State Publication 5659, p. 99.

ment.³⁵ Although it is to be replaced by "new arrangements setting forth the rights and obligations of the Three Powers and other States having forces in the territory of the Federal Republic," which are to be "based on" the NATO Agreement ("supplemented by such provisions as are necessary in view of the special conditions existing in regard to the forces stationed in the Federal Republic"),³⁶ it is obvious that the working out of the new agreement will not be easy. The probability that the Forces Convention will not be superseded for a considerable time is strong enough to justify detailed consideration of its provisions, which were not much altered by the 1954 Protocol.

Contrary to the situation under the NATO Agreement, the Three Powers retain what is for all practical purposes exclusive criminal jurisdiction over the members of their forces.³⁷ The German authorities can arrest members of the forces only in emergencies, and then must turn them over promptly to their own authorities. Although the German courts are given civil jurisdiction over members of the forces,³⁸ they cannot restrict their personal liberty, nor seize any personal property which the military authorities certify as necessary for the performance of a member's duties.³⁹

In other respects also, the Forces Convention confers on the Allied Forces rights which, while much more circumscribed than those which they have enjoyed as avowed military occupants, nevertheless go beyond anything which a NATO Power would be likely to obtain in the territory of another NATO Power. Thus, Article 3(3) and Annex A of the Forces Convention in effect amend and supplement the German Penal Code by making criminal all sorts of offenses against the forces, ranging from

³⁵ The text of the NATO Agreement is reproduced in Exec. T, 82d Cong., 2d Sess., June 16, 1952; also in this JOURNAL, Supp., Vol. 48 (1954), p. 83. See Schwartz, "International Law and the NATO Status of Forces Agreement," 53 Columbia Law Review (1953) 1091.

³⁶ Convention on Relations, Art. 8(1)(b).

³⁷ Art. 6(1). Art. 6(4), however, provides for the transfer of such cases to German jurisdiction, by agreement between the German authorities and the authorities of the forces. The Supreme Court of the United States has said that members of an invading or occupying force are "not subject during the war to the laws of the enemy or amenable to his tribunals for offenses committed by them." *Coleman v. Tennessee* (1879), 96 U. S. 513. Although it is by no means clear that the Supreme Court, even in 1879, would have applied this dictum to a situation in which the occupying government had agreed to subject members of its forces to local courts, any attempt so to transfer to German jurisdiction a member of the United States Forces—which includes dependents—might lead to an attempt to litigate in the American courts the question whether the war and the occupation have been terminated for legal purposes.

³⁸ Art. 9. It can also be argued that, at least under the American view of international law, members of an occupying force cannot be subjected even to the civil jurisdiction of "enemy" courts. *Cf. Dow v. Johnson* (1880), 100 U. S. 158. However, it is very doubtful that the immunity is so personal to the individual that it cannot be waived by the authorities of the occupying government. Thus, it appears that after World War I the American occupation authorities subjected members of their forces to the civil jurisdiction of German courts in paternity cases. See *American Representation in Occupied Germany, 1920-1921*, Vol. II, p. 60. In any case, it would seem almost impossible to get the issue before an American court, except through a collateral attempt to enforce the judgment of a German court.

³⁹ Art. 10(3), (4).

espionage and sabotage to publicly vilifying them or maliciously exposing them to contempt,⁴⁰ although the provision that the German authorities shall have exclusive jurisdiction over offenses against the forces by Germans⁴¹ certainly represents a considerable derogation from the ordinary authority of a military occupant.

A few further examples may be adduced, without attempting exhaustively to recapitulate the elaborate provisions of the convention. The forces, their members and their vehicles, vessels and aircraft can move into, within and out of Western Germany without restriction.⁴² The forces can establish their own communications facilities so far as required for military purposes; and this includes radio communications, despite the scarcity of radio frequencies.⁴³ They can conduct maneuvers and training exercises throughout the Federal territory.⁴⁴ Their installations and works "directly serving the purposes of defense"—which, presumably, would include a minefield or a chain of concrete pillboxes—are to be constructed by the Federal Republic, as needed, or if there is special need for secrecy or security, the forces can construct them themselves.⁴⁵ The Three Powers can, subject to review by an impartial arbitrator, veto on grounds of security a German decision to grant the request of a foreign sovereign for extradition.⁴⁶

