

spect to suits by individuals, and that the foreign state enjoys a similar sovereign immunity and cannot be sued without its consent.⁹

The mere statement of these elementary jurisdictional questions will serve to suggest the complexity of the many problems of substantive and procedural law which will present themselves for solution in working out any scheme for international penal jurisdiction, whether it be intended to operate concurrently with national legal processes or to be imposed upon them as an appellate jurisdiction.

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THE RIGHTS OF THE UNITED STATES IN BERLIN¹

Origin of Rights

The United States is in Berlin as of right. The rights of the United States as a joint occupying power in Berlin derive from the total defeat and unconditional surrender of Germany. Article I of protocol on zones of occupation in Germany agreed to by the Soviet Union in the European Advisory Commission on November 14, 1944 provides:

“I. Germany, within frontiers as were on December 31, 1937, will, for purposes of occupation, be divided into three zones, one of which will be allotted to each of three powers, and a special Berlin area, which will be under joint occupation by the three powers.”

This agreement (later amended to include France) established the area of Berlin as an international enclave to be jointly occupied and administered by four powers.

The representatives of commanders-in-chief adopted, on July 7, 1945, a resolution establishing the Allied Kommandatura for administration of Berlin. The Kommandatura was to be under the direction of the chief military commandant which post was to be held in rotation by each of four military commanders. The chief military commandant in consultation with the other commanders was to exercise administration of all Berlin sectors when a question of principle and problems common to all sectors arose. In order to exercise supervision of Berlin local government, one or two representatives from each Allied command were to be attached to each section of the local German government.

⁹ 292 U. S. 313; this JOURNAL, Vol. 28 (1934), p. 576.

¹ Because of his official duties with the United States Delegation to the General Assembly in Paris, Mr. Jessup was unable to contribute an editorial to this issue of the JOURNAL. On December 8, 1948, President Truman designated Mr. Jessup Acting Chief of the United States Mission to the United Nations. As of interest to its readers, the JOURNAL is reproducing here an extract from the statement made by Mr. Jessup on behalf of the United States before the Security Council on Oct. 6, 1948, during the Council's consideration of the Berlin question. The full text of the statement is contained in Department of State Press Release No. 821, Oct. 8, 1948, excerpts from which appear in the Department of State Bulletin, Vol. XIX, No. 485, Oct. 17, 1948, p. 484.

Implicit in these agreements is the right of each of the four powers to free access to and egress from the greater Berlin area. Not only has this right been clearly recognized and confirmed by the Soviet Union by practice and usage for almost three years, but it has been the subject of written agreements between the respective governments as well as by their representatives in the Allied Control Council for Germany. Rights of free access were directly specified in the message from President Truman to Premier Stalin on June 14, 1945, which agreed to withdraw back to the prescribed zonal boundaries those forces which in the course of the war had overrun part of the territory which later became the Soviet zone of occupation, provided satisfactory arrangements for free access by rail, road and air to the forces in Berlin could be entered into between the military commanders. I quote one sentence from the Truman message:

“. . . As to Germany, I am ready to have instructions issued to all American troops to begin withdrawal into their own zone on June 21 in accordance with arrangements between the respective commanders, including in these arrangements simultaneous movement of the national garrisons into greater Berlin and provision of free access by air, road and rail from Frankfurt and Bremen to Berlin for United States forces.”

Premier Stalin replied on June 16, 1945, accepting this plan excepting for a change in date. Premier Stalin gave assurances that all necessary measures would be taken in accordance with the plan. Correspondence in a similar sense took place between Premier Stalin and Prime Minister Churchill. Premier Stalin thus agreed that the Western occupying powers should have “free access by air, road and rail” to Berlin. Even in the Russian language, “free access” does not mean “blockade.”

The four zone commanders met in Berlin on June 29, 1945, to put the agreement of the Chiefs of State into force. At this meeting it was agreed that the Western Powers would withdraw their forces from the Soviet zone and would have the use of the Helmstedt-Berlin *Autobahn* and rail routes without restriction and subject only to the normal traffic regulations of the Soviet zone. In reply to a question from General Clay, Marshal Zhukov, the Soviet commander, stated: “It will be necessary for vehicles to be governed by Russian road signs, military police, document checking, but no inspection of cargo—the Soviets are not interested in what is being hauled, how much or how many trucks are moving.” In accordance with this understanding, the United States, whose armed forces had penetrated deep into lands of Saxony and Thuringia, in the Soviet zone, withdrew its forces to its zone. Simultaneously, United States garrisoning forces took up their position in Berlin.

The right of the United States to be in Berlin thus stems from the same source as the right of the Soviet Union. Rights of occupying powers are co-equal as to freedom of access, occupation and administration of the area.

