



Surrender, Occupation, and Private Property in International Law (2) : An Evaluation of Some United States Practices during the Occupation of Surrendered Japan

Ando, Nisuke

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SURRENDER, OCCUPATION, AND PRIVATE PROPERTY IN INTERNATIONAL LAW (2)*

— An Evaluation of Some United States Practices
during the Occupation of Surrendered Japan —

Nisuke ANDŌ*

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※ Professor of International Law, Faculty of Law, Kobe University, Japan; Member, Human Rights Committee (*International Covenant on Civil and Political Rights*), 1987~1990.

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The study in the preceding Section indicated that the term unconditional surrender was not well defined by those who used it. When it was used at a meeting of the Subcommittee on Security Problems, an unconditional surrender was understood to imply an "imposed cessation of hostilities," as opposed to an armistice which was a "negotiated cessation of hostilities." The same Subcommittee considered that an unconditional surrender was an act of a primarily military nature. What the Subcommittee members had in mind was the surrender of many European states to Nazi Germany in 1940.²⁷¹ Then, at Casablanca, President Roosevelt made public this term, saying that it was the only means to realize a total elimination of Axis war power. The total elimination of Axis war power presupposed a total military defeat of the Axis states, and probably a complete military defeat was regarded by the President as an essential requirement of an unconditional surrender. When he rejected the Joint Chiefs of Staff recommendation to issue a statement in clarification of the Casablanca formula, Roosevelt insisted that, in order to attain their war aims, the Allies should be determined to administer a total defeat to Germany as a whole.²⁷²

It is doubtful, nonetheless, that Roosevelt used the term in its purely military sense. At Casablanca he also stated that an unconditional surrender meant the destruction of the Axis philosophy, based on the conquest and subjugation of other peoples. The President knew that such a great task could not be achieved by a military victory alone, however complete it might be.²⁷³ How he planned to attain this objective is not exactly known, but in the official communiqué of the Yalta Conference of February 1945, Roosevelt, Churchill, and Stalin stated that:

We have agreed on common policies and plans for enforcing the unconditional surrender terms which we shall impose together on Nazi Germany after German armed resistance has been finally crushed. These terms will not be made known until the final defeat of Germany has been accomplished....

It is our inflexible purpose to destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world. We are determined to disarm and disband all German armed forces; break up for all time the German General Staff...; remove or destroy all German military equipment; eliminate or control all German industry that could be used for military production; ... and take in harmony such other measures in Germany as may be necessary to the future peace and safety of the world.²⁷⁴

271. See pp. 46-47, No. 20 of this *LAW REVIEW* (1986).

272. U. S., *Foreign Relations*, 1944 Vol. 1, pp. 501-502.

273. *Ibid.*, p. 502.

274. U. S., *Department of State Bulletin*, Vol. 12, p. 214.

The question of post-surrender treatment to be accorded to Germany and the Germans is touched upon in this statement. It was precisely because such a question was raised by the term unconditional surrender that German propaganda appealed successfully to the fear of the Germans as to their future in order to stiffen their resistance against the invading Allied forces. Indeed for that reason, the U. S. military staff and the Office of Strategic Service repeatedly requested a clarification of the term. Ironically, it was in this very respect that President Roosevelt was resolved to avoid any commitment. Therefore, it can probably be concluded that, at least in Roosevelt's thinking, a complete military defeat of the enemy and no advance commitment regarding post-hostilities treatment of the enemy, the conditions of which were to be later imposed by the victor, constituted essential characteristics of an unconditional surrender.²⁷⁵ The conditions of post-surrender treatment of the vanquished state would certainly include measures of other than a military nature — that is, those of a political nature. They would involve interests not only of the vanquished but also of the victorious.²⁷⁶ Hence, no more Fourteen Points!

But, if Roosevelt was to illustrate his concept of an unconditional surrender, Lee's surrender to Grant was a bad choice. It must be remembered that in March 1865 Lee proposed to Grant to submit the subjects of controversy between the belligerents to a military convention. Upon transmitting this proposal to Washington, Grant received the following instruction from President Lincoln, through Secretary of War Stanton:

The President directs me to say to you that he wishes you to have no conference with General Lee, unless it be for the capitulation of Lee's army, or solely minor or purely military matters. He instructed me to say that you are not to decide, discuss or confer upon any political question. Such questions the President holds in his own hand and will submit them to no military conferences or conversations. Meantime you are to press to the utmost your military advantage.²⁷⁷

Here, as in the discussion of the Subcommittee on Security Problems, an unconditional surrender was treated as a purely military act, and no political questions were to be involved therein.

The French expression for "unconditional surrender" is "la capitulation sans condition" or "la capitulation inconditionnelle,"²⁷⁸ and this

275. For a psychological background of the term, see A. Armstrong, *Unconditional Surrender* (n. 181 *supra*), p. 15ff. The strategic implication of an unconditional surrender is neatly analyzed by P. Kecskemeti, *Strategic Surrender* (n. 181 *supra*), especially pp. 218–219.

276. U. S., Department of State, Division of Special Research, *Chronological*, Minutes S–4, Meeting of May 20, 1942, p. 2.

277. John W. Draper, *History of the American Civil War* (3 vols., New York: Harpers, 1868–1870), Vol. 3, p. 561.

278. Sometimes the word "reddition" is used in the place of "capitulation." See for example, Charles Rousseau, *Droit international public* (Paris: Sirey, 1953), p. 591.

“capitulation inconditionnelle” or unconditional capitulation in the strictly military sense has been an established institution of international law. A capitulation is ordinarily defined as an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theater of operations. Usually it specifies terms or conditions of the surrender, but the surrender may be unconditional.²⁷⁹ Unless otherwise stated in that agreement, surrendering forces are to become prisoners of war, and war materials in their possession are to be surrendered in the same condition as they are at the time of signing of the agreement.²⁸⁰ In fact, Article 35 of the Hague Regulations provides that: “Capitulations agreed on between the contracting parties must be in accordance with the rules of military honor. When once settled, they must be scrupulously observed by both parties.”²⁸¹

From the standpoint of international law, the concept or nature of an unconditional surrender must not be confused with the effect of an unconditional surrender. A complete military defeat of the enemy and no advance commitment regarding its post-surrender treatment may well represent characteristics of the unconditional surrender, as envisaged by Roosevelt. However, while the former refers to its legal nature, the latter concerns its legal effect. In his Casablanca statement Roosevelt himself made clear that an unconditional surrender was “the simplest formula” to attain a total elimination of Axis war power. Thus, he conceived an unconditional surrender as a means to achieve the Allied war aims. An elimination of Axis war power was an objective to be implemented through an unconditional surrender. It was not part of an unconditional surrender itself. Therefore, an unconditional surrender should be regarded as a matter of a purely military nature. It means a capitulation without condition—surrendering of arms by a body of troops without condition. When applied to the entire military forces of one belligerent, it also means the legal recognition of its complete military defeat and its renunciation of any will to resume hostilities. An unconditional surrender applies exclusively to military forces.

A series of documents signed by the German High Command in the early part of May 1945 were all termed acts of military surrender and they provided for an unconditional surrender of all the forces under German control.²⁸² It might be recalled that, in the case of Japan, the unconditional surrender similarly applied to its armed forces.²⁸³ As for Italy and the East European states, each arrangement that put an end to their hostilities against the allied forces was termed either “conditions of armistice” or “armistice agreement.” But a closer examination of provisions of these

279. *FM 27-10: The Law of Land Warfare* (n. 149 *supra*), Para. 470, p. 169; *British Manual of Military Law* (n. 149 *supra*), Para. 474, p. 135.

280. L. Oppenheim, *International Law* (n. 146 *supra*), Vol. 2 (7th ed. by H. Lauterpacht), p. 544.

281. For the text of the Hague Regulations, see n. 157 *supra*.

282. See p. 58, No. 20 of this *LAW REVIEW* (1986).

283. See *ibid.*, pp. 7-10.

documents indicates that, as far as military terms therein were concerned, there was virtually an unconditional surrender of each Axis forces. In the case of Italy, its land, sea, and air forces were to surrender and, except for a small portion thereof, they were all to be demobilized.²⁸⁴ Rumania recognized its defeat in the war against the Allies, and its armed forces were obliged to fight against Germany under U. S. S. R. command.²⁸⁵ Bulgaria and Hungary, besides ceasing hostilities, had to make their forces available for the Allied use. These forces, moreover, were to be demobilized at the cessation of hostilities against Germany.²⁸⁶ Finland accepted a similar obligation.²⁸⁷

The surrender of the Italian military forces and those of the East European states raise the question whether an unconditional surrender or a capitulation can be combined with terms of surrender of a political nature. Lincoln's instruction to Grant, as quoted above, suggests that an instrument of surrender should comprise only military terms.²⁸⁸ However, this does not exclude the possibility that, if so authorized by his government, a surrendering commander may agree to terms of a political nature in addition to the military ones and stipulate them together in one document. When an unconditional surrender or a capitulation involves an area which has been defended by the surrendering forces, the question of the treatment to be accorded to the civilian population therein is bound to arise. When the entire military forces of one belligerent surrender unconditionally or capitulate, the fate of its government and nationals becomes an urgent issue. Both the U. S. and British Military Manuals explain that, if a capitulation involves an area, it is desirable to make special provisions regarding its civil administration and inhabitants in the future.²⁸⁹ An instrument of surrender or a capitulation may contain terms of a political nature as may an armistice agreement.²⁹⁰

It must be pointed out, therefore, that an instrument of surrender or a capitulation and an armistice agreement may assume a very similar function. Indeed, the title of a document prescribing for cessation of hostilities should not be given too much weight in ascertaining its legal nature. The practice of states shows that belligerents often identify a capitulation document as an armistice for various political reasons.²⁹¹ The armistice between Germany and France of 1871, the armistice between the Allied and the Central Powers of 1918, and the German-Franco and the Italian-Franco

284. See Articles 1 and 3 of the long armistice. For the text, see n. 211 *supra*.

285. Preamble and Article 1. For the text, see n. 238 *supra*.

286. Article 1 of each armistice. For the text, see notes 239 and 240 *supra*.

287. Articles 1 and 4. For the text, see n. 241 *supra*.

288. See p. 12 *supra*.

289. FM 27-10: *The Law of Land Warfare* (n. 149 *supra*), Para. 475 (i), p.171; *British Manual of Military Law* (n. 149 *supra*), Para. 479, p. 136.

290. See p. 40, No. 20 of this *LAW REVIEW* (1986).

291. Riccardo Monaco, "Les convention entre belligerents," *Recueil des Cours*, Tome 75 (1949- II), p. 314.

Armistices of 1940 were all capitulations, in substance.²⁹² Because of their nature, they are sometimes called a capitulation-armistice.²⁹³ An agreement between belligerents is likely to reflect their military position in the war. In the conclusion of a general armistice the winning belligerent ordinarily attempts to impose its will on the opponent, in order to pave the way for a peace favorable to it. In reality, the terms of a general armistice are dictated by the victor, and the loser has no alternative but to accept unfavorable terms or to continue hopeless resistance.²⁹⁴ The Allied armistices with Italy and the East European states in World War II followed this pattern.

Assuming that an instrument of surrender or a capitulation contains terms of a political nature, those terms require the authorization or approval of the government of the belligerent concerned. It must not be overlooked that, in concluding the armistices with Italy and the East European states, the Allied Powers required that representatives of the governments of the defeated states affix their signature to the documents. As for the provisions of a military nature, the signature of military representatives would have been enough to make them binding. But, because these documents contained provisions of a political nature as well, it was necessary that the government representatives should sign them. Thus, each of these documents consisted of two parts. One was of a purely military nature, providing for a virtual unconditional surrender of the armed forces. The other was of a political nature, providing for post-surrender relations between the belligerents. The second part of the documents was legally binding not because it resulted from an unconditional surrender, but because it was based on the consent of the parties concerned.

In conclusion, it is submitted that legal nature of an unconditional surrender is purely military; that an unconditional surrender applies to military forces of a belligerent only; that in an instrument of surrender terms of a political nature may be included; that such terms require approval of political authorities; and that such terms are binding not because they are a result of an unconditional surrender but because they are a result of mutual consent.

292. Marcel Sibert, "L'armistice dans le droit des gens," *Revue générale de droit international public*, 40 ann. (1933), pp. 693-694.

293. *Ibid.*, p. 664.

294. R. Monaco (n. 291 *supra*), *Recueil des Cours*, Tome 75 (1949-II), p. 313.

Section 4. The Applicability of the Hague Regulations to a Post-Surrender Occupation

(i) *Some Qualifications of the Problem*

An unconditional surrender does not exclude the application of the Hague Regulations to an occupation of enemy territory, so long as any troops of a belligerent or of its allies are still fighting in the field to recover the occupied territory for its original sovereign.

It might be recalled that, when the term unconditional surrender was used by the Subcommittee on Security Problems, the members of the Subcommittee had in mind the surrenders of many European states to Nazi Germany in the early stage of World War II. Denmark surrendered in April 1940 before the reckless advance of Hitler's armies. Belgium capitulated in May, and the Dutch surrender followed. In June, the capitulation of Norway took place. In the same month France entered into armistices with Germany and Italy respectively.²⁹⁵ Although these documents were termed armistices, their substance was similar to that of the Italian or East European satellites' armistices. In the Franco-German and the Franco-Italian armistice agreements the French forces were to cease hostilities against the Axis and lay down their arms. Certain parts of the French territory were to be occupied and controlled by the German forces. Besides, some of the French overseas possessions in North Africa were demilitarized and made available to Italy. Nevertheless, the Axis purpose in concluding the armistices was strategic, and German forces occupied only the western coastal regions of France to guard against British attack.

In France as well as in the other defeated states, Germany set up military governments, some administered directly by German military commanders, others indirectly under the supervision of German civil commissioners.²⁹⁶ After their liberation by the allied forces and the final defeat of Germany, the courts of these European states almost invariably tested the legality of German occupation measures on the basis of the Hague Regulations. They held that the capitulations or surrenders to Germany had not terminated the state of war between their respective states and Germany; that the law of war continued to apply to their relations with Germany; and that the law of belligerent occupation, in particular the Hague Regulations, should govern the German occupation.

295. Raphaël Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), pp. 125, 157–159, 173–174, 200, and 208–210; *Survey* (n. 36 *supra*), 1939–1946, Hitler's Europe, pp. 338, 475–476, 494, 519–520, and 534–535. For an English translation of the Franco-German and the Franco-Italian armistices, see S. Shephard Jones and Denys P. Meyers (Eds.), *Documents on American Foreign Relations* (Boston: World Peace Foundation, 1940), July 1939–June 1940, Vol. 2, pp. 427–432 and 436–440.

296. R. Lemkin, *Axis Rule in Occupied Europe* (n. 295 *supra*), pp. 125, 157–159, 173–174, 200, and 208–210.

For example, when deciding if a state of war existed between Norway and Germany after the former's capitulation of June 10, 1940, the Supreme Court of Norway observed in its judgment dated March 6, 1948, that, while in the capitulation the Norwegian armed forces agreed to lay down their arms and not to raise them again for the duration of the war, a state of war had continued to exist between the two states.²⁹⁷ The capitulation had applied to the armed forces of Norway, but the court added that: "[T]he Norwegian Government undoubtedly continued the war as the responsible leader of the country's foreign policy and defence. That is shown by the fact immediately after the arrival in London [of the exile Norwegian Government] ... steps were taken to rebuild the ... army, navy and air force."²⁹⁸ In the same vein, in its decision of June 21, 1948, the Special Court of Cassation of Holland rejected the contention that one of the annexes to the 1940 capitulation of the Dutch forces had imposed on private ports and wharves an obligation to continue to work to full capacity under the German occupation.²⁹⁹ The court admitted the existence of that provision in the annex. However, "[S]uch provisions ... must ... be interpreted in accordance with the general rules of international law. They could not therefore be construed as imposing obligations on any person ... to work for the direct benefit of the German war effort, contrary to Article 52 of the Hague Regulations."³⁰⁰ Courts in Belgium, Denmark, and France followed suit.³⁰¹

In the case of these European states, their allies or their own government in exile continued to fight against the Axis even after the respective

297. *In re Five*, (1948) Ann. Dig. 503 (No. 162).

298. *Ibid.*, 505.

299. *In re van der Giessen*, *ibid.* 503 (No. 161).

300. *Ibid.*

301. The following are some of the cases reported in Ann. Dig. and I. L. R.. For other decisions in Dutch courts, see *Public Prosecutor v. N.*, (1919–1942 Supp.) Ann. Dig. 296 (No. 162); *In re Policeman Balster*, (1947) *ibid.* 255 (No. 115); *In re van Kampen*, *ibid.* 259 (No. 117); *In re Rauter*, (1948) *ibid.* 500 (No. 159); *Re Christiansen*, *ibid.* 502 (No. 160); *In re Esau*, (1949) *ibid.* 482 (No. 177); *In re Wintgen*, *ibid.* 484 (No. 178); *In re Hinrichsen*, *ibid.* 486 (No. 179); *In re Fiebig*, *ibid.* 487 (No. 180); *Transatlantica Transport Maatschappij v. Laufer*, (1953) I. L. R. 665; *State of the Netherlands v. Jessen*, *ibid.* 646.

For other Norwegian courts' decisions, see *Johansen v. Gross*, (1949) Ann. Dig. 481 (No. 176); *A/S Sobral v. Norwegian Crown*, (1952) I. L. R. 630 (No. 145).

For Belgian courts' decisions, see *De Coene v. Town of Courtrai and Belgian State*, (1950) I. L. R. 430 (No. 143); *Société Anonyme Pneumac v. Société Anonyme Belge du Pneumatique Michelin*, (1953) *ibid.* 662.

For a Danish court's decision, see *Andersen v. Christensen and the State Committee for Small Allotments*, (1947) Ann. Dig. 275 (No. 124).

For French courts' decisions, see *Breimann v. Arbouin*, (1919–1942 Supp.) Ann. Dig. 296 (No. 163); *Société Colas et Boulet v. Brugère*, *ibid.* 298 (No. 164); *Secret v. Loizel*, (1943–1945) *ibid.* 457 (No. 164); *Société des Etablissements Pigeat et Hazard v. Cie de Traction sur les Voies Navigables*, *ibid.* 458 (No. 165); *Société Industrielle et Commerciale des Marbres v. Sarfati*, *ibid.* 412 (No. 139); *In re Suarez*, *ibid.* 412 (No. 140); *Mortier v. Lauret*, (1947) *ibid.* 274 (No. 123); *Soubrouillard v. Kilbourg*, (1948) *ibid.* 551 (No. 180).

capitulations, and there was a possibility that the German occupant would one day be ousted. Indeed, in its decision dated October 1, 1946, the International Military Tribunal at Nuremberg recognized the application of the Hague Regulations to the German occupation of the European states.³⁰² The court was presented with the allegation that the rules of land warfare no longer bound Germany in the occupied territories because Germany had completely subjugated these states and incorporated them into the German Reich. But, in the view of the court:

[I]t is unnecessary in this case to decide whether this doctrine of subjugation ... has any application.... The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1st September, 1939.³⁰³

What is at issue here, on the other hand, is the applicability of the Hague Regulations to a post-surrender occupation, that is, to occupation of enemy territory after hostilities come to a complete end.