Article 30(2), not in itself of great importance, deserves special attention as a type of the numerous instances in which close bargaining between Allied and German negotiators has led to a mean between the rights of an occupant and those of a mere visitor. It provides in essence that in areas outside cities, if the German authorities cannot meet military standards of purity of the water supply, the forces themselves may purify the supply, whereas in cities there must be agreement with the municipal authorities on standards of purification. Some knowledge of the history of the occupation is requisite to full understanding of the significance of this compromise. The medical corps of the Allied Armies, particularly the American, have been strongly of the opinion that local water supplies

⁴⁰ The inclusion of these detailed provisions is attributable less to Allied hypercaution than to the fact that the Federal Republic, having no armed forces, has no legislation dealing specifically with offenses against them. The statutes dealing with offenses against the *Wehrmacht* of the Third Reich were, of course, among those repealed by the Allies at the outset of the occupation. Otherwise it would have been enough to provide that offenses against the forces of the Three Powers should be assimilated to offenses against the Federal Republic's own armed forces.

⁴¹ Art. 6(3).

⁴² Arts. 17(1), 25. This is presumably subject to the overall limitation on the strength of such forces provided by the separate convention. See above, p. 130.

⁴³ Art. 18(2), (5); Annex B.

⁴⁴ Art. 19(1). The separate convention (Art. 1(3)) permits additional forces to enter and remain for periods up to 30 days in connection with NATO training activities, but only with German consent.

⁴⁵ Art. 20(1). Here too, however, there is a substantial subtraction from the usual rights of an occupant, in that such measures, if they are likely to cause serious damage to public or private property, as would often or usually be the case, are subject to review by the Arbitration Tribunal. Art. 20(3).

⁴⁶ Art. 27.

should be chlorinated, in the interest of public health. They could and did cite alarming instances of contamination of untreated water supplies. The German authorities, from the *polizei* up to the *Bundeskanzler*, believed with equal fervor that chlorination was a slur upon the purity of German water and, what was worse, ruinous to the flavor of German beer. Trivial as the controversy might seem, it has been a source of real friction since the inception of the occupation. Article 30(2) probably represents the most satisfactory possible compromise, considering that most beer is brewed in large cities and most troops are stationed outside such cities.

The Forces Convention's articles on logistics give the Allied Forces a good deal less than the rights of an occupant and something more than the privileges of a visitor. All property requisitioned by the forces prior to the effective date of the convention will remain in their possession as long as needed.⁴⁷ The power to requisition will be replaced by the Federal Republic's obligation to make available necessary accommodations, goods and services.⁴⁸ To insure the Federal Republic's ability to honor this commitment, it obligates itself to enact legislation implementing its right of eminent domain; pending such enactment the convention revives *pro tanto* the provisions of the former laws of the Third Reich which assured the supply of the *Wehrmacht*.⁴⁹

To the extent that German supplies and services prove inadequate, the forces may freely import their own supplies and maintenance personnel into the Federal territory. Where this does not suffice, they may import their own contractors, and even, in effect, assimilate them to units of the forces⁵⁰—a privilege not accorded, for example, to United States Forces in France.

4. Provisions designed to insure against a revival of totalitarianism or militarism

The problem of preventing German rearmament from getting out of hand is outside the scope of the conventions, in either their 1952 or 1954 versions, and of this article. Indeed, Article 2 of the Protocol on the Termination of the Occupation provides that "The rights heretofore held or exercised [by the Three Powers] relating to the fields of disarmament and demilitarization shall be retained and exercised by them." Control of German rearmament is to be accomplished within the framework of the Brussels Treaty by a series of Protocols signed at Paris contemporaneously with the Protocol on Termination of the Occupation.⁵¹ Briefly stated, the

⁴⁷ Art. 48. But "rights relating to hunting and fishing heretofore requisitioned" are to expire one month after the entry into force of the convention (Art. 46(5)). Members of the Occupying Forces have been able to hunt the expensively conserved game of Germany when and as they liked, subject only to the conservation regulations imposed by their own authorities. This issue, like that of chlorination, has aroused irritation out of all proportion to its intrinsic importance, perhaps because there are so many Nimrods among high Allied and German officials.

⁴⁸ Art. 37(1), (2). See below, p. 146. ⁴⁹ Art. 37(3), (4).

⁵⁰ Art. 36(2), (3).

⁵¹ Dept. of State Publication 5659, pp. 37-62.