Confirmation by Agreements and Usage

It clearly results from these undertakings that Berlin is not a part of the Soviet zone of occupation, but is, by express agreement, an international enclave. Commitments entered into in good faith by the commanders of the four zones of occupation, agreements reached by the Allied Control Authority in Germany, as well as uncontested usage, have recognized basic rights of the United States in the joint administration of Berlin and rights of freedom of access thereto for the purpose of fulfilling United States obligations and responsibilities as an occupying power.

Since July 7, 1945, it agreed that supplies necessary for the welfare of the people of Berlin were a joint responsibility of the four powers. There have been a series of quadripartite agreements entered into between July 1945 and April 1948 for the joint provision of food, solid fuels and electric power, and medical supplies.

All agreements, of course, carried with them the right of access to permit the Western occupying powers to bring their share of supplies to Berlin.

Pursuant to agreement in the Control Council establishing train paths, military trains regularly traversed the Helmstedt-Berlin train route. There was no inspection by Soviet authorities and no Soviet permit was required for outgoing shipments from the Berlin area. Proof of identity through proper documentation was sufficient to comply with traffic regulations, which during this period were reasonable and were fully accepted by the Western Powers. Similarly, personnel of the United States Military Forces and other United States officials traveled freely by train or motor-car over the rail and *Autobahn* routes from Berlin to Helmstedt without Soviet visa.

Air corridors were established between the Western zones and Berlin with unrestricted flight, subject, of course, to safety regulations. Three such corridors were established in November 1945 by Four Power agreement in the Allied Control Council to augment the single provisional corridor agreed to in the meeting of the Allied Commanders-in-Chief on July 7, 1945. In December 1945 uniform safety regulations were adopted in these corridors, under which aircraft have operated continuously since that date. These regulations were reaffirmed by publication on October 22, 1946, of the agreed second revision of these flight rules. In practice, military and civilian airline aircraft of the three Western Powers used the corridors for unlimited flight without notification to Soviet authorities.

Bilateral agreements were made by British and Soviet authorities concerning barge traffic between their two zones. Quadripartite arrangements concerning postal traffic, telecommunications and movement of Germans between the Western zones and Berlin were concurred in, and carried out satisfactorily, prior to institution by the Soviet Union of blockade measures.

There can thus be no question of the legal basis for United States rights to free access to Berlin or of recognition of these rights by the Soviet Union.

Regulation of Traffic

The United States maintains its basic juridical rights of free access to Berlin. These are clearly established and recognized by the Soviet Government. As every reasonable and practical person knows, rail, road, barge and air traffic must be subject to some degree of regulation. Let me repeat the statement of Marshal Zhukov on June 29, 1945:

“It will be necessary for vehicles to be governed by Russian road-signs, military police, and documents checking, but no inspection of cargo—Soviets not interested in what is being hauled, how much or how many trucks are moving.”

The United States agreed to this position and we still agree. We do not assert freedom of access means absence of reasonable regulations, but precaution cannot be distorted to mean imposition of restrictions to the point where the principle of free access is completely strangled. The United States will not permit the Soviet Government to use the agreed principle of reasonable regulation as a measure to cloak the threat of force designed to force the United States to abandon Berlin to single domination and rule by the Soviet Union.

RESPONSIBILITY FOR INJURIES TO UNITED NATIONS OFFICIALS

Count Folke Bernadotte was assassinated in Jerusalem on September 17, 1948, while on tour as United Nations Mediator in the Palestine dispute. Colonel André P. Serot, a United Nations observer, was murdered at the same time. Ralph Bunche, personal representative of the Secretary General of the United Nations, immediately reported the incident to Moshe Shertok, Foreign Minister of the Provisional Government of Israel. Dr. Bunche said the act was committed by “Jewish assailants” and was “an outrage against international community and unspeakable violation of elementary morality.” He continued:

This tragic act occurred when Count Bernadotte, acting under the authority of United Nations, was on official tour of duty in Jerusalem, and in presence of liaison officers assigned to him by the Jewish authorities. His safety, therefore, and that of his lieutenants under the ordinary rules law and order was a responsibility of Provisional Government Israel whose armed forces and representatives control and administer the area.

This act constitutes a breach of the truce of utmost gravity for which Provisional Government Israel must assume full responsibility. . . .¹

It will be noted that the responsibility of the Government of Israel was attributed to the facts that the assassination took place in an area controlled and administered by the armed forces of that government and that

¹ Message from Representative of Secretary General to Israeli Foreign Minister, Sept. 17, 1948, Department of State Bulletin, Vol. XIX, No. 482 (Sept. 26, 1948), p. 399.