In examining whether the Hague Regulations apply to a post-surrender occupation, it will be of use to look into the reasons why the Allied Powers chose to end the hostilities of the Second World War with an unconditional surrender instead of a general armistice. According to the current British Manual of Military Law, the method of terminating hostilities by way of unconditional surrender was adopted in the Second World War to make it possible for the Allies; (1) to avoid the conclusion of agreements with the governments whose complete abolition was among their proclaimed war aims; and, (2) as shown in the study of Section 2 of this Chapter, to refrain from making any advance commitment of a political nature, in particular a commitment on post-surrender treatment of the enemies, which subsequently might carry the force of an armistice agreement. And, thus, the Allied Powers wanted to be left free, after cessation of hostilities, to proceed with a demilitarization and political reorganization of the Axis states in order completely to destroy the latter's war potentials.³⁰⁴

From the political point of view, these reasons are understandable and relevant. But, from legal viewpoint, the second reason raises the question whether a military occupant of enemy territory is entitled to such freedom of action after cessation of hostilities. In the general armistices of 1918 each of the Central Powers pledged to surrender a huge amount of weapons, other war materials, and, where applicable, warships. Moreover, the

302. *In re Goering and Others*, International Military Tribunal, *Trial of the Major War Criminals* (n. 138 *supra*), Vol. 1, p. 171ff.

303. *Ibid.*, p. 254.

304. See the Yalta Communiqué at p. 11 *supra*. Also, Curtis C. Shears, "Some Legal Implications of Unconditional Surrender," *Proceedings of the American Society of International Law*, 39th Yr. (1945), p. 49; J. Stone, *Legal Controls of International Conflict* (n. 135 *supra*), p. 645.

Central Powers were to demobilize a substantial portion of their armies.³⁰⁵ The same method could have been adopted by the allies in the Second World War to disarm the defeated states. But it would have been necessary to enter into an agreement with the enemies. A military occupation of enemy territory after an armistice agreement would have been governed by the Hague Regulations, and it would have hampered the freedom of action that the Allies had been seeking to secure. If the conclusion of an agreement were to be excluded, the only method which traditional international law had provided to enable the Allies to achieve their aim would have been subjugation of Axis states. However, the Allied Powers had made clear that an unconditional surrender would not mean the destruction of the enemy states.³⁰⁶ Thus, it is presumed that an unconditional surrender was intended to attain an intermediate point between an armistice regime governed by the Hague Regulations and an annexation; that is to say, it was not to entail annexation of the defeated but to release the victor from the restrictions which the Hague Regulations would impose on the latter's post-surrender dealing with the former.

Nonetheless, the course of the war lead the Allies to conclude an armistice, at least in name, with most of the Axis states. It was only from Germany that they successfully secured an unconditional surrender without having made any commitment on political questions. For this reason, in examining the applicability of the Hague Regulations to the post-surrender occupations in World War II, the German case will be distinguished from the others. Attention must be paid to any differences between the two which are of legal importance.

(ii) *Italy and the East European States*

Not much has been written about the applicability of the Hague Regulations to the Allied occupation of Italy,³⁰⁷ but, roughly speaking, the Hague Regulations were regarded as applicable to it in practice. With respect to the legal basis of the occupation and of the occupant's power over Italy and the Italians, Article 20 of the long armistice provided that the Allied Powers would exercise all the rights of an occupant in the occupied area, the administration of which would be provided for by the issuance of proclamations and regulations.³⁰⁸ The proclamations and regulations issued in accordance with this provision were basically in line with the

305. See Articles 4, 22, and 23 of the German armistice; Articles 2 (Military Clause) and 3 (Naval Clause) of the Austria-Hungary armistice; Article 2 of the Hungarian armistice; Articles 2 and 3 of the Bulgarian armistice. For the text, see n. 153 *supra*.

306. See pp. 47–48, No. 20 of this *LAW REVIEW* (1986).

307. For example, see listed publications in *World Polity*, Vol. 2, pp. 373–375.

308. For the text of the Italian armistices, see notes 210 and 211 *supra*.

Hague Regulations.³⁰⁹ Allied requisitions of Italian private property were based on this provision too, and the decisions of Italian courts admitted it. At the same time the courts considered that the requisitions had to be governed by the Hague Regulations.³¹⁰ Allied seizures of private property of the Italians were likewise treated as a legitimate exercise of a military occupant's rights under the Hague Regulations.³¹¹

As a rule, Italian courts considered that the Allied administration of the occupied parts of Italy was, in principle, governed by the Hague Regulations. In dealing with the question whether a member of the Allied military forces of occupation exercising police power in Italy was a public servant in the meaning of the Italian Penal Code, the Italian Court of Cassation looked to Article 43 of the Hague Regulations. The court held, in its decision of December 6, 1945, that the provision of Article 43 included the duty of the occupant to establish an administration for the occupied territory; that this duty gave rise to some rights, which were essential for the execution of the duty; that such rights supplied the legal basis for the protection accorded to the Allied military personnel who exercised police power on Italian territory; and that such personnel should be treated as public officers.³¹² On January 22, 1946, the Italian Council of State rejected the claim that an Italian citizen who had been appointed as Italian public servant by the Allied Military Government in disregard of the ordinary appointment procedure of the occupied area could not be dismissed by the Italian Government after the return of the administration of the territory to the Italian hands. According to the Council, international law authorized the Allies to dispense with the observance of the local law in case it was absolutely prevented, but the return of the administration to the Italian Government made such irregularity no longer permissible.³¹³

It must be noted, however, that the Italian Court of Cassation in another case dealt with the question whether the armistice could entitle the occupying Allies to powers more extensive than those granted under the Hague Regulations. The court answered this question affirmatively, observing that the armistice of 1943 had conceded to the occupation forces full legislative authority.³¹⁴ In its decision dated July 31, 1952, the court relied on Article 20 of the long armistice, which, as quoted above, gave the Allies "all the rights of an occupying power in the occupied area." Besides, by the same armistice, such additional rights as the rights of free transport to unoccupied territory and use of facilities therein had been ceded to the

309. U. S., Department of the Army, *U. S. Army in World War II* (n. 223 *supra*), pp. 7-8. See also C. R. S. Harris, *Allied Military Government of Italy* (n. 218 *supra*), pp. 5 and 391-392 for the text of the Allied Military Government Proclamation No. 1 to Sicilians.

310. See *Zito-Scalici v. Fontani*, (1948) Ann. Dig. 613 (No. 208); *Montuoro Arlotta v. Agrelli*, (1947) *ibid.* 249 (No. 113); *Agati v. Società Elettr. Coloniale Italiana*, (1950) I. L. R. 421.

311. See *Ministero della Difesa-Esercito v. Solamone*, (1951) I. L. R. 686 (No. 211).

312. *Re Vittucci*, (1946) Ann. Dig. 362 (No. 151).

313. *Anastasio v. Ministero dell' Industria e del Commercio*, *ibid.* 359 (No. 150).

314. *Genel & Bussi v. Steiner*, (1952) I. L. R. 613 (No. 135).

Allies. The Allies could enjoy these rights, not by virtue of the Hague Regulations, but by virtue of the armistice agreement. This holds true with the defascistization program, too. The Allies were authorized to order dissolution of Fascist organizations and impound their property because the armistice with Italy had granted them such power. In other words, the Allied occupation of Italy was basically governed by the Hague Regulations, but the occupant could exercise powers more extensive than those recognized under the Hague Regulations, if the armistice agreement specifically permitted such extension.³¹⁵

In observing the Allied practice in Italy, it must not be forgotten that the occupation took place during the hostilities of the Second World War. Before the armistices were entered into, parts of Italian territory was occupied by the Allied forces. After the conclusion of the armistices hostilities against Germany continued on the Italian Peninsula almost till the German surrender in the spring of 1945. It must also be noted that the Allied Powers adopted the policy of transferring the control of the occupied areas to the Italian Government as long as such transfer was not detrimental to their military operations. As a result of this policy, areas under Allied occupation were mostly near the war front, and the occupation was, in substance, of a belligerent character.

The foregoing observations on the occupation of Italy may be summarized as follows: (1) The Allied occupation of Italy retained a predominantly belligerent character. To this kind of occupation the application of the Hague Regulations was justifiable. (2) Apart from its belligerent character, the Allied occupation of Italy was based on the armistice agreements. An armistice agreement, which includes terms of a political nature, presupposes the existence of an enemy government. The armistices with Italy contained political terms and the Italian Government was in existence. The occupation of Italy did not transfer Italian sovereignty to the Allied Powers.³¹⁶ The armistices terminated Italian hostilities against the Allies, but, despite Italian co-belligerency with the Allies, the state of war between them was held to continue.³¹⁷ Thus, as in the case of the occupation of Central Powers' territories by the Allied and Associated forces under the 1918 armistices, the Hague Regulations, particularly the provisions of Section III, governed the Allied occupation of Italy.

As to the applicability of the Hague Regulations, in particular the provisions of Section III, to the Allied or U. S. S. R. occupation of the Axis satellite states in East Europe,³¹⁸ almost no materials are available. The fact remains, however, that their situation was quite similar to that of Italy.

315. Eric Stein, "Application of the Law of the Absent Sovereign in Territory under Belligerent Occupation: The Schio Massacre," *Michigan Law Review*, Vol. 46 (1948), pp. 348-349.

316. See, for example, *S. A. C. A. v. Lazzi & the Ministry of the Interior*, (1949) Ann. Dig. 433 (No.158); *In re Foti and Arena*, (1948) *ibid.* 552 (No. 181).

317. *In re LoDolce*, (1951) I. L. R. 318 (No. 100); *In re Hourigan*, (1943-1945) Ann. Dig. 415 (No. 142).

318. Finland managed to remain unoccupied. See p.56, No. 20 of this *LAW REVIEW* (1986).

First, during a substantial part of the occupation period, hostilities continued. Also, as in the case of Italy, parts of their territories were occupied before the conclusion of the respective armistices. After the conclusion of the armistices Allied hostilities against Germany continued on the territories of these states. Thus, the U. S. S. R. occupation maintained the character of belligerent occupation. Secondly, after the general cessation of hostilities of the Second World War, the Soviet occupation of these states continued on the basis of the provisions of the armistice agreements. The armistices put an end to the hostilities against the Allies, but the formal state of war between them and the Allied Powers continued.³¹⁹ The conclusion of the armistices presupposed the existence of governments in these states, and their occupation by the U. S. S. R. forces did not transfer their sovereignty to the occupant. Under these conditions, it is submitted that the Hague Regulations were applicable to the occupation of the East European states.

(iii) *Germany*

The conditions surrounding the German surrender were entirely different from those of the surrenders of Italy and the East European satellites. The German surrender was a perfect model of unconditional surrender, as envisioned by President Roosevelt. There was a complete military defeat of enemy armed forces, and the Allied Powers had made no advance commitment as to post-surrender treatment to be accorded to the enemy. What legal effect this kind of unconditional surrender had on post-surrender relations of the Allies with Germany and the German people and whether the Hague Regulations were applicable to those relations have been a most controversial issue among writers of international law since 1945.³²⁰ In general, German writers argue that the unconditional surrender did not extinguish Germany as a state; that it did not end the state of war between Germany and the Allied Powers; and that the law of war, including the law of belligerent occupation and the Hague Regulations, should have applied to the Allied occupation of Germany.³²¹ However, considering the Allied intent in choosing an unconditional surrender rather than a general armistice as the means of terminating the hostilities,³²² this approach

319. The preamble of each Peace Treaty with these states provides that the parties agreed to declare the cessation of the state of war. See *United Nations Treaty Series*, Vol. 41, p. 52ff; *ibid.*, p. 170ff; *ibid.*, Vol. 42, p. 36ff; *ibid.*, Vol. 48, p. 230ff., See also *ibid.*, Vol. 49, p. 127ff.

320. See, for example, publications listed in *World Polity*, Vol. 2, pp. 362-368.

321. Kurt von Laun, "The Legal Status of Germany," *American Journal of International Law*, Vol. 45 (1951), pp. 274-281; Rolf Stödter, *Deutschlands Rechtslage* (Hamburg: Rechts- und Staatswissenschaftlicher Vlg., 1948), SS. 171 and 228; Hans-Jürgen Schlochauer, "Zur Frage eines Besatzungsstatus für Deutschland," *Archiv des Völkerrechts*, Bd. 1 (1948-1949), SS. 203-205.

322. See p. 18 *supra*.

seems to be oversimplifying and too categorical. An objective observation of the facts is not likely to support such a view.

In any event, it is generally accepted that an unconditional surrender does not automatically end a state of war, and this holds true for Germany too. In connection with a law suit involving the legal effect of an unconditional surrender, the British Foreign Office produced a certificate dated April 2, 1946, with its view of the post-surrender status of Germany.³²³ According to the Foreign Office, the Allied Powers assumed the supreme authority of government of Germany as a result of the unconditional surrender. The unconditional surrender, however, did not effect the annexation of Germany, and Germany continued to exist as a state. On the other hand, the Allied Control Commission was the only agent through which the government of Germany was carried on. Since no treaty of peace had been concluded, the British Government was still "in a state of war with Germany."³²⁴ In fact, throughout the period of occupation, the Allied Powers regarded that Germany as a state had survived the unconditional surrender and that it was formally at war with them.³²⁵ Hence, for example, the joint resolution of the U. S. Congress of October 19, 1951, and the corresponding proclamation of the President of October 24 of the same year, terminating the state of war with Germany.³²⁶ Similar measures were taken by other Allies as well.³²⁷ It might be added that, in its judgment dated November 22, 1945, the Supreme Court of New Zealand adopted the view of its Foreign Office: "His Majesty's Government in New Zealand consider that a formal state of war has continued to exist and still exists between New Zealand ... and Germany following the Declaration of Unconditional Surrender of Germany...."³²⁸

Assuming that Germany as a state subsisted after the unconditional surrender and, as such, was in a state of war with the Allied Powers, were the Hague Regulations applicable to the Allied occupation of Germany? It might be recalled that, following the assumption of supreme authority with respect to Germany, the Allied Powers agreed on August 2, 1945, to a common line of policy for the occupation and control of Germany.³²⁹ In the agreement the Allies made their intention clear that they would completely demilitarize Germany, destroy the Nazi Party and wipe out Nazism, decentralize the German political structure, democratize its judicial system, reform its education, and control industry and all economic and financial transactions in Germany. The agreement also provided that, for

323. *Rex v. Bottrill*; ex parte Kuechenmeister (1946) Ann. Dig. 312 (No. 132).

324. *Ibid.* 313.

325. G. von Glahn, *The Occupation of Enemy Territory* (n. 160 *supra*), pp. 277-279.

326. U. S., *Statutes at Large*, Vol. 65, p. 451; *Ibid.*, Vol. 66, p. c3.

327. See Lothar Kotzsch, *The Concept of War in Contemporary History and International Law* (Geneva: E. Droz, 1956), pp. 258-259.

328. *In re Hourigan*, (1943-1945) Ann. Dig. 415, 417 (No. 142).

329. A report on the agreement is found, for example, in U. S., *Department of State Bulletin*, Vol. 13, p. 153ff.

the time being, no central German Government should be established. The Hague Regulations could not have authorized a military occupant of enemy territory to take all these measures. If these measures were to be held lawful in international law, it would be impossible to maintain that the Hague Regulations applied to the Allied occupation of Germany.

Allied military tribunals set up in occupied Germany generally adopted the view that the Hague Regulations did not apply to the occupation of Germany. In its decision of December 31, 1949, the Control Commission Court of Appeal in the British Zone of Germany stated:

There was no Government in Germany after the occupation of the country by the Allied Forces. The so-called Doenitz Government never had any authority from the German people to represent them. With the collapse of German armed resistance there resulted ... the complete collapse of governmental structure and disintegration of administrative organization....

The Control Council and the Zone and Sector Commanders in their respective spheres are neither mere *de facto* authorities set up by a belligerent occupant with limited powers nor are they ruling the occupied territory adversely to any existing German Government, for there is no other German Government; but they are, for the time being, the supreme organs of Government in Germany. For these reasons we cannot agree that they are restricted by the limitations placed by the Hague Convention on a belligerent occupant....

We are satisfied that Section III of the Hague Regulations does not apply and has never, since the Allies assumed supreme authority over the occupied territory, applied, to the present occupation of Germany.³³⁰

That is to say, the collapse of German armed resistance was accompanied by the collapse of German Government, and after the occupant assumed supreme authority with respect to Germany, there was no government in Germany other than the Allied Government — or the Allied Government was the Government of Germany. The Hague Regulations were not designed to govern this type of situation.

Decisions of various domestic courts followed the same line of argument. Thus, in its decision of February 13, 1952, dealing with an Allied requisition of a motor car owned by a German national, the German Federal Supreme Court stated that the Hague Regulations applied only "while the existence of German governmental authority was recognized by international law."³³¹ The collapse of the German central government was

330. *Dalldorf and Others v. Director of Prosecutions*, (1949) Ann. Dig. 435, 437-438 (No. 159); See also *In re Altstötter and Others*, (1947) *ibid.* 278 (No. 126); *In re Weizsaecker and Others*, (1949) *ibid.* 344 (No. 118); *British Army of Occupation (Road Accident) Case*, (1950) I. L. R. 407. (No. 131).

331. *Loss of Requisitioned Motor Car (Germany) Case*, (1952) I. L. R. 621.

taken note of by the Dutch Special Court of Cassation in its decision dated June 27, 1949, too. According to the court, the war against Germany had ended in May 1945 by a *debellatio*, which had taken the form of an unconditional surrender and the disappearance of the organized state authority.³³² Some domestic tribunals described the Allied assumption of supreme authority as a denial of German sovereignty. For example, the French Court of Appeal of Colmar stated in its judgment of November 12, 1948, that the capitulation of May 8, 1945, and the declaration of June 5, 1945, had temporarily deprived Germany of its sovereignty.³³³ A similar view was expressed by the Supreme Court of Poland in its judgment of June 11, 1948, over the Allied settlement of the German-Polish boundaries.³³⁴ In the same vein, the German Federal Court of Appeal of Frankfurt referred, in its decision of January 31, 1951, to the legal status of Germany under the occupation. The court observed that: "[F]rom 1945 onwards the Occupying Power existed not only side by side with German state authority, but was immediately substituted for the latter. This unique situation undoubtedly resulted in the Occupying Power exercising German sovereignty to the fullest extent."³³⁵

It must be admitted that, if the Allied assumption of supreme authority or sovereignty with respect to Germany were justifiable in international law, then the Allied Government of Germany should be held to be the Government of Germany, and it could exercise sovereignty in the guise of the German Government. If all occupation measures were taken as exercise of German sovereignty, international law, including law of belligerent occupation and the Hague Regulations, was not applicable to them, because the whole issue was a matter of domestic jurisdiction. But, was the Allied assumption of supreme authority justifiable in international law? In the Allied declaration regarding the assumption of supreme authority, it was stated that no central government or authority existed in Germany which was capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with Allied requirements. As a matter of fact, there existed in Germany of May 1945 the Government of Doenitz, which was allegedly the successor to Hitler's regime.³³⁶ Although the military situation prevented it from functioning effectively as the central government, it was still the only central government of Germany.³³⁷ However, the Allied Powers arrested Doenitz and his colleagues as war criminals and took over the government of Germany. Was this action lawful in international law?

The situation of Germany in May 1945 was a complete collapse of the

332. *In re Flesche*, (1949) Ann. Dig. 266, 267 (No. 87).

333. *In re Bauerle*, (1948) *ibid.* 292, 293 (No. 93).

334. *L. and J. J. v. Polish State Railways*, 24 I. L. R. 77, 78 (1957).

335. *Recidivist (American Military Tribunal) Case*, (1951) *ibid.* 617 (No. 189).

336. Many German writers are against this view. See K. von Laun (n. 321 *supra*), *American Journal of International Law*, Vol. 45 (1951), p. 267.

337. *Ibid.*, p. 275.

national life both in the civil and military spheres. In the words of the U. S. Military Tribunal at Nuremberg, "The surrender was preceded by the complete disintegration of the central government, and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding."³³⁸ The unconditional surrender in May 1945 and the Four-Power declaration in the following month were, in essence, a formal recognition of this situation. According to rules of traditional international law the situation would have authorized the Allied Powers to annex the entire German territory, and then a complete "subjugation" of Germany would have been lawfully accomplished.³³⁹ However, the Allied Powers voluntarily refrained from exercising this right of annexation to the full extent. They assumed, instead, the right of supreme authority or the right of sovereignty unaccompanied by annexation. They chose to govern the territory of Germany not as an integral part of their own territories but in the name of a continuing German State.³⁴⁰ Their choice was, in a sense, a lesser exercise of the right to which they were entitled. Since international law does not prohibit a lesser exercise of such a right by a belligerent, the Allied assumption of supreme authority should be held to be lawful. To this kind of occupation resulting from a legitimate exercise of the right of the victor the Hague Regulations did not apply.