Federal Republic, which becomes one of the Brussels Treaty Powers, commits itself not to manufacture in its territory atomic, chemical or biological weapons, nor (except upon recommendation of NATO, approved by two thirds of the Brussels Treaty Powers) guided missiles, heavy warships, or bomber aircraft. The Brussels Treaty Powers will establish an "Agency for the Control of Armaments" to satisfy itself that these undertakings are observed. These provisions are not essentially different from those which were envisioned in 1952, save for the replacement of E. D. C. by the Brussels Treaty mechanism.

Much more interesting is the omission of any provision explicitly dealing with the danger of a revival of totalitarianism. Article 5(2) of the 1952 Convention on Relations would have made a "subversion of the liberal democratic basic order," which in the opinion of the Three Powers endangered the security of their forces, one of the grounds for declaration of a state of emergency and concomitant restoration of military government. No such explicit provision now appears. But, as noted above, the "temporary" retention by the Three Powers of their rights relating to the security of their forces may come to very much the same thing. A totalitarian government of Germany might not necessarily endanger the security of the Three Powers' forces; but the decision as to whether or not it did would apparently be up to the Three Powers. The most that can be said is that, so long as the Three Powers maintain in Germany armed forces stronger than any at the disposal of German neo-Nazis or Communists, there would be legal justification for their intervention to prevent the accession to power of a new Hitler of the right or left.

5. Provisions designed to recognize and implement the new relationship between the Allies and Western Germany

The problem of making official the new and radically different relation between the conquerors and the conquered was encountered principally in the negotiation of the Convention on Relations (and the annexed Charter of the Arbitration Tribunal) and the Convention on the Status of Forces. (The Convention on the Settlement of Matters Arising Out of the War and the Occupation deals with matters which should have figured in a peace treaty, and disposes of most of them in much the same way as such a treaty would probably have done. The Finance Convention is essentially an international bargain, not dissimilar to many struck among the NATO Powers, concerning the size of Western Germany's monetary contribution to the upkeep of the forces stationed in her territory for her protection.)

As part of the Final Act of the London Conference, the Three Powers recognized "that a great country can no longer be deprived of the rights properly belonging to a free and democratic people."⁵² Accordingly, the Convention on Relations leads off by terminating the occupation regime, revoking the Occupation Statute and abolishing Allied organs of govern-

⁵² Dept. of State Publication 5659, p. 10.

ment in Western Germany.⁵³ It then states flatly that "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs."⁵⁴ Although, as has been pointed out above, this resounding declaration is somewhat qualified by succeeding provisions, the limitations on German sovereignty are certainly held to a minimum.

The limits on the sovereignty of the Federal Republic over its external affairs are mainly either those implicit in the fact that no final treaty of peace can be concluded,⁵⁵ or such as any sovereign nation may by treaty with its equals impose upon itself. The Federal Government's various obligations under the conventions to enact, or not to repeal, certain legislation, would, when taken in conjunction with the enforcement powers which the Arbitration Tribunal had under the 1952 conventions, have constituted a real limitation on its sovereignty in domestic matters. For example, there has been mentioned in connection with the Forces Convention the obligation of the Federal Republic to enact certain legislation necessary to the fulfillment of its obligations to the forces. To select another example, it has committed itself, under the Convention on the Settlement of Matters Arising out of the War and the Occupation, not to repeal or amend, without the consent of the Three Powers, certain legislation of the Allied High Commission dealing with reparations.⁵⁶ Allied laws providing for the breakup of certain industrial cartels (although fewer of them than in the 1952 version of that convention) are to be maintained in force until their purposes have been achieved.⁵⁷ Other provisions deal with such matters as the disposition of German war criminals and other persons sentenced by Allied tribunals,⁵⁸ the restitution of foreign property stolen by the Nazis,⁵⁹ and the protection of foreign interests in Germany,⁶⁰ and there is a general provision that:

Legislation . . . which is required to be maintained in force [by any of the conventions] may only be amended or repealed with the consent of the Three Powers.⁶¹

The Charter of the Arbitration Tribunal would, in its 1952 version, have put real teeth in these restrictions on German sovereignty, for that body was given extraordinary powers to enforce the provisions of the treaties. Specifically, it was empowered, if a party failed to "issue legal provisions" required under the conventions, to incorporate in its judgment "provisions, not inconsistent with the Basic Law of the Federal Republic, creating rights and obligations for all persons and authorities in the

⁵³ Art. 1(1).

⁵⁴ Art. 1(2).