(iv) *Tentative Conclusions*

From the foregoing observations of the Italian, the East European, and the German situation, the following conclusions are tentatively drawn as to the applicability of the Hague Regulations to a post-surrender occupation. It must be pointed out, however, that, since an unconditional surrender is a comparatively new institution in international law and since only limited state practice and judicial precedents regarding such a surrender are available, the tentative conclusions must rely heavily on theoretical analysis rather than on an empirical approach.

An unconditional surrender of the entire armed forces of a belligerent gives the victor *de facto* freedom of action vis-à-vis the vanquished state and its people. From the legal point of view, this freedom includes the power to annex the territory of the vanquished state, to suppress its government, and to take over the government of the territory and people of that state.³⁴¹

338. *In re Alstötter and Others*, (1947) Ann. Dig. 278, 279 (No. 126).

339. C. C. Shears (n. 304 *supra*), *Proceedings of the American Society of International Law*, 39th Yr. (1945), n. 27 at p. 51.

340. R. Y. Jennings, "Government in Commission," *British Year Book of International Law*, Vol. 23 (1946), p. 137.

341. L. Oppenheim, *International Law*, Vol. 2 (n. 146 *supra*), p.553.

Nevertheless, the occupant's freedom of action is not unlimited. First of all, if all his requirements are complied with, an occupant is prohibited from continuing or resuming hostilities against the surrendering enemy. True, an unconditional surrender entitles an occupant to impose on the occupied state whatever terms he sees fit unless prevented by any previous commitment, but the very concept of an unconditional surrender implies the condition that fighting will cease and the lives of those surrendering will be spared. Otherwise, there is no point in the surrender, and those concerned might as well go on fighting.³⁴² An occupant, furthermore, is prohibited from inhumane treatment of the enemy soldiers and civilians, and this prohibition requires an examination of the applicability of the Hague Regulations to a post-surrender occupation.

The provisions of Section III of the Hague Regulations concerning military occupation of enemy territory are built around the principle of humanity and the principle of precariousness. The study in Sub-Section ii, Section 1 of this Chapter made clear that the principle of humanity is applicable to a post-hostilities occupation of enemy territory in general. The principle is held to be applicable to a post-hostilities occupation, because the interests of civilian populations of all belligerents must be protected irrespective of the existence or non-existence of hostilities.³⁴³ The necessity to protect the interests of civilian populations likewise exists when the populations are living under the regime of a post-surrender occupation. In advocating the application of the Hague Regulations to the Allied occupation of Germany, von Laun argues that the populations of occupied territory are most in need of the protection of the Regulations when their armies and state have collapsed and can do nothing to protect them. He quotes part of the Preamble to the Fourth Hague Convention of 1907, which reads: "[T]he high contracting parties ... declare that, in cases not included in the Regulations adopted by them, the inhabitants ... remain under the protection and the rule of the principles of the law of nations, as they result ... from the law of humanity, and from the dictates of the public conscience."³⁴⁴ It was pointed out, in the preceding Sub-Section, that the Hague Regulations as such were not applicable to the Allied occupation of Germany. However, this is not to deny that the principle of humanity should have governed Allied dealings with the lives and property of the German people. In other words, not necessarily the words, but at least the spirit, of the provisions of the Hague Regulations stemming from the principle of humanity should have governed the post-surrender relations between the occupant and the civilian populations of the occupied state.

This statement finds endorsement in some of the provisions of the Convention relative to the Protection of Civilian Persons in Time of War

342. G. Fitzmaurice (n. 151 *supra*), *Recueil des Cours*, Tome 73 (1948-II), p. 269.

343. See p. 41, No. 20 of this *LAW REVIEW* (1986).

344. K. von Laun, (n. 321 *supra*), *American Journal of International Law*, Vol. 45 (1951), p. 275. For the text of the Hague Regulations see n. 157 *supra*.

which was adopted at the International Conference of Geneva of 1949. Article 2 of the Convention provides that the Convention shall apply to all cases of war or armed conflict and also to cases of partial or total occupation of a signatory's territory.³⁴⁵ This includes an occupation resulting from an armistice or capitulation.³⁴⁶ Moreover, Article 6 provides that, in the case of occupied territory, the Convention shall cease to apply one year after the general close of military operations, but some important provisions for the protection of civilians—including the prohibition of pillage and the prohibition of reprisals against private property as well as of unnecessary destructions thereof (Articles 33 and 53)—continue to apply as long as an occupying power exercises the functions of government over the territory.³⁴⁷ Finally Article 47 prohibits any deviation from the benefits of the Convention prescribed for civilian populations by means of agreement between an occupying state and the occupied one.³⁴⁸

Admittedly, it is a moot question which particular provisions of the Hague Regulations stem from the principle of humanity. It must not be forgotten that, while the Fourth Geneva Convention of 1949 elaborated the protection of the personal rights of civilian populations under enemy occupation, the protection of their property rights was left in much the same from as under the Hague Regulations of 1907.³⁴⁹ Nevertheless, the current U. S. Army Field Manual states that:

[C]ertain designated provisions of the Geneva Conventions of 1949 ... continue to be operative, notwithstanding the termination of any antecedent hostilities, during the continuance of a military occupation. Insofar as the unwritten law of war and the Hague Regulations extend certain fundamental safeguards to the persons and property of the populations of occupied territory, their protection continues until the termination of any occupation having its origin in the military supremacy of the occupant, notwithstanding the fact that the Geneva Convention relative to the Protection of Civilian Persons may have ceased to be applicable.³⁵⁰

The provisions of the Hague Regulations concerning an occupant's treatment of private enemy property are primarily based on the principle of humanity.³⁵¹ Since the Hague Regulations are not necessarily applicable

345. *United Nations Treaty Series*, Vol. 75 (1950), p. 287ff. See also *Final Record of the Diplomatic Conference of Geneva of 1949* (n. 141 *supra*), Vol. 1, p. 297ff.

346. International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949 Commentary* (n. 142 *supra*), 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War, p. 22.

347. For the text, see n. 345 *supra*.

348. *Ibid.*

349. See p. 38, No. 20 of this *LAW REVIEW* (1986).

350. *FM 27-10: The Law of Land Warfare* (n. 149 *supra*), Para. 10 at pp. 8-9.

351. See p. 36, No. 20 of this *LAW REVIEW* (1986).

to a post-surrender occupation, the detailed procedure prescribed in Articles 48, 49, 51–54, and 56 may not literally apply to an occupant's dealing with private enemy property. But, the respect for private enemy property as well as the prohibition of confiscation and pillage are drawn essentially from humanitarian considerations. Furthermore, the concept of an unconditional surrender presupposes the saving of the lives of those surrendering. Therefore, it is proper to conclude that private enemy property must be protected to the extent that the lives of individual civilians in occupied territory can be maintained at least on the subsistence level.

The question remains if the provisions of the Hague Regulations based on the principle of precariousness apply to a post-surrender occupation. An answer to this question depends upon, above all, whether or not an unconditional surrender is accompanied by political terms of surrender, which may constitute an advance commitment on the part of a victor regarding his post-surrender treatment of a vanquished state and its people, and secondly, upon the form and substance of such terms.

First, when an unconditional surrender is not accompanied by any such terms, as was the case with Germany, a victor or occupant may impose on a vanquished state whatever terms it sees fit so long as they do not violate the principle of humanity. Since it may suppress the existing government of the vanquished state and assume the government thereof, the principle of precariousness may claim no validity in this type of post-surrender occupation. The provisions of the Hague Regulations stemming from that principle do not apply to such an occupation. It might be added that, as long as an occupant chooses to retain the existing government of the vanquished state in power, its sovereignty, however nominal, will remain in the hands of that government, and an occupant must work through the government unless the sovereignty is transferred or ceded to him by an agreement.³⁵²

Second, when an unconditional surrender is accompanied by political terms of surrender, the validity of the principle of precariousness in terms of a post-surrender occupation depends upon the form and substance of those terms. If those terms set limits to the scope of an occupant's freedom of action and if, in particular, they presuppose a recognition and continuation of the existing government of a vanquished state and eventual withdrawal of occupying forces, then the principle of precariousness is pertinent to a post-surrender occupation, and the provisions of the Hague Regulations stemming from this principle should apply to such an occupation in so far as they are not curtailed by the terms of surrender.

On the other hand, when the form and substance of political terms of surrender set no limits to an occupant's freedom of action and if, in particular, they presuppose suppression of the existing government of a vanquished state and eventual annexation of occupied territory, then the provisions of the Hague Regulations based on the principle of

352. R. Y. Jennings (n. 340 *supra*), *British Year Book of International Law*, Vol. 23 (1946), p. 137.

precariousness should not be considered applicable. The basic difference between the post-surrender situation in Italy or the East European states and that in Germany was that, while the Allied Powers dealt with the governments of the former, they completely suppressed the government of the latter. Even in the case of occupation resulting from a general armistice, some domestic tribunals rejected the application of the Hague Regulations to it on the ground that the peace treaty, which would soon come into force, had provided for annexation of the territory. Thus, on November 3, 1922, the Court of Cassation of Rome, Italy, held that Trieste could not be regarded as foreign territory after the dismemberment of Austria-Hungary.³⁵³ The German Reichsgericht followed suit, in its judgment of March 9, 1933, recognizing that Italy as the occupant of Trieste should be entitled to wield state authority.³⁵⁴

As for the applicability of the Hague Regulations to a post-surrender occupation, two other factors might be briefly looked into. They are the length of an occupation and deviation from the Hague Regulations by means of an armistice agreement. First, even if an eventual return of occupied territory to the original sovereign is expected, an occupant sometimes finds it difficult to comply strictly with the Hague Regulations when the occupation extends for a long period of time and administrative necessity requires measures of a lasting character.³⁵⁵ In this eventuality, flexible application of the Regulations would be inevitable. Second, both the armistices of 1918 and those of the Second World War period show that in an armistice agreement an occupant often demands and acquires powers more extensive than those recognized under the Hague Regulations.³⁵⁶ The case with Italy is mentioned elsewhere in the present thesis.³⁵⁷ The U. S. S. R. measures of denazification in the occupied East European states supply another example.³⁵⁸ If international law allows a military occupant of enemy territory to obtain, through an armistice, powers more extensive than those admitted to a belligerent occupant by the Hague Regulations, this should *a fortiori* hold true for an instrument of unconditional surrender. The application of the Hague Regulations to a post-surrender occupation may be curtailed in this way.

353. *Galatiolo v. Senes*, (1919–1921) Ann. Dig. 453, 454 (No.319).

354. *In re Fabijan*, (1933–1934) *ibid.* 360, 368 (No. 156).

355. See, for example, Norman Bentwich, "The Legal Administration of Palestine under British Military Occupation," *British Year Book of International Law*, Vol. 1 (1920–1921), pp. 145 and 148.

356. For the text of the armistices of 1918, see n. 153 *supra*.

357. See pp. 20–21 *supra*.

358. See p.57, No. 20 of this *LAW REVIEW* (1986).

CHAPTER 5

THE U. S. PRACTICE IN JAPAN AND INTERNATIONAL LAW

It is tentatively concluded in the preceding Chapter that the applicability of the Hague Regulations to a post-surrender occupation is determined, for one thing, by the existence or non-existence of political terms of surrender which may constitute an advance commitment on the part of a victor state regarding post-surrender treatment of a vanquished state and its people, and for another, by the form and substance of those terms. When those terms presuppose continuation of the existing government of a vanquished state and eventual withdrawal of occupation forces, then the Hague Regulations should apply. But, when those terms presuppose suppression of the existing government of a vanquished state and annexation thereof, the Hague Regulations are not applicable. It must also be pointed out that those terms may entitle a victorious occupant to powers more extensive than those recognized under the Hague Regulations.

Thus, in order to determine whether the Hague Regulations were applicable to the U. S. occupation of Japan, it is necessary to examine, first, whether there existed such terms in the case of Japan, and if so, whether they favor the application of the Hague Regulations. For the purpose of this examination, it is proposed to look into the similarities and differences between the conditions surrounding the Japanese and the German surrenders.

Section 1 : The Similarity and Difference between the Japanese and the German Situations

(i) *The Legal Nature of the Japanese Surrender : The Similarity of the Japanese and the German Situations*

It must be noted at the outset that writers often assimilate the post-surrender situation of Japan to that of Germany. They observe that, in both cases, the victor's freedom of action vis-à-vis the vanquished was not limited by the general rules of international law on belligerent occupation, in particular by the Hague Regulations.

For example, Lauterpacht in Oppenheim's treatise on international law explains that, while an ordinary armistice — even if dictated by the victor — is still in the nature of an agreement signed by both sides and prescribing exhaustively the rights and obligations arising thereunder, this is not the case with regard to an instrument of surrender. In the latter, the explanation goes, there is no legal limit set to the victor's freedom of action: The victor may totally suppress the government of the defeated state, as was the case in Germany. "A similar right was reserved ... in the case of

Japan.”³⁵⁹ Some Continental writers seem to share the same view. Contrary to an occupation resulting from an armistice, one of them states, this new type of occupation, whether resulting from an agreement or an unconditional surrender, enables the occupant to go beyond the Hague Regulations. “The occupation of Germany and Japan ... constituted that type of occupation. The unconditional surrenders of these two states, as a consequence, submitted them to the will of the victorious states.”³⁶⁰

These arguments represent not only the views of many individual writers but also the official view of the United States as well. It may be recalled that, in his message to General MacArthur on September 6, 1945, President Truman stated that, since the Allied relations with Japan did not rest on a contractual basis but on an unconditional surrender, SCAP’s authority was supreme, and MacArthur should not entertain any question on the part of the Japanese as to the scope of his authority.³⁶¹

It is true that the original U. S. plan regarding the post-surrender policy for Japan was to assimilate a Japanese surrender to the surrender of Germany. The U. S. Initial Post-Defeat Policy relating to Japan, which was completed in June 1945 as an predecessor to the U. S. Initial Post-surrender Policy for Japan, was based on the assumption that, upon an unconditional surrender or total defeat of Japan, the supreme Allied commander would exercise supreme authority over the domestic and foreign affairs of the Japanese Empire, and that the powers of the Emperor and the powers and functions of all instrumentalities which participated in the formation of national policies should be simultaneously assumed by the Allied military government.³⁶² Even after the issuance of the Potsdam Declaration, the State-War-Navy Coordinating Committee endeavored to put a Japanese surrender on the same footing with the German surrender. Thus, on August 10, 1945, its “*ad hoc*” Committee on the Legal Implications of Unconditional Surrender reported that the earlier documents prepared for a Japanese surrender needed to be rewritten in order to free the Allied supreme commander from “the restrictions in various international conventions,” and to make the legal rights of the victorious occupant “identical with those of the Control Council for Germany.”³⁶³ To attain this purpose, it was planned that the Allied supreme commander was, beside promulgating a document on unconditional surrender of the Japanese armed forces, to issue the following proclamation:

The Emperor of Japan has announced the unconditional surrender of the Japanese Imperial High Command and of all Japanese armed forces, and Japan ... is no longer capable of

359. L. Oppenheim, *International Law*, Vol. 2 (n. 146 *supra*), p. 553.

360. Paul Guggenheim, *Traité de droit international public* (2 vols., Genève: Georg, 1954), Tome 2, p. 469. See also Charles Rousseau, *Droit international public* (n. 278 *supra*), p. 592; *Le droit des conflits armés* (Paris: A. Pedone, 1983), pp. 209–210.

361. See p.32, No. 20 of this *LAW REVIEW* (1986).

362. U. S., *Foreign Relations*, 1945 Vol. 6, p. 555.

363. *Ibid.*, pp. 593–594.

resisting the will of the victorious powers. The unconditional surrender of Japan has thereby been effected, and Japan has become subject to such requirements as may now or hereafter be imposed on her.

Although in these circumstances the victorious powers have both the legal right and power to take whatever steps regarding Japan they may deem appropriate, including the termination of Japan's existence as an independent State, it is not their intention that the Japanese people shall be enslaved or that Japan shall be destroyed as a nation. But it is their purpose to assume such powers and impose such requirements upon Japan and the Japanese people as may be necessary for the accomplishment of the declared aims and purposes of the victorious powers.

Now therefore, I ... make the following declaration: The Governments of [the victorious powers] hereby assume supreme authority with respect to Japan, including all the powers possessed by the Emperor ... , the Japanese Government, the Japanese Imperial High Command, and any regional, prefectural, municipal or local government or authority. The assumption ... of the said authority and powers does not effect the annexation of Japan....³⁶⁴

Had events taken this course, the surrender of Japan might have been similar to that of Germany, except that there existed in Japan a functioning central government and well organized armed forces. It might have been possible for the Allied Powers to rely on the legal argument which they used in regard to Germany: Due to the assumption of supreme authority over Japan, the occupying forces might have been able to disregard the Hague Regulations in their dealings with Japan and its people. On the contrary, the Japanese acceptance of the Potsdam Declaration required a drastic revision of the Initial Post-Defeat Policy relating to Japan in line with the Declaration. In revising the document the U. S. Government had to take account of the fact that, while the Allied assumption of supreme authority with respect to Germany was based on the non-existence of a German Government, this was not the case in Japan. Late in August 1945 the revision was completed, producing the Initial Post-Surrender Policy for Japan.³⁶⁵ In this revised document it was stated that the U. S. occupation policies were to be executed through the Japanese Government.

Nonetheless, there is no denying the fact that the Japanese and the German situations shared some characteristics in common. First, both Japan and Germany survived their respective unconditional surrenders as states. Second, the state of war between these states and the Allies subsisted after the unconditional surrenders. Third, the unconditional surrenders were of a military nature in both cases.

364. *Ibid.*, pp. 596-597. Compare with the Four-Power declaration of June 1945 regarding Germany at p. 59, No. 20 of this *LAW REVIEW* (1986).

365. See n. 25 *supra*.

Undoubtedly, Japan survived the unconditional surrender as a state. It was clearly stated in the Potsdam Declaration that the Allied Powers did not intend to destroy Japan as a state. In the Presidential proclamation of December 31, 1946, ending the hostilities of the Second World War, the U. S. Government made it clear that, even after the cessation of hostilities, the state of war continued to exist vis-à-vis Japan until a treaty of peace was concluded.³⁶⁶ In fact, the Treaty of Peace with Japan, which became effective in April 1952, provided in Article 1 that: "The state of war between Japan and each of the Allied Powers is ... terminated as from the date on which the present Treaty comes into force between Japan and the Allied Powers concerned...."³⁶⁷

Prior to that time the U. S. Government as well as U. S. courts regarded Japan as an enemy state and treated occupied Japanese territories as enemy territories. For example, dealing with a private claim arising from an automobile accident which had been caused by a U. S. soldier of the occupation army in Okinawa, the U. S. District Court for the Northern District of California stated as follows in its decision of February 18, 1948:

Plaintiff has presented the ... contention that Okinawa ... because it has been militarily conquered and is under the exclusive military domination of the United States, is a part of the domain of the United States as its conqueror.

But this contention is basically unsound, because, under international law ... conquest alone does not make a foreign country any less foreign....

Furthermore, it appears from the record that the Department of State, in conformity with [this principle], has declared Okinawa to be foreign territory under military occupation of the United States.³⁶⁸

In the same vein, in dealing with the question whether an American had lost his citizenship by voting in an election in occupied territory, two Circuit Courts of Appeals held that Japan and Germany during the American occupation had been foreign states.³⁶⁹

As in the case of Germany, the unconditional surrender applied exclusively to the armed forces of Japan. Throughout the provisions of the Potsdam Declaration and the Instrument of Surrender a reference was made to "the unconditional surrender of the Japanese armed forces."³⁷⁰ A careful examination of the first Allied statement, issued exclusively toward Japan, makes this point further clear. Addressing the Japanese people on the day of the German surrender, President Truman specifically remarked

366. Proclamation No. 2714 in U. S., *Federal Register*, Vol. 12 No. 1 (January 1, 1947), p. 1.

367. *United Nations Treaty Series*, Vol. 136, p. 45ff.

368. *Brewer v. United States*, 79 F. Supp. 405 at 405-406.

369. *Acheson v. Wohlmuth*, 196 F. 2nd, 866 (D. C. Cir.); *Acheson v. Kuniyuki*, 189 F. 2nd, 741 (9th Cir.).

370. See pp. 7-10, No. 20 of this *LAW REVIEW* (1986).

that:

The Japanese people have felt the weight of our land, air and naval attacks....

The longer the war lasts, the greater will be the suffering and hardships which the people of Japan will undergo — all in vain. Our blows will not cease until *the Japanese military and naval forces lay down their arms in unconditional surrender.*

Just *what does the unconditional surrender of the armed forces of Japan mean for the Japanese people?*

It means the end of the war.

It means the termination of the influence of the military leaders who brought Japan to the present brink of disaster.

It means provision for the return of soldiers and sailors to their families, their farms, and their jobs.

It means not prolonging the present agony and suffering of the Japanese in the vain hope of victory.

Unconditional surrender does not mean the extermination or enslavement of the Japanese people.³⁷¹

It is obvious, in this statement, that the emphasis was laid intentionally on the military nature of an unconditional surrender of Japan. When Acting Secretary Grew recommended that President Truman issue a statement in clarification of the terms of surrender for Japan, he put down in his draft that, in the interest of common humanity, "[W]e call upon those in authority in Japan to proclaim now the unconditional surrender of all the Japanese armed forces."³⁷² This phrase is essentially the same in the corresponding part of Stimson's draft, which eventually became the text of the Potsdam Declaration.³⁷³

That an unconditional surrender was only applicable to armed forces was the understanding of the Japanese Government too. After the Allied Powers issued the Potsdam Declaration, the Japanese Foreign Office drafted a document entitled "An Examination of the Potsdam Declaration" for use by the Japanese Government.³⁷⁴ In this document it was mentioned that the term unconditional surrender referred only to "the Japanese armed forces." The execution of the unconditional surrender of the entire Japanese forces required great efforts on the part of the Japanese Government. Therefore, in its note to the Allied Powers of August 16, 1945, the Japanese Government requested that, since the unconditional surrender of the Japanese forces was most delicate task involving 3,000,000 officers and men overseas, the Allies allow them, under the command of the

371. U. S., *Department of State Bulletin*, Vol. 12, p. 886. Emphasis supplied.

372. U. S., Department of State, Record Service Division, Unconditional Surrender of Japan: Proposed Statement of United Nations War Aims (File No. 740. 0011 EW/5-3145). For a different version of the original draft, see n. 2 *supra*.

373. See p. 9, No. 20 of this *LAW REVIEW* (1986).

374. Gaimu-sho, *Shi-Roku* (n. 12 *supra*), Vol. 2, pp. 527-533.

Emperor, to disarm themselves and to surrender their arms of their own accord, and that Article 35 of the Hague Regulations be applied respecting the honor of the soldiers.³⁷⁵ It bears mention that MacArthur vehemently reacted to this request, suggesting that it went to the point of preferential treatment of Japanese soldiers and that the Potsdam Declaration should be put into effect as drawn.³⁷⁶ SACP seems to have been well aware of the military nature of the unconditional surrender.

(ii) *The Potsdam Declaration and the Instrument of Surrender as the Allied Commitment regarding Post-Surrender Treatment of Japan: The Difference between the Japanese and the German Situations*

Despite all these similarities, there was a fundamental difference between the post-surrender situation of Japan and that of Germany. This difference relates to the question whether there were political terms of surrender, in the case of Japan, which would constitute the Allies' as well as Japan's advance commitment regarding post-surrender treatment of Japan and the Japanese people.

It might be recalled that the Yalta Proclamation of February 1945 indicated that, until the final defeat of Germany had been completed, the Allied Powers would not publish the terms to be imposed on Germany and the German people.³⁷⁷ Thus, the Allies avoided any advance commitment as to their post-surrender treatment of Germany and the Germans. After the capitulation of German armed forces the Allies proceeded to assume supreme authority with respect to Germany, and the subsequent occupation measures were taken as the exercise of this authority. The assumption of supreme authority was a unilateral act on the part of the victorious Allies. In contrast to this, the Allied or American occupation measures toward Japan were, in most cases, taken as the implementation of certain provisions of the Potsdam Declaration incorporated in the Instrument of Surrender. True, the Potsdam Declaration and the Instrument of Surrender constituted a commitment on the part of Japan as to the post-surrender treatment to be accorded to it by the Allied Powers, but at the same time, it is submitted, the provisions of these documents should be considered an advance commitment on the part of the Allies as to their post-surrender treatment of Japan and the Japanese people.

The Japanese surrender took an entirely different course from that of Germany. The study in Chapter 2 indicated that the United States, Great Britain, and China issued the Potsdam Declaration to make clear what an unconditional surrender would imply with respect to Japan. The Declaration included Allied demand for the unconditional surrender of

375. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 668-669.

376. *Ibid.*, p. 671.

377. See p. 11 *supra*.

Japanese armed forces. But, along with that demand, the Potsdam Declaration enumerated the terms on which Japan was given an opportunity to end the war. It was also stated in the Declaration that the Allied Powers would not deviate from those terms. Thus, the Instrument of Surrender, which incorporated the Potsdam Declaration, consisted of two parts: One, which was of a military nature, providing for the unconditional surrender of Japanese armed forces; the other, which was of a political nature, providing for post-surrender treatment of Japan and the Japanese people. This second part should be regarded as constituting an Allied commitment toward Japan.

However, there is a view which asserts that the Instrument of Surrender was not an international agreement and that the provisions of the Potsdam Declaration were not legally binding on the Allied Powers. As noted earlier, President Truman in his message to SCAP on September 6, 1945, stated that the Allied relations with Japan did not rest on a contractual basis but on an unconditional surrender.³⁷⁸ His message then went on to say that:

The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East.³⁷⁹

Nevertheless, the validity of this view is dubious, considering the circumstances under which it was put forward.

As a matter of fact, this message was drawn up by the U. S. Department of State in connection with its demand for the closing of Japanese overseas missions in neutral states. Immediately after the Japanese Government notified the Allied Powers of its final acceptance of the Potsdam Declaration on August 14, 1945, the Department moved to close the Japanese diplomatic and consular missions in neutral states and to secure the transfer to the Allies of all property and archives possessed by the missions, including those protected in neutral hands. But, upon receipt of the U. S. notice to this effect the Japanese Government replied that it was unable to comply with the notice since it did not correspond to any provision of the Potsdam Declaration accepted by Japan.³⁸⁰ In the eyes of the Department of State this reaction on the part of the Japanese Government was "a matter of great importance."³⁸¹ Therefore, the Department recommended that the President send SCAP the message which it had drawn up concerning the occupant's authority vis-à-vis the Japanese

378. See p. 32, No. 20 of this *LAW REVIEW* (1986).

379. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 711-712.

380. *Ibid.*, pp. 663-664 and 677.

381. U. S., National Archives, Record Group No. 165, SCAP, Command, Manila, P. I.

Government.³⁸² At the same time SCAP was requested by the Department of State to issue a directive ordering the Japanese Government to instruct its overseas missions to close and to turn over their property and archives to Allied representatives.³⁸³ In October 1945 SCAP issued a directive to that effect, and despite repeated protest from the Japanese Government it was finally carried out.³⁸⁴

A clear implication of this incident is that, in dealing with the Japanese Government, the U. S. Government followed, at least in form, the procedure which was provided for by the Instrument of Surrender. The Potsdam Declaration did not contain any provision regarding procedures to implement its terms. This point was taken note of by the Allied Powers when they prepared the draft Instrument of Surrender. As a result, in the formal Instrument of Surrender presented by the Allies, the Japanese Government undertook to take whatever action might be required by SCAP for the purpose of giving effect to the Potsdam Declaration.³⁸⁵ It was in accordance with this provision that the U. S. Government instructed SCAP to issue the directive in question. Indeed, SCAP relied on the same provision in issuing the directives relating to those specific occupation measures which were studied in Chapter 2 and which affected Japanese private property. If the Potsdam Declaration, which was presented by the Allies and accepted by Japan, had established no legal bond between them, it would not have been necessary for the former to insert that particular provision in the Instrument of Surrender and to invoke it in its dealings with the latter. Discussing the legal implication of the Potsdam Declaration, a noted American specialist on Japan writes:

The fact that the United States government has chosen officially to adopt the view that these stipulations do not constitute conditions possessed of any binding contractual force does not of itself preclude or invalidate variant interpretations by other interested parties.³⁸⁶

The fact that the relevant document was entitled an instrument of surrender might be held to affect its legal nature. The study in the preceding Chapter indicated that the title of a document causing cessation

382. U. S., *Foreign Relations*, 1945 Vol. 6, p. 711.

383. See n. 381 *supra*.

384. SCAPIN 189. For the text, see SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 2, p. 473; Gaimu-sho, *Bunsho-shu* (n. 31 *supra*), Vol. 2, pp. 40–41; University of Tokyo, *Kenkyu* (n. 31 *supra*) Vol. 4, pp. 55–57. For a critical view of this U. S. action, see University of Tokyo, *Kenkyu* (*supra*), Vol. 4, pp. 46–47 (Study Section). See also U. S., *Foreign Relations*, 1945 Vol. 6, pp. 819–820. It may be noted that some Japanese overseas agents kept refusing to comply with the directive as late as mid-1947. See SCAP, General Headquarters, Government Section, Courts and Law Division, *Chronological File*; Memorandum for the Chief, Government Section, from J. D. Conners on the Authority of SCAP to Punish Former Japanese Consular-General, August 19, 1947 (U. S., National Archives).

385. See p. 10, No. 20 of this *LAW REVIEW* (1986).

386. Robert E. Ward, "The Origins of the Present Japanese Constitution," *American Political Science Review*, Vol. 50 (1956), p. 982.

of hostilities should not be given too much weight in ascertaining its legal nature,³⁸⁷ though the title does in some degree point to the intention of the parties. The documents which brought about the cessation of hostilities between Italy or the East-European states and the Allies were entitled "armistice," in contrast to the corresponding German or Japanese document which was entitled "act of military surrender" or "instrument of surrender." As a legal concept, an armistice differs from a surrender in that the former envisages, and the latter does not, the possibility of resumption of hostilities by both belligerents. Nevertheless, in its decision of January 16, 1948, a British court regarded the German surrender as constituting an armistice, despite the publication of a contrary view by the Foreign Office.³⁸⁸ To the mind of the learned judge it seemed there had been an armistice, in this particular case, "where I find a cessation of active hostilities for an indefinite time and in such circumstances as gave rise to a general expectation that they would not be resumed."³⁸⁹

In a similar tone, Fitzmaurice explains that:

[T]he element of mutual agreement is not wholly lacking, even in an unconditional surrender. It is really, in law, a kind of armistice, because although, following upon the surrender, the victor can impose what terms he pleases, yet it is conceived that those surrendering would, if in a position to do so, be entitled to resume hostilities if, for instance, the victor went on bombing their cities despite the surrender ; for this would be inconsistent with the fundamental basis of surrender, namely that active hostilities should cease.³⁹⁰

The writer is referring to an unconditional surrender like that of Germany. But his argument holds true for a surrender document which contains provisions of a political nature. Speaking of the effect of the protocol of surrender signed by Belgium and Germany on May 28, 1940, the Court of Appeal of Ghent, Belgium, stated that: "Surrender is a form of armistice ... ; it is military, is imposed by the will of the conqueror.... Such a surrender is binding on the State and must, in conformity with Article 35 of the Hague Convention of 1907 and according to international law, be scrupulously observed by the two parties. A violation of the Protocol of Surrender would, according to international law, confer on the other signatory the right to denounce it...."³⁹¹

True, the document connected with the Japanese surrender was entitled an Instrument of Surrender. But the current British Manual of Military Law refers to the Potsdam Declaration, incorporated into the Instrument of Surrender, as the "Armistice with Japan" in one part, while in another part

387. See p. 14 *supra*.

388. *Re Orchard*, (1948) 1 All Eng. L. R. 203, 204.

389. *Ibid*.

390. Gerald Fitzmaurice (n. 151 *supra*), *Recueil des Cours*, Tome 73 (1948—II), note 2 at p. 269.

391. *De Deckere v. Belgian State*, (1955) I. L. R. 930, 931.

it assimilates the Japanese surrender to the German one.³⁹² Similarly, Schwarzenberger in his book on international law states that: "In all cases except that of Germany, the Allies of the Second World War found it advisable to conclude armistice conventions with their defeated enemies."³⁹³ In the same book he distinguishes armistice occupation, to which the Hague Regulations apply, from occupation subsequent to unconditional surrender, in which deviations from the law of belligerent occupation are allowed to the victor within the standard of civilization.³⁹⁴ Furthermore, in one of its decisions, the Netherlands-Japanese Property Commission described the Japanese Instrument of Surrender of September 2, 1945, as "the Armistice".³⁹⁵ These examples show that, in examining whether the Instrument of Japanese Surrender established a legal bond between Japan and the Allies, the title of the document does not provide much help.

For an evaluation of the legal implication of the provisions of the Potsdam Declaration, the more important factors are their substance and the situation in which the Declaration was issued. Here again, comparison between the Japanese and the German situations prior to their respective unconditional surrender is useful.

In Germany of May 1945 there was a complete collapse of national life in both civil and military spheres, but this was not true in Japan of August 1945. In other words, while there was *debellatio* in Germany, there was no *debellatio* in Japan. By *debellatio* is meant a complete submission of a state to another through military defeat, as a result of which the latter takes over the former's sovereignty and the former loses its statehood.³⁹⁶ Upon such a subjugation, international law authorizes the victor to take any action whatsoever vis-à-vis the vanquished state, including annexation. It was by virtue of this right that the Allied Powers assumed supreme authority with respect to Germany. In Japan of August 1945, however, there was an efficiently functioning central government. Moreover, its armed forces were defending the four main and minor adjacent islands of Japan as well as much larger overseas territories. Of course the chance of Japanese victory was nil, and the Allied, in particular the U. S., concern was to bring about the earliest possible Japanese surrender at the minimum of sacrifice in their manpower.³⁹⁷ An invasion of the Japanese home islands could not

392. *British Manual of Military Law* (n. 149 *supra*), note 3 at p. 133 and Para. 461 at p. 132.

393. Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (n. 147 *supra*), Vol. 2, p. 731.

394. *Ibid.*, p. 318.

395. Netherlands (The) in *re Op Ten Noort v. Japan*, *Japanese Annual of International Law*, No. 6 (1962), p. 178. See also 30 I. L. R. (1966) 515 at 517.

396. Louis Delbez, *Les principes généraux du droit international public* (3 éd. Paris: R. Pichon et R. Durand-Auzias, 1968), p. 599. See also Karl Strupp-Hans J. Schlochauer, *Wörterbuch des Völkerrechts* (Berlin: Walter de Gruyter, 1961), Vol. 2, pp. 336-337, and G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (n. 147 *supra*), Vol. 2, p. 320.

397. See p. 6, No. 20 of this *LAW REVIEW* (1986).

have met this requirement. The experience in Germany was proving that a mere unconditional surrender would not solve all post-surrender problems unless cooperation among the victorious states should be secured. Under these circumstances, it is presumed, the United States was ready to try any other alternatives that might best fit its need. Hence the issuance of the Potsdam Declaration!

It is interesting to note that inside the U. S. Government and even within the Department of State there had been a strong opposition to a specification of any surrender terms to Japan. For example, immediately after the issuance of the Potsdam Declaration, Assistant Secretary of State MacLeish contended that such an action would not make a Japanese surrender unconditional.³⁹⁸ At the same time the Department's Office of Far Eastern Affairs prepared a memorandum entitled "Comparison of the [Potsdam] Proclamation of July 26, 1945, with the Policy of the Department of State."³⁹⁹ The purpose of the memorandum was to clarify to what extent the Potsdam Declaration was consistent with the Department's policy regarding post-hostilities treatment of Japan. It was stated at the outset of the memorandum that: "The proclamation is a statement of terms addressed to Japan ... and to the Japanese government ... which if accepted would constitute an international agreement.... The contractual character of the surrender contemplated by the proclamation together with the allusion to "good faith" in paragraph 13, suggests that to some extent the execution of the terms is to be left to the good faith of the Japanese Government." Similarly, according to the memorandum drafted by the Japanese Foreign Office on August 9, 1945, in order to examine the provisions of the Potsdam Declaration, the declaration was understood to be a proposal of terms on the basis of which a cessation of hostilities should be agreed upon.⁴⁰⁰ Thus, in both the U. S. and the Japanese Government circles, there was the awareness that the provisions of the Potsdam Declaration possessed a contractual character.

Furthermore, it must not be overlooked that the provisions of the Potsdam Declaration presupposed obligations not only of Japan but also of the Allies. No doubt, most of the provisions of the Declaration prescribed obligations on the part of Japan. However, some provisions implied pledges on the part of the Allies. The Allies did not intend to enslave the Japanese people or to destroy Japan as a nation; the Japanese military forces, once disarmed, should be permitted to return to their home to lead peaceful lives; Japan's "sovereignty" was to be limited to the four main and other minor islands; and the Allied occupation forces should be withdrawn from Japan as soon as the objectives enumerated in the Declaration had been accomplished. If the Allies had acted in violation of any of these provisions, Japan could have legitimately protested against such actions.

398. U. S., *Foreign Relations*, Conference of Berlin 1945, Vol. 1, pp. 895-897 and 900-901.

399. *Ibid.*, Vol. 2, pp. 1284-1289.

400. Gaimu-sho, *Shi-Roku* (n. 12 *supra*), Vol. 2, pp. 527-533.

In fact, some of the dispositions of former Japanese territories, which were executed during the occupation, could not have been justified unless the Potsdam Declaration and the Instrument of Surrender had possessed the character of an armistice or a preliminary peace binding on both Japan and the Allies. In November 1943 the United States, Great Britain, and China issued the so-called Cairo Declaration, in which the governments of the three states made clear that, though they had no thought of territorial expansion for themselves, Japan should be deprived of Manchuria, Formosa, the Pescadores, and the Pacific Islands which it had seized and occupied since the beginning of the First World War, and that Korea should in due course become free and independent.⁴⁰¹ Thus, Article 6 of the Potsdam Declaration provided that the terms of the Cairo Declaration should be carried out and Japanese sovereignty be limited to the main four and other minor islands. In April 1947 the United Nations Security Council established the U. S. trusteeship over the Pacific Islands under Japanese mandate. In November of the same year the United States representative at the United Nations voted for the establishment of a national government of Korea. These measures were criticized on the ground that they should have awaited the making of a peace with Japan.⁴⁰² Some contended that a surrender of Japanese sovereignty over the areas specified in the Cairo Declaration had taken place by the Instrument of Surrender,⁴⁰³ but this contention is untenable in view of both the attitude of the U. S. Government, as described above,⁴⁰⁴ and the provisions of the Peace Treaty with Japan stipulating Japanese acceptance or recognition of these measures.⁴⁰⁵ The most probable answer is that Japan had agreed in the Instrument of Surrender to the Allied disposition of certain of its territories within the framework of the Potsdam Declaration, with the understanding that such dispositions would be formally recognized by the coming peace treaty.