⁵⁵ "The problem has posed itself of according to the Federal Republic full authority over its internal and external affairs while preserving the means of negotiating German unity and of maintaining the rights of the Three Powers in Berlin." Sen. Exec. Rep. No. 16, 82d Cong., 2d Sess., p. 37.

⁵⁶ Convention on the Settlement of Matters Arising Out of the War and the Occupation, Ch. 6, Art. 2.

⁵⁷ *Idem*, Ch. 1, Arts. 9, 11.

⁵⁸ Ch. 1, Arts. 6, 7.

⁵⁹ Ch. 5.

⁶⁰ Ch. 10.

⁶¹ Ch. 1, Art. 1.

Federal territory,"⁶² *i.e.*, having the force of a statute. Moreover, if it had found an Act of the German legislature to be in conflict with the conventions, it could have declared it "null, in whole or in part, in the Federal territory."⁶³

This bold attempt to break new ground in the enforcement of obligations among nations, dismissed by Secretary Dulles as "not normal to a body created to arbitrate disputes between sovereign states,"⁶⁴ has vanished without a trace and been replaced with a provision which is, even by the standards of past efforts to enforce treaties, of almost unique futility. Article 11(2) of the Charter now reads, *verbatim ac litteratim*:

If a Signatory State required by a decision of the Tribunal to take action to give effect to that decision is unable, or fails, to take such action within the time specified by the Tribunal, or if no time is specified, within a reasonable time, then that State, or any other Signatory State a party to the dispute, may apply to the Tribunal for a further decision as to alternative action to be taken by the defaulting State.

The decision as to alternative action would presumably be subject to the same provision, and so on *ad infinitum*.

The Federal Republic is not even under a moral obligation to refrain from repealing or amending such legislation of the Occupying Authorities as is not specifically covered by the conventions.⁶⁵ Legislation of the long dormant Quadripartite Control Council presented more of a problem, for the Three Powers could not well permit the Federal Republic to repeal what they could not themselves, without Soviet participation, formally repeal. They do, however, delegate to the Federal Republic the power (exercised by themselves since the collapse of quadripartite government of the occupied territory) to "deprive of effect" such legislation after "consultation" with the Three Powers.⁶⁶ Perhaps the distinction between killing a statute by repeal and throwing it into a cataleptic state by "depriving it of effect" has conceptual validity; but it is not likely to make much practical difference.

Such restrictions as exist on the Federal Republic's sovereignty over its domestic affairs are thus dependent on whatever moral sanction may attach to a decision by the Arbitration Tribunal. The Charter of that court contains genuine recognition of German claims to be placed on a footing of equality.

The composition of the Tribunal ensures its impartiality—three Germans, three Allies and three "neutrals."⁶⁷ If anything, the Germans have the

⁶² Charter of the Arbitration Tribunal (Annex B to the Convention on Relations, 1952), Art. 11(6).

⁶³ *Idem*, Art. 11(3).

⁶⁴ New York Times, Nov. 16, 1954, p. 12; Dept. of State Bulletin, Vol. 31 (1954), p. 851.

⁶⁵ Convention on Settlement, etc., Ch. 1, Art. 1(1).

⁶⁶ Ch. 1, Art. 1(2).

⁶⁷ "Neutral members," who cannot be either Germans or nationals of any of the Three Powers, are to be appointed by agreement between the Federal Republic and the Three Powers or, in default of such agreement, by the President of the International Court of Justice. Charter, Art. 1(2), (3).

better of it, for the German members would be more likely to vote as a bloc than would the members appointed by the Three Powers. In all other respects the Federal Republic and the Three Powers stand on a footing of equality before the Tribunal, so far as its jurisdiction extends.

To the scope of that jurisdiction there are two major exceptions. In the first place, certain disputes between the Federal Republic and the Three Powers are excluded from the Tribunal's competence by provisions of the conventions themselves. The most important such exceptions are disputes involving the rights of the Three Powers with respect to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement; their rights relating to the stationing of armed forces in the Federal Republic (pending the entry into force of the arrangements for a German defense contribution and thereafter insofar as they are necessary to the exercise of rights respecting Berlin, reunification and the peace treaty); and their rights relating to the protection of the security of their armed forces in the Federal territory.⁶⁸ Not only are disputes involving these rights exempted, but also disputes involving action taken under the provisions relating to these rights. The precise wording of these exceptions deserves (and undoubtedly got from the negotiators) the most concentrated attention, for it appears to be intended to exclude the Arbitration Tribunal from even passing on its own jurisdiction over a dispute arising from an action which the Three Powers assert to be an exercise of these rights.