All in all, therefore, the provisions of the Potsdam Declaration incorporated into the Instrument of Surrender should be regarded as constituting the terms of surrender for Japan as well as the advance commitment on the part of the Allies as to their post-surrender treatment of Japan and the Japanese people — an international agreement binding on both sides.

401. U. S., *Department of State Bulletin*, Vol. 9, p. 393.

402. H. Duncan Hall, "The Belligerency of the Mandated Territories during the Second World War," *British Year Book of International Law*, Vol. 24 (1947), p. 389.

403. Pitman B. Potter, "Legal Basis and Character of Military Occupation in Germany and Japan," *American Journal of International Law*, Vol. 43 (1949), p. 324.

404. See p. 34 *supra*.

405. For the text of the Treaty, see n. 367 *supra*. Article 2 (a) provides that: "Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea," and Article 2 (d) that: "Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan."

(iii) *The Legal Basis and Characteristics of the U. S. Occupation*

Assuming that the Potsdam Declaration and the Instrument of Surrender constituted an international agreement entered into between the Allied Powers and Japan in regard to the former's treatment of the latter and its people in the period subsequent to the unconditional surrender, the U. S. occupation of Japan had its legal basis in this agreement. Article 7 of the Declaration read: "Until such a new order [of peace, security, and justice] is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth," and Article 12 provided: "The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government."⁴⁰⁶ These provisions indicate that the purpose of the occupation was to insure the attainment of the objectives stated in the Declaration. In the past a state sometimes occupied the territory of another as a means to guarantee performance of the latter's international obligations.⁴⁰⁷ The occupation of the territories of the Central Powers by the Allied and Associated Powers under the 1918 armistices present good examples. The U. S. occupation of Japan fell into this category: In the eyes of the Japanese it constituted a kind of guarantee occupation.⁴⁰⁸

It might be pointed out that the provisions of Article 6 suggest not a total but a partial occupation of Japanese territory. Originally, a draft Article submitted to the British delegation at Potsdam read: "Japanese territory shall be occupied to the extent necessary to secure the achievement of the basic objectives we are here setting forth...."⁴⁰⁹ But the British delegation proposed a revision of the sentence so that it would run: "[P]oints in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth."⁴¹⁰ The revision was accepted by the U. S. delegation and was incorporated into the final text.⁴¹¹ The British Government had been for a symbolic, though effective, occupation of only a certain number of points in Japan, including

406. For the text of the Potsdam Declaration, see Appendix I *infra*.

407. For a military occupation of foreign territory other than belligerent occupation, including "guarantee occupation," see Raymond Robin, *Des occupations militaires en dehors des occupations de guerre* (n. 133 *supra*).

408. Gaimu-sho, *Shi-Roku* (n. 12 *supra*), Vol. 2, pp. 528–529.

409. U. S., *Foreign Relations*, Conference of Berlin 1945, Vol. 2, pp. 1275–1276.

410. *Ibid.*, pp. 1277 and 1279–1281.

411. *Ibid.*, pp. 1474–1476.

ports with Allied war vessels in them.⁴¹² Actually, upon its acceptance of the Potsdam Declaration, the Japanese Government requested that the number of the points to be occupied by the Allied Forces be limited to a minimum and that the size of the occupation forces be kept small.⁴¹³ As it turned out, the U. S. forces occupied all parts of Japanese territory.

In regard to the U. S. occupation of Japan, two other characteristics bear mention. One is its limited purpose, and the other is its military, though non-belligerent, character.

The fact that the U. S. occupation was based on an international agreement implies that the purposes and, accordingly, the scope of authority of the occupant should be primarily regulated by the provisions of the agreement. In this respect too, the U. S. occupation of Japan differed greatly from that of Germany. In the case of Germany, the occupation was a direct outcome of the hostilities and the unconditional surrender. Since it was a unilateral act on the part of the occupant, only general rules of international law governed the relations between the occupant and the occupied.⁴¹⁴ In the case of Japan, the application of the general rules was to be affected by the provisions of the agreement on which the occupant's authority was based. The purpose of the U. S. occupation of Japan was to secure the achievement of the basic objectives set forth in the Potsdam Declaration. Therefore, the occupant was, in principle, not entitled to administer the occupied state unless it should be essential in order to attain the stated objectives. According to the U. S. Initial Post-Surrender Policy for Japan "The Japanese Government will be permitted ... to exercise the normal powers of government in matters of domestic jurisdiction," and even when changes in the form of Government initiated by the Japanese people or government "[involve] the use of force ... the Supreme Commander should intervene only where necessary to ensure the security of his forces and the attainment of all other objectives of the occupation."⁴¹⁵

The U. S. occupation of Japan differed from the other post-surrender occupations in World War II, as the Japanese home islands were occupied only after the general cessation of hostilities. By the time the first occupation forces arrived in the hitherto unoccupied parts of Japan, the disarmament and demobilization of Japanese armed forces were well under way, and there was almost no conflict between the Japanese and the occupation personnel. In this sense, it was a peaceful occupation.

However, such peacefulness did not deprive the U. S. occupation of its military character. The U. S. Initial Post-Surrender Policy for Japan

412. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 582-584. For the British policy toward Japan after the latter's defeat, see Royal Institute of International Affairs, *Japan in Defeat: A Report by a Chatham House Study Group* (London: Oxford University Press, 1945).

413. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 668-669.

414. See Chapter 4, Section 4, (iv) *supra*.

415. Part II -2. For the text, see n. 25 *supra*.

stated that: "There will be a military occupation of the Japanese home islands to carry into effect the surrender terms.... The occupation shall have the character of an operation in behalf of principal allied powers acting in the interests of the United Nations at war with Japan."⁴¹⁶ Since the occupation forces were mainly composed of army personnel, the War Department exerted a great influence in the planning and, particularly in the implementation, of the occupation measures. Moreover, the U. S. Government traditionally tended to give a commander in the field only general instructions, with a very wide liberty to interpret and implement them as he saw or might see fit.⁴¹⁷ Due to good cooperation by the Japanese Government, action by the occupation forces were seldom called for, but they reserved the right to act directly if the Japanese authorities did not meet the requirements of the occupant in effectuating the surrender terms. In the ultimate analysis the execution of occupation measures relied on the use of force.⁴¹⁸

Section 2 : The Applicability of the Hague Regulations to the U. S. Occupation of Japan

Did the provisions of the Instrument of Surrender, incorporating those of the Potsdam Declaration, presuppose the continuation of the Japanese Government as well as an eventual withdrawal of the occupation forces? Did these provisions prevent the Hague Regulations from applying to the U. S. occupation of Japan or did they favor such application?

It is unquestionably clear that the occupation of Japan was not intended to develop into an annexation. In the Potsdam Declaration the Allied Powers made known that they did not intend to destroy Japan as a nation. On the contrary, the occupying forces were to withdraw from Japan once objectives stated in the Declaration had been accomplished and there had come into existence a peacefully inclined, responsible Japanese government based on the freely expressed will of the people.⁴¹⁹ Nevertheless, the Allied objectives in the occupation of Japan, as set forth in the Potsdam Declaration, were so extensive that some Japanese wondered if it might prolong the occupation for ten to fifteen years.⁴²⁰ On the other hand, General MacArthur was basically against a prolonged control by the occupant and the U. S. Government attempted, in vain, to conclude a peace settlement with Japan as early as 1947.⁴²¹

The question whether the provisions of the Potsdam Declaration and the

416. Part II-1. For the text, see n. 25 *supra*.

417. Hugh Borton in *Survey* (n. 36 *supra*), 1939-1946, The Far East 1942-1946, p. 319.

418. For the direct actions of the occupant, see n. 31 *supra*.

419. Article 12. For the text, see Appendix I *infra*.

420. For example, see University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 13, pp. 8-9 (Study Section).

421. See n. 111 *supra*.

Instrument of Surrender presupposed the continuation of the existing Japanese Government requires careful examination. It is a fact that the Allied Powers addressed the Declaration to the Japanese Government then in power. It is also a fact that this Government accepted and faithfully executed the terms of surrender. However, in the Instrument of Surrender the Japanese representatives undertook "for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander ... for the purpose of giving effect to that Declaration," and the last sentence of this document read that: "The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."⁴²² Thus, the question arises whether these provisions authorized the occupant to suppress the existing Japanese Government.

Concerning the limits of the power to be exercised by the occupant in Japan, an official report of SCAP states that:

The surrender of Japan and its occupation by the forces of the victorious Allied Powers presented a new problem in international law. The surrender was, of course, total, but no annexation or destruction of the country was contemplated. On the contrary, the existing government was left in power, to operate under, and subject to, the control of the occupant, for the purpose of accomplishing certain political and economic reforms that would ensure a peaceful Japan once the military forces had been withdrawn.

.....

It has very generally been accepted that the military occupant exercises military authority over the occupied country but does not have full rights of sovereignty. How far total surrender, made with full knowledge of the intentions of the victors, would operate to change this rule has never been established.⁴²³

The statement testifies that, even in the mind of the occupation authorities, the legal limits of their power with respect to Japan and the Japanese people was an unanswered question.

Similarly, a U. S. Department of State memorandum entitled "Comparison of the [Potsdam] Proclamation of July 26, 1945, with the Policy of the Department of State" explains that:

[T]he reference to "the Japanese government" in paragraphs 10 and 13 of the proclamation suggest[s] that continuance of the Japanese government which accepts the terms is contemplated so long as that government observes the terms in good faith. This

422. For the text, see Appendix II *infra*.

423. SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 1, pp. 88-89.

interpretation is, however, not certain because of the suggestion that the "Self-willed militaristic advisers" (par. 4) and the "irresponsible militarism" of Japan (par. 5 [6]) are to be eliminated. These terms may refer to the existing government of Japan. Furthermore paragraph 13 of the proclamation requires that occupation of certain points in Japan shall continue until "there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government." This statement could be interpreted to mean that the government which accepts the terms shall immediately retire and leave the occupying forces to govern Japan until the objectives stated have been achieved and a "peacefully inclined and responsible government" has been established by an election. That statement might also mean that the emperor will accept the terms proposed in the proclamation and will continue to function, but will at once dismiss all his militaristic advisers, democratize the constitution of Japan, arrange an election, appoint a government in accordance with its results, and direct that government to carry out the terms of the proclamation.⁴²⁴

Thus, it seems that the provisions of the Potsdam Declaration may be interpreted either way: The Japanese Government was expected to continue or the occupant was authorized to suppress it.

The possibility of these different interpretation notwithstanding, it must be borne in mind that the Potsdam Declaration itself did not provide for the procedure to implement its own terms. Precisely because of this *lacuna* the provision was inserted in the Instrument of Surrender in which the Japanese Government undertook to issue whatever orders and take whatever action might be required by SCAP in order to effectuate the provisions of the Declaration.⁴²⁵ There is no denying the fact that this procedure presupposed the existence and continuation of Japanese Government. Only with the continued existence of the Japanese Government, could the occupant rely on this procedure. The United States had originally planned to set up a direct military government in Japan, but as of the summer of 1945 such a plan was impracticable due to the great shortage of personnel who could command the Japanese language for a smooth functioning of the military government.⁴²⁶ In other words, the United States had no alternative but to work through the Japanese Government to attain the objectives stated in the Potsdam Declaration. Hugh Borton, who was one of the most important members of the Sub-Committee for the Far East of the State-War-Navy Coordinating Committee, later wrote that:

The United States had decided that it was necessary, as a matter

424. See n. 399 *supra*.

425. See p. 38 *supra*.

426. See, for example, U. S., *Foreign Relations*, 1945 Vol. 6, pp. 584-587.

of administrative expediency, to retain the Japanese government and work through it. Consequently, the Potsdam Declaration provided specifically that "the Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people," and the Instrument of Surrender was also based on the concept that we recognized a central governmental authority in Japan. The surrender instrument specifically provides that the Japanese Government, as a government, shall carry out the provisions of the Potsdam Declaration and shall be responsible for carrying out the terms of surrender.⁴²⁷

Probably the occupant could have suppressed the Japanese Government, if the latter had not complied with former's directives based on the Potsdam Declaration and thus had violated that international agreement. But, so long as those directives were complied with and the Japanese Government observed its obligations under the international agreement, the occupant was not entitled to suppress the Government.

As to the relationships between the Japanese Government and SCAP, the most basic question seems to be the existence and exercise of sovereignty with respect to Japan. The Potsdam Declaration was addressed to and accepted by the existing Japanese Government, which had been representing and exercising Japanese sovereignty as the Government of Japan. The Instrument of Surrender imposed certain limitations on the exercise of Japanese sovereignty but it did not transfer the sovereignty to SCAP. So long as the sovereignty was not transferred to SCAP, it remained in the hands of the Japanese Government.

True, it was provided in the Instrument of Surrender that the authority of the Emperor and the Japanese Government to rule the state was subject to SCAP, who would take such measures as he deemed proper to effectuate the provisions of the Potsdam Declaration. However, this cannot be understood to have implied that Japanese sovereignty was transferred to SCAP. The subordination of the authority of the Emperor and the Japanese Government to SCAP was not unlimited. The subordination was obligatory on the part of the Japanese authorities only for the purpose of effectuating the Potsdam Declaration. Outside of this purpose, the authority of the Emperor and the Japanese Government was not subject to SCAP and remained supreme. Similarly, the Emperor and the Japanese Government were to issue whatever orders and take whatever action might be required by SCAP, but only "for the purpose of giving effect to" that Declaration. That was why, as explained elsewhere, the Japanese Government stated that it could not comply with the U. S. demand to close

427. Hugh Borton, "United States Occupation Policies in Japan since Surrender," *Political Science Quarterly*, Vol. 62 (1947), p. 254. For the role of Hugh Borton in the U. S. planning of the post-surrender policy toward Japan, see his *Japan's Modern Century* (New York: Ronald Press, 1955), note 14 at p. 389. See also U. S., *Foreign Relations*, 1945 Vol. 6, pp. 587-590.

its overseas missions in neutral states and to hand over the custody of diplomatic and consular property and archives to the Allied Powers. In the opinion of the Japanese Government, that demand did not correspond to any provision of the Potsdam Declaration.⁴²⁸

A similar problem arose when the occupant attempted to close neutral missions in Japan. In his letter to the Secretary of State dated October 2, 1945, George Atcheson, the Political Adviser to SCAP, reported that the Japanese Foreign Office was endeavoring to hold the same position vis-à-vis neutral states as it had held before the surrender.⁴²⁹ While certain functions of the Foreign Office might be desirable for the purpose of occupation, the report went on, the U. S. Government should give serious consideration to the desirability of directing the Japanese Government to conduct its relations with neutral missions only through SCAP.

It is realized that this action might be questioned by neutral countries, but we believe it justified *as contributing to the carrying out of the Potsdam Declaration....* Furthermore, while neutral governments might perceive objection to our requesting that they cease relations with Japanese diplomatic missions in their own capitals, there would not seem to be strong ground on which they could object to the suggested restriction on Japanese Foreign Office here as exigency of military occupation. Recall of Japanese diplomatic personnel abroad might constitute a further desirable step to be taken in near future.⁴³⁰

Writing to Under Secretary of State Dean Acheson on the same topic on October 3, 1945, John C. Vincent, the Director of the Office of Far Eastern Affairs, stated that the question involved in the matter was a fundamental but unanswered one, and that it related to the legal position of the Japanese Government vis-à-vis SCAP.⁴³¹ According to Vincent, the Potsdam Declaration had forced the change of U. S. planning for the occupation of Japan, as a result of which, "There is a Japanese Government 'subject' to General MacArthur."

The unanswered question is whether the Japanese Government is to be considered purely as an "administrative instrument" for General MacArthur or whether it is to be considered a government ... in much the same manner as the government of a protected country or the government of a country under military occupation. If it is purely an "administrative instrument" then the neutral missions should ... have relations only with MacArthur's headquarters. If it is a government then it would seem to me that the neutral missions should be permitted to have relations with

428. See pp. 37-38 *supra*.

429. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 733-734.

430. *Ibid.* Emphasis supplied.

431. *Ibid.*, pp. 734-735.

it.⁴³²

In the end SCAP issued two directives, one instructing the Japanese Government to recall its diplomatic missions in neutral states, the other ordering the Government to cease carrying on its relations with neutral representatives in Japan.⁴³³ If Japanese sovereignty had been transferred to Allied Powers with the surrender, the occupant should have directly dealt with the neutral states. In reality, the occupant acted through the Japanese Government by recourse to the arrangements of the Potsdam Declaration and the Instrument of Surrender.

A few domestic tribunals, Japanese as well as American, which referred to the relations between the Japanese Government and SCAP, seem to have supported the view that the occupant limited the exercise of Japanese sovereignty but did not oust it. For example, the U. S. District Court for the Southern District of New York held, in its decision of November 20, 1951, that Japan had not been occupied for the purpose of subjugation, annexation, or destruction. "The occupation has been, essentially, provisional and temporary; Japan has continued as a sovereign with its rights and powers of sovereignty limited only by the directives of the Supreme Commander."⁴³⁴ Judging the validity of a punishment imposed by the occupation authorities, the Supreme Court of Japan in its decision of July 22, 1950, observed that, in consequence of the Potsdam Declaration and the Instrument of Surrender, SCAP had acquired the authority to take measures as he deemed proper to give effect to the terms of surrender, and "to that extent, the power of the Japanese Government to rule the state was made subject to the prerogatives of the Supreme Commander for the Allied Powers."⁴³⁵

That Japanese sovereignty was not transferred to the occupying Allies is most clearly shown in connection with the question of territorial dispositions. As mentioned earlier, the formal disposition of Japanese territories had to await the conclusion of the Peace Treaty with Japan, except for that which the Japanese Government had given its prior consent to in the Potsdam Declaration and the Instrument of Surrender.⁴³⁶ In contrast to this, the Allied Powers declared, with respect to Germany, that their assumption of supreme authority included the right to determine the boundaries of Germany and the disposition of any part of German territory. In the case of Japan, the Potsdam Declaration and the Instrument of

432. *Ibid.*

433. SCAPIN 189 (October 25, 1945) and SCAPIN 237 (November 4, 1945). See SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 2, pp. 473 and 476; Gaimu-sho, *Bunsho-shu* (n. 31 *supra*), Vol. 2, pp. 40-41 and 44; University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 4, pp. 55-57 and Vol. 5, p. 3.

434. *Japanese Government v. Commercial Casualty Insurance Co.*, 101 F. Supp. 243 at 245.

435. *Re the Validity of Cabinet Order No. 325 of 1950 (Sakagami Case)*, *Saiko Saiban-sho Keiji Saiban-Rei-Shu* (Reports of Supreme Court's Judgments Criminal Cases), Vol. 7 No. 7, p. 1562ff.

436. See p. 42 *supra*.

Surrender did not entitle the occupant to the general right of territorial disposition for Japan. This right, as an aspect of sovereignty, was retained in the hands of the Japanese Government. It was only with the consent of this Government that the Allied Powers could, in law, effectuate their disposition of Japanese territories.

However, the scope of the power which SCAP was authorized to exercise by the Potsdam Declaration and the Instrument of Surrender was very broad. Since the authority of the Emperor and the Japanese Government to rule the state and their power of government were subject to SCAP in so far as the effectuation of the surrender terms was concerned, SCAP judgment was to prevail over the Japanese Government's in case of conflict. The Potsdam Declaration provided for the demilitarization and democratization of Japan. Thus, SCAP was authorized to direct the Japanese Government to take virtually any action for the purpose of demilitarizing and democratizing Japan. Such a broad authorization left very little room for the Japanese Government to exercise its sovereignty.

That the scope of SCAP authority was broad or extensive, however, does not mean that it was unlimited. Neither the Potsdam Declaration nor the Instrument of Surrender contained any provision that would have allowed the Allied Powers to impose additional terms on Japan once the documents were signed. As a matter of fact, the draft Instrument of Surrender prepared by the British Government had a clause providing that: "The Imperial Japanese Government and Japanese Imperial General Headquarters undertake to fulfil without question any other terms of whatever kind which the Allies may decide to impose upon Japan."⁴³⁷ A similar proposal was made by the Australian Government.⁴³⁸ But neither of these proposals was incorporated into the final text of the Instrument of Surrender. The broad and even vague scope of authority which the wording of the final text suggested might have been regarded as sufficient. But, considering the provision that the Allied occupying forces were to withdraw from Japan as soon as the objectives set forth in the Potsdam Declaration had been accomplished, the terms specified therein must be considered exhaustive, and no other terms should be allowed to be added, for, if the occupant could have imposed additional terms, then there would have been no point of making the withdrawal contingent on the accomplishment of the specified terms.

Summing up, it is proper to conclude that the U. S. occupation of Japan was not intended to be an annexation; that the provisions of the Potsdam Declaration and the Instrument of Surrender should be interpreted to have presupposed the continuation of the existing Japanese Government; that, in any event, the Japanese Government was kept in power and its authority was to be subject to SCAP only in so far as the implementation of the surrender terms was concerned; that, as a result, Japanese sovereignty remained in the

437. U. S., *Foreign Relations*, 1945 Vol. 6, pp. 641-642.

438. *Ibid.*, pp. 661-662.

hands of the Japanese Government; and that the scope of SCAP authority was very broad but not unlimited. Under these conditions it is submitted that the Hague Regulations should apply to the U. S. occupation of Japan. It might be recalled that SCAP made clear in the general instruction to its command dated December 19, 1945, that the occupation forces would observe the obligations imposed upon them by international law and the "rules of land warfare".⁴³⁹

Section 3 : An Evaluation of the U. S. Practice in Japan

Assuming that the Hague Regulations were applicable to the U. S. occupation of Japan, three questions remain to be answered in evaluating the U. S. practice or occupation measures in Japan from the standpoint of international law; First, were these occupation measures forbidden by the provisions of the Hague Regulations? Second, were these occupation measures permissible under the provisions of the Potsdam Declaration and the Instrument of Surrender? Third, did the fact that the measures were ordered by SCAP but were actually taken by Japan affect the responsibility of the United States as the occupant?

(i) *The U. S. Practice in the Light of the Hague Regulations*

In regard to the first question, a closer look into the provisions of Section III of the Hague Regulations concerning the occupant's treatment of private enemy property is appropriate. It was pointed out in Chapter 4 that Article 46 requires an occupant to respect private enemy property; that his interferences in private enemy property, such as contributions, requisitions, or seizures, are permissible only when carried out in accordance with the procedures prescribed in Articles 48, 49, 51-54, and 56; and that, in all cases, confiscation as well as pillage of private enemy property is prohibited by Article 46, Paragraph 2 and Article 47.⁴⁴⁰

More specifically, the Hague Regulations govern an occupant's treatment of private enemy property in the following manner. As for money contributions, Article 48 allows an occupant to collect taxes, dues, and tolls imposed for the benefit of an occupied state. In so doing, he should, as far as possible, comply with the rules of assessment and incidence in force. If an occupant collects taxes, dues, and tolls, he must defray the expenses of the administration of an occupied territory in the same manner as the legitimate government is so bound. An occupant may levy other money contributions in an occupied territory, but such contributions are permissible only when they are for the needs of the army of occupation or

439. See p. 32, No. 20 of this *LAW REVIEW* (1986).

440. See pp. 35-36, *ibid.* For the text of the Regulations, see n. 157 *supra*.

for the administration of that territory (Article 49). Any contribution must be collected under a written order and on the responsibility of a commander in chief, and a receipt must be given (Article 51).

Requisitions in goods and services are permitted an occupant by Article 52. But he may demand requisitions from the inhabitants of an occupied territory only for the needs of occupying army. Requisitions must be demanded on the authority of the commander in that territory and the demands must be in proportion to the resources of an occupied state. Requisitioned articles must be paid in cash as far as possible. If that is impossible, a receipt needs to be issued and the amount of due must be paid as soon as possible.

In regard to seizures, Article 53 provides that all appliances for the transmission of news or for the transport of persons or things, depots of arms, and generally all kinds of ammunitions of war may be seized. In case of absolute necessity, submarine cable connecting an occupied with a neutral territory may also be seized or destroyed (Article 54). All seized property must be restored and compensation fixed when peace is made. Seizures of, as well as destruction or wilful damage done to, property belonging to religious, charitable, and educational institutions are forbidden. Likewise, historic monuments and works of arts and science must not be seized or damaged. In case such seizures, destructions, or damage occurs, they should be made the subject of legal proceedings (Article 56).

From the foregoing examination, it is clear that the Hague Regulations attempt to limit the occupant's interferences with private enemy property to a great extent, but it is also clear that these provisions do not cover every possible case of an occupant's dealing with private enemy property. Sometimes the necessity arises to evaluate a particular case by way of interpretation or analogy, or by recourse to judicial precedents and state practice. It is proposed, for the sake of convenience, to examine the legality in international law of the ordinary type of U. S. occupation measures in Japan, before proceeding to evaluate the specific U. S. practice or occupation measures that were studied in Chapter 2.

Generally speaking, the U. S. practice in contributions and requisitions as well as in seizures seems to have satisfied the requirements of the Hague Regulations. As for money contribution, SCAP chose to obtain the funds for occupation costs from the Japanese Government in Japanese currency.⁴⁴¹ Since an occupant is permitted by the Hague Regulations to take possession of cash or funds belonging to an occupied state, the procedure adopted by SCAP was perfectly legal.⁴⁴² This procedure could also be regarded as being an exercise, through the government of an occupied state, of the ordinary power of an occupant to levy money contributions on civilian populations for the needs of the occupying forces.

441. See pp. 14-15, No. 20 of this *LAW REVIEW* (1986).

442. Article 53. For the text, see n. 157 *supra*.

For the very reason that the Termination of War Appropriation was included in the national budget, the requirement of the Regulations that an occupant observe the rules of assessment and incidence of local taxes in levying contributions was met.

U. S. requisitionings of Japanese goods and services were similarly in compliance with the provisions of the Hague Regulations. On September 25, 1945, SCAP appointed a General Procurement Agent and his representatives in major Japanese cities, who were authorized to demand requisitions from the corresponding Japanese agents. At the same time the regular form of procurement documents was fixed.⁴⁴³ It is true that some of the goods and services requisitioned by the occupant were considered luxurious in view of the then prevailing standard of living in Japan, and the amount of procurement expenses appeared excessively high in proportion to available Japanese resources.⁴⁴⁴ However, this should not be understood to imply that the U. S. requisitions in Japan ignored the needs of the Japanese people. The Initial Post-Surrender Policy for Japan clearly stated that: "Japan will be expected to provide goods and services to meet the needs of the occupying forces to the extent that this can be effected without causing starvation, widespread disease and acute physical distress."⁴⁴⁵ In fact, during 1946 SCAP more than once released U. S. Army subsistence stocks to Japanese in order to mitigate the aggravated foodshortage of the defeated state.⁴⁴⁶ Thus, as a rule, the U. S. requisitionings in Japan should be regarded as compatible with the provisions of the Hague Regulations.

U. S. seizures of privately-owned Japanese plants, equipment, and war materials connected with the production of implements of war were executed without compensation. The limits to which an occupant's right of seizure extends is not easily definable.⁴⁴⁷ But, the U. S. policy in handling the seized Japanese property was to destroy only those which were for exclusive use in war and not suitable for peaceful use. Also, the seized property which was not necessary for a peaceful Japanese economy or the supplying of the occupation forces was to be utilized for reparations.⁴⁴⁸ As for the seized property that survived the destruction and reparation, it was to be returned to the Japanese Government so that it could be converted for the production of the essential needs of Japanese people.⁴⁴⁹ Considering that the question of compensation was to be settled by a peace

443. University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 12, p. 122.

444. Watanabe, *Oboyegaki* (n. 35 *supra*), p. 43.

445. Part IV-3. For the text, see n. 25 *supra*.

446. See, for example, University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 10, p. 59; *ibid.*, Vol. 11, pp. 1, 11-13.

447. See E. Lauterpacht, "The Hague Regulations and the Seizure of *Munitions de Guerre*," *British Year Book of International Law*, Vol. 32 (1955-1956), pp. 218-243.

448. Part IV-4. See n. 25 *supra*.

449. See, for example, University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 3, pp. 7-9 (SCAPIN 53; September 24, 1945); *ibid.*, Vol. 12, pp. 132-134 (SCAPIN 151; October 16, 1945).

treaty, these measures do not seem to have been prohibited by the Hague Regulations. With respect to the collection of arms possessed by civilian Japanese, the objects that had particular artistic value were exempted from seizures.⁴⁵⁰ This testifies to U. S. compliance with the provisions of the Regulations in matters of seizures of Japanese private property.

In contrast to these ordinary types of U. S. occupation measures, it is questionable whether the legality of the particular measures studied in Chapter 2 should be evaluated within the framework of the Hague Regulations. These particular measures — the dissolution of certain organizations, the purge of militarists and ultranationalists, the liquidation of *Zaibatsu* combines and of property belonging to certain *Zaibatsu* families, and the land reform — were all motivated by the policy of demilitarizing and democratizing the Japanese nation. Inevitably, these measures required repeal and revision of the existing laws of Japan. They formed indispensable parts of the U. S. attempt to change the fundamental values and concepts on which the existing institutions, political, economic, or social, of Japan had been functioning.⁴⁵¹ But, such an attempt is a challenge to the existing legal system of an occupied territory and it is essentially contradictory to the principle of precariousness, one of the basic principles on which the provisions of the Hague Regulations were established. The provisions of Section III of the Hague Regulations permit an occupant of enemy territory to interfere with private enemy property only for the needs of occupying forces or for the administration of an occupied area, but the U. S. practice at issue had nothing to do with the needs of occupying forces, nor was it for the administration of occupied Japan. The administration of occupied Japan was in the hands of the Japanese Government. The occupation was to change the entire social structure of Japan, including its administration machinery.⁴⁵² Therefore, these occupation measures were, by their nature, to go beyond the provisions of the Hague Regulations. According to Feilchenfeld:

The general rule requiring respect for fundamental institutions would seem to have important economic and financial implications. It would seem that an occupant has no right to transform a liberal into a communistic or fascist economy, except so far as military or

450. *Ibid.*, Vol. 3, pp. 3–5 (SCAPIN 50; September 24, 1945).

451. For an interesting account of the effects of this change in Japan, see John D. Montgomery, *Forced to Be Free; the Artificial Revolution in Germany and Japan* (Chicago University Press, 1957); Edward W. Bakke, *Revolutionary Democracy; Challenge and Testing in Japan* (Hamden, Conn.: Archon Books, 1968).

452. For example, the Japanese constitution was amended as part of the occupation measures. See SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 1, p. 82ff. See also R. E. Ward (n. 386 *supra*), *American Political Science Review*, Vol. 50 (1956), p. 980ff; Theodore McNelly, "The Japanese Constitution: Child of the Cold War," *Political Science Quarterly*, Vol. 74 (1959), p. 176ff; *Washington Law Review*, Vol. 43 (1968), special symposium on the Japanese constitution, p. 887ff.

public-order needs should require individual changes.⁴⁵³

Nevertheless, it does not necessarily follow that every single U. S. treatment of Japanese private property relating to these occupation measures contravened the provisions of the Hague Regulations. The direct interferences with Japanese private property which these measures involved included the transfer to the Japanese Government of the property belonging to the abolished organizations, the non-payment of purged persons' pensions, the liquidation of *Zaibatsu* companies, the limitation of economic transactions of the designated *Zaibatsu* family members, and the confiscatory expropriation of the farming land. Some of these acts might have been justifiable as a legitimate exercise of the power granted to an ordinary military occupant of enemy territory under the Hague Regulations. It is worthwhile to examine whether and to what extent the U. S. practice in question was permissible within the framework of the Hague Regulations.

The U. S. interferences with the Japanese private property, as enumerated above, had one characteristics in common: transfer of private property from one group of Japanese to another. In all these cases, the first group consisted of those Japanese whom the occupant associated with the military expansion of Japan. The latter group was regarded by the occupant as representing the public interests or at least the interests of a greater number of Japanese. The private property of the abolished organizations as well as the pension funds of purged persons were transferred to or retained by the Japanese Government. The property of the *Zaibatsu* personnel was distributed among a wider range of stockholders, and the lands belonging to the landlords among the peasants. Interestingly enough, the U. S. Army Field Manual on the Land Warfare, which was issued in a revised and enlarged edition in 1956, has the following newly added paragraph:

In order to ensure public order and safety, as required by Art. 43 [of the Hague Regulations] ... an occupant is authorized to expropriate either public or private property solely for the benefit of the local population. The occupant is obliged, unless absolutely prevented, to respect the laws in force in the occupied area in so doing.⁴⁵⁴

This suggests the possibility that Article 43 might be relied upon to justify the U. S. interferences with the Japanese private property at issue.

However, it must again be pointed out that, the administration of Japan being in the hands of the Japanese Government, the United States was not entitled to administer the occupied state as designed by the provisions of Article 43. The occupant was entitled to do so only when it was essential for the effectuation of the occupation objectives. Throughout the entire period of occupation such an occasion rarely occurred. Those U. S. interferences with Japanese private property did not take place as an

453. E. H. Feilchenfeld, *Economic Law* (n. 129 *supra*), p. 90.

454. FM 27-10: *The Law of Land Warfare* (n. 149 *supra*), Para. 431 at p. 158.

exercise of the power of the occupant under Article 43. Even if the interferences had taken place as an exercise of that power, they could not have been justified unless they had been based on an urgent necessity to secure public order and safety of the occupied territory. The U. S. occupation measures relating to the purges, the dissolution of *Zaibatsu*, or the land reform were not grounded on such a necessity.

In connection with the admissibility of these interferences within the framework of the Hague Regulations, it is interesting to note that a few writers consider the denazification program in occupied Germany as consistent with the provisions of Article 43. They argue that the Allied occupant in Germany was "absolutely prevented," as phrased in that article, from doing otherwise. On the one hand, Greenspan explains that in a war fought on ideological basis like World II the final defeat of a totalitarian belligerent could only mean his complete loss of political power. The victor was absolutely prevented from respecting such a regime, and its elimination was the only feasible course of action for him.⁴⁵⁵ On the other hand, McDougal and Feliciano lay emphasis on the security needs of occupying forces in their interpretation of the phrase "unless absolutely prevented." According to them:

The Allied belligerent occupants may fairly be said to have been "absolutely prevented" by their own security interests from respecting the German laws.... It is indeed difficult to envisage how the Allied occupants could be expected to protect their security interests if they were required to respect such laws.⁴⁵⁶

Article 43 may be thus interpreted in order to justify the corresponding U. S. measures in occupied Japan.

However, these interpretations should be rejected on the following grounds. Whereas the ideological basis of a war may affect the principle of precariousness, it could not prevent the principle of humanity from applying to a post-surrender occupation. Whether civilian populations live under a fascist regime or under a democratic one, their private property must uniformly be respected in international law unless such respect should work against the principle of humanity itself.⁴⁵⁷ Secondly, the security needs of occupying forces could not provide a legal basis for all the denazification measures, since some of the measures went far beyond the abolition of Nazi laws and far beyond what would have been necessary to maintain the security of the occupying forces. In fact, many of the denazification measures aimed not so much at the security of the occupying forces as at

455. Morris Greenspan, *The Modern Law of Land Warfare* (n. 159 *supra*), p. 225.

456. Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (n. 147 *supra*), p. 770. See also Edmund H. Schwenk, "Legislative Power of the Military Occupant under Article 43, Hague Regulations," *Yale Law Journal*, Vol. 54 (1945), p. 403.

457. See M. S. McDougal and F. P. Feliciano, *Law and Minimum World Public Order* (n. 147 *supra*), p. 771; L. Oppenheim, *International Law*, Vol. 2 (n. 146 *supra*), pp. 446-447 and 603, note 2; E. Fraenkel, *Military Occupation and the Rule of Law* (n. 30 *supra*), p. 189; *British Manual of Military Law* (n. 149 *supra*), Para. 510 at p. 510, note 1.

social change in the occupied state. This also holds true for Japan. It is hard to believe that the dissolution of *Zaibatsu* or the land reform was an indispensable means for the security of the U. S. occupation forces in Japan. As in the case of Germany, these measures aimed at introducing social change in Japan.

In conclusion, it is difficult to justify, within the framework of the Hague Regulations, those specific U. S. occupation measures which were studied in detail in Chapter 2. While those measures were taken in order to change the Japanese society in conformity with the Potsdam Declaration, the Hague Regulations were not, and are not, designed to govern an occupant's attempts to initiate change in occupied territory. If such attempts are to be allowed in international law, then the Hague Regulations cannot provide proper criteria on the basis of which their legality is to be determined.

(ii) *The U. S. Practice in the Light of the Potsdam Declaration and the Instrument of Surrender*

As to the international legality of the U. S. practice at issue under the provisions of the Potsdam Declaration and the Instrument of Surrender, it must be asked at the outset whether and to what extent international law allows an occupant of enemy territory to go beyond the Hague Regulations by virtue of his agreement with an occupied state. If it is not allowed at all, then the Potsdam Declaration and the Instrument of Surrender themselves should be held to be in violation of international law.

In international law as well as in domestic law, special law supersedes general law. *Pacta sunt servanda* is a basic norm of international law. The study in Chapter 4 made clear that a victorious occupant often demands and acquires, by means of an armistice agreement, powers more extensive than are recognized under the Hague Regulations. The armistices terminating the hostilities of the First World War and those with Italy and the East European states in the Second World War are typical illustrations. If international law allows an occupant to go beyond the Hague Regulations by means of an armistice, this should be the case for an instrument of surrender too.⁴⁵⁸ While the Hague Regulations govern an occupation of enemy territory resulting from an armistice, they are not always applicable to a post-surrender occupation. Considering that a surrender entitles a victorious belligerent to broader freedom of action vis-à-vis a vanquished one than under an armistice, international law should not prevent a victor from acquiring powers, by virtue of a surrender instrument, more extensive than those recognized under the Hague Regulations.

Assuming that the Potsdam Declaration and the Instrument of Surrender entitled SCAP to the power going beyond the Hague Regulations, the

458. See p. 30 *supra*.

question arises as to the legal limits to that power. The Potsdam Declaration provided for a complete demilitarization and democratization of Japan and the Instrument of Surrender authorized SCAP to take such steps as he deemed proper to effectuate the provisions of the Potsdam Declaration. Did this mean that SCAP was given complete freedom of action in implementing occupation measures to execute the surrender terms, or were there some legal restrictions imposed on such freedom?

It is submitted that SCAP had to satisfy itself of the following three requirements in executing occupation measures: (1) Occupation measures should not contravene the provisions of the Potsdam Declaration and the Instrument of Surrender ; (2) Only such occupation measures as were objectively necessary to effectuate the terms of surrender should be implemented. The Potsdam Declaration and the Instrument of Surrender had not authorized SCAP to take occupation measures at his subjective discretion; (3) Occupation measures should be implemented in conformity with the principle of humanity.

First, SCAP should take his occupation measures within the framework of the Potsdam Declaration and the Instrument of Surrender. These documents constituted the legal basis for the U. S. occupation of Japan and for the occupation measures to be adopted by the occupant. It is true that the scope of power accorded to SCAP in these documents was very broad. As the U. S. Department of State memorandum, quoted earlier in the present thesis, pointed out, the terms contained in the Potsdam Declaration, such as permanent elimination of militarist influence, complete disarmament of Japanese military forces, strengthening of democratic tendencies, establishment of respect for human rights, and industrial control and disarmament, presupposed power and authority of much more "than an ordinary military occupant under the law of war".⁴⁵⁹ The implementation of these terms would have necessitated abolition and modification of existing institutions in Japan, and the Potsdam Declaration and the Instrument of Surrender should be interpreted to have authorized such measures. Nevertheless, it must be kept in mind that these documents imposed certain obligations on the part of the occupant.⁴⁶⁰ Any occupation measures should not have been in violation of these obligations.