The Tribunal has jurisdiction only over disputes arising "under the provisions" of the conventions.⁶⁹ The Three Powers would undoubtedly take the position that a dispute as to the scope of the retained powers does not arise "under" that or any other article, for the rights themselves are not conferred by the convention—it merely recites their retention. Moreover, the mere assertion by the Three Powers that a particular action was an exercise of these rights would *ipso facto* "involve" these rights in the dispute. The same consideration would apply to the propriety of measures taken by the Three Powers in the exercise of their right to protect the security of their armed forces stationed in the Federal territory.

A few other Allied actions are immune from review by the Arbitration Tribunal, the most significant probably being the exercise—or non-exercise—by the Power which tried and sentenced a war criminal of its exclusive prerogative to terminate or reduce that sentence.⁷⁰

The Convention on Relations complements its revocation of the Occupation Statute by a declaration⁷¹ that the mission of the Three Powers' armed forces stationed in the Federal territory "will be the defence of the free world, of which Berlin and the Federal Republic form part." This announced change of mission, from occupation to defense, is imple-

⁶⁸ Convention on Relations, Art. 9(3). ⁶⁹ Charter, Art. 9(1).

⁷⁰ Convention on Settlement of Matters Arising out of the War and the Occupation, Ch. 1, Art. 6. The Power in question is bound to follow a unanimous recommendation of the Mixed Board set up to review such cases, but that Board includes a representative of each of the Three Powers.

⁷¹ Art. 4(1).

mented by the Forces Convention which, while devoted to matters considerably less fundamental than those dealt with in the Convention on Relations, regulates those aspects of the Allied-German relationship which impinge most acutely on the consciousness of the average German. His relationship with the Allied Armed Forces, which are the highly visible symbols of their countries, will be the touchstone by which he judges how much substance there is to the concept of equal partnership between his country and the Western democracies.

It has been pointed out in a preceding section that the Allied Forces would, under the Forces Convention, occupy a more favored position than would, for example, the forces of one NATO Power in the territory of another. But their position is, on the whole, still farther removed from that of a military occupant, who can, generally speaking, take in the occupied territory any measures which can be justified on grounds of security, furthering the accomplishment of its mission, or the maintenance of public order. Although it is impossible within the scope of this article to recapitulate the provisions of the Forces Convention, it is illuminating to abstract a few of its provisions which deviate most significantly from the rights normally exercised by a military occupant.

Except as the conventions may otherwise provide, the members of the forces are to observe German law, and the forces are to be responsible that it is enforced against them.⁷² Moreover, as the single exception to the exclusive criminal jurisdiction of the Three Powers over the members of their armed forces, if for any reason the courts-martial of the Power concerned lack criminal jurisdiction over a member who has committed against Germans an act which is a crime under German law, a German court may try him and, upon conviction, sentence him to imprisonment in a German jail.⁷³ These provisions, however strongly they emphasize the "guest" status of the quondam occupants, are mainly declarations of principle emphasizing the abrogation of the absolute rule that members of an occupying force are exempt from the criminal jurisdiction of the courts of the occupied territory,⁷⁴ for the German authorities are bound to abstain from prosecuting any such case in which German law gives them discretion to abstain, or in which the offender has been suitably punished by the disciplinary action of the forces,⁷⁵ although, in the latter case, the adequacy of the punishment would be subject to review by the Arbitration Tribunal. Moreover, so far as the United States is concerned, it is difficult to conceive of a violation of German law, so serious that disciplinary punishment under Article of War 15 would be inadequate,⁷⁶ which would not also violate one or another of the Articles of War, if only that which denounces "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed

⁷² Art. 2(1).

⁷⁴ See note 37 above.

⁷³ Art. 6(2), (5).

⁷⁵ Art. 6(2) (b).