Regarding the second requirement that the U. S. occupation measures should be based on objective necessity in each case, it must be admitted that SCAP was vested with the ultimate authority to decide on occupation measures. The last sentence of the Instrument of Surrender read: "The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate those terms of

459. See n. 399 *supra*, p. 1287.

460. See pp. 41-42 *supra*.

surrender."⁴⁶¹ If a dispute arose between SCAP and the Japanese Government as to propriety of an occupation measure to effectuate any of the surrender terms, SCAP's judgment was to prevail. But this should not be understood to imply that SCAP had an entirely free hand or that he could rely on his subjective judgment or discretion when deciding on the propriety of any occupation measure. In its decision quoted elsewhere in the present thesis, the District Court of Tokyo, Japan, stated that:

[C]onsidering that ... special agreements like the Instrument of Surrender are generally to be interpreted restrictively in the interest of the occupied, the authority of [SCAP] to effectuate the provisions of the said Instrument of Surrender should not be understood to be entirely discretionary so far as it concerns restriction or deprivation of the rights or freedom of the inhabitants of the occupied territory, but the exercise of [this] authority shall be admitted only as far as it is necessary for the achievement of its purpose; that is to say, as far as it is *objectively* considered necessary for the effectuation of the provisions of the Instrument of Surrender.⁴⁶²

Third, any occupation measures should be implemented as humanely as possible. The study in Chapter 4 indicated that, even in the case of an unconditional surrender without political terms, not the words but the spirit of those provisions of the Hague Regulations which are based on the principle of humanity should govern the relations between the victorious occupant and the enemy civilians in an occupied territory. Private enemy property must be so respected as to enable enemy civilians under military occupation to maintain their lives at least on the subsistence level. Therefore, when attempting to examine the relevance of the principle of humanity to the U. S. occupation of Japan, the question must be asked whether the Instrument of Surrender authorized the occupant to deviate from that principle in implementing the surrender terms. Article 47 of the Fourth Geneva Convention of 1949 prohibits any deviation from the benefits of the Convention prescribed for civilian populations through an agreement between an occupying and an occupied state.⁴⁶³ In the same vein, it might be possible to argue that the Instrument of Surrender should not be so construed as to authorize infringement of basic protection which the Hague Regulations provide for the persons and property of enemy civilians under military occupation. But, without examining the validity of this argument, it must be pointed out that the very concept of an unconditional surrender presupposes humane treatment of surrendering soldiers and civilians, in

461. See Appendix II *infra*.

462. *Kakyo Saiban-sho Minji Saiban-Rei-shu* (Reports of Lower Courts' Judgments Civil Cases), Vol. 17 Nos. 1-2, p. 131ff. Emphasis supplied. See p. 31, No. 20 of this *LAW REVIEW* (1986).

463. See p. 28 *supra*.

particular sparing of their lives.⁴⁶⁴ Consequently, the Instrument of Surrender should not be interpreted to justify inhumane treatment of the persons and property of the Japanese civilian population. Any occupation measures adopted by the U. S. occupant should have been implemented to the least possible detriment of the persons and property of the Japanese concerned.

With these observations as background, it is proposed to evaluate the legality of the U. S. practice: those specific occupation measures in question.

As for the international legality of the purge of militarists and ultranationalists, the measures were taken as an implementation of Article 6 of the Potsdam Declaration, which provided for the permanent elimination of militarist authority and influence from among the Japanese people. To establish objective criteria to determine which particular organizations were militaristic or which particular persons had influenced Japanese militarism was an essentially difficult task. But, in as much as the provisions of Article 6 were vaguely put and in as much as SCAP was vested with the ultimate authority to decide the propriety of the purge measures, it is presumed that the measures were within the framework of the surrender terms and that objective necessity existed for their implementation. However, at the same time, precisely because the terms were vaguely put and SCAP had the final voice on the matter, there existed the risk that the purge measures would be abused for political expediency. Irrespective of its legality, the purge of communist party members testifies to this danger.

In this connection, the occupant's treatment of the property belonging to the abolished organizations and of the pensions due to purged persons present a problem. On the one hand, it is possible to argue that, since SCAP had the legal right to decide the propriety of occupation measures, the transfer of the abolished organizations property to the Japanese Government as well as the non-payment of pensions to the purged persons was justified as a means to destroy Japanese militarism permanently. On the other hand, it is also possible to argue that the legality of these measures was questionable from the standpoint of the principle of humanity.

In particular, the pensions in question are mostly for the maintenance of the lives of the persons covered as well as of their dependents after the pensioners' retirement, and some of the pensions must be regarded as the saving of part of the pensioners' wages in expectation of later payment. In view of the requirement that occupation measures should have been implemented to the least possible detriment to the persons and property of the Japanese concerned, it is suggested that the pensions should have been paid at least, on the subsistence level. When the German army seized funds in Belgian post offices during the First World War, which had been acting as saving banks and custodians of old age and other kinds of pensions, the

464. See p. 27 *supra*.

seizure was criticized on the ground that those funds were the property of the individuals concerned.⁴⁶⁵ Indeed, the U. S. occupant in Japan took note of the private character of some portion of the military pensions. In SCAPIN 889 dated April 20, 1946, SCAP recognized the request of the Japanese Government that SCAPIN 338 of November 24, 1945, prohibiting the payment of all military pensions be amended so as to enable the Government to refund exservicemen amounts deducted from their salaries and paid into the pension funds.⁴⁶⁶ Nor were humanitarian considerations utterly lacking in the U. S. dealings of Japanese pensions. Although SCAPIN 338 ordered the Japanese Government to terminate payment of all military pensions, it exempted compensation for physical disabilities caused in the military service. This was only authorized if the rates of such compensation were not higher than those for physical disabilities arising from non-military causes.⁴⁶⁷

Nonetheless, as far as the pensions of the purged persons were concerned, SCAP did not allow their payment until such persons were released from the purge. Neither could the purgees obtain any portion of their prepaid pension funds.⁴⁶⁸ Since in Japan many government officials almost entirely depended on pensions in sustaining their own lives and those of their dependents after retirement, no doubt the flat prohibition of pension payments caused great difficulties to the lives of the persons involved.⁴⁶⁹ From the humanitarian point of view, the pensions or their substitutes should have been paid at least on the subsistence level. The non-payment

465. James W. Garner, *International Law and the World War* (n. 137 *supra*), Vol. 3, p. 132.

466. For SCAPIN 889, see University of Tokyo, *Kenkyu* (n. 31 *supra*), Vol. 10, pp. 57-59. For SCAPIN 338, see *ibid.*, Vol. 5, pp. 45-49.

467. *Ibid.*, Vol. 5, p. 47.

468. *Ibid.*, Vol. 35, p. 84.

469. This writer has experienced a great difficulty in collecting information and materials regarding "difficulties" caused to the lives of the purged persons and their dependents by dint of the non-payment of pensions. The Pensions Bureau, Prime Minister's Office, the Japanese Government, has kept the records of payment of pensions, but no official information is available as to the afore-said "difficulties". The bureau has sometimes received from purgees letters of inquiry as to subsequent treatment of the non-paid portion of their pensions. However, the bureau has refused to publicize these letters because they concern privacy of the purgees. The Ministry of Health and Welfare explains that the relief of purgees and their families was the duty assigned to its local offices throughout Japan, but that, since these offices have long been closed, the documents related to this duty are barely available now. Newspapers in Japan were under censorship of SCAP during the occupation and this writer has been unsuccessful in his attempt to find newspaper articles which may testify to the "difficulties". Though it may make this footnote too long, following are some examples of the "difficulties" that this writer has so far collected through personal interviews:

Mr. Ryo-emon Sakata, an officer of the Relief and Demobilization Bureau, Ministry of Health and Welfare, said to this writer on May 6, 1971, that the non-payment of military pensions had caused great difficulties to economic life of the pensioners and their dependents. In particular, according to him, the non-payment extended even to the old veterans of the Sino-Japanese and the Russo-Japanese Wars which had been fought in 1894-1895 and 1904-1905 respectively. Some of these veterans, who had no family to support them, could hardly maintain their lives without pensions.

(continued to the next page.)

of the pensions ought to be considered an abuse of the power of the occupant or a contravention of the principle of humanity. It might be recalled that, in the implementation of defascistization measures in occupied Italy, many members and collaborators of the Fascist Party were removed from public service and part of their wealth illicitly acquired under the Fascist regime was confiscated. But, they were allowed to maintain their pension right.⁴⁷⁰ Even in the case of denazification of Germany, members and collaborators of the Nazi Party were allowed to retain in their hands minimum means of livelihood.⁴⁷¹

As to the property belonging to the abolished organizations, it might be asked whether the transfer of title to the Japanese Government without compensation to the original owners was objectively necessary to eliminate their influence. The origin of SCAPIN 548 was a Joint Chiefs of Staff directive to SCAP containing the following stipulation: "All property ... owned or controlled by ... the organizations ... should be considered public property."⁴⁷² It must be noted that directives from the U. S. Government to SCAP were often modeled after corresponding U. S. directives to the military government of Germany.⁴⁷³ Since both the Nazi and the Fascist Parties had been working as part of the government machinery of Germany and Italy respectively, property of these Parties might have assumed a public character. However, the organizations abolished by SCAPIN 548 were not official organs of the Japanese Government but private entities.

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Mrs. Torajiro Urata, whose husband had been purged and arrested by SCAP as a suspect (later found innocent) in connection with ill-treatment of Allied war prisoners, explained to this writer on May 8, 1971, that, as soon as he had been arrested, not only had the payment of his pensions been suspended but also the property and bank account under his name had been held in custody by the Occupation Authorities. (Since married women were treated as incompetents by the Japanese laws then in force, it was customary to register and deposit wives' property and money under the name of husbands.) "From that moment," said Mrs. Urata, "I had to work day and night in order to support myself and three children."

A member of the family of the late Professor Masa-aki Kohsaka, who had been purged from his post as professor of philosophy at Kyoto University, told this writer on October 22, 1971, that not necessarily the non-payment of pension but the sudden loss of income resulting from the purge had put the family in a very difficult position.

Commenting on SCAPIN 550, Mr. Masakiyo Takahashi, a then legal officer at the Ministry of Justice, explains: "Purged persons lose their right to pensions, public or private.... [But] 'special circumstances' may exempt them from application of this provision. 'Special circumstances' are to include cases where purged persons [and their dependents] cannot maintain their lives without pensions. In reality, however, such purgees [and their dependents] have been covered by social welfare programs, and *there has been no report of exemptions which are based on 'special circumstances'.*" See Masakiyo Takahashi, *Tsuiho-sha no Kodo no Genkai* (The Limitations Imposed on Conduct of Purged Persons. Tokyo: Minori Shobo, 1949), pp. 42-43. Emphasis supplied.

470. See p. 53, No. 20 of this *LAW REVIEW* (1986).

471. See p. 60, *ibid.*

472. SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 1, p. 73.

473. In this connection, see E. M. Hadley, *Anti-Trust in Japan* (n. 102 *supra*), pp. 8-9.

Although these organizations had been a source of support to Japanese militarism, this did not make their property public. Thus, it was wrong to assimilate their property with that of the Nazi or the Fascist Party. Perhaps, SCAP should have merely imposed restrictions on the use of the property of these organizations.⁴⁷⁴ Considering the humanitarian requirement that occupation measures should have been implemented to the least possible detriment to the persons and property of the Japanese involved, the outright deprivation of ownership of the private property in question seems to have been an excessive, if not illegal, use of the occupant's authority.

The legality of the liquidation of *Zaibatsu* combines and property of the *Zaibatsu* family members seems to have been better grounded than in the case of the purge programs. The dissolution measures were based on Article 10 of the Potsdam Declaration, which provided for the removal of obstacles to the strengthening of democratic tendencies among the Japanese people. Since the *Zaibatsu* monopoly was an undeniable fact, the measures could be held to be within the framework of the surrender terms and to be objectively necessary to effectuate them. From the humanitarian point of view, the measures left little problem. Although the *Zaibatsu* family members were shut out of the Japanese business world, they were reimbursed from the proceeds of the sale of their property — mostly stocks of the liquidated companies. This might be compared with the confiscation of German industrial assets as part of the denazification program, which was bitterly criticized in and outside of Germany.⁴⁷⁵ The reimbursement for the liquidated *Zaibatsu* property was made in the form of non-negotiable government bonds in order to prevent their immediate re-investment in Japanese industry. The control of their family property by the Holding Company Liquidation Commission might have caused various inconveniences to *Zaibatsu* families, but it is difficult to say that the inconveniences alone provided any basis for holding the dissolution measures unlawful, so long as their economic life was maintained without too much difficulty.

The land reform should be evaluated in much the same way as the *Zaibatsu* dissolution. The reform was initiated because of the need for an economic or agricultural democratization of Japan. Even though not contemplated in the original occupation program, the measures seem to have fallen well within the framework of the Potsdam Declaration. It was unfortunate that the landlords were unable to secure more equitable compensation for their forcibly purchased lands. But again, it is doubtful that the principle of humanity protects this kind of economic loss and make the land reform in Japan illegal. In fact, in its decision of December 23, 1953, the Supreme

474. See, for example, the Expert Opinion of Shigejiro Tabata in the so-called Suiko-sha Case, which is cited in n. 121 *supra*.

475. See P. Guggenheim, *Traité de droit international public* (n. 360 *supra*), Tome 2, p. 473; O. Debasch, *L'occupation militaire* (n. 160 *supra*), note 21 at p. 369.

Court of Japan held that, considering the special nature of agricultural land, the compensation adopted in the land reform should be considered fair.⁴⁷⁶ The land reform in Japan might be compared with the same type of reform in the East European states which took place during the U. S. S. R. occupation. No compensation was paid in that case.⁴⁷⁷

(iii) *The Responsibility of the Occupant and the Japanese Government*

The question remains whether and how the fact that these occupation measures were directed by the occupant but were actually taken by the Japanese Government should affect the responsibility of the United States or SCAP.

Regarding this question, it might be possible to argue that the U. S. occupation of Japan as well as U. S. occupation measures in Japan were taken based on an agreement between Japan and the Allied Powers; that in the agreement Japan accepted the obligation to take measures in accordance with occupant's directives; that those measures were not occupant's but Japan's acts; and that Japan should be responsible for the measures thus taken. In other words, while in Germany the Allied Powers set up their direct military government and took various occupation measures themselves, it was the Japanese Government which took occupation measures in Japan, and therefore, the occupant should not be held responsible for all those measures.

It must be pointed out, however, that the Potsdam Declaration was not an ordinary international agreement. In the agreement the Japanese Government undertook to work as the agent of the occupying powers to effectuate their occupation measures. The occupant was always ready, in case this arrangement did not work satisfactorily, to act directly. It was, therefore, the occupant which should be responsible for the occupation measures taken in his behalf.

First of all, it is true that the Potsdam Declaration, incorporated in the Instrument of Surrender, constituted an international agreement binding on both sides. But, as the Subcommittee on Security Problems noted, an instrument of surrender represents an "imposed cessation of hostilities."⁴⁷⁸ In the Potsdam Declaration the Allied Powers presented certain terms for Japanese acceptance, demanding at the same time the unconditional surrender of its armed forces. Japan accepted the terms as presented by the Allies and its armed forces surrendered unconditionally. Japan did so, because the only alternative for it would have been to continue hopeless

476. *Saiko Saiban-sho Minji Saiban-Rei-Shu* (Reports of Supreme Court's Judgments Civil Cases), Vol. 7 No. 13, p. 1523ff.

477. See p. 57, No. 20 of this *LAW REVIEW* (1986). Baete Ruhn von Oppen, *Documents on Germany under Occupation 1945-1954* (n. 270 *supra*), p. 60.

478. See p. 47, No. 20 of this *LAW REVIEW* (1986).

resistance. The fact that terms of an international agreement has been imposed by one side does not necessarily deprive the agreement of its binding effect. However, the terms of such an agreement are likely to favor one side at the expense of the other.

Secondly, in the Instrument of Surrender incorporating the Potsdam Declaration, Japan undertook to take whatever action might be required by SCAP to effectuate the surrender terms. The U. S. understanding of this provision is neatly expressed in the U. S. Initial Post-Surrender Policy for Japan.

In view of the present character of Japanese society and the desire of the United States to attain its objectives with a minimum commitment of its forces and resources, the Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers U. S. objectives.... This policy, however, will be subject to the right and duty of the Supreme Commander ... to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms.... The policy is to use the existing form of Government in Japan....⁴⁷⁹

This means that Japan would make its governmental machinery available for the occupant to attain his occupation objectives. However, when that arrangement did not work, the occupant was to act directly.

Thirdly, as a result, the Japanese Government took occupation measures as directed by the occupant. The measures were taken by the Japanese Government not as the execution of its own will but as the execution of occupant's directives. Some of the measures were taken in the form of an executive order, as in the case of the purges, and others were executed in the form of Diet legislation, as in the case of *Zaibatsu* dissolution and the land reform, but whenever unsatisfied, the occupant was ready to reverse the Japanese action. In order to avoid this eventuality, however, there were constant contacts between representatives of each section of the Japanese Government and the corresponding SCAP staff, who were to see to it that the occupant's objectives were accomplished.⁴⁸⁰ As a matter of policy, SCAP encouraged the Japanese to take the initiative in various reforms. For example, both in the case of the *Zaibatsu* dissolution and the land reform, there were some genuine efforts on the part of the Japanese. Nevertheless, the occupant left such efforts in the Japanese hands only in so far as they were compatible with the objectives of the occupation. Thus, when the constitutionality of the land reform was litigated in Japanese

479. Part II -2. See n. 25 *supra*.

480. See, for example, U. S., National Archives, SCAP, Government Section, *Chronological File of Courts and Law Division and the same of Legislation and Justice Division*; Daily, Weekly, and Monthly Activities Reports.

courts,⁴⁸¹ there was a move among SCAP personnel to remove the case from the courts' jurisdiction.⁴⁸² As far as the purge programs were concerned, the Japanese Government implemented each measure in the form of an Extraordinary Imperial Ordinance,⁴⁸³ and Japanese courts have unanimously held that the measures had been based on an extra-constitutional authority.⁴⁸⁴

Nevertheless, it might still be argued that the original Japanese consent to the terms of surrender as expressed in the Instrument of Surrender was a genuine Japanese act, and all subsequent Japanese acts in implementing the occupation measures were merely an execution of the obligation undertaken by this consent. But this argument is not a valid one. An agreement of such a general content as the Potsdam Declaration or the Instrument of Surrender only sets up a general framework for subsequent legal transactions between the parties. Each subsequent act of one party creates a new right-duty relationship between the two. In other words, the Japanese consent in the Instrument of Surrender only set up such a general framework, and each of the subsequent SCAP directives created corresponding obligations on the part of the Japanese Government. It might be also recalled that the issuance of the Potsdam Declaration forced a drastic change of the original U. S. plan on the post-surrender treatment of Japan and the Japanese, and the State-War-Navy Coordinating Committee had to struggle to revise the U. S. Initial Post-Defeat Policy relating to Japan to complete the U. S. Initial Post-Surrender Policy for Japan.⁴⁸⁵ The latter was radioed to SCAP in late August 1945, but since it was not thoroughly detailed, the more elaborate Basic Post-Surrender Directive to SCAP for the Occupation and Control of Japan had to be sent to Japan in November 1945.⁴⁸⁶ It might be added that the land reform was not in the original occupation plan, but was initiated by General MacArthur.⁴⁸⁷ All these seem to testify to the soundness of the above refutation.

In conclusion, it can properly be said that the fact that the occupation measures were directed by SCAP but were actually taken by the Japanese Government did not deprive the measures of their character as acts of the

481. See p. 23, No. 20 of this *LAW REVIEW* (1986).

482. U.S., National Archives, SCAP, Economic and Scientific Section, Natural Resources Division, Report No. 127 *The Japanese Land Reform Program*, p. 80.

483. Under the Japanese constitution then in force, this ordinance could be issued by the Emperor in an emergency, pending subsequent consent of the Diet. For the English text of the ordinance, see SCAP, *Political Reorientation* (n. 36 *supra*), Vol. 1, p. 193.

484. See, for example, the decision of the Supreme Court on the so-called *Choren Case* in *Saiko Saiban-sho Minji Saiban-Rei-Shu* (Reports of Supreme Court's Judgments Civil Cases), Vol. 19 No. 6, p. 1454ff. See also U. S., National Archives, SCAP, Government Section, Courts and Law Division, *Chronological File*; Memorandum for the Chief, Government Section, on the Legality of Penal Provisions in Cabinet Ordinance Implementing SCAP directives, from Alfred Oppler, March 8, 1948.

485. See pp. 32-33 *supra*.

486. See n. 125 *supra*.

487. See p. 21, No. 20 of this *LAW REVIEW* (1986).

occupant, and that the occupant could not be relieved of his international responsibility for the measures. If any of the occupation measures had violated international law, then the occupant should have been held to be responsible. It must not be forgotten that in May 1951 General Ridgway, as successor to SCAP, authorized the Japanese Government to review all the previous occupant's directives and corresponding Japanese measures for any modification that the latter might see fit.⁴⁸⁸ If the occupant had not been responsible for the results of occupation measures, this authorization would have had little legal significance. It was only after this review that the Japanese Government could be held to be responsible for the results of the occupation measures. A brief look into provisions of the Treaty of Peace with Japan will further help to clarify this question of responsibility.

Section 4 : A Settlement of the Problem by the Treaty of Peace with Japan and the Remedy for the Damages to the Japanese Private Property

The Treaty of Peace with Japan, which ended the state of war between Japan and the participating Allies, was signed at San Francisco on September 8, 1951, and became effective on April 28, 1952. Article 19 (d) of the Treaty provides that:

Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.⁴⁸⁹

This provision raises the question whether Japan was to recognize the validity of occupation measures that had been in violation of international law, and whether Japan and its nationals were to be excluded from claims arising from such violations. In fact, this question was brought before a Japanese court in the case in which, as quoted above, the plaintiff attempted to recover the title of real estate transferred to the Japanese Government as property of one of the abolished organizations.⁴⁹⁰ The plaintiff asserted that Article 19 (d) obligated Japan to recognize the validity of only those occupation measures which had been lawful in international law, whereas the defendant contended that Japan had to recognize all occupation measures irrespective of their legality.

As to the question whether Article 19 (d) covers lawful acts and omissions alone or applies to unlawful ones as well, it is difficult to maintain the view that only the first category is covered. For one thing, it is generally

488. See p. 28, No. 20 of this *LAW REVIEW* (1986).

489. *United Nations Treaty Series*, Vol. 136, p. 45ff at p. 72.

490. See p. 31, No. 20 of this *LAW REVIEW* (1986).

accepted in international law that a returning sovereign should recognize the validity of measures which an occupant has undertaken within the latter's authority.⁴⁹¹ No provision would be necessary if the intent were merely to reinstate the accepted rule. For another, the Japanese Government, which entered the case as an assistant intervener for the defendant, argued that Article 19 (d) was to apply to unlawful acts and omissions as well. This view seems to have been adopted by the Japanese High Court of Tokyo in *the Horimoto case*, although that case involved not Article 19 (d) but Article 19 (a).

Article 19 (a) is a more comprehensive provision than Article 19 (d). It provides that:

Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.⁴⁹²

The Horimoto case arose from the serious wounding of a Japanese shot by burglars who were soldiers of the U. S. armed forces then in occupation of Japan. The High Court of Tokyo held in its decision of April 8, 1959, that, by the provision of Article 19 (a) of the Peace Treaty, the Japanese Government had been excluded from presenting the plaintiff's claim against the United States or the soldiers.⁴⁹³ To be sure, such shooting was outside of the power granted to the occupant in the surrender documents and the Hague Regulations, and yet Article 19 (a) excluded diplomatic protection by the Japanese Government. By the same token, Article 19 (d) should be interpreted to cover unlawful acts and omissions of the occupant. There is no phrase in the Article which seems to limit its application only to the occupant's lawful conduct. Therefore, with the coming into force of the Peace Treaty with Japan, the Japanese Government could no longer present claims for Japanese to recover damages caused to their property by occupation measures, even if the measures concerned were against international law, that is, against the Potsdam Declaration and the Instrument of Surrender or general international law, including the Hague Regulations.⁴⁹⁴

The provisions of Article 19 (a) and (d) of the Peace Treaty with Japan are unique in that they do not provide for any remedy for the losses of Japanese nationals resulting from the general waiver of their claims in the

491. Felice Morgenstern, "Validity of the Acts of the Belligerent Occupant," *British Year Book of International Law*, Vol. 28. (1951), p. 293.

492. *United Nations Treaty Series*, Vol. 136, p. 70.

493. See *Inao Horimoto v. the Japanese State in Kakyu Saiban-sho Minji Saiban-Rei Shu* (Reports of Lower Courts' Judgments Civil Cases), Vol. 10, p. 712ff.

494. Tatsuo Sato, *Nihon-Kempo Seiritsu-Shi* (The History of the Birth of the Japanese Constitution. 2 vols., unfinished. Tokyo: Yuhikaku, 1962-1964), Vol. 1, note 1 at p. 136.

Treaty. All the four peace treaties signed at Paris in 1947, and the corresponding settlements with Germany and Austria after World War II, provided for compensation by each state for the losses or damages which its nationals incurred from its occupant.⁴⁹⁵ The origin of the omission of such compensation procedure in the Japanese Peace Treaty is not necessarily clear. It is known, however, that many of the clauses in the Japanese Peace Treaty concerning claims and damages were of British origin and that in the British draft treaty of April 1951 the Japanese Government was expected to compensate its nationals at least for their property taken by the Allies in their own territories.⁴⁹⁶ After the Anglo-American joint redrafting of the same month, the compensation clause disappeared.⁴⁹⁷ In the final text of the Treaty, the Allies and Japan waived all claims for themselves and their nationals on a mutual basis, except that the Allied prisoners of war who were maltreated by Japan were specifically to be indemnified.⁴⁹⁸

It is reported that in San Francisco the Allies were, in general, not at all happy about the waiver of their own and their nationals' claims against Japan and its nationals.⁴⁹⁹ The question of this waiver was debated in some length during the hearings before the Committee on Foreign Relations of the U. S. Senate.⁵⁰⁰ Similarly, when the Peace Treaty was discussed in the Japanese Diet, one of the members of the House of Representatives asked the Japanese Government why, unlike the Italian peace treaty of 1947, no provision was inserted in the Japanese Peace Treaty to compensate Japanese nationals for their losses caused by the waiver. The Government replied, with regret, that the consideration of the necessity to compensate other war damages and stringent Japanese financial conditions prevented any commitment as to such compensation.⁵⁰¹ It was probably the case that, through the negotiations for the peace treaty, the Japanese Government successfully persuaded the United States to avoid, as much as possible, financial burdens which might result from concluding a peace. There was strong opposition among the Japanese people to making peace without the

495. See Article 76 (2) of the Peace Treaty with Italy in *United Nations Treaty Series*, Vol. 49, p. 159; Art. 28 (2) of the same with Bulgaria in *ibid.*, Vol. 41, p. 78; Art. 32 (2) of the same with Hungary in *ibid.*, p. 202; Art. 30 (2) of the same with Rumania in *ibid.*, Vol. 42, p. 64; Chapter 9, Art. 3 of the Convention with the German Federal Republic on the Settlement of Matters Arising out of the War and Occupation in *ibid.*, Vol. 332, p. 286; Art. 24 (2) of the Austrian State Treaty in *ibid.*, Vol. 217, p. 273.

496. Frederick S. Dunn, *Peace-Making and the Settlement with Japan* (Princeton, N. J.: Princeton University Press, 1963), p. 139. See also U.S., *Foreign Relations*, 1951 Vol.6, Pt. 1 p. 777ff.

497. F.S. Dunn, *Peace-Making and the Settlement with Japan* (n. 496 *supra*), p. 139.

498. Article 14. For the text, see n. 489 *supra*.

499. Dean Acheson, *Present at the Creation* (n. 96 *supra*), p. 541.

500. U. S., Congress, Senate, 82nd Congress, *Hearings before the Committee of Foreign Relations* (2nd session on Japanese Peace Treaty and other Treaties relating to Security in the Pacific) (Washington: Government Printing Office, 1952), p. 145ff.

501. See Mr. Tokujiro Kitamura's question and Mr. Hayato Ikeda's (Minister of Finance) answer at *Dai-11-kai Kokkai, Shugi-in, Kaigi-Roku* (Japan, Diet, 11th Session, Record of Debates: House of Representatives) in *Kampo*, Special Issue of August 18, 1951, pp. 20 and 23.

participation of the socialist bloc. The Korean War was still on. The Japanese economy had just shown a sign of recovery. If a serious financial burden on Japan were to accompany peace, Japan's recovery would be slowed down, its economic sufferings prolonged, the left wing would increase in popularity, and there might come into power an anti-American government in Japan. To the U. S. military, the supply bases in Japan were indispensable to maintain the fighting in Korea. In terms of U. S. foreign policy, the loss of Japan would mean an irreparable set-back in the Far East. Hence, a peace with the least financial commitment on the part of Japan, but with the freedom to use Japanese bases on the part of the United States. Article 6 of the Treaty provided for the withdrawal of all occupation forces within 90 days of its coming into force, but said that: "Nothing in this provision shall ... prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements ... between one or more of the Allied Powers ... and Japan."⁵⁰² On the day the Peace Treaty was signed with Japan, the U. S.-Japan Security Treaty was also signed.⁵⁰³

This is not the place to evaluate the political relevance of the Japanese Peace Treaty nor to make a general statement on its legal validity. But one thing may bear mention. The provision of Article 19 (d) was a natural outcome of the attitudes of the U. S. and the Japanese Government which they had respectively adopted during the years of occupation. Despite the fact that occupation measures generally complied with international law, the occupant had based his conduct primarily on political expediency of the time. The government of the occupied state had never shown serious concern for the protection of the private property of its nationals. Thus, the Treaty of Peace with Japan left unanswered the question as to the availability of the remedy for damages which had been caused to Japanese private property by occupation measures.

502. For the text, see n. 489 *supra*.

503. U. S., *Treaties and Other International Agreements*, Vol. 3 (1952) Pt. 3, pp. 3329-3340.

CHAPTER 6

CONCLUSION

The theme of the present thesis was an international legal evaluation of some specific occupation measures which the United States, as the occupant, adopted in order to demilitarize and democratize occupied Japan after latter's surrender in the Second World War. Particular attention was paid to the occupant's treatment of Japanese private property involved in these measures. While most of the occupant's handling of the Japanese private property was considered a legitimate exercise of the power that the United States was accorded in international law, a few were held to be in contravention of that law. Irrespective of the validity of those evaluations, this conclusion proposes to make general observations on some of the international legal problems concerning a surrender, an occupation, and an occupant's treatment of private enemy property.

First, there is the problem of the use of an unconditional surrender as a means of ending hostilities. The study in the present thesis showed that, from the political or military point of view, there had been differences of opinion as to the desirability of using an unconditional surrender as a means to end the hostilities of the Second World War. Similarly, from the legal point of view, an argument can be made for or against such use. On the one hand, an unconditional surrender might be condemned as granting too much freedom of action to a victor vis-à-vis a vanquished state and its people. On the other hand, an unconditional surrender might be praised in that it enables a victor to attain its war objectives without annexing a vanquished state. According to the traditional theory of international law, a war can be terminated either by the subjugation of one belligerent to the other or by the conclusion of a peace treaty between them. When a victorious belligerent purports to attain his war objectives without entering into any agreement with his opponent, he leaves himself no choice but to fight to the very end. For both belligerents and their peoples this will mean the prolongation of hardships which accompany hostilities, and a victor's annexation of his enemy state may sow the seeds of more troubles. An unconditional surrender, however, will enable a victor to achieve its war goals without annexing a vanquished state, even if it refuses to conclude an agreement. So far, the international community has not been highly successful in its attempt to outlaw war and control the use of force by individual sovereign states. As long as wars or armed conflicts are not eliminated from the community of nations, an unconditional surrender may thus be able to help mitigate the misery of hostilities, particularly those carried out over a life or death issue.

Second, the question might be asked if a post-surrender occupation of enemy territory should be utilized by a victorious occupant as a means of introducing social change in a defeated state. The present thesis made clear that the Allied occupation of the defeated Axis states in World War II

had witnessed a drastic departure from the traditional rules on this issue. The traditional rules, as expressed by the provisions of Section III of the Hague Regulations, are established around the principle of humanity and the principle of precariousness. The second principle dictates that, occupation being essentially temporary and occupant's status precarious, an occupant should not attempt to change the fundamental institutions of an occupied territory. But, contrary to this principle, the Nazi regime in Germany as well as the Fascist counterpart in Italy was completely eliminated and new institutions were substituted by the Allied occupant. Under the U. S. occupation Japan was transformed from a militant, despotic nation to a peaceful, democratic one. In Eastern Europe the U. S. S. R. changed the capitalistic economy of occupied Rumania, Bulgaria, and Hungary into a socialist-orientated one. Both the validity of the old principle and the relevance of the new practice ought to be questioned.

From the standpoint of international law, the answer to this question depends upon the evaluation of the institution of unconditional surrender. If an unconditional surrender does not prevent the Hague Regulations from applying to a post-surrender occupation, the Regulations prohibit an occupant from changing the fundamental institutions of an occupied territory. If an unconditional surrender excludes the application of the Hague Regulations, it is difficult to maintain that international law prohibits an occupant from implementing such change. However, even in the latter case, it is politically wise and legally tenable to require that, in any attempt to implement social change, an occupant comply, as much as possible, with the will of the local inhabitants. Any social change that is not welcomed by them is most likely to be cancelled, as soon as the occupation is over. The only way to keep such unwelcome change in effect will be the imposition of semi-permanent occupation, but that is contradictory to the original purpose of distinguishing an unconditional surrender from subjugation. The principle of self-determination of peoples, which has been championed by the community of nations in the post-World War II period, will certainly reject the concept of social change, under a post-surrender occupation, imposed against the will of local populations.

Finally, the protection of private enemy property under post-surrender occupation presents a subtle problem. Assuming that an unconditional surrender is established as a means of ending hostilities, and assuming, further, that during a post-surrender occupation an occupant is not prohibited from changing the fundamental institutions of an occupied territory, then to what extent can an occupant lawfully interfere with private enemy property as such social change is implemented? Should an occupant treat such property in any manner he sees fit, if that treatment is supported, or not opposed to, by the majority of the local populations?

It is true that the nineteenth century assumption of the inviolability of private property has long been outdated and that the public needs prevail over the private ones in the twentieth century economy. The question of property rights falls primarily within the jurisdiction of domestic law:

International legal norms on property should reflect general trends of domestic law on property relations. Application of the principle of humanity on economic matters should equally reflect such trends. Accordingly, an occupant may interfere with the private property of a particular enemy civilian, when the interests of the remainder of local inhabitants require and that interference is directed toward social change. But, even in the twentieth century economy, the right of a person to live and to be given means of living must be protected uniformly. Any occupation measure which distinguishes a particular inhabitant from the remainder and deprives him of his economic needs in the name of the others is justifiable only when taken as a pecuniary punishment against a crime which that inhabitant has committed, and even when sentenced to death, he must be fed until executed. An occupant must not interfere with private enemy property when that interference impairs, without reason, the right of survival of a particular enemy civilian as opposed to others. The statement in the present thesis, which declares that private enemy property under a post-surrender occupation must be so protected as to enable individual inhabitants to maintain their lives at least on the subsistence level, must be interpreted in this manner.

APPENDIX I

PROCLAMATION BY THE HEADS OF GOVERNMENTS, UNITED STATES, CHINA AND THE UNITED KINGDOM*

- (1) We, the President of the United States, the President of the National Government of the Republic of China and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.
- (2) The prodigious land, sea and air forces of the United States, the British Empire and of China, many times reinforced by their armies and air fleets from the west are poised to strike the final blows upon Japan. This military power is sustained and inspired by the determination of all the Allied nations to prosecute the war against Japan until she ceases to resist.
- (3) The result of the futile and senseless German resistance to the might of the aroused free peoples of the world stands forth in awful clarity as an example to the people of Japan. The might that now converges on Japan is immeasurably greater than that which, when applied to the resisting Nazis, necessarily laid waste to the lands, the industry and the method of life of the whole German people. The full application of our military power, backed by our resolve, *will* mean the inevitable and complete destruction of the Japanese armed forces and just as inevitably the utter devastation of the Japanese homeland.
- (4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.
- (5) Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.
- (6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
- (7) Until such a new order is established *and* until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.
- (8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu,

* U. S., *Foreign Relations*, Conference of Berlin 1945, Vol. 2, pp. 1474-1476. See also U. S., *Department of State Bulletin*, Vol. 13, p. 137.

Shikoku and such minor islands as we determine.

- (9) The Japanese military forces, after being completely disarmed, shall be permitted to return to their homes with the opportunity to lead peaceful and productive lives.
- (10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.
- (11) Japan shall be permitted to maintain such industries as will sustain her economy and permit the exaction of just reparations in kind, but not those industries which would enable her to re-arm for war. To this end, access to, as distinguished from control of raw materials shall be permitted. Eventual Japanese participation in world trade relations shall be permitted.
- (12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.
- (13) We call upon the Government of Japan to proclaim now the unconditional surrender of all the Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction.

POTSDAM July 26, 1945

HARRY S. TRUMAN
WINSTON CHURCHILL by H. S. T.
PRESIDENT OF CHINA by wire

APPENDIX II

INSTRUMENT OF SURRENDER*

We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Government of the United States, China, and the Great Britain on 26 July 1945 at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

We hereby command all Japanese forces wherever situated and the Japanese people to cease hostilities forthwith, to preserve and save from damage all ships, aircrafts, and military and civil property and to comply with all requirements which may be imposed by the Supreme Commander for the Allied Powers or by agencies of the Japanese Government at his direction.

We hereby command the Japanese Imperial General Headquarters to issue at once orders to the Commanders of all Japanese forces and all forces under Japanese control wherever situated to surrender unconditionally themselves and all forces under their control.

We hereby command all civil, military and naval officials to obey and enforce all proclamations, orders and directives deemed by the Supreme Commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority and we direct all such officials to retain at their posts and continue to perform their non-combatant duties unless specifically relieved by him or under his authority.

We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers for the purpose of giving effect to that Declaration.

We hereby command the Japanese Imperial Government and the Japanese Imperial General Headquarters at once to liberate all allied prisoners of war and civilian internees now under Japanese control and to provide for their protection, care, maintenance and immediate transportation to places as directed.

The authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of

* U. S., *Statutes at Large*, Vol. 59 Pt. 2, p. 1733. See also U. S., *Department of State Bulletin*, Vol. 13, p. 364.

surrender.

Signed at Tokyo Bay, Japan at 0904 on the Second day of September, 1945.

MAMORU SHIGEMITSU,

By Command and in behalf of the Emperor of Japan and the Japanese Government.

YOSHIJIRO UMEZU

By Command and in behalf of the Japanese Imperial General Headquarters.

Accepted at Tokyo Bay, Japan at 0908 on the Second Day of September, 1945, for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan.

DOUGLAS MACARTHUR,

Supreme Commander for the Allied Powers.

(names of the representatives of nine signing powers omitted)