⁷⁶ Such punishments, imposed by commanding officers for "minor offenses" not warranting a court-martial, include withholding of privileges, restriction to limits, and forfeiture of half a month's pay (in the case of officers) or reduction to the next inferior grade (in the case of enlisted men). The Articles of War appear at 50 U.S.C. §§ 551-736.

forces. . . ."⁷⁷ The same comment applies to the obligation of the Three Powers to prosecute offenses by members of the forces against Germans as vigorously as offenses against their own personnel, for this would be their responsibility in any case, both as part of their obligation to maintain public order and safety and in the interest of preserving the discipline of their forces. Similarly, the surrender by the Three Powers of their jurisdiction to try offenses against their forces by Germans and other persons subject to German jurisdiction underscores the end of the occupation but does not mark a great departure from the practice which has for some time prevailed.⁷⁸

Of much greater practical effect is the subjection of members of the

⁷⁷ Art. of War 134. See Manual for Courts-Martial, United States (1951), p. 383. A complex jurisdictional problem might arise where a member of the forces commits a serious offense against German law and is discharged before apprehension. If he were a member of the United States Forces and the offense were punishable by imprisonment for 5 years or more, he could probably be subjected to the jurisdiction of a court-martial under Art. of War 3; but the Germans could probably also claim jurisdiction, since he is no longer a member of the forces and since Art. 3(2) of Ch. One of the Convention on the Settlement of Matters Arising Out of the War and the Occupation, which deprives German courts of jurisdiction of acts of which they would not have had jurisdiction at the time of commission, applies only to those acts antedating the entry into force of the convention.

⁷⁸ Art. 6(5) provides in substance that the Germans may transfer to the authorities of the forces, with their consent, jurisdiction in cases in which an offender against the forces is, although subject to German jurisdiction, not a German; *e.g.*, a Russian saboteur or spy whose trial might embarrass the Federal Republic. It is not entirely clear that an American court-martial would have adequate jurisdiction in such a case. Art. of War 2(12) gives to courts-martial, subject to the provisions of any treaty to which the United States is a party, jurisdiction over "all persons within an area leased by or otherwise reserved or acquired for the use of the United States" outside its territories and possessions, but this could hardly include any territory in Germany save, perhaps, the precincts of a military installation. Art. of War 106 gives general courts-martial and military commissions jurisdiction over "any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the armed forces of the United States . . . or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere. . . ." The 1951 Manual for Courts-Martial states (at p. 341) that it is necessary to prove intent to communicate information to the "hostile party" or "enemy." Assuming that, for this purpose, "time of war" will continue until the conclusion of a formal peace treaty with Germany, a question arises as to whether the Soviet Union and its satellites could, for the purposes of the article, be considered the "enemy" or even "the hostile party." The same problem arises with Art. of War 104, "Aiding the Enemy." The Three Powers are, however, permitted to maintain in the Federal Territory "tribunals exercising jurisdiction as contemplated" by any of the conventions. Convention on the Settlement of Matters Arising out of the War and the Occupation, Ch. 1, Art. 4(1). If it were concluded that a court-martial, applying the Articles of War, could not deal adequately with such an offense, recourse might be had to a military commission, whose jurisdiction to protect the security of forces under the command of the authority which appoints it is, while not clearly defined, less circumscribed than that of a court-martial. See Fairman, *The Law of Martial Rule* (2d ed., 1943), pp. 265 ff., 271 ff. On the other hand, if a German court attempted to try a member of the Soviet forces, he could argue that his government has never terminated its status as a military occupant of Western Germany and that he is, as a matter of international law, immune to the jurisdiction of a German court.

forces to German civil jurisdiction, the most obvious effect of which will probably be a rash of automobile and paternity litigation.⁷⁹ There is not even absolute immunity from suit for acts committed in the course of their official duty, for the German courts are bound to give to that fact only "such legal weight and effect as it is entitled to under German law."⁸⁰ Under a military occupation, such acts would, it goes without saying, be entirely exempt from the jurisdiction of the local courts.⁸¹

The right to requisition, a major incident of occupation, has been abolished and replaced by the Federal Republic's commitment to ensure that the forces' requirements will be met⁸²—a commitment which is limited to the fulfillment of the defensive mission of the forces and which in other respects is closely circumscribed. Goods, materials and services do not, under present conditions, present a serious problem, except perhaps in the case of the French forces. Sales to the British and American forces for sterling or dollars constitute, in effect, substantial export items and as such are not likely to cause pain to the Federal Republic. To the extent, however, that there may be competition between the forces and the civilian economy for items in short supply, the matter would be regulated by a Joint Supply Board, with Allied and German representation, which is responsible for formulating procurement programs.⁸³

Such a squeeze actually does exist in the matter of "accommodations," meaning housing and real estate; not only is housing still inadequate, but the requirements of the forces for maneuver areas place a severe strain on Western Germany's limited supply of farmland. The Three Powers would, as noted above, keep what they have; but additional "accommodations" would be pretty much in the discretion of the Germans, for the requirements which the Federal Republic is obligated to fill are those "agreed" by the forces and the Federal Government.⁸⁴ Unlike the case of goods and services, there is no provision for a Joint Board, and the Three Powers would seem to have no recourse from German refusal to agree save an appeal to the Arbitration Tribunal, based on a contention that the refusal was arbitrary and unreasonable—a contention which the Tribunal, whose members are to be eminent lawyers rather than soldiers,⁸⁵ might find it a puzzle to adjudicate.

The forces have retained the right to contract directly with German suppliers of goods and materials,⁸⁶ but labor is to be obtained through the German authorities, who set the terms and conditions of employment, including wages.⁸⁷ Moreover, no duties even remotely para-military may be assigned to German employees.⁸⁸

Many other provisions of lesser importance, *e.g.*, the subjection of the

⁷⁹ Art. 17(7) requires that members of the forces obey the requirements of German law as to liability insurance on their private vehicles, although they may insure with any company, German or otherwise, which can pay Deutschemark claims.

⁸⁰ Art. 16(3).

⁸¹ *Dow v. Johnson* (1879), 100 U. S. 158.

⁸² Art. 37. The question of payment for such requirements is left to the Finance Convention.

⁸³ Art. 39.

⁸⁴ Art. 38(2).

⁸⁵ Charter, Art. 1.

⁸⁶ Art. 39(5).

⁸⁷ Art. 44(1), (5), (7).

⁸⁸ Art. 44(2), Art. 45.

forces to German excise taxes on certain commodities purchased by them from German producers,⁸⁹ might be adduced in support of the proposition that the privileges of the forces will be drastically deflated under the Forces Convention, but the point has been labored sufficiently. No doubt the Federal Republic will now press for the application of the whole NATO Status of Forces Agreement to the forces of the Three Powers stationed in its territory. But from the standpoint of the Three Powers, there is not much water to be squeezed out of the present convention. Domestic political considerations would make it exceedingly difficult for any of them, and especially for France, to concede, for example, the exercise of any form of German criminal jurisdiction over members of their forces. The United States, prior to the NATO Agreement, had traditionally asserted exclusive criminal jurisdiction over its armed forces, even when visiting the territory of a friendly Power,⁹⁰ and the Congressional uproar which greeted even that agreement's partial cession of criminal jurisdiction over a comparatively small number of American troops might well deter repetition of the experiment on a larger scale. And the Three Powers may argue, with considerable justification, that the NATO Agreement was never designed to meet the problems presented by the stationing of forces in the territory of another Power in such numbers, or in positions so near the forces of a potential aggressor, as is the case in Western Germany.

* * * * *

It would be profitless to pose, and very hard to answer, the question as to what the legal status of Western Germany will be under the Contractual Agreements. Vis-à-vis the Soviet Union, surely, the Three Powers must still claim the status of occupants of Germany, as the Soviet Union (despite its purported grant of sovereignty to the German Democratic Republic) claims it vis-à-vis them. It will be noted that the conventions "terminate the Occupation regime"⁹¹ but do not announce the end of the occupation itself, and, as already pointed out, the Three Powers explicitly state that they *retain*—not acquire under the conventions—those rights of an occupant which are essential in their relations with the Soviet Union and its East German satellite. They cannot thus be said to have voluntarily terminated their occupation. On the other hand, they would bind themselves, as solemnly and firmly as is possible to sovereign states, to exercise no other rights of occupation, save in stated extraordinary circumstances. The result, if taxonomy were essential in the circumstances, might be described as an occupation limited by contract. It seems to be without precedent in international law. Nor is this surprising, for the Contractual Agreements represent an effort to tailor a relationship among nations to a set of circumstances without precedent in history. In international law, as in other fields of law, this is how precedents are made.

⁸⁹ Art. 33(1)(a). The U. S. forces, at least, are unlikely to purchase within Germany tobacco, coffee, tea or sugar, but coal and alcohol, and possibly gasoline, might be procured from German sources.

⁹⁰ See King, "Jurisdiction over Friendly Foreign Forces," this JOURNAL, Vol. 36 (1942), p. 539.

⁹¹ Convention on Relations, Art. 1(